No. 09-0627

In the Supreme Court of Ohio

DIRECTV, INC., and ECHOSTAR SATELLITE L.L.C.,

Plaintiffs-Appellants,

v.

RICHARD LEVIN, Tax Commissioner of Ohio,

Defendant-Appellee.

ON APPEAL FROM THE COURT OF APPEALS,
TENTH APPELLATE DISTRICT
CASE NO. 08AP-32

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE SPECIALTY WINE RETAILERS ASSOCIATION

JOHN A. HINMAN (pro hac vice pending)
HINMAN & CARMICHAEL LLP
260 California Street, Suite 1001
San Francisco, CA 94111
(415) 362-1215
(415) 362-1494 – fax
jhinman@beveragelaw.com

Counsel for Amicus Curiae
Specialty Wine Retailers Association

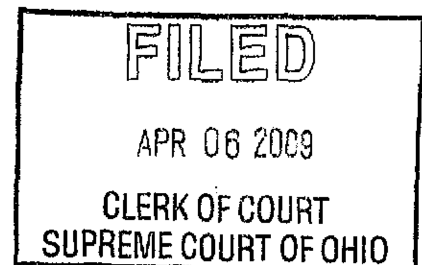


TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
FEDERAL CASES	ii
STATE CASES	iii
OTHER AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
THIS CASE PRESENTS SUBSTANTIAL CONSTITUTIONAL ISSUES OF GREAT PUBLIC AND GENERAL INTEREST	1
STATEMENT OF FACTS	5
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	5
CONCLUSION	12

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dept. of Treasury,
(1989) 490 U.S. 66 ..... passim

Bacchus Imports, Ltd. v. Dias,
(1984) 468 U.S. 263 ..... 6, 9

Black Star Farms, LLC v. Oliver,
(D. Ariz., 2008) 544 F. Supp. 2d 913 ..... 10, 11

Boston Stock Exchange v. State Tax Comm.,
(1977) 429 U.S. 318 2

Cherry Hill Vineyards, LLC v. Hudgins,
(W.D. Ky., 2006), 488 F. Supp. 2d 601, aff'd, 553 F.3d 423 (C.A.6, 2008) 11

Cherry Hill Vineyards, LLC v. Lilly,
(C.A.6, 2008) 553 F.3d 423 ..... 4, 9

Exxon Corp. v. Governor of Maryland,
(1978) 437 U.S. 117 ..... 3, 7, 9

Island Silver & Spice, Inc. v. Islamorada,
(C.A.11, 2008), 542 F.3d 844 11

Lewis v. BT Inv. Managers, Inc.,
(1980) 447 U.S. 27 ..... 6, 8

People Super Liquor Stores, Inc. v. Jenkins,
(D. Mass., 2006) 432 F. Supp. 2d 200 ..... 4, 10

Quill v. North Dakota,
(1992) 504 U.S. 298 2

Siesta Vill. Mkt, LLC v. Perry,
(N.D. Tex. 2008), 530 F. Supp. 2d 848 ..... 4, 10

Westinghouse v. Tully,
(1984) 466 U.S. 388 2

STATE CASES

Dayton Power & Light Co. v. Lindley,
(1979), 58 Ohio St. 2d 465, 391 N.E.2d 716 6

DIRECTV, Inc. v. Levin,
10th Dist. No. 08AP-32, 2009-Ohio-636 .... passim

Div. of Alcoholic Beverages & Tobacco v. McKesson Corp.,
(Fla. 1989), 524 So.2d 1000 .... 7, 11

OTHER AUTHORITIES

Maureen K. Ohlhausen & Gregory P. Luib, Moving Sideways: Post Granholm Developments in Wine Direct Shipping and Their Implications for Competition,
75 Antitrust L.J. 505 (2008) 11

Peter D. Enrich, Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Businesses, 110 Harv. L. Rev. 377 (Dec. 1998) 2

STATEMENT OF 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. 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 stand united in the view that national markets—whether they involve wine, liquor, or pay TV service—should be truly national in scope and operation.

