Case No. 07-1513
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHERRY HILL VINEYARD, LLC; PHILIP BROOKS;
Plaintiffs - Appellees

vs.

JOHN E. BALDACCI, Governor of Maine; G. STEVEN ROWE, Attorney General of Maine; JEFFREY R. AUSTIN, Supervisor of the Bureau of Liquor Enforcement; PATRICK J. FLEMING, Commander of Special Investigations Unit, Bureau of Liquor Enforcement
Defendants - Appellees

DAN GAWADOWSKY, Director of the Bureau of Alcoholic Beverages and Lottery Operations.
Defendant

Appeal from a Final Judgment of the United States District Court
for District of Maine

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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I. SUMMARY OF DISPUTES

The argument plaintiffs presented in our opening brief consists of 6 points. We first argued that the following five legal principles applied:

1. The case presents a question of law, so review is de novo.
2. The sole issue is whether Maine's wine sales law discriminates against out-of-state wineries in violation of the dormant Commerce Clause.
3. Under controlling Supreme Court precedent, discrimination is a matter of the practical effect of a law, not whether the law appears on its face to regulate in-state and out-of-state interests equally. The intent of the legislature is therefore irrelevant, and a good motive is not a defense to a law that has unintended discriminatory effects.
4. The dormant Commerce Clause applies to wine and the 21st Amendment does not exempt state beverage laws from Commerce Clause scrutiny.
5. Discriminatory state laws are subject to strict scrutiny, and are invalid unless the State meets its burden of proving that no reasonable non-discriminatory alternative exists. The State's burden is a heavy one and requires a fully developed record showing why alternative regulations would not work.

Plaintiffs then applied those principles to the record in this case. We argued that the evidence shows that Maine's wine sales law has a discriminatory effect on out-of-state wineries and gives preferential access to the consumer market to in-state wineries, so the law is presumptively invalid. We conceded that the State has an important interest in regulating wine sales, primarily to keep alcohol out of the hands of minors, but pointed out that there is an alternative way of advancing the goal of restricting youth access that is not discriminatory. The State may license and regulate out-of-state sellers and require them to verify age both upon purchase and again upon delivery. We then argued that the State has not proved that these alternatives will not work (it has not offered any evidence on this issue at all), so its affirmative defense of necessity fails.

In its response brief, the State contests none of the first 5 points that set out the law to be applied.

1. The State agrees that review is de novo. State Br. at 23.
2. It concedes that the sole issue is whether the wine law discriminates against out-of-state wineries. State Br. at 4, 7 n.6
3. The State concedes that discrimination is a question of the practical effect of a law, not whether it is even-handed on its face. State Br. at

5, 26.[1] It does not dispute our assertion that the intent of the legislature is irrelevant.

4. The State concedes that the dormant Commerce Clause applies to wine and makes no argument that the 21st Amendment supplies some kind of automatic defense.[2]

5. The State concedes that discriminatory laws are subject to strict scrutiny, State Br. at 5, 26, and that it has the burden of proving that there are no possible nondiscriminatory alternatives. State Br. at 5, 27. It does not dispute our assertion that the burden is a heavy one requiring a fully developed factual record.

The State rests its case upon an argument that when these principles are properly applied to the facts before the Court, they lead to a different conclusion. The State disputes whether the law has been shown to have any discriminatory effects in the first place, State Br. at 28, and if so whether the discrimination is justified in pursuit of an important state interest -- protecting minors. State Br. at

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[1] At one point in its brief, the State suggests that *Granholm* stands for the proposition that only intentional discrimination is prohibited. State Br. at 38. However, the State makes no serious argument that only intentional discrimination violates the Commerce Clause.

[2] Indeed, the State mentions the 21st Amendment only once in the Argument section, State Br. at 38 (in a parenthetical). The State claims to be relying on its police powers, not its 21st Amendment power. Id. at 25.

8-14, 40-41. The State acknowledges that alternatives exist, State Br. at 17, but argues that the alternative of licensing and regulating remote sellers will not work, and that requiring a face-to-face appearance at a distant winery is the only way it can advance its interest in restricting youth access. State Br. at 40-43.

