SC95388

IN THE SUPREME COURT OF MISSOURI

GATE GOURMET, INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

On Petition for Review from the Administrative Hearing Commission

Hon. Sreenivasa Rao Dandamudi, Commissioner

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The parties dispute whether Appellant Gate Gourmet, Inc.'s sales of TV-dinner-style frozen meals to its commercial airline customers are subject to the one percent sales tax rate for food under § 144.014, RSMo. Gate Gourmet filed its sales tax returns using this one percent state sales tax rate. Following an audit of taxable periods from January 1, 2008, through December 31, 2010, Respondent Director of Revenue issued assessments of additional tax based on the four percent sales tax rate in § 144.020, RSMo. Gate Gourmet paid the assessments under protest and filed a complaint with the Administrative Hearing Commission challenging the assessments. The Commission upheld the Director's assessments after a hearing, basing its decision on the Commission's interpretation of this Court's opinion in *Wehrenberg, Inc. v. Director of Revenue*, 352 S.W.3d 366 (Mo. banc 2011).

The first question presented (do the food products sold by Gate Gourmet qualify for the one percent state sales tax rate on food under § 144.014, RSMo?) requires construction of Missouri's revenue laws. The second question presented (would it violate the uniformity clause contained in art. X, § 3 of the Missouri Constitution to answer the first question in the negative?) also requires construction of Missouri's revenue laws. Therefore, this Court has exclusive jurisdiction over this appeal under art. V, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

Gate Gourmet is a global provider of catering and provisioning services for airlines and railroads. P.Ex. 5.[1] At all relevant times, Gate Gourmet did business in Missouri at its Saint Louis Facility, a warehouse located at 8725 Scudder Road in Berkley, Missouri. Tr. 34.

Gate Gourmet earned approximately half its revenue at the Saint Louis Facility from sales of various food products, and half from non-taxable catering service fees. Tr. 24. The Saint Louis Facility is not a restaurant. Tr. 37. Gate Gourmet does not employ any chefs at the Saint Louis Facility, there is no public seating area there, and with the exception of employee lunches and the like, no food is served to or consumed by anyone at the Saint Louis Facility. Tr. 37, 52, 64, 77, 85, 95.

A. The Food At Issue

At all relevant times, Gate Gourmet sold prepackaged frozen meals that required additional preparation by the purchaser before they became safe to eat ("TV-Dinner-Style Frozen Meals"). Tr. 39, 45, 47, 50, 62-63; P.Ex. 15A-15H. Gate Gourmet sold the majority of these TV-Dinner-Style Frozen Meals in bulk to commercial airlines that prepared and served the meals to their passengers and crew at no additional cost. Tr. 46, 48, 69-70; A2, ¶ 4 (Decision); L.F. 129, ¶ 4.

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[1] References to the hearing transcript are as "Tr. __," and references to the attached hearing exhibits are as "P.Ex. __" for Petitioner's/Appellant's Exhibits. References to the Legal File are as "L.F. __," and references to the Appendix are as "A__."

The TV-Dinner-Style Frozen Meals sold by Gate Gourmet were substantially the same as grocer-sold TV-dinner-style frozen meals subject to the one percent sales tax rate. A2, ¶ 5; L.F. 129, ¶ 5; P.Exs. 15A, 15L. The components of a typical Gate Gourmet TV-Dinner-Style Frozen Meal might include a protein (meat or fish), a starch, and a vegetable, all fully cooked then flash-frozen and set on a dish wrapped in foil that is color-coded or marked to identify its contents. Tr. 42, 46, 60, 71; P.Exs. 14.16, 14.18. The TV-Dinner-Style Frozen Meals were not hot or ready for immediate consumption at the point of sale; they required additional preparation in order to be edible or safe to eat. Tr. 39, 45, 47, 50, 62-63; P.Exs. 14.16-14.20, 14.23, 15A-15H. In general, TV-Dinner-Style Frozen Meals must be cooked in an oven at 350° for approximately 20 to 25 minutes prior to serving before they are safe to eat. Tr. 47, 50, 63. Gate Gourmet did not provide napkins or utensils with the TV-Dinner-Style Frozen Meals. P.Exs. 15A-15H. In each case, the customer thawed, heated, and otherwise prepared each meal before serving it to its customers at an off-premises location. Tr. 40, 45, 47, 88. Customers did not consume the food at Gate Gourmet's Saint Louis Facility. Tr. 37, 47, 53.

