No. 85399

IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, ex rel. JEREMIAH W. NIXON,	)
Plaintiff/Respondent,	)
vs.	)
QUIKTRIP CORP.,	)
Defendant/Appellant.	)

Appeal from the Circuit Court of
Jefferson County

The Honorable Timothy J. Patterson
Circuit Judge

Reply Brief of Appellant QuikTrip Corp.

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Argument

I. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The Trial Court Misinterpreted The Act, In That:

A. The Act Requires Proof Of An Unfair Effect On Competitors Beyond The Effects Of Below-Cost Sales; and

B. The State Neither Articulated Nor Proved Any Such Unfair Effect.

QuikTrip's initial brief established that the Motor Fuel Marketing Act (the Act) does not prohibit all below-cost sales of motor fuel – just those that have the intent or effect set forth in § 416.615.1. The State's brief expressly acknowledges that the Act "does not prohibit *all* below-cost sales of motor fuel." Br. at 30 (emphasis original). It also expressly admits that "'unfairly' diverting trade from a competitor cannot be the same as simply diverting trade." Br. at 35.

The State argues that QuikTrip's authorities are distinguishable and it tries to shift the burden of proof to QuikTrip. But it **never** explains what distinguishes a legal below-cost sale from an illegal one, let alone tries to prove that QuikTrip's occasional below-cost sales fall on the illegal side of the line. The State's brief amounts to a confession of error.

For example, the State and the amicus claim that the word "unfairly" in § 416.615.1(2) modifies only the phrase "divert trade" and not "otherwise injure a competitor." Br. at 31; Amicus Br. at 22-23. Thus, the State claims that it can

prove an illegal below-cost sale by proving that QuikTrip's pricing had the effect of damaging its competitors. Br. at 41-42.[1]

There are two fundamental problems with this argument. First, this Court's opinions interpreting the identical language of the Unfair Milk Sales Act have rejected it. The Milk Act prohibits below-cost sales with the "effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor." This Court has expressly held that a below-cost sale '**is not illegal** (a violation of the act) unless it is done with the intent or with the effect of **unfairly** diverting trade from a competitor." State ex rel. Thomason v. Adams Dairy Co., 379 S.W.2d 553, 555-56 (Mo. 1964) (emphasis added). Accord, State ex rel. Davis v. Thrifty Foodliner, Inc., 432 S.W.2d 287, 291 (Mo. 1968) (below-cost sale "is not 'in and of itself' illegal, unless the intent or effect is not merely to divert trade but to unfairly divert such trade") (emphasis original).

The amicus claims that these cases focused only on the "unfairly diverting" part of the statute, not the "otherwise injuring" prong. Amicus Br. at 24-25. The Thrifty Foodliner opinion states exactly the opposite:

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[1] Amicus claims that the use of the word "otherwise" means that the word "unfairly" does not modify "injuring competitors." Amicus Br. at 23. That does not follow. The obvious purpose of the word "otherwise" is to include all unfair injuries to competitors, not just diversion of trade.

> [S]imilarly to Adams, the meritorious question here is a narrow one: Upon a consideration of all the evidence, did the commissioner sustain his burden to prove that in advertising and selling milk below "cost to the retailer", respondent did so with the intent or with the effect of unfairly diverting trade from a competitor or otherwise injuring a competitor?

432 S.W.2d at 290. Having reviewed the record, this Court was not persuaded that the record established that the below-cost sale "was either intended to or had the effect of creating a monopoly, destroying competition or injuring competitors." Id.

The amicus brief itself recognizes that the Act only prohibits "unfair" injuries to competitors. Quoting Borden Co. v. Thomason, 353 S.W.2d 735 (Mo. banc 1962), the brief recites that, in addition to avoiding monopoly, the Milk Act attempts to "remedy unfair competition" and to prevent "unfair trade practices by competitors." Amicus Br. at 26. A below-cost sale, without more, cannot be an unfair trade practice, because the legislature did not ban all below-cost sales.

Second, this theory does not distinguish between legal and illegal below-cost sales. A below-cost sale will **always** "injure" a competitor in the sense that the State claims, because competitors "lost trade or they were injured by reason of having to lower their own prices to meet those of QuikTrip." Br. at 43-44:

> If that argument is valid, no possible reason exists for the inclusion by the legislature of the requirement of Section 416.440 that the giveaways (and

other acts) prohibited are only those done with the intent or the effect of unfairly diverting trade.