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

The Court of Appeals has taken a machete to a generation of dormant Commerce Clause jurisprudence and left in its place an impotent doctrine that is ill-equipped to prevent even the most discriminatory of statutes. This is not just bad for satellite TV providers and their Ohio subscribers, who are forced to pay a 5.5% tax simply because they chose a service that can be more efficiently distributed to them from a satellite in outer space than through a costly ground distribution network in Ohio. It is bad for anyone who wants to do business in Ohio, whether it involves selling clothes to a parent in Cincinnati through a catalogue or distributing auto parts to a repair shop in Perrysburg.

It is especially troubling for Amicus, whose members are constantly subjected to discrimination at the hands of states that are advancing their own parochial interests at the expense of businesses who—like wineries, distillers, and wine/liquor retailers—have operations outside of the state. The Court of Appeals's opinion will make it even more difficult for Amicus—and countless other businesses that rely upon the Commerce Clause as a shield against protectionist legislation—to challenge discriminatory regulations in court. The result: Ohioans will have to pay a

higher price for a smaller selection of goods and services—whether its satellite TV service or a bottle of cabernet from Sonoma.

How could a single opinion from the Court of Appeals have such a profound impact on so many people and businesses?

For starters, the court ignored three decades of U.S. Supreme Court precedent and confined the dormant Commerce Clause to the increasingly rare instance in which a statute explicitly favors a business that is entirely in-state (i.e., all of its operations and sales take place inside the state lines) and the disfavored business is out-of-state (i.e., all of its operations are located outside of the state). *DIRECTV, Inc. v. Levin*, 10th Dist. No. 08AP-32, 2009-Ohio-636, at ¶23-27.[1] This strained interpretation of the Commerce Clause leaves our members at the mercy of the General Assembly and other state legislatures—particularly those members who have retail operations in multiple states, or use the Internet to sell wine or liquor to consumers or businesses in places like Ashtabula or Oxford. This case presents this Court with the perfect opportunity to address the scope and application of the dormant Commerce Clause in situations, like here, where an interstate company is being penalized for not engaging in a specified economic activity in the State. This type of guidance is necessary if the dormant Commerce Clause is to provide the business community—both in and outside of Ohio—with the assurance and protection necessary to fulfill the Framers' intent of a unified system of interstate commerce. See *Quill v. North Dakota* (1992), 504 U.S. 298, 313.

---

[1] But see *Boston Stock Exchange v. State Tax Comm.* (1977), 429 U.S. 318, 335 (recognizing that it was "constitutionally impermissible" for a state to "tax in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses . . ."); *Westinghouse v. Tully* (1984), 466 U.S. 388, 399-401; Peter D. Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Businesses*, 110 Harv. L. Rev. 377, 428 (1998) ("Over the past two decades the Court has repeatedly applies principles articulated in Boston Stock Exchange to invalidate state tax provisions that selectively reduce the tax burdens imposed on in-state goods or activities.").

Further review by this Court is also necessary to repair the damage that the Court of Appeals has inflicted on the Commerce Clause through its interpretation of the U.S. Supreme Court's decisions in *Exxon Corp. v. Governor of Maryland* (1978), 437 U.S. 117 and *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dept. of Treasury* (1989), 490 U.S. 66. Those 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 geographic location of an activity.* See *Amerada Hess*, 490 U.S. at 77. The Court of Appeals, however, interpreted them to stand for something altogether different. In its view, *Exxon* and *Amerada Hess* carve out an exception to the dormant Commerce Clause any time a statute discriminates between two types of businesses and it can be characterized as discriminating on the basis of the method of operation or "mode[]" of doing business. *DIRECTV, Inc.* at ¶¶23-24.