II. PLAINTIFFS HAVE PROVED THAT MAINE'S WINE LAW HAS A DISCRIMINATORY EFFECT ON OUT-OF-STATE WINERIES

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Plaintiffs have the burden of proving discrimination. The State asserts somewhat weakly that we "produced no evidence" of a discriminatory effect, State Br. at 28, but the claim is absurd. A discriminatory effect is simply one that benefits in-state economic interests by giving them preferential access to the market, *Granholm v. Heald*, 544 U.S. 460, 474 (2005); *Oregon Waste Systems,* 511 U.S. 93, 98-99 (1994), and places out-of-state products or producers at a commercial disadvantage, measured is dollars and cents and lost sales. *Assoc. Indus. of Mo. v. Lohman,* 511 U.S. 641, 654 (1994); *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 275 (1988). The evidence shows both halves of the equation -- a competitive advantage to in-state wineries and a loss of business for out-of-state wineries.

For in-state wineries, the requirement that sales take place on the premises poses no significant problem. Their premises are located in Maine, so they may sell directly to consumers in the state without being forced to pay a middleman (either

a wholesaler or retailer) to sell it for them. [Stip. 20, Apx. 28]. Because they are located within the state, consumers may go to the wineries in person, buy as much wine as they want, and transport it home without needing any special approval from the State. Me. Rev. Stat., tit. 28-A, § 2077(2).

For most out-of-state wineries, the requirement that sales take place on the premises effectively prevents direct sales. Cherry Hill is located in Oregon. Without a physical location in Maine, it cannot sell directly to consumers at all. The State concedes this fact (Stip. 22, Apx. 29), which by itself constitutes a discriminatory effect. If an out-of-state winery wants to sell wine in Maine, it must pay a middleman (wholesaler or retailer).[3] The record establishes that using a middleman raises the cost to the consumer and lowers the profit to the winery. [FTC Report, Apx. 75, 77-78]. Cherry Hill can also sell to the tourists who visit the winery, but a tourist can carry home only one gallon, Me. Rev. Stat., tit. 28-A, §

[3] The State accuses us of falsely claiming that out-of-state wineries must go through both a wholesaler and a retailer to sell wine in Maine, despite having been "corrected" by the Magistrate Judge that Maine law allows them to sell directly to a retailer and bypass the wholesaler. State Br. at 18-19. To the contrary, we took pains to explain that the issue we were addressing was whether a winery "may sell directly to consumers in the state without being forced to pay a middleman (either a wholesaler or retailer) to sell it for them." Plaintiffs Br. at 19. The State may be confusing the formal law, which allows an out-of-state winery to sell directly to a retailer, with the practical reality that few such direct-to-retailer sales will take place so as a practical matter most out-of-state wines go through wholesalers. See FTC Report, App. at 77 (retailers lack shelf space to carry wines from all US wineries). Retailers depend for 99% of their stock on wholesalers, so few are going to risk harming that relationship by bypassing them and buying wine directly from producers.

2077(1-A), unless he has special permission. The State has admitted that the winery is not allowed to ship wine. (Answer ¶ 23, Apx. 23).[4] These effects cost out-of-state wineries real sales and profits.

The State advances three specific arguments why the law has no discriminatory effect. None has merit.

First, the State repeatedly points out that in-state and out-of-state wineries are treated the same as a formal legal matter. Under the terms of the licensing statute, both in-state and out-of-state wineries are equally required to sell wine in face-to-face transactions only. State Br. at 15-17, 33, 37, 40. This observation is irrelevant, because the Supreme Court has said consistently that discrimination is not simply a question of whether a statute is even-handed or discriminatory on its face, but of whether it discriminates against out-of-state businesses in practical effect. *Granholm*, 544 U.S. at 466, 472, 493; *Assoc. Indus. of Mo. v. Lohman,* 511 U.S. at 654; *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

Second, the State points out that an out-of-state winery can get its product to Maine in ways other than by direct-to-consumer sales. This observation is also

[4] In its Brief, the State argues that we cited no statute or regulation for this proposition. We were not required to do so, because the State admitted this allegation in its Answer. It cannot now, for the first time in the Court of Appeals, represent that it is their position that on-site purchases may be shipped. See State Br. at 44.