Adams Dairy, 379 S.W.2d at 555.

The State argues that the Court cannot add words to a statute in the course of construing it. Br. at 31. QuikTrip does not ask the Court to add any words to the Act, merely to interpret the existing word "unfairly" to apply to injuries to competitors as well as diversion of trade. If mere damage to a competitor violates the Act, it bans all below-cost sales. But the parties agree that the Act does not ban all such sales.[2]

The State claims that the Milk Act cases are distinguishable because those cases found that loss leaders were a recognized form of competition in the grocery business, but specifically prohibited by the Motor Fuel Act. Br. at 40. The State does not explain why this distinction matters. The State never alleged that QuikTrip was using below-cost sales to induce the purchase of other merchandise. Nor does this distinction respond to the square holdings in both Adams Dairy and Thrifty Foodliner that below-cost sales are not illegal unless they unfairly divert trade or injure competitors.

The State also tries to distinguish these cases on the ground that both grocery stores "offered justification" for their below-cost sales after the State

[2] QuikTrip addresses the State's argument about the meaning of "unfairly," Br. at 35-39, in its Point II.

allegedly made a prima facie case of illegality. Br. at 39. By contrast, says the State, QuikTrip offered no evidence that its below-cost sales "were a common and accepted practice." Br. at 40.

This argument stands the burden of proof on its head. Under the plain terms of § 416.640, that burden switches to QuikTrip **only** when the State makes "a prima facie showing of a violation." As the State's brief expressly admits, mere proof of a below-cost sale does not make a prima facie case. "Only those sales that meet the criteria of either subsections (1) or (2) . . . are illegal." Br. at 31. Since the State has never explained what additional proof it must submit to satisfy those criteria, it did not have a prima facie case and QuikTrip is obliged to justify nothing.

The State's only other argument is that QuikTrip's below-cost sales "unfairly diverted trade from a competitor" because the competitors had to lower their own prices or lose customers. Br. at 41. Thrifty Foodliner expressly rejects the idea that below-cost sales are, standing alone, unfair:

> [A]ppellant then argues that "the intent to divert competition through advertising, offering and selling milk below cost is in and of itself unfair." This boot-strap argument ignores the plain language of the statute.

432 S.W.2d at 291.

The reason for this conclusion is just as applicable to the Motor Fuel Act: the legislature did not choose to ban all below-cost sales, only those that **unfairly** injure competitors or divert trade.

Gross v. Woodman's Food Market, Inc., 655 N.W.2d 718 (Wis. App. 2002), on which the State relies, Br. at 42, is not in point because the statutory language is different. Wis. Stat. § 100.30(3) provides that any sale below cost "shall be prima facie evidence" of the prohibited intent or effect. Under that statute, proof of below-cost sales, standing alone, does make a submissible case. As the State's brief candidly admits, it does not make a submissible case under the Missouri Act.

The fundamental problem with the State's theory remains that it has never identified what additional proof is necessary to distinguish between legal and illegal below-cost sales. Since the State has the burden of proof, that alone requires a reversal.

II. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The State Lacked A Submissible Case, In That There Is No Evidence To Support The Trial Court's Finding That QuikTrip's Pricing Policies Unfairly Injured QuikTrip's Competitors.

QuikTrip's Point II established that there is no evidence to support a finding that QuikTrip's prices were unfair, under the trial court's own definition of that word. On the contrary, the evidence affirmatively proved that occasional below-cost sales were not unfair under that definition.

The State does not even try to argue that the record supports any one of the five criteria in the trial court's definition. Its principal argument is that the trial court's definition is wrong: "the broader federal view of what may be found 'unfair' would call into question" the trial court's definition. Br. at 39-40.

The "broader federal view" is simply that the Federal Trade Commission can prohibit unfair trade practices even if they do not violate the antitrust laws. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972). The trial court's definition of "unfair" says nothing about the antitrust laws. The FTC's standard for "unfair" considers whether the practice "offends public policy . . . or other established concept of unfairness"; whether it is "immoral, unethical, oppressive, or unscrupulous"; and whether it causes "substantial injury" to consumers or competitors." Id. n.5. That is not materially different from the trial court's definition.