B. Procedural History

Appellant Gate Gourmet filed sales tax returns with Respondent Director of Revenue for the taxable periods beginning January 1, 2008, through December 31, 2010 (Audit Period), reporting sales of TV-Dinner-Style Frozen Meals at the one percent state sales tax rate provided in §144.014, RSMo. Tr. 25. Following an audit, the Director issued assessments of additional tax based on the four percent state sales tax rate in §144.020, RSMo. P.Ex. 1. Gate Gourmet paid all the assessments under protest, and the

Director issued a final decision denying the protests. Tr. 28. Gate Gourmet appealed to the Commission, and the Commission conducted a hearing where the parties submitted evidence through exhibits and witness testimony, followed by briefs. Tr. 1. On November 2, 2015, the Commission issued its decision in favor of the Director. A1-A10; L.F. 128-37. This is an appeal from that decision.

POINTS RELIED ON

I.

QUALIFYING FOOD

The Administrative Hearing Commission erred in holding that the TV-Dinner-Style Frozen Meals sold by Gate Gourmet do not qualify for the one percent state sales tax rate on "food" as defined in § 144.014, RSMo, because the Commission misinterpreted this Court's holding in *Wehrenberg, Inc. v. Director of Revenue*, 352 S.W.3d 366 (Mo. banc 2011) to require that the food literally must be eaten in a personal residence to qualify as "food items for home consumption" in that *Wehrenberg* did not set forth such a requirement, and that food need not actually be eaten in a personal residence to qualify.

Wehrenberg, Inc. v. Director of Revenue, 352 S.W.3d 366 (Mo. banc 2011)

§ 144.014, RSMo

§ 144.020, RSMo

12 C.S.R. 10-110.990

II.

UNIFORMITY

The Administrative Hearing Commission erred in holding that the TV-Dinner-Style Frozen Meals sold by Gate Gourmet do not qualify for the one percent state sales tax rate on "food" as defined in § 144.014, RSMo, because taxing TV-Dinner-Style Frozen Meals sold by Gate Gourmet at a higher rate than similar meals sold by other vendors violates the uniformity clause contained in art. X, § 3 of the Missouri Constitution in that this non-uniform treatment singles out Gate Gourmet and disallows to it the preferential tax rate provided to other vendors/grocers that sell similar food.

Missouri Constitution, art. X, § 3

Missouri Pacific Railroad Co. v. Morris, 345 S.W.2d 52 (Mo. banc 1961)

508 Chestnut, Inc. v. City of St. Louis, 389 S.W.2d 823 (Mo. 1965)

State v. Bates, 224 S.W.2d 996 (Mo. banc 1949)

SUMMARY OF THE ARGUMENT

The Commission erred when it held that the TV-Dinner-Style Frozen Meals sold by Gate Gourmet do not qualify for the one percent state sales tax rate on "food" as defined in §144.014, RSMo, even though they are "similar to frozen dinners sold to the public in grocery stores" (A2, ¶ 5; L.F. 129, ¶ 5) that do qualify for this rate.

The Commission held that the case is governed by this Court's decision in *Wehrenberg, Inc. v. Director of Revenue*, 352 S.W.3d 366 (Mo. banc 2011). In *Wehrenberg*, the Court held that "the 'products and types of food' subject to the one percent state sales tax are food items for home consumption." *Id.* at 367. Although the Commission agreed with Gate Gourmet that "the nature of the vendor" and "the nature of the purchaser" are not legally relevant (A5; L.F. 132), the Commission nevertheless interpreted this holding to mean that the food must literally be consumed at home in order to qualify. A5-A9; L.F. 132-36.