irrelevant. The only alternative sales channels the state identifies are selling through a wholesaler or obtaining a Farm Winery license and selling through a retailer. State Br. at 17. Either avenue requires a Maine middleman -- if you can find one. They are not obligated to do business with every small out-of-state winery that asks. These middlemen also are not charitable organizations and do not provide this service for free. They add their costs to the price of the wine they distribute. The Supreme Court holds that a law which has the effect of raising the cost of out-of-state products in relation to in-state products violates the Commerce Clause. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994); *Oregon Waste Sys., Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93 (1994). It also holds that a law which has the effect of requiring an out-of-state business to use a local processor is unconstitutional. C *& A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994).

Third, the State points out that a consumer can apply for and generally -- but not always -- obtain special permission to import wine bought in person at out-of-state wineries. The State calls this a "simple" matter of sending a letter providing details of the type and quantity of the wine one wants to import, and then waiting for a response. State Br. at 19-20. Whether this is really such a simple matter is doubtful. The special permission process works only in conjunction with a

purchase on the winery's premises, so a consumer has to travel to that winery, select the wines he wants to purchase, then send a letter and wait for a reply -- which could take days, and could be denied. [Stip. 27, Apx. 29]. The existence of this process is in any event irrelevant. The special permission system itself constitutes a burden placed on interstate, but not in-state sales, and is therefore discriminatory. The State concedes later in its brief that *Granholm* held that requiring a separate additional certificate from the state authorizing a direct sale from an out-of-state winery not required for a direct sale from an in-state winery constitutes exactly the kind of "less favorable treatment" that meets the definition of discrimination. State Br. at 39-40; *Granholm*, 544 U.S. at 475-76.

Ultimately the State concedes that because of the face-to-face sale requirement, "Cherry Hill would not be able to sell wine directly to consumers in Maine unless it established a retail location within the state." State Br. at 18. By contrast, it is easy for in-state wineries to sell directly. State Br. at 35. Recognizing that this looks a lot like a discriminatory effect, the State argues *dehors* the record that the impact is small because direct sales do not constitute a significant market and that in-state wineries do not do much walk-in business. State Br. at 35. Even if true, the argument is irrelevant, because the Supreme Court has clearly stated that "there is no "'*de minimis*' defense to a charge of discriminat[ion] ... under the

Commerce Clause." *Camps Newfound/Owatonna v. Town of Harrison,* 520 U.S. 564, 581 n.15 (1997).

III. THE STATE HAS FAILED TO PROVE THAT THERE ARE NO NONDISCRIMINATORY ALTERNATIVES

The dispute between the parties boils down to whether the face-to-face sales requirement, with its admittedly discriminatory effect, is the only way the State can adequately advance its interest in restricting youth access to alcohol. The parties agree that the State bears the burden of proof on this issue. State Br. at 27.[5]

Plaintiffs have identified a reasonable alternative. The State can license out-of-state wineries, allow wineries to take remote orders and ship them in clearly labeled cartons via common carriers approved by the state, require the seller to verify age at the time of sale using an on-line service approved by the State, and require the delivery company to verify age before delivery. This is the system put into place by Michigan in order to comply with *Granholm*. Mich. Comp. L. § 436.1203.

The State claims first that it is obvious this alternative will not work. State Br. at 41-42. A bald assertion of "obviousness" hardly carries the State's burden

[5] At one point in its Brief, the State argues that plaintiffs have not proved that the alternatives will be effective. State Br. at 43-44. Plaintiffs have no burden if proof, and therefore do not have to prove effectiveness.

of proving that this alternative will not work to protect against youth access. The Supreme Court describes the State's burden as a heavy one. *New Energy Co. v. Limbach,* 486 U.S. at 278 ("the standards for such justification are high"). The Court has only twice found that discrimination was justified, and then only upon an extensive factual record clearly demonstrating the absence of workable alternatives. *See Maine v. Taylor*, 477 U.S. 131, 140-43 (1986) (imported baitfish could introduce non-native parasites that could harm Maine fish; experts testified no way to prevent it other than a total ban); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956-57 (1982) (reserving ground water for own citizens in time of drought). The best argument the State can make is that the record is silent on whether online age verification services are effective, State Br. at 43, n.32, silent on how effective the in-person sales rule actually is, State Br. at 42, n.30, and ambiguous on whether delivery personnel could be trained to check IDs as easily as retail sales clerks. State Br. at 42, n. 30. If so, it was the State's burden to offer such evidence, and their failure to do so forecloses their defense.

