No. 17-379

IN THE

Supreme Court of the United States

ECHOSTAR SATELLITE L.L.C. N/K/A DISH NETWORK L.L.C.,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF WINE RETAILERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the National Association of Wine Retailers ("*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 national in scope and should have equal tax burdens upon functionally-identical economic activity. The goal of *Amicus* is to ensure that the channels of commerce remain open, free from protectionist tax burdens, so that consumers can choose freely from all the available alternatives in the national market, unaffected by discriminatory local taxes.

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[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 37.2, the parties have granted blanket consent to *amicus curiae* briefs. Counsel of Record for all parties received notice at least ten days prior to the due date of *Amicus'* intention to file this brief.

SUMMARY OF ARGUMENT

The Florida Supreme Court's decision to uphold the provision of the Communication Service Tax (the "CST"), which levies different tax rates on two similarly situated groups, is an unlawful regulation of interstate commerce in violation of the dormant Commerce Clause. This decision highlights the need for this Court to settle a growing divide among jurisdictions.

A statute will be found to be discriminatory against out-of-state interests and therefore violative of the Commerce Clause if it is facially discriminatory, has a discriminatory effect, or has a discriminatory intent. *See Florida Dept. of Revenue v. DirectTV, Inc., et al.*, 215 So.3d 46, 51 (Fl. 2017). The decision below addresses only the last two types of discrimination and found incorrectly on both counts.

The Supreme Court of Florida wrongly found that the CST was not discriminatory in its effect because the tax did not benefit an "in-state interest" over an "out-of-state interest" and instead, two out-of-state interests were involved. The court concluded that because none of the largest cable companies are headquartered in Florida and do not "produce" anything in Florida, they are not in-state. Therefore, the levying of a lower tax rate for cable did not favor an in-state interest and unlawfully discriminate against satellite, an out-of-state interest. The Florida Court concluded this, even though it noted that cable companies had a significant impact on and investment in the local economy by "employ[ing] [Florida]

residents to sell, maintain [and] repair their service to Florida customers [, and] own[ing] or lease[ing] a significant amount of property in Florida" whereas the satellite companies had no significant local economic investment. The court also acknowledged that "cable employs more Florida residents and uses more local infrastructure to provide its services" than does satellite. *Id.*, 215 So.3d at 53. Despite this clear disparity in local involvement between the two groups, the court found there was no discriminatory effect on taxing the two groups differently.

The Supreme Court of Florida also erred when it determined that the CST was not discriminatory in its intent. The Supreme Court of Florida ignored ample evidence, including testimony and affidavits, that showed that the CST was enacted in part to encourage the development of cable television infrastructure, which benefits the local economy, relying solely on the language of the statute itself and the official legislative record. This limited analysis fails when compared to the many instances in the alcohol industry where this Court relied on detailed evidence beyond the official record to examine whether a law has a discriminatory intent. Based on this cursory review, the Supreme Court of Florida limited its application of the Commerce Clause to the increasingly rare instance in which the express language of a statute explicitly identifies its preference for a business that is entirely in-state, at the expense of an entirely out-of-state business. This application and interpretation of the Commerce Clause, relying wholly on a finding of facial discrimination, will hamstring interstate businesses attempting to compete with businesses that have

made more significant local economic investments. *Amicus*' members, who desire to ship wine across state borders and compete with in-state retailers that support a local distribution system, as well as other interstate actors in innumerable other industries, will find themselves at the mercy of protectionist state legislatures without this Court's intervention.

If this and other similar lower court decisions are not addressed by the Court, they will lead to more protectionist laws promoting discriminatory treatment based on "differences between the nature of their business." The Court should grant the petition for certiorari in this case to ensure that state legislatures will not use the Florida Supreme Court's decision as a sword to disadvantage the surge of innovative players who have adapted to effectively operate across state lines in favor of outmoded but local enterprises that rely on local infrastructure. *Amicus* submits that the Florida decision, and others that have preceded it in the pay-TV space, if left unreviewed, will seriously curtail the power of the Commerce Clause. If the Commerce Clause is so narrowed, state legislatures will simply rewrite laws—once found to be unconstitutional—to conform with this interpretation.

We urge this Court to grant certiorari and ensure the free flow of commerce across state borders.

ARGUMENT

I. The Commerce Clause Prohibits Laws that Favor Local Economic Activity Over Non-Local Activity, Regardless of Whether the Law Benefits Purely In-State Companies and Burdens Purely Out-of-State Companies.