The Court has not fully defined "for home consumption," which is a term of art also left not explicitly defined in § 144.014, RSMo, the Director's regulation (12 C.S.R. 10-110.990), or Federal Food Stamp statute (7 U.S.C. § 2012) to which Missouri law links. The controlling issue here is more narrow: Does food qualify for the one percent state sales tax rate **only if** it is actually eaten in a personal residence? This Court in *Wehrenberg* did not interpret the "for home consumption" requirement so literally, instead holding more practically that Wehrenberg's food failed to qualify because it was consumed on the seller's premises ("food sold at the theater concession stand is for

consumption at the theater"). *See Wehrenberg*, 352 S.W.3d at 367. Thus, the Court in *Wehrenberg* did not say what "for home consumption" is, but rather said what it is not.

The Commission's literal interpretation would produce an absurd result because in order to comply with the law, grocery store clerks would be forced to ask their customers: "Will you eat this food at home, or instead at work or school, in the car or on a picnic, or perhaps in an airplane?"

Like a father who buys snack boxes from a Dierbergs grocery store in Saint Louis for his kids to eat at school, or a boss who buys a gooey-butter coffee cake from a Schnucks supermarket to serve at her staff meeting, or a traveler who purchases a pre-packaged meal from Schnucks to eat on a plane, a commercial airline like Delta purchases TV-Dinner-Style Frozen Meals from Gate Gourmet to feed its passengers in the air. In each of these cases, the food satisfies the "for home consumption" requirement because the food is not the type of food purchased for immediate consumption on the seller's premises (the grocery store or Gate Gourmet's facility).

Consequently, this Court should reverse the decision of the Administrative Hearing Commission and hold that the food sold by Gate Gourmet qualifies for the one percent state sales tax rate.

ARGUMENT

Standard Of Review

A decision of the Administrative Hearing Commission will be affirmed "'if (1) it is authorized by law; (2) it is supported by competent and substantial evidence on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not contrary to the reasonable expectations of the General Assembly.'" *Eilian v. Director of Revenue,* 402 S.W.3d 566, 567-68 (Mo. banc 2013), *quoting Custom Hardware Engineering & Consulting, Inc. v. Director of Revenue*, 358 S.W.3d 54, 56 (Mo. banc 2012), and *citing* § 621.193, RSMo. The Court reviews the Commission's interpretation of the law and its application of the facts *de novo*. *Zip Mail Services, Inc. v. Director*, 16 S.W.3d 588, 590 (Mo. banc 2000).

I.

QUALIFYING FOOD

The Administrative Hearing Commission erred in holding that the TV-Dinner-Style Frozen Meals sold by Gate Gourmet do not qualify for the one percent state sales tax rate on "food" as defined in § 144.014, RSMo, because the Commission misinterpreted this Court's holding in *Wehrenberg, Inc. v. Director of Revenue*, 352 S.W.3d 366 (Mo. banc 2011) to require that the food literally must be eaten in a personal residence to qualify as "food items for home consumption" in that *Wehrenberg* did not set forth such a requirement, and that food need not actually be eaten in a personal residence to qualify.

The Commission erred when it held that the TV-Dinner-Style Frozen Meals sold by Gate Gourmet do not qualify for the one percent state sales tax rate on "food" as defined in §144.014. This case is controlled by this Court's decision in *Wehrenberg*, which held that qualifying food is "food items for home consumption" and that Wehrenberg's food failed to qualify because it was for immediate consumption on Wehrenberg's premises. If the Commission had interpreted *Wehrenberg* correctly, it would have concluded that Gate Gourmet's TV-Dinner-Style Frozen Meals qualified for the one percent state sales tax rate because, like frozen TV dinners sold by grocery stores, the food sold by Gate Gourmet was not intended for immediate consumption on Gate

Gourmet's premises, but rather, was intended to be heated and consumed off the premises of Gate Gourmet's Saint Louis Facility.

A. "Food For Home Consumption" Qualifies For The One Percent Rate

Resolution of this case turns on whether Gate Gourmet's TV-Dinner-Style Frozen Meals qualify as "food for home consumption" and thus for the one percent state sales tax rate. In *Wehrenberg*, the Court traced the history of this qualified food test through the statutory framework:

> Section 144.020 imposes a four percent state sales tax on the retail sale of tangible personal property, including food. Section 144.014 imposes a one percent state sales tax on the retail sale of 'those products and types of food for which food stamps may be redeemed pursuant to the provisions of the Federal Food Stamp Act as contained in 7 U.S.C section 2012.' The federal food stamp program defines 'food' as 'any food or food product for home consumption ….' 7 U.S.C., section 2012(k).