The State reiterates its argument that one consequence of the below-cost sales was that QuikTrip's competitors lowered their prices and therefore earned less money than they otherwise might have. Br. at 44-45. The State claims that:

> When a competitor loses profits in matching the lower price of another competitor who has chosen to sell below its own cost, it suffers the type of injury that the MFMA is intended to prevent.

Br. at 45. Thus, the State claims that its proof was sufficient to make a prima facie case which QuikTrip failed to rebut. Id.

All of these alleged injuries, however, derive solely from the fact of below-cost sales. A legal below-cost sale would produce exactly the same injury: competitors would have to reduce prices or lose customers. Thus, these arguments could establish a prima facie case only if the legislature chose to prohibit all below-cost sales. But the State admits that the Act does **not** prohibit *"all* below-cost sales of motor fuel." Br. at 30 (emphasis original).

Once again, the State has entirely failed to identify what it is that separates a legal below-cost sale from an illegal one. Under the trial court's own definition, QuikTrip's occasional below-cost sales were not unfair and hence did not violate the Act. The judgment must be reversed on that basis alone.

III. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The Act Violates Due Process As Applied To QuikTrip's Store No. 611, In That Increasing The Profits Of An Already Healthy Business Is Not A Legitimate Governmental Purpose.

Point III of QuikTrip's initial brief established that, as construed by the trial court and applied to QuikTrip's Store No. 611, the statute violates due process. On this record, the only purpose served by this statute is to increase the already healthy profits of QuikTrip's competitors at the expense of the general public. That is not a proper public purpose.

As construed by the trial court, the Act prohibits all below-cost sales, because the effect of all such sales is to force competitors to lower their prices or lose customers. It does not matter if the sale is only one thousandth of a cent per gallon below cost. It does not matter if the defendant's facility is consistently profitable viewed on a weekly or yearly basis. It does not matter that defendant's competitors all have large and growing profits from their motor fuel operations. It does not matter that there is nothing unfair about an occasional day of below-cost sales. The only effect of such a statute, applied to such a facility, is to inflate the profits of thriving private businesses. If that is a proper public purpose, the legislature is free to appropriate large sums of tax dollars and give them to politically connected private corporations.

Understandably, the State does not argue that increasing the profits of QuikTrip's competitors is a valid public purpose. But its defense of the Act's constitutionality simply and stubbornly refuses to recognize the difference between a facial challenge and an as applied challenge. All of the State's arguments and authorities deal with facial challenges. None respond to QuikTrip's argument that the Act, as construed by the trial court, violates due process as applied to QuikTrip's Store No. 611.

The State's discussion of the purposes of the Act is a good illustration. The State claims that the purposes of the Act are to protect competition and to protect competitors from unfair competition and that these are legitimate public purposes. Br. at 49. Banning occasional below-cost sales at Store No. 611 serves neither

purpose. The State has never argued that those sales have adversely affected competition, and there is nothing unfair about occasional below-cost sales when the relevant competitors enjoy large and increasing profits. The only effect of such a ban is to increase those profits to even higher levels, at the expense of the consuming public, which is not a legitimate public purpose.

Similarly, the State claims that "highly restrictive price-related statutes have withstood due process attacks" and that the legislature can regulate economic conditions to the point of fixing prices. Br. at 50-51, quoting Borden, 353 S.W.2d at 745. Again, these "attacks" were all **facial** challenges to the statute. If, in a given situation, the sole purpose and effect of that price fixing were to "protect[] the monopoly rents" that private businesses "extract from customers," it would violate due process. Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002).

The State claims that Craigmiles is distinguishable because the Act does not prevent anyone from entering the motor fuel market. Br. at 52. The effect of the trial court's construction of the Act, however, is precisely what Craigmiles condemned: excessive prices extracted from consumers for no valid purpose.

Under the trial court's order, every below-cost sale is illegal because it has the effect of injuring a competitor. The only way to avoid liability for penalties and damages is to set the price high enough that there is no possibility that it will be below cost – i.e., abandon a low cost philosophy and raise prices by several cents a gallon. That would enable the competitors to raise their prices and their

profits, which is exactly what the amicus wants. The loser is the consuming public.