The starting point for any review under the Commerce Clause begins with 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, 455-56 (1940). 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 v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 99 (1994)).

The Florida Supreme Court focused its analysis on whether a specific in-state business benefited from the CST, in stark contrast with this Court's precedent, which looks at differential treatment of two groups and whether local activity is favored. The court below, unable to find an "in-state" company that benefited directly from the differing tax rates, upheld the tax. To support its decision, the Florida Supreme Court

relied on interpretations of two prior decisions of this Court that affirmed tax schemes that treated groups with different business models differently while concluding there was no discriminatory effect under the Commerce Clause. As shown below, the differing CST rates on cable and satellite are discriminatory and benefit one group based on their local activity in Florida.

A. The Florida Supreme Court Erred When It Failed to Find that the CST Violated the Commerce Clause.

This Court should grant certiorari to repair the damage the Supreme Court of Florida has done to the Commerce Clause through its erroneous 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 based on the "location of their activities." *Amerada Hess*, 490 U.S. at 78. *See also Exxon*, 437 U.S. at 126.

The Supreme Court of Florida used these cases to justify the CST, while acknowledging that the two businesses, cable and satellite services, "have a different impact on local communities." *Florida Dept. of Revenue*, 215 So.3d at 53. The Supreme Court of Florida acknowledged that cable and satellite impact local interests differently, finding that "cable's business model requires the employment of more people and the use of more infrastructure." *Id*. This

should have led the Supreme Court of Florida to conclude that such a tax, which greatly favors interstate providers that make local investment and employment at the expense of those that provide comparable goods and services without local investment, is unconstitutional.

This Court has repeatedly found that protectionist laws cannot be saved by focusing on factors other than the physical location of players. See *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 392 (1994) ("Discrimination against interstate commerce in favor of local business *or investment* is per se invalid . . . .") (emphasis added); *Lewis v. BT Invest. Managers, Inc.*, 447 U.S. 27, 42 (1980) (prohibited "local favoritism or protectionism" includes discrimination among businesses according to the extent of their contacts with the local economy or based on the extent of local operations); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 344 (1996) ("States may not impose discriminatory taxes on interstate commerce in the hopes of encouraging firms to do business within the State"). Had the Supreme Court of Florida engaged in even a limited analysis of the tax, it would have found it to be discriminatory and in violation of the Commerce Clause. Instead, the Supreme Court of Florida ended its analysis with geography, finding that because "neither cable nor satellite is produced in Florida, and neither business is headquartered in the state . . . [the court did] not consider cable an in-state interest for the purpose of the dormant Commerce Clause." *Florida Dept. of Revenue*, 215 So.3d. at 53.

This Court has repeated this fundamental precept of its Commerce Clause jurisprudence many times and 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." *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 405 (1984) (quoting *Dean Milk, Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). Likewise, in *Halliburton,* this Court held that a state cannot encourage an out-of-state firm to become an in-state resident to compete on equal terms with local interests. *See Halliburton Oil Well Cementing Corp. v. Reilly*, 373 U.S. 64 (1963); *accord Fulton Corp. v. Faulkner,* 516 U.S. 325, 333 n. 3 (1996).

The Florida Supreme Court's cursory analysis is therefore insufficient. Commerce Clause claims turn on "economic realities," which must be determined through "a sensitive, case-by-case analysis of purposes and effects." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). 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). Once the effect of the CST is analyzed, its discriminatory effect becomes clear. The CST directly benefits one provider of pay-TV—cable—based on the fact that cable invests more into the local economy, even though it provides the same goods and services as satellite. The Florida Supreme Court's refusal follow this Court's reasoning should be overturned.

B. This Court Has Rejected Laws that Favor the Local Production of Alcoholic Beverages and the Use of Local Distribution Networks.

This Court need only look to its body of law concerning the alcohol industry to see that laws benefiting local interests (be they companies or constituencies) cannot withstand a Commerce Clause challenge. In *Granholm v. Heald,* this Court clarified that it was impermissible under the Commerce Clause for a state law to differentiate tax benefits between in-state and out-of-state businesses based on the nature and extent of in-state economic investments. *See Granholm*, 544 U.S. at 491.