What evidence there is supports plaintiffs' argument that there are reasonable regulatory alternatives. Over thirty states allow remote sales and direct shipments of wine and have found adequate ways to advance their interests through licensing and reporting requirements rather than making direct sales virtually impossible.

Cherry Hill Vineyards v. Hudgins, 2006 U.S. Dist. LEXIS 93266 at *57, n. 24 (W.D. Ky. 2006) (noting that 32 states allow direct shipping without a face-to-face appearance). *See also Jelovsek v. Bredesen*, 2007 U.S. Dist. LEXIS 23814 at *2-3 (E.D. Tenn. 2007)(number of states that currently prohibit the direct shipment of wine from out-of-state wineries to in-state consumers is steadily decreasing). The Federal Trade Commission has found that states that allow remote orders and direct wine shipments have experienced no increase in youth access to alcohol [Apx. 91-95], and this alternative was endorsed by the Supreme Court in *Granholm*. 544 U.S. at 490. The scattered anecdotal evidence offered by the State that some minors were able to obtain alcoholic beverages over the Internet in the past[6] is of minimal relevance, because there is no evidence any of that occurred under a regime where direct sellers were licensed, regulated, and both sellers and delivery carriers were required to verify age.[7]

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[6] The major item of evidence on this issue offered by the State is actually false. The State relies upon the statement in the National Academy of Sciences report on Reducing Underage Drinking that a study conducted in 2000 found that 10% of minors obtained alcohol "over the Internet or through home delivery." State Br. at 9. The summary is inaccurate. The actual source of this statistic is Fletcher et al., *Alcohol Home Delivery Services: a Source of Alcohol for Underage Drinkers,* 61 J. STUD. ALCOHOL 81 (2000) [See Apx. at 44), which was a study of home deliveries ordered from local retail liquor stores, and had nothing whatsoever to do with obtaining alcohol over the Internet. See http://www.ncbi.nlm.nih.gov/sites/entrez?cmd=Retrieve&db=PubMed&list_uids=10627100&dopt=Abstract (last visited 7/6/2007).

[7] The State collects this evidence at pages 9-12 of its Brief. Not a single one indicates that the illegal delivery occurred in a state that licensed and regulated such deliveries or required age verification. The State's own evidence indicates that minors would use the Internet to buy wine

IV. THE NEW ARGUMENTS RAISED BY STATE ARE WITHOUT MERIT

In response to Plaintiffs' opening brief, the State raises four issues that were not addressed by the Plaintiffs. None is significant.

A. Objections to Judicial Notice.

The State in a footnote appears to object to this Court taking judicial notice of background data on the wine industry that plaintiffs have occasionally referred to when it is helpful to a clear understanding of the issues. The Court is authorized to take notice of such facts that are not subject to reasonable dispute. Fed. R. Evid. 201. The State complains that these facts were not included in the record below, but whether such facts were brought to the District Court's attention is irrelevant because this Court is reviewing this case *de novo*. The Court of Appeals is entitled under these circumstances to take judicial notice. *Aponte-Torres v. University Of Puerto Rico*, 445 F.3d 50, 55 (1st Cir. 2006); *Maher v. Hyde,* 272 F.3d 83, 86 n.3 (1st Cir. 2001).

In any event, the State makes no specific objection to any particular fact, offers no evidence that any of these facts are reasonably disputable, presents no legal argument that judicial notice cannot be taken, and raises this issue only in a footnote, all of which amount to a waiver of the issue. See FED. R. EVID. 103(a)(1)

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only "if age verification were not required." State. Br. at 11.