Wehrenberg, 352 S.W.3d at 367.

This statutory tracing led the Court to this concise statement of the qualified food test:

> Thus, the 'products and types of food' subject to the one percent state sales tax are food items for home consumption.

Id.[2]

The meaning of the "for home consumption" requirement was not expressly explained by the Court in *Wehrenberg*, and is not explained in the Missouri tax statutes or in the Federal Food Stamp statute that is incorporated into Missouri's qualified food test. The holding in *Wehrenberg*, however, demonstrates the meaning of "for home consumption" — a practical meaning that, as discussed below, the Director has adopted and followed in rulings and regulations over the past twenty years.

Unfortunately, the Commission below misinterpreted *Wehrenberg*'s holding.

B. Absurd Results Flow From The "Literally Eaten At Home" Rule Adopted By The Commission

The error in the Commission's decision is that it interprets the phrase "for home consumption" literally to mean "taken home to eat." A7; L.F. 134. This led the Commission to conclude that Gate Gourmet's TV-Dinner-Style Frozen Meals do not

[2] In addition to the qualified food test at issue in this case, § 144.014.2, RSMo, provides a second test – a qualified establishment test or "80/20 test" – that essentially denies the one percent rate to restaurants even if the food they serve would satisfy the qualified food test. The Director has never contended that Gate Gourmet is a restaurant and so the qualified establishment test is not at issue here. The nature of the seller and the nature of the purchaser are irrelevant under the statute's qualified food test and thus have no bearing on this dispute. The nature of the food is all that matters here.

satisfy the qualified food test because these meals are eaten by people "not in their homes, but aboard commercial airlines flying a mile or more above anyone's home." *Id.*

If the Commission's decision is affirmed, food sold by grocers should be denied the one percent rate whenever that food is "not taken home to eat" by purchasers, but is instead consumed in a workplace breakroom, in a school cafeteria, in a car during morning rush hour, or purchased in a grocery store on the way to the airport to eat on the plane. But how is a food seller to know whether those coffee pods and soup packets are destined for a kitchen pantry or a workplace breakroom, whether that gooey-butter coffee cake will be eaten by kids at the kitchen table or by co-workers in a staff meeting, whether those TV dinners will be eaten in front of the television in the evening or at a work desk for lunch, or whether those on-the-go lunches will be pulled out of paper bags at school, saved to eat in the backyard sandbox later that afternoon, or eaten side by side with Gate Gourmet's meals on the airplane?

It would be absurd to expect food sellers to discover the answers to these questions. The Commission itself has previously acknowledged the absurdity of this "literally eaten at home" interpretation of the "for home consumption" requirement:

> No party to this case seriously suggests that citizens using food stamps are asked whether they will eat the food they purchase at home, or whether grocery checkers ask the same question in deciding what rates of sales tax to apply to food purchases.

Krispy Kreme v. Director of Revenue, Case No. 06-1044 RS (Mo. Admin. Hear'g Comm., December 23, 2010) *5, *aff'd in relevant part*, *Krispy Kreme v. Director of Revenue*, 358 S.W.3d 48 (Mo. banc 2011).

Statutes must be construed to avoid unreasonable or absurd results. *See Murray v. Mo. Hwys & Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2011). Further, the taxing statute at issue in this appeal must be strictly construed in favor of Gate Gourmet and against the Director. *See Morton v. Brenner*, 843 S.W.2d 538 (Mo. banc 1992) (citing *Cascio v. Beam*, 594 S.W.2d 943, 945 (Mo. banc 1980)). The Commission erred when it concluded that *Wehrenberg* defined "for home consumption" as literally meaning "taken home to eat," with all the absurd and impractical burdens this holding would impose upon the marketplace. The *Wehrenberg* court, of course, did not so hold.