Granholm involved 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. New York law did not expressly prohibit out-of-state wineries from the direct shipment of wine to consumers; however, New York required out-of-state wineries to have an in-state physical presence before they could make direct shipments of wine to the state. The physical presence requirement made it prohibitively expensive for out-of-state wineries with no need for a New York office to compete with in-state wineries. This Court found that such restrictions directed toward out-of-state manufacturers of wine were unconstitutional under the dormant Commerce Clause, relying heavily on *Pike* and *Halliburton*. *See Granholm*, 544 U.S. at 475.

The purpose and effect of the Florida law here is the same as the New York law in *Granholm*. The New York statute rejected by this Court in *Granholm*, could easily have been characterized as being based on a difference in delivery models; the difference between the direct shipment of wine from the winery, on the one hand, and the more traditional sale of wine from brick-and-mortar retailers, on the other. This Court, however, had "no difficulty concluding that New York . . . discriminates against interstate commerce through its direct-shipping laws." 544 U.S. at 476. Similarly in Florida, by requiring interstate suppliers to establish a substantial "brick and mortar" presence in the state, with all the concomitant local benefits, Florida has discriminated against those suppliers that provide the same service electronically. This form of local protectionism violates the Commerce Clause, as *Granholm* confirms.

In *Bacchus Imports, Ltd. v. Dias*, this Court addressed a Hawaii law that provided exemptions from the state's wholesale liquor tax "for certain locally produced alcoholic beverages." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). One exemption applied to Okolehao, "a brandy distilled from the root of . . . an indigenous shrub of Hawaii" while another applied to "pineapple wine." *Id.* Other types of liquors were not exempted. *Id.* The Court held that "the effect of the exemption[s] [was] clearly discriminatory." *Id.* at 271. There was "competition between the locally produced exempt products and non-exempt products from outside the State," and the exemptions gave the former a direct price advantage over the latter. *Id.*; *see also id.* at 272 ("'[N]o State may discriminatorily tax the products manufactured or the

business operations performed in any other State'" (*quoting Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 337 (1977)).

This Court held that Hawaii's regulatory schemes, which benefitted pineapple wine and Okolehao producers, violated the Commerce Clause in purpose and effect because they imposed a special levy on businesses that performed their production activities out-of-state. While these tax schemes were not facially-discriminatory by specifically requiring in-state production to receive the tax benefits, the effect of the regulations benefitted in-state manufacturers and discriminated against out-of-state competitors.

With Florida's CST, we get the same result of discriminatorily taxing the satellite industry, which performs most of its production activities outside of the state, while benefiting the cable industry, which performs far more of its activities within the state. Even though both satellite and cable deliver the same goods to the same consumers, satellite companies are penalized with a higher tax because cable companies provide greater local impact, including economic benefits to Florida. This result simply cannot stand, given this Court's precedent.

The principles articulated in *Granholm* form the bedrock of this Court's modern Commerce Clause jurisprudence. By failing to properly consider the long line of decisions of this Court, ending with *Granholm*, the Florida Supreme Court's decision ignores their precedence and undercuts many protections historically afforded by the Commerce Clause.

These issues are not limited solely to the pay-TV industry. *Amicus*' members have been fighting these Commerce Clause challenges for over a decade.[2] State legislatures continue to find new ways to disguise protectionist laws and this is simply the latest tactic. If left unchecked, the Florida Supreme Court's conclusion that the state may tax similarly-situated satellite and cable providers differently will have far reaching effects. A whole new category of protectionist laws will spring up, relying on decisions such as the Florida Supreme Court's as support, pointing to differing modes of operation to justify obvious Commerce Clause violations. The Supreme Court of Florida stated that "[a] state law is discriminatory in effect if it affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests." *Florida Dept. of Revenue*, 215 So.3d. at 51 (citing *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. at 99). The court then concluded that "cable and satellite providers are similarly situated because they both provide television service and compete directly in the pay-television market for the same customers." *Id.* This

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[2] *See, e.g., Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 432 (6th Cir. 2008) (finding a law requiring that consumers be physically present at a winery to purchase wine for direct-shipment violated the Commerce Clause as it "present[ed] an economic barrier that both benefits in-state wineries and burdens out-of-state wineries by making it financially infeasible for out-of-state wineries to sell directly to Kentucky residents."); *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200, 218-219 (D. Mass. 2006) (involving a Massachusetts statute that barred out-of-state liquor retailers from obtaining package store license violated Commerce Clause).

conclusion, despite the court's failure to take this line of reasoning to its logical conclusion and find that the CST is unconstitutional, coupled with other lower court decisions contemplating how to treat in-and out-of-state alcohol retailers, highlights how important it is that the Court accept the petition to hear this matter. *See, e.g., Wine Country Gift Baskets.com, et al. v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010) (noting that if in-state alcohol retailers in Texas could deliver to consumers state-wide versus local, in-county delivery, then out-of-state retailers might be similarly situated to in-state retailers and, being prohibited from delivering to Texas consumers, be subject to discrimination under *Granholm*).