As discussed below, this exception cannot be found in either of the two cases the Court of Appeals cited. Those cases make clear that if a statute discriminates on the basis of geographic location—whether by intent or effect—it violates the Commerce Clause, regardless of whether it is couched in "location-neutral" language or recast as distinguishing between the nature of how the beneficiary and the victim of the statute do business. Put simply, there is no exception or savings clause to the Commerce Clause. If a statute or regulation discriminates on the basis of the geographic location of a particular activity, it is presumptively unconstitutional; if it does not discriminate on those grounds, it is constitutional. By creating an exception to this simple rule out of whole cloth, the Court of Appeals has wrought havoc on dormant Commerce Clause jurisprudence, and given license to state legislatures to enact discriminatory statutes—so long as those statutes do not expressly mention state boundaries (e.g., "in-state" or "out-of-state"). At bottom, almost any discriminatory statute or regulation can be recast as a difference in the mode of doing business—especially if other courts follow the Court of Appeals, and refuse to consider

anything other than the plain language of the statute when determining whether the state legislator acted with a discriminatory purpose.

The State will no doubt attempt to minimize the importance of the Court of Appeals's opinion. It will argue that the constitutionality of a 5.5% tax on satellite TV service is specific to that particular industry and has no ramifications for other businesses, let alone Ohioans in general. It is wrong. The Court of Appeals's opinion in this case will quickly find its way into countless briefs across the country. It will be used by states to defend cleverly drafted discriminatory statutes and regulations that deprive consumers, whether in Ohio or other states, of the right to purchase innumerable goods and services at the lowest possible price. And, it will be used by courts in other jurisdictions to defend laws that were enacted for no other reason than to protect industries with local operations in the state—industries who, more often than not, also happen to have an army of lobbyists swarming through the state legislature. All of these cases are cited interchangeably, whether they involve trash haulers, out-of-state wineries, or oil producers and refiners.[2]

The issues presented in this case are hardly confined to a single industry; to the contrary, they go to the very heart of the dormant Commerce Clause. We know—our members have been and continue to be embroiled, both directly and indirectly, in scores of these types of challenges. See, e.g., *Cherry Hill Vineyards, LLC v. Lilly* (C.A.6, 2008), 553 F.3d 423, 432 (holding that Kentucky "on premises" requirement for direct shipment of wine violated Commerce Clause; *Peoples Super Liquor Stores, Inc. v. Jenkins* (D. Mass., 2006), 432 F. Supp. 2d 200, 218-19 (Massachusetts statute that barred out-of-state liquor retailers from obtaining package store license violated Commerce Clause); *Siesta Village Market, LLC v. Perry*, (N.D. Tex. 2008), 530 F. Supp. 2d 848, 864-66 (holding that law

[2] Indeed, as discussed below, the Court of Appeals's relied heavily on two cases, Exxon and Amerada Hess, that both involved statutes that were alleged to discriminate against vertically integrated oil companies. See infra at 6-9.

that limited right to ship wine to retail stores located in a particular county violated Commerce Clause). And, the wine and satellite TV industry are just the tip of the iceberg. It does not take a crystal ball to predict that state legislatures will eventually turn to e-commerce, and will undoubtedly use the same devices at issue here to protect local "bricks-and-mortar" businesses from Internet retailers. It bears repeating—the real victims of these laws are not the disfavored businesses; they are the Ohio consumers who are forced to pay higher prices for a smaller selection of goods and services.

In sum, the constitutional questions presented in Appellants' motion for jurisdiction are too important and substantial to be left in the hands of a single three judge panel of the Court of Appeals. These are issues that merit this Court's review.

STATEMENT OF FACTS

Amicus adopts and incorporates by reference the Statement of Facts set forth in the Appellants' Memorandum in Support of Jurisdiction. *See* App. Br. at 3-6.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

We agree with Appellants that Propositions of Law Nos. 1, 2, and 3 present substantial constitutional issues of great public and general interest that merit review by this Court, and adopt the arguments set forth in their Memorandum of Law in Support of Jurisdiction. We write to embellish on their analysis of Proposition of Law No. 2.