(specific objection required); *Buck v. American Airlines, Inc*., 476 F.3d 29, 38 (1st Cir. 2007) (half-hearted arguments not fully developed will not be considered); *U.S. v. Dairy Farmers of America, Inc*., 426 F.3d 850, 856 (2005) (argument presented in footnote does not preserve issue for appeal).

B. Preemption

The State argues that Maine might be precluded from requiring common carriers to verify age because the Supreme Court might rule that such requirements are preempted by the Federal Aviation Administration Authorization Act. The Court has granted certiorari in *New Hampshire Motor Transp. Assoc. v. Rowe*, 448 F.3d 66 (1st Cir. 2006), to determine whether a state's efforts to impose restrictions on the delivery of cigarettes is preempted by federal law forbidding certain kinds of state restrictions on air carriers. What the Supreme Court might do is speculative, and the State develops no argument that such restrictions are pre-empted under the current interpretation of the law. The State does not cite to any specific federal statute that might pre-empt the kinds of wine regulations proposed as an alternative to the face-to-face rule, and cites no precedent that a restriction on alcohol sales (as opposed to cigarettes) can be statutorily pre-empted in the face of

the 21st Amendment.[8] Arguments not fully developed are waived. *Buck v. American Airlines, Inc*., 476 F.3d 29, 38 (1st Cir. 2007).

C. Three Lower Court Cases Decided Before *Granholm* Have Little Value

The State relies on three lower court cases decided prior to *Granholm* which held that certain face-to-face requirements not in the alcoholic beverage context were constitutional. They are inconsequential cases easily disposed of Both *Arkansas Tobacco Control Bd. v. Santa Fe Nat. Tobacco Co.*, 199 S.W.3d 656, 661 (Ark. 2004) and *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 212 (2d Cir. 2003), found that the face-to-face requirement for cigarette sales had no discriminatory effect. In both cases, the courts held that the requirement that an out-of-state seller establish a brick-and-mortar physical location in the state was insufficient to establish a discriminatory effect. The Supreme Court in *Granholm* held to the contrary, 544 U.S. at 474-75, so neither case is good law for this point.[9] The third case is even farther afield. *Consigned Sales Co. v. Sanders*, 543 F.Supp. 230 (W.D. Okla. 1982) concerned firework s sales, was decided not only prior to

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[8] The only case cited by the State is the Court of Appeals opinion in *N.H. Motor Transp. Assoc. v. Rowe*. However, once the Supreme Court grants certiorari, the court of appeals opinion is a nullity. *See Glick v. Ballentine Produce, Inc*., 397 F.2d 590, 594 (8th Cir. 1968).

[9] The Court in *Brown & Williamson* also noted that the plaintiffs, who had the burden of proving discrimination, had failed to establish that out-of-state sellers suffered any hardship or business loss. 320 F.3d at 212. That is not the situation in our case.

Granholm but also prior to the bulk of the Court's modern Commerce Clause cases, and did not actually reach the merits of the Commerce Clause argument because it was only an order denying a preliminary injunction.

D. Jelovsek v. Bredesen.

The State points to a recent case in Tennessee called *Jelovsek v. Bredesen*, 482 F.Supp. 2d 1013 (E.D. Tenn. 2007) (currently on appeal) that upheld Tennessee's wine laws against a Commerce Clause challenge. Although the State does not connect this case to any particular argument, we gather that it is being touted as a precedent. The State is urging this court to reach the same result, on the flimsy premise that because that case involved a Commerce Clause challenge to a state wine law as discriminatory, and this case involves a Commerce Clause challenge to a state wine law as discriminatory, the result should be the same regardless of the details.

The State does not ask the court to follow the analysis used in *Jelovsek*, and for good reason. In *Jelovsek*, the District Court dismissed the case on the pleadings without giving plaintiffs the opportunity to present evidence and without oral argument.[10] The court only considered whether the Tennessee law was

[10] The authors of this brief, Robert Epstein and James Tanford, were co-counsel in *Jelovsek* and make this representation on personal knowledge.

discriminatory on its face and did not consider discriminatory effect. See Section V of opinion (page numbers not yet available). Since plaintiffs cannot establish discrimination in practical effect without evidence, they were unable even to argue the point. This contradicts *Granholm* and all the other Supreme Court cases that hold that discrimination in the context of commerce is a question of effect, measured in economic terms, *Jelovsek* cannot, therefore, be considered good law.