If the Supreme Court of Florida's decision is permitted to stand, the wine and pay-TV industry are just the tip of the iceberg. It is not an overstatement to say that the reach of the concerns raised is only limited by the creativity and imagination of state legislators that draft discriminatory laws for interstate producers perceived to confer local benefits.

II. Commerce Clause Analysis Must Go Beyond the Text of the Statute at Issue When Determining Whether Discriminatory Intent Exists.

By limiting its analysis of the CST to the language of the statute and the official legislative records, the Supreme Court of Florida deliberately ignored compelling evidence that confirms the actual intent of the tax: to benefit interstate suppliers that "invest locally" at the expense of those that do not. This goes against this Court's holdings regarding Commerce Clause analysis. This Court has long since

shunned a purely 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"); *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434 (1959) (noting that formalism attributes constitutional significance to using "magic words or labels"). Specifically, this Court has looked beyond the words of a state law and clarified that the Commerce Clause applies equally to statutes that distinguish between interstate businesses based on 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* 447 U.S. at 42 n. 9 (1980) ("[D]iscrimination based on the extent of local operations is itself enough to establish the kind of local protectionism we have identified.").

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"); *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*, 466 U.S. at 405. So long as the statute discriminates against a business—whether in purpose or effect—based on geographic location, it is unconstitutional under the Commerce Clause. *See, e.g.*, *Bacchus Imports,* 468 U.S. at 270-271 (holding a

state tax invalid under Commerce Clause based on external evidence showing that law was enacted to promote the local industry); *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010) (holding that a 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 Florida failed to follow 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 "[t]here is no evidence from the text of the statute that it was enacted with a discriminatory purpose." *Florida Dept. of Revenue*, 215 So.3d at 55. The court refused to rely on other evidence in the record, such as affidavits from lobbyists and two former legislators which stated that "cable lobbyists sought a differential tax rate for cable and satellite because satellite was beginning to take over the market." *Id.* at 54-55. By refusing to look beyond the official legislative history, the lower court was unable to conduct a complete Commerce Clause analysis as articulated time and again by this Court: does the statute discriminate, in either purpose or effect, against one industry member over another, based on the location of a specified economic activity?

Many courts have rejected this limited review and analysis of whether a statute is discriminatory. The Court in *Family Winemakers*, for example, noted that comments by a bill's sponsor calling for the promotion of local wineries are "precisely the kind of evidence the Supreme Court has looked to in previous

Commerce Clause cases challenging a statute as discriminatory in purpose." *Family Winemakers,* 592 F.3d at 7 n.4 (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 465-68 (1981) (looking to a senator's and representatives' statements during floor debates as probative evidence of purpose)). S*ee also Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 352 (1977) (pointing to a statement by a single state commissioner as strong evidence of discriminatory purpose).

If courts followed the model of the Florida Supreme Court and relied solely on the language of a statute and the self-serving justifications of the legislators who passed it, effective constitutional review, whether under the Commerce Clause or otherwise, would be foreclosed. This Court recently took the opposite approach, going well beyond the legislative history to determine whether a state's gerrymandering laws were discriminatory. *See, Alabama Legislative Black Caucus v. Alabama,* ___U.S.___, 135 S. Ct. 1257, 1271 (2015) (this Court assessed Alabama's redistricting plan using not only the official legislative pronouncements, but extensive additional evidence). It is not unprecedented for a state legislature to draft a legislative history that provides a thin veneer of neutrality to a statute that is impermissibly discriminatory in effect. As this Court has shown, looking to the official record is just the first step in analyzing a statute.