Proposition of Law No. 2

The satellite-only tax of R.C. 5739.01(XX) cannot be saved from Commerce Clause challenge on the ground that the discrimination "results solely from differences between the nature of [two companies'] businesses, *not* from the location of their activities," *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dept. of Treasury* (1989), 490 U.S. 66, 78 (emphasis added), because the discriminatory tax is inextricably tied to the *location* of a specified economic activity.

The dormant Commerce Clause prohibits states from enacting statutes that discriminate against two types of businesses on the basis of the location of a particular economic activity.

Amerada Hess, 490 U.S. at 78, n.10. Importantly, it does not matter whatsoever that this discrimination is not evident from the face of the statute. *Dayton Power & Light Co. v. Lindley* (1979), 58 Ohio St. 2d 465, 473-74, 391 N.E.2d 716. 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 *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."); *Bacchus Imports, Ltd. v. Dias* (1984), 468 U.S. 263, 270-71 (holding that tax exemption for fruit wine violated Commerce Clause where evidence showed that it was enacted to promote the local pineapple wine industry, despite fact statute did not specify an indigenous product).

The Court of Appeals overlooked this basic principle when it held that any disparity between the tax imposed on satellite TV (5.5%) and cable TV (0%) was due to the difference in the nature of their respective businesses. See *DIRECTV, Inc.* at ¶¶23-27. In other words, it missed the most important part of the dormant Commerce Clause analysis—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*? See *Dayton Power*, 58 Ohio St. 2d at 472 (noting that "[a]ny semblance of facial neutrality disappears in light of the facts relating to the geographical location and ability to mine low-sulphur coal in Ohio"). Relying on two U.S. Supreme Court cases—*Exxon* and *Amerada Hess*—the Court of Appeals instead carved out an exception to the Commerce Clause where a statute purportedly distinguishes between two types of businesses on the basis of their "modes" of business or "business models." *DIRECTV, Inc.* at ¶23-24, 27.

But neither of those cases stands for this proposition. To the contrary, they stand for nothing more remarkable than the following: Where a statute does not have the purpose and effect of discriminating on the basis of where a specified activity is performed, then it falls outside the

scope of the Commerce Clause, and the disparity between the two businesses amounts to nothing more than a difference between the nature of their operations. *Amerada Hess*, 490 U.S. at 78.

In *Exxon*, the Supreme Court upheld a Maryland statute that prohibited oil producers and refiners—all of which were located outside of the state—from owning gasoline stations in the state. 437 U.S. at 121. Enacted in response to the 1973 fuel crisis, the statute was designed to address a widely-held belief in Maryland that oil producers had allocated more fuel to their own gas stations than to gas stations owned by independent dealers. Id. 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 124-25.

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. Turning to the retail market, the Court determined that the statute placed "no barriers whatsoever" on local competition because other interstate dealers—i.e., those not owned by oil companies—could still compete with local retailers. Id. at 125-26. As such, the statute did not prevent retailers from entering the market; 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. See *Div. of Alcoholic Beverages & Tobacco v. McKesson Corp.* (Fla. 1989), 524 So.2d 1000, 1006-07 (explaining that crucial part of *Exxon's* holding was that "[t]he Maryland statute had no effect whatsoever on the interstate flow of goods because, regardless of the status of the ultimate retailer, all the petroleum products sold within the state came from out-of-state"). In other words, and as the U.S. Supreme Court later explained, *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.

Amerada Hess is even easier to distinguish. That case 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 on "income or profits," including the federal income tax. 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 companies had already conceded that a discriminatory purpose claim did not exist—hardly surprising given the fact the New Jersey statute was enacted 22 years before the federal windfall profit tax—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 Court of Appeals ignored 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, or whether there was evidence of discriminatory motive, *Exxon*, 437 U.S. at 124-25, the court instead seized on a single strand from each decision. The result: The Court of Appeals created a new exception to the Commerce Clause for statutes or regulations that purportedly distinguish between two types of businesses on the basis of the "modes" of operation or "business models." *DIRECTV, Inc.* ¶¶ 23-24. This exception, which finds no support in *Exxon*, *Amerada Hess*, or any other U.S. Supreme Court or Ohio Supreme Court precedent, threatens to swallow the Commerce Clause whole. As Appellants point out in their brief, any statute or regulation—including laws that are location-specific, like here—can be characterized as discriminating on the basis of "modes" of business or methods of operation. App. Br. at 13.