V. THE STATE ADVANCES A NUMBER OF IRRELEVANT ARGUMENTS

The State makes a number of arguments in its Brief that are simply irrelevant.

1. The State argues that all wineries are equally prohibited from making remote sales, and all are equally eligible to sell directly to retailers. State Br. at 18-19, 33-34, 36-38. Even if true, this argument is irrelevant, because non-discrimination in some sales channels does not excuse discrimination in another sales channel. This case is solely about wineries making sales directly to consumers without having to use a wholesaler or retailer.

2. The State discusses at length the Magistrate Judge's Report, State Br. at 4-7, and castigates plaintiffs for not doing so. State Br. at 33 n.26. Review in this Court is *de novo*, so the Magistrate Judge's Report is not relevant.

3. The State discusses the *Pike v. Bruce Church* balancing test, which is used to determine whether a <u>non-discriminatory</u> law violates the Commerce Clause.

State Br. at 27-28. The sole issue in this case is whether Maine's wine laws have an unconstitutionally discriminatory impact on out-of-state wineries, so *Pike* is irrelevant.

4. The State repeatedly points out that it has an interest in combating youth access to alcohol. State Br. at 8-13, 41. No one disagrees with this truism, but it is irrelevant. Under the Supreme Court's precedents, the State must advance that interest through non-discriminatory means. It may not discriminate against out-of-state businesses no matter how important the interest. *E.g., New Energy Co.,* 486 U.S. at 278.

5. The State also points out that the 21st Amendment gives it broad authority to regulate wine sales in non-discriminatory ways. State Br. at 15, 25. No one disagrees with this truism either, but it is also irrelevant. This case presents a situation where state law has a discriminatory impact on out-of-state wineries, and the Supreme Court holds that the 21st Amendment does not give states the authority to discriminate. *Granholm,* 544 U.S. at 476.

6. Finally, the State argues that the negative impact on out-of-state wineries is not caused by Maine's laws, but by natural market conditions, such as distance. It argues that a state is not required to remedy the effects of such natural conditions by creating laws to facilitate interstate competition. State Br. at 36-37. The

argument is irrelevant, because we are not dealing here with natural market conditions, but with a state law that has imposed a barrier to the natural market. Under natural market conditions, an out-of-state winery would be able to take advantage of the Internet, FedEx and UPS to sell wine in Maine, albeit with the extra expense of having to maintain a website and pay for delivery. This case is quite different, because Maine artificially prohibits the market from working. It is that barrier that is being challenged. Out-of-state wineries would be perfectly happy if they were allowed to compete for business in Maine under natural conditions.

VI. AMICUS MAY NOT RAISE NEW ISSUES

Plaintiffs are aware that at least three amicus briefs will be filed in this case in support of the State. Plaintiffs have not received these briefs in time to reply to any of the arguments they raise. Plaintiffs expect that they will mostly focus on an issue that is not before this court -- namely, what remedy the District Court should impose on remand if this Court reverses, and whether it should require that Maine allow remote sales and direct shipping as the only way to solve the discrimination and allow meaningful competition Because the District Court ruled against plaintiffs below, it did not consider the issue of remedy, and that matter is not before this Court. An amicus may not raise new issues or arguments not presented by the parties. *U.S. v. Sturm, Ruger & Co., Inc.*, 84 F.3d 1, 6 (1st Cir. 1996).

VII. CONCLUSION

For the reasons expressed in this brief and Plaintiffs' opening brief, Maine's law that interferes with direct-to-consumer sales by out-of-state wineries and gives preferential access to the direct-sale market to in-state wineries should be declared unconstitutional, and the case remanded to the District Court for consideration of the proper remedy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

I hereby certify that the above Proof Brief of Appellees complies with the type-volume requirements of Fed.R.App.P. 32(a)(7)(B) because such Brief contains 4550 words, excluding the parts of the Brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii) as determined by the word processing program WordPerfect 11.0.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by United States mail on this the 7th day of July, 2007 to:

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