C. "Food For Home Consumption" Includes "Food Eaten Off-Premises"

1. This Court Has Held That Food Eaten On The Seller's Premises Is Not "Food For Home Consumption"

The holding in *Wehrenberg*, which the Commission misinterpreted, reads as follows:

> [T]he 'products and types of food' subject to the one percent state sales tax are food items for home consumption. There is no doubt that the food sold at the theater concession stand is for consumption at the theater and are not sold for home consumption. Consequently, the one percent state sales tax

rate provided in section 144.014 does not apply to Wehrenberg's concession sales.

Wehrenberg, 352 S.W.3d at 367.

Contrary to the Commission's decision, the Court in *Wehrenberg* did not define what "for home consumption" is, but rather, defined what it is not. The Court's specific holding in *Wehrenberg* means only that when food is sold at a theater for immediate consumption **on the premises** of the theater, the food is not "for home consumption."

Thus, under *Wehrenberg*, frozen and cold foods sold for later consumption **off the premises** of the seller qualify as "food for home consumption" entitled to the one percent state sales tax rate. Conversely, hot foods, and any other food sold to be eaten on the seller's premises without further preparation are not "for home consumption" and do not qualify for the one percent state sales tax rate.[3]

This understanding of *Wehrenberg* is consistent with the Director's own past interpretations.

[3] The *Wehrenberg Court* held that the nachos and popcorn at issue did not qualify as food "for home consumption." A movie theater's concession snacks are sold hot, in messy open containers, and for immediate consumption before, during, or after the movie without further preparation. By contrast, Gate Gourmet's TV-Dinner-Style Frozen Meals were sold frozen, wrapped, and for consumption at a later time requiring further preparation, in addition to being sold for consumption off Gate Gourmet's premises.

2. The Director's Own Rulings And Regulation Provide That "Food For Home Or Off-Premises Consumption" Qualifies

LETTER RULINGS issued by the Director over the past two decades to taxpayers in which s/he interpreted "for home consumption" are in harmony with the interpretation urged by Gate Gourmet. For example, in a letter ruling authorizing application of the one percent state sales tax rate to sales of certain frozen pies, the Director stated:

> All sales of food, drinks and desserts intended **for home or off-premises consumption** are subject to the reduced sales tax rate as provided in § 144.014, RSMo. The reduced sales tax rate of one percent is not applicable to meals, drinks and desserts sold by Applicant **for on-premises consumption**.

Mo. Ltr. Rul. No. CL 1182 (September 2, 1998) (emphasis added).

In another ruling approving the reduced tax rate for deli foods "**consumed off Applicant's premises**," the Director explained:

> Pursuant to Section 144.014.2, "food" is defined as only those products and types of food for which food stamps may be redeemed pursuant to the Federal Food Stamp Program contained in 7 U.S.C. Section 2012. This includes food products for home consumption. Hot food and cold food for consumption on premises are not eligible for the Federal Food Stamp Program. Therefore, hot food and cold food sold **for consumption on premises** are taxed at the full sales tax rate.

Mo. Ltr. Rul. No. CL 2328 (October 17, 2000) (emphasis supplied).

REGULATIONS issued by the Director also are contrary to the Commission's literal interpretation of "for home consumption." The Director's regulation found at 12 C.S.R. 10-110.990 specifically provides examples of food that qualifies without specifying **where** that food must be consumed, other than to require that it may not be consumed on the seller's premises:

> (F) A convenience store sells prepared cold sub sandwiches, ice cream and cold drinks. The store also prepares and sells hot dogs and chili. All items are sold "**to go**." The store should charge the reduced tax rate on the cold items, but should charge the regular tax rate on the hot items.
>
> * * *
>
> (G) A company sells pre-packaged ice cream bars made by an unrelated ice cream manufacturer to neighborhood families from trucks. The ice cream truck driver should charge the reduced rate of tax because the seller does not prepare the ice cream bars and they are **not consumed on the premises of the seller**.

12 C.S.R. 10-110.990(3)(F) and (G) (emphasis supplied).

None of the examples provided by the Director in the regulation requires that the food must actually be eaten at home in order to qualify. In fact, the "Basic Application of Rule" section of the regulation provides, in part:

> Food items refrigerated or at room temperature qualify for the reduced rate, **even if the purchaser elects to heat the item on the business' premises**.