The Court of Appeals's flawed interpretation of *Exxon* and *Amerada Hess* is deeply troubling for Amicus and its members. The wine and liquor 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 and liquor to out-of-state consumers. The Court of Appeals's application of the dormant Commerce Clause 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, liquor distillers, merchants and retailers.

For example, several states have enacted statutes that prohibit manufacturers and distillers from shipping wine to a consumer who has not visited the premises or had an "in-person" meeting with the seller. Since it is far easier for a consumer to visit a winery or distiller in his or her home state, these statutes have the effect of discriminating against out-of-state businesses. Compare *Cherry Hill Vineyards, LLC*, 553 F.3d at 433 ("It is impractical for customers to travel hundreds or

thousands of miles to purchase wine in-person, and out-of-state wineries are clearly burdened by Kentucky's regulatory scheme") with *Black Star Farms, LLC v. Oliver* (D. Ariz., 2008), 544 F. Supp. 2d 913, 925 (upholding Arizona's "on premises" requirement for direct shipment of wine). In defending these discriminatory statutes, states will undoubtedly cite to the Court of Appeals's decision in this case, and argue that the challenged statute merely distinguishes between wineries or distillers that sell their goods "on-site" to consumers and wineries/distillers that rely upon catalogs or the Internet to sell the same goods. In other words, despite the fact these statutes typically include "location specific" language—i.e., "in person" or "on the premises"—and are enacted for the sole purpose of favoring local wineries at the expense of out-of-state wineries, states will defend these statutes as doing nothing more than distinguishing between two "modes" of selling wine to consumers.

The Court of Appeals's opinion will also make it harder for out-of-state wine retailers to sell wine or liquor to customers via the Internet or through catalogs, despite the fact those same states allow in-state retailers to use both mediums for sales. See, e.g., *Perry*, 530 F. Supp. 2d at 864-66 (holding that law that limited right to ship wine to retail stores located in a particular county violated Commerce Clause); *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d at 219. Again, relying on the Court of Appeals's ruling, a court could uphold the statute on the grounds that it discriminates between two modes of doing business: out-of-state stores that depend upon direct shipment on the one hand, and bricks and mortar wine and liquor stores that depend upon "in person" sales on the other hand.

And these are just the ramifications of the Court of Appeals's opinion with respect to statutes or regulations that include "location specific" language. One can only imagine how states will use the court's interpretation of *Exxon* and *Amerada Hess* to defend statutes or regulations that have been cleverly drafted to appear location neutral. In the past three years, at least five states

(including Ohio) have amended their direct shipping statutes to permit only wineries producing less than a specified amount of wine to ship directly to those states' consumers. See Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 Antitrust L.J. 505, 533-34 (2008). These limitations fall entirely on out-of-state wineries, while in-state wineries remain unaffected. Nonetheless, states have used the same reasoning as the Court of Appeals to defend these statutes—i.e., production limitations do not discriminate on the basis of the location of a specific economic activity but instead distinguish between large wineries and small wineries. See *Black Star Farms, LLC*, 544 F. Supp. 2d at 922-25 (upholding Arizona's 20,000 gallon production limit); *Cherry Hill Vineyards, LLC v. Hudgins* (W.D. Ky., 2006), 488 F. Supp. 2d 601, 613, aff'd, 553 F.3d 423 (C.A.6, 2008) (upholding Kentucky's 50,000 gallon production limit). But cf. *Island Silver & Spice, Inc. v. Islamorada* (C.A.11, 2008), 542 F.3d 844, 846-47 (holding that regulation that effectively prevented the establishment of new formula retail stores violated Commerce Clause despite fact it only applied to a subset of out-of-state retailers); *McKesson Corp.*, 524 So. 2d at 1006 (questioning Colorado court's application of *Exxon* to statute that discriminated against gasohol facilities that produced more than a specified amount of gas per year). It should not be long before we receive a brief that includes a cite to the Court of Appeals's decision—and specifically its interpretation of *Exxon* and *Amerada Hess*—in support of these discriminatory laws.[3]