The State quotes Borden for the proposition that a reasonable legislature could find that below-cost sales cause "small distributors [to] disappear and large distributors [to] expand until competition no longer controls prices." Br. at 53. Such findings may be sufficient to rebut facial challenges like the one in Borden. From an as applied perspective, however, there is not one iota of proof that 23 days of below cost sales out of 1,000 poses any risk that any competitor will go out of business and the record proves exactly the opposite.

The State's other arguments also fail to distinguish between a facial and an as applied challenge. It may be that the Act goes "beyond the existing antitrust" laws in protecting competitors and avoiding monopolies. Br. at 54. On this record, there is not the faintest chance that QuikTrip's occasional below-cost sales threaten the existence of any of its competitors, let alone lead to monopoly.

Sixty Enterprises, Inc. v. Roman & Ciro, Inc., 601 So.2d 234 (Fla. App. 1992), and Woodman's both rejected facial challenges to below-cost sale statutes. Neither case, however, involved the sort of occasional below-cost sales present here. In Sixty Enterprises, as the State candidly concedes, the statute exempted "isolated, inadvertent incidents." § 526.304(2)(a), Fla. Stat. In Woodman's, defendant sold below cost on 293 days over a 21-month period from September 13, 1998 to June 3, 2000, 655 N.W.2d at 728, or almost half the time.

That kind of long-term below-cost sales could conceivably threaten competitors' viability. It is uncontradicted that QuikTrip's below-cost sales did not.

The State acknowledges that Ports Petroleum Co. v. Tucker, 916 S.W.2d 749 (Ark. 1996), found that a flat ban on below-cost sales would thwart legitimate business strategies, but complains that QuikTrip has never identified any such strategy. Br. at 57. The State is wrong. In its opening brief, QuikTrip identified its strategy as aggressive competition based on price. That is unquestionably a legitimate business strategy. As the State acknowledges, QuikTrip is "among the most prosperous of America's privately held businesses." Br. at 64. The reason is its philosophy of aggressive price competition.

The trial court's absolute ban on any below-cost sale, no matter how short-lived and no matter how occasional, effectively prohibits that kind of strategy. Under that ban, if QuikTrip underestimates its costs by less than a dollar, it can be liable for civil penalties, damages and, if the trial court issues an injunction, contempt of court. The only way to avoid these calamities is to abandon the low price strategy and tack on several extra cents per gallon to assure that the price is never below cost.

And that is why the State's argument that prices based on real costs are not gouging the public, Br. at 59, is just plain wrong. Under the trial court's interpretation, the Act is a strict liability statute: drop below cost by a few tenths of a cent per gallon, or even a few thousandths of a cent, and liability is automatic. The problem is that costs fluctuate and QuikTrip does not immediately know its

costs down to the penny. The several additional cents per gallon that QuikTrip must add to its price to avoid strict liability are gouging consumers.

On this record, application of the Act to QuikTrip's Store No. 611 protects neither competition nor competitors. All it does is force QuikTrip to raise its prices so that the competitors can raise their prices, thereby enjoying even higher profits than they already have. That is not a legitimate public purpose.

IV. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The Act Violates Due Process As Applied To QuikTrip's Store No. 611, In That QuikTrip Does Not And Cannot Know Its Costs With The Precision That The Act Requires.

QuikTrip's Point III established that it does not and cannot reasonably know its costs with the precision demanded by the trial court's interpretation of the Act. If QuikTrip underestimates its costs by as little as 25 or 30 cents, the trial court holds it strictly liable for below-cost selling. It violates due process to demand that QuikTrip do something that is impossible.

The State does not dispute that due process prohibits imposing a penalty for violating a statute with which QuikTrip cannot comply. The State makes no serious effort to defend the trial court's rationale for its ruling. And it does not dispute that QuikTrip cannot know its costs with absolute precision given current industry customs and practices.

Instead, the State speculates that QuikTrip might be able to change its organizational structure and business practices so that it would have more current information about the precise costs it incurs. Br. at 62-64. It asserts that QuikTrip presented no evidence to refute this speculative possibility. There are a variety of problems with this argument.