12 C.S.R. 10-110.990(2)(A) (emphasis supplied).

Further, Example (C) in the regulation states:

> (C) A convenience store **sells burritos from its freezer.** The convenience store provides a microwave so the purchaser can heat it. **The sale of the burrito is taxed at the reduced rate because it is a qualifying food item.**

12 C.S.R. 10-110.990(3)(C) (emphasis supplied).

The regulation's "Basic Application of Rule" section and the examples make clear that, as the Commission specifically found (A4-A5; L.F. 131-32), the nature of either the purchaser or the vender is irrelevant, but rather the focus is on the nature of the food. In the frozen burrito example, like Gate Gourmet's situation, the seller sold the food frozen and the customer was required to heat it before it was consumed.

These regulatory examples illustrate the Director's long-standing policy that the location where the customer actually eats the food – in the store after microwaving the burrito, in the car, at home, or in an airplane – does not define "for home consumption." Again, it is the nature of the food that must guide the analysis. The nature of the food sold by Gate Gourmet – TV-Dinner-Style Frozen Meals – just like the nature of frozen TV Dinners sold by grocers, is prepackaged frozen food that their customers must heat and consume off premises.

These rulings and regulations are, of course, not binding on the Court, but they do demonstrate that not even the Director agrees with the Commission's literal interpretation of the term "for home consumption."

D. Gate Gourmet's TV-Dinner-Style Frozen Meals Qualify For The One Percent Tax Rate

Gate Gourmet's TV-Dinner-Style Frozen Meals are sold frozen and cannot be consumed until Gate Gourmet's **customer heats the meals**, an event that **always** occurs off Gate Gourmet's premises. It is instructive to note that in the regulation's burrito example above, even the seller's provision of "on premises" equipment enabling customers to heat and consume the food on the seller's premises did not disturb the frozen burrito's qualification for the one percent state sales tax rate. Gate Gourmet does not provide an "on premises" consumption option to its customers; all of its TV-Dinner-Style Frozen Meals are sold cold and inedible, and must be heated by its customers off of Gate Gourmet's premises before they can be consumed. This pushes Gate Gourmet's food even further into qualified status. Gate Gourmet's meals are no different than frozen TV Dinners sold by grocers (a fact the Commission specifically found), and thus Gate Gourmet's food qualifies as food "for home consumption" that is eligible for the one percent state sales tax rate under §§ 144.014.2.

This Court should reverse the Commission's decision, abate the assessments, and order the Director to refund to Gate Gourmet the amounts it paid under protest, plus interest.

E. Unexpected Tax Decisions Apply Only Prospectively

In the event that this Court upholds the Commission's decision below, such a holding would implicate both uniformity clause concerns under the Missouri Constitution (discussed in point II below) and the legislature's "unexpected decision" statute.

The Director's regulation and historic ruling practice make the Commission's unprecedented interpretation of § 144.014, RSMo an "unexpected decision" under § 143.903, RSMo. The same would be true of this Court's decision if it were to affirm the Commission's holding below. The legislature has provided that such an unexpected decision can only be applied prospectively. Under § 143.903.2, RSMo, a decision of the Commission or the courts is "unexpected" if "a reasonable person would not have expected the decision or order based on prior law, **previous policy or regulation** of the department of revenue" (emphasis supplied). The Commission's decision fits squarely within this definition because, as discussed above in point I.C., the decision is contrary to the Director's regulation found in 12 C.S.R. 10-110.990. Thus, even if the Court were to affirm the Commission's decision (which it should not), the assessments would still be invalid and would have to be abated.

II.

UNIFORMITY

The Administrative Hearing Commission erred in holding that the TV-Dinner-Style Frozen Meals sold by Gate Gourmet do not qualify for the one percent state sales tax rate on "food" as defined in § 144.014, RSMo, because taxing TV-Dinner-Style Frozen Meals sold by Gate Gourmet at a higher rate than similar meals sold by other vendors violates the uniformity clause contained in art. X, § 3 of the Missouri Constitution in that this non-uniform treatment singles out Gate Gourmet and disallows to it the preferential tax rate provided to other vendors/grocers that sell similar food.