The Supreme Court of Florida rejected all other forms of evidence outside the official legislative history and the statute itself, citing to this Court's decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), to support its sparse analysis. But the

reasoning in *Circuit City Stores* is distinguishable from the Florida Supreme Court's reasoning. The Court in *Circuit City Stores* dismissed testimony before a Senate subcommittee testimony about the exception at issue in the case may have been added at the behest of the president of the International Seamen's Union of America. *See Id.* at 121. In *Circuit City Stores*, this Court made a point of distinguishing the subcommittee testimony from testimony by a Member of Congress. It made this distinction by relying on its previous decision in *Kelly v. Robinson*, which distinguished between statements about a piece of legislation made by a Member of Congress and statements by non-Members, affording no significance to the statements made by non-Members and giving weight to those made by legislators. *Circuit City* Stores, 532 U.S. at 121 (citing *Kelly v. Robinson*, 479 U.S. 36, 51, n. 13 (1986)). The Supreme Court of Florida refused to acknowledge this important distinction between statements made by legislators involved with the drafting and passing of a piece of legislation and statements made by other interested parties when it dismissed affidavits from legislators affirming that the cable industry lobbied for the CST "because satellite was beginning to take over market share." *See Florida Dept. of Revenue*, 215 So. 3d at 54.

By using such a restrictive lens to analyze the statute, the Supreme Court of Florida has emasculated Commerce Clause jurisprudence, and given state legislatures a formula to enact discriminatory statutes. Buoyed by the decision of the lower court, state legislatures will be presented with countless options to advantage multistate enterprises that provide local benefits over those that do not.

Almost any discriminatory statute or regulation can be recast as a difference in the "nature of the business" of the favored and disfavored entities. This is especially true if courts refuse to consider anything other than the plain language of the statute and the official legislative history when determining whether the state legislature acted with a discriminatory purpose. Local legislatures can easily frame a discriminatory statute and its history to appear neutral.

This Court should grant certiorari to confirm that courts must undertake a full analysis of the specific circumstances surrounding a statute before ruling on its constitutionality.

III. The Fluidity of State Borders in the Internet Age Does Not Allow for the Rigid Constitutional Analysis Undertaken by the Supreme Court of Florida.

Amicus' members are foreclosed from competing in the thirty-six states that do not allow direct shipments to consumers by out-of-state retailers.[3] Under the aegis of the Twenty-First Amendment, state legislatures have drafted protectionist laws insulating in-state actors from out-of-state competitors. While challenges are constantly being brought,[4] the Florida Supreme Court's ruling to

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[3] Retail-to-Consumer Direct Shipping Guide http://www-archive.shipcompliant.com/media/40066/retail_to_consumer_updated.pdf (last accessed Sept. 28, 2017).

[4] S*ee, e.g.*, *Lebamoff Enterprises, Inc.et al., v. Snyder et al.,* 2:17-cv-10191 (E.D. Mich); *Sarasota Wine Market, LLC et al., v. Nixon, et al.,* 4:2016cv01515 (E.D. Mo.); *Lebamoff Enterprises, Inc. et al., v. Rauner, et al.,* 1:16-cv-08607 (N.D. Ill.).

limit the reach of the Commerce Clause would serve as powerful ammunition against our members' efforts throughout the country.

State legislatures will undoubtedly jump at the chance to craft laws that distinguish between businesses based on their different natures to further insulate in-state interests. This is why this decision cannot stand: it provides a blueprint for discrimination. This will impact not only the pay-TV and alcohol industries, but has the potential to have far-reaching effects.

The Supreme Court of Florida's flawed interpretation of *Exxon* and *Amerada Hess,* and its inadequate analysis of the underlying statute, 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 sometimes outright prohibit, industry members' sale of wine to out-of-state consumers.

The lower court's Commerce Clause analysis lobotomizes a constitutional doctrine, and exposes out-of-state alcohol industry members to the uncertainty of protectionist legislation in all fifty states. Its ruling will be the centerpiece of states' efforts to defend statutes and regulations that discriminate in both purpose and effect against out-of-state wine producers, merchants and retailers.

CONCLUSION

The Florida Supreme Court's decision creates greater legal uncertainty regarding the proper analysis under the Commerce Clause for evaluating interstate discrimination. The decision permits a law which discriminates against interstate businesses with limited local impact. As a result, millions of Americans are at risk of losing the wide selection of goods and services they demand. *Amicus* believes that the Court's guidance and review is essential for resolving this conflict and protecting the legacy of a strong dormant Commerce Clause.

For these reasons, we respectfully request the Court grant the petition for a writ of certiorari.

Respectfully Submitted,

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