For starters, the State did not make this argument in the trial court and therefore cannot defend the judgment based upon it. It is certainly true that this Court may affirm on grounds other than those relied upon by the trial court:

> The full statement of that rule, however, is that the order must be affirmed, if the dismissal of an action can be sustained on any ground which is supported by the motion to dismiss regardless of whether the trial court relied on that ground.

Property Exchange & Sales, Inc. v. King, 822 S.W.2d 572, 574 (Mo. App. 1992) (emphasis original). It is simply unfair for the State to complain that QuikTrip presented no evidence on a topic when the State never suggested that QuikTrip needed to present any evidence.

In any event, the State's speculation does not refute the evidence in the record. QuikTrip could certainly delegate the responsibility to set the price to the station manager who would receive bills of lading when the fuel is delivered. The station manager would not, however, know what the freight cost. Nor would the station manager be able to predict what discrepancies there might be between the invoice for the fuel and the bill of lading. QuikTrip neither owns nor controls the

freight company or the suppliers of fuel. How can it require absolutely accurate bills within two or three days?

The State also argues that there is no evidence that these problems caused the below-cost sales. Br. at 62-63. Once again, the State never raised this argument below and hence cannot rely on it here. Had the State raised the argument, QuikTrip could have supplied the required linkage, since in virtually every case the cause of the below-cost sale was an increase in QuikTrip's costs rather than a reduction in the price.

The State's claim that QuikTrip should maintain cost data in the ordinary course of its business, Br. at 63, simply misses the point. QuikTrip does have access to accurate cost data within a week or two of the shipment. It does not have, and cannot reasonably obtain, absolutely precise data within three days of the shipment.

The State reiterates the trial court's finding that QuikTrip's competitors were able to determine their costs. Br. at 63-64. But the State never responds to QuikTrip's argument that those affidavits were too conclusory to be meaningful and, in any event, did not establish an ability to assess those costs with the precision that the trial court's interpretation of the Act requires.

The State's final salvo is that it surely is not impossible for QuikTrip to comply with the below-cost sales statute in its home state of Oklahoma. Br. at 64. While the State is quite correct in that assertion, the reason is the very different language of the Oklahoma statute. 15 Ok. Stat. § 598.3 prohibits below-cost sales

"with the intent or purpose" of unfairly diverting trade. Obviously, if QuikTrip does not know that it is selling below cost, it cannot have the requisite intent.

An earlier version of the Oklahoma statute imposed liability if the below-cost sale had the "effect" of causing such diversion. The Oklahoma Supreme Court held that, absent an intent requirement, the statute violated due process. Englebrecht v. Day, 208 P.2d 538, 544 (Okla. 1949).

The amicus claims that QuikTrip's affidavits are inadmissible, because they allegedly contradict its prior sworn statement that it has a policy of examining its exact cost of doing business whenever its prices come within a specified range of its estimated cost. Amicus Br. at 33-34. There is no inconsistency. That QuikTrip **tries** to determine its exact cost of doing business does not mean that it will always succeed. And the reason it does not succeed is precisely because it cannot know the exact amount of its costs.

On the admissible evidence in this case, QuikTrip cannot know the exact amount of its costs with the precision required to avoid liability under the trial court's interpretation of the Act. Thus, applying the Act to QuikTrip violates due process.

V. The Amicus Brief.

The Petroleum Marketers Association filed an amicus brief promising to provide a "detailed perspective of the purposes behind the Act and economic factors at work in the industry." Amicus Br. at 4. In fact, the amicus is primarily

dedicated to the erection and subsequent demolition of a series of straw men. QuikTrip will comment on a few of the more egregious examples.

The biggest straw man of all is the amicus' claim that QuikTrip "posits a singular purpose" for the Act: preventing pricing practices intended to put competitors out of business. Br. at 11. The brief repeats this mantra several times. Amicus Br. at 21; 25; 26-27; 28. That is a complete misrepresentation of QuikTrip's argument in this Court.

QuikTrip's statutory argument is that the Act requires proof of something more than a below-cost sale in order to establish a prima facie case of a violation. That is the only construction that gives meaning to subsections (1) and (2) of § 416.615. Neither the State nor the amicus has ever explained what it is that distinguishes a legal below-cost sale from an illegal one.