In sum, this issue presents a substantial question of constitutional law that this Court should resolve. The Court of Appeals's opinion puts millions of Ohioans at risk of losing the wide

[3] And once the federal moratorium on discriminatory taxation of e-commerce expires in November 2014—assuming it is not repealed beforehand, there is no question that states will cite to opinions like the Court of Appeals's to support statutes that imposes a higher tax on Internet sales than on brick-and-mortar sales—again on the grounds that the statute falls within the court's "mode of business" exception. See Internet Tax Freedom Act Amendments of 2007 § 1101(a)(2), Pub. L. No. 110-108, § 2, 121 Stat. 1024, 1024 (2007) (codified at 47 USC § 151 note).

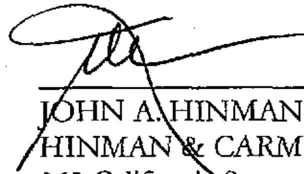
selection of goods and services that they have become accustomed to purchasing at the lowest possible price.

CONCLUSION

For the foregoing reasons, further review of the judgment of the Court of Appeals is warranted. The Court should accept jurisdiction of this appeal and adopt the propositions of law stated herein.

Dated: April 6, 2009

Respectfully submitted,



JOHN A. HINMAN (pro hac vice pending)
HINMAN & CARMICHAEL LLP
260 California Street, Suite 1001
San Francisco, CA 94111
(415) 362-1215
(415) 362-1494 – fax
jhinman@beveragelaw.com

Counsel for Amicus Curiae
Specialty Wine Retailers Association

Certificate of Service

This is to certify that the undersigned mailed a copy of this Memorandum in Support of Jurisdiction by ordinary U.S. mail to counsel listed below on April 6, 2009.

Peter A. Rosato (0068026)
Calfee, Halter & Griswold LLP
1100 Fifth Third Center
21 E. State Street
Columbus, OH 43215
Phone: (614) 621-1500
Facsimile: (614) 621-0010
PRosato@Calfee.com

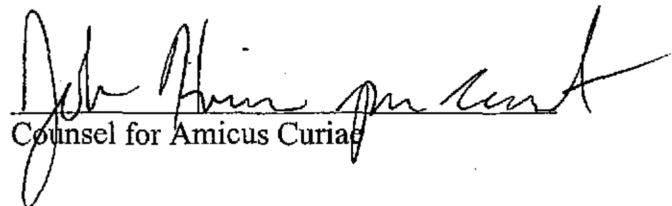
E. Joshua Rosenkranz (Pro Hac Vice)
New York Bar No. 2224889
Orrick, Herrington & Sutcliffe LLP
666 Fifth Avenue
New York, NY 10103
Phone: (212) 506-5000
Facsimile: (212) 506-5030
JRosenkranz@Orrick.com

Pantelis Michalopoulos (Pro Hac Vice)
District of Columbia Bar No. 453179
Mark F. Horning (Pro Hac Vice)
District of Columbia Bar No. 203323
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Phone: (202) 429-3000
Facsimile: (202) 429-3902
PMichalopoulos@steptoe.com
MHorning@steptoe.com

Counsel for Plaintiffs-Appellants

Lawrence Pratt (0021870)
Alan P. Schwepe (0012676)
Julie E. Bringer (0066367)
Damion M. Clifford (0077777)
Assistant Ohio Attorneys General
Taxation Section
30 E. Broad Street, 25th Floor
Columbus, OH 43215
Phone: (614) 466-5967
Facsimile: (614) 466-8226

Counsel for Defendant-Appellee



Counsel for Amicus Curiae