The Commission's interpretation of "for home consumption", if upheld, would cause the statute to violate the uniformity clause of the Missouri Constitution by creating an unreasonable classification between retailers that know in advance where their customers will consume food and retailers that are ignorant of the location where their customers will consume food, even though there is no material difference in the food they sell. If this Court adopts Gate Gourmet's position, it will avoid this arbitrary and impermissible result.

The uniformity clause of the Missouri Constitution, art. X, § 3, bars the imposition of tax on Gate Gourmet's TV-Dinner-Style Frozen Meals at a higher rate than that imposed on TV-Dinner-Style Frozen Meals sold by grocers and all other non-restaurants.

The uniformity clause provides that "[taxes] shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax." The Missouri Constitution requires that similarly situated taxpayers must be treated similarly. Although it does not require absolute uniformity, it does prohibit unreasonable or arbitrary taxation of the same class. *See Missouri Pacific Railroad Co. v. Morris*, 345 S.W.2d 52 (Mo. banc 1961); *508 Chestnut, Inc. v. City of St. Louis*, 389 S.W.2d 823, 831 (Mo. 1965). The **legislature** may create reasonable classifications and tax each class differently without violating the uniformity clause if the legislature reasonably could have concluded that the classification would promote a legitimate state purpose. A classification is unreasonable if it is "palpably arbitrary." *State v. Bates*, 224 S.W.2d 996, 1000 (Mo. banc 1949).

In enacting the reduced tax rate for food, the Missouri legislature created only two classes of taxpayers: restaurants and non-restaurants. Food items sold by restaurants are not eligible for the one percent tax rate irrespective of whether the food items are consumed off premises or would otherwise qualify as "for home consumption." Food items sold by non-restaurants, such as Gate Gourmet and grocery stores like Dierbergs or Schnucks, are allowed to pay the one percent tax rate so long as the food they sell qualifies as food "for home consumption." Gate Gourmet and Dierbergs are similarly situated because they are non-restaurants that sell similar TV-Dinner-Style Frozen Meals for off-premises consumption. A2, ¶ 5; L.F. 129, ¶ 5; Tr. 42, 49-50, 80-81; P.Ex. 14.16-14.20, 14.23, 15A-15H, 15L. Therefore, they cannot be taxed differently.

The Commission's decision created a new classification based on the sellers' knowledge at the point of sale. Neither the Director nor the Commission may create such a classification where the legislature has not done so. Moreover, this classification is palpably arbitrary. It is unreasonable to penalize Gate Gourmet merely because Gate Gourmet knows that the TV-Dinner-Style Frozen Meals will not be consumed in a personal residence and reward Dierbergs for its ignorance. No legitimate state purpose is promoted by imposing a duty on sellers either to ask each of their customers where they intend to consume the food they are purchasing, or to treat more favorably those sellers who do not have that knowledge. Gate Gourmet and Dierbergs are similarly situated vendors and their knowledge at the cash register about their customers' intent is not a reasonable classification. Moreover, even assuming this would be a reasonable classification, the legislature chose not to make such a classification. It focused only on the food. Neither the Director nor the Commission may create this unreasonable new classification.

Accordingly, this Court should reverse the Commission's decision, abate the assessments, and order the Director to refund to Gate Gourmet the amounts it paid under protest, plus interest.

CONCLUSION

For the forgoing reasons, Appellant Gate Gourmet, Inc. respectfully requests that this Court reverse the decision of the Administrative Hearing Commission by abating all assessments, additions to the tax, and interest, and order Respondent Director of Revenue to refund to Gate Gourmet the amounts of the assessments it paid under protest, plus interest, and grant such other relief as the Court deems proper in the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the limitations in Rule 84.06(b), and it contains 5,008 words, excluding the parts of the brief exempted; and has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 13 point Times New Roman font.

/s/ Matthew J. Landwehr

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served through the Missouri CaseNet electronic filing system this 16th day of February, 2016, upon the following:

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