QuikTrip did argue in the trial court that the Act imposed a predation requirement; the trial court rejected that argument; and QuikTrip has not renewed it on appeal. Having concluded that QuikTrip's interpretation was wrong, the trial court then jumped to the conclusion that the State's must be right – a conclusion that simply does not follow from the premise. As the party with the burden of proof, the State is obliged to present a coherent explanation of the difference between legal and illegal below-cost sales and some evidence that QuikTrip's pricing practices fall on the illegal side. Its complete failure even to attempt such an explanation means that the State has not satisfied its burden of proof.

The amicus' next straw man is that QuikTrip "readily concedes" that the trial court properly interpreted the statute if the word "unfairly" does not modify the phrase "otherwise injure a competitor." Br. at 21-22. QuikTrip's brief contains no such concession and no fair advocate could argue that it did. The referenced part of the brief merely identified the operative words in the Act that require interpretation.

It is certainly true that, if QuikTrip's interpretation is correct, the trial court's is wrong. The converse is not necessarily true. Basic principles of statutory construction dictate that the State has to prove something more than a below-cost sale to make a prima facie case of violation. Neither the trial court, the State, nor the amicus has ever explained what that "something more" is.

The next red herring in the amicus brief is that the trial court's order does not hold that the Act is an "outright prohibition of below-cost sales." Br. at 24. That is the logical consequence of what the trial court did hold: that QuikTrip's competitors were injured because they had to lower prices or lose customers. Those "injuries" are the consequence of any below-cost sale, so the trial court's interpretation prohibits all below-cost sales. Even the State admits that result is wrong. Br. at 30.

The amicus' discussion of QuikTrip's due process argument takes an equally distorted view of what that argument really is. The amicus urges that direct and intended benefit to private parties does not violate due process so long as the statute serves some valid public purpose. Br. at 28.

A total prohibition against below-cost sales on the facts of this case, however, serves no public purpose. It is entirely unnecessary to protect either competition or QuikTrip's competitors, because the State has never contended competition is in danger and QuikTrip's competitors are financially successful businesses with ever-increasing profits. A statute that serves only to increase the profits of a healthy private business violates due process, as the amicus' own case squarely holds:

> [T]he Constitution forbids even a compensated taking of property when executed for no purpose other than to confer a private benefit on a particular private party.

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 245 (1984).

The amicus also characterizes QuikTrip as arguing that there "cannot be a valid public purpose because the Act has an adverse effect on competition and, thereby, harms consumers." Br. at 28. Again, that is a total distortion of QuikTrip's real argument: on this record, the only purpose or effect of a total ban on below-cost sales is to increase the profits of financially healthy businesses, which is not a valid public purpose.

The amicus claims QuikTrip is arguing that a valid public purpose must be defined as co-terminous with the antitrust laws; whereas protecting competitors and preserving market structure are also legitimate governmental interests. It cites Borden for the proposition that these interests are sufficiently legitimate to avoid a facial challenge to a statute. Br. at 28-29.

This is more distortion. QuikTrip does not dispute that preserving an existing market structure can be a legitimate government interest. Its argument is that, as applied to the facts of this case, a complete ban on below-cost sales does not serve that interest. It only inflates the hefty profits of private businesses.

The amicus argues that an as applied challenge must demonstrate that the state action is truly irrational. Br. at 30, citing WMX Technologies, Inc. v. Gasconade County, 105 F.3d 1195 (8th Cir. 1997). As WMX plainly states, that is the standard when the issue is the "means by which the County seeks to further" what are admittedly legitimate interests. 105 F.3d at 1199. The instant case challenges the legitimacy of the Act's objective.

In short, the amicus brief neither acknowledges QuikTrip's arguments nor tries to address them fairly. If the amicus had any legitimate arguments against QuikTrip's position, one presumes it would have made them. The failure to make any legitimate argument is the best possible proof that the amicus knows that the trial court's construction of this special interest legislation is indefensible.

Conclusion

For the foregoing reasons, QuikTrip respectfully prays that the Court reverse the judgment of the trial court and remand with instructions to enter judgment in favor of QuikTrip.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 5,411 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 2002 SP-2. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

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Mark G. Arnold

Certificate of Service

I certify that one copy of this brief and one copy on floppy disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by hand delivery, on this 18th day of December, 2003:

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