IN THE NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO

On Appeal from the Lorain County Court of Common Pleas

JACQUELINE STOWERS*, et al.*,	)	**Case No. 10CA009782**
Appellants,	)	**Trial Court Case No. 08CV159968**
	)	**APPELLANTS' BRIEF**
-VS-	)	
OHIO DEPARTMENT OF AGRICULTURE*, et al.*,	)	
Appellees.	)	

Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 East State Street
Columbus, Ohio 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
Email: MThompson@OhioConstitution.org
Counsel of Record for Appellants

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STATEMENT OF THE CASE

This is an appeal from the Lorain County Court of Common Pleas. In December, 2008, the home of Plaintiffs/Appellants John Stowers, Jacqueline Stowers, and Manna Storehouse LLC (hereinafter collectively referred to as "Manna.") was raided, pursuant to a retail food establishment licensure enforcement action. Soon thereafter, Manna filed a Complaint for Declaratory and Injunctive Relief, and a Writ of Mandamus, against Defendants/Appellees Ohio Department of Agriculture and Lorain County General Health District. This Complaint, amended on January 15, 2009, sought a return of the family's food, which was seized in the raid, a declaration that Manna was not subject to Ohio's retail food establishment licensure, and an injunction prohibiting further enforcement of retail food establishment regulations against them.

ODA and LCGHD removed the case to federal court on February 23, 2009, and Manna immediately moved to remand. This Motion to Remand was granted, and the case was remanded to the Lorain County Court of Common Pleas on July 15, 2009. The Trial Court consolidated Manna's Motion for Preliminary Injunction with the Trial on the Merits, and set both for October 8, 2009; however, the court cancelled the trial on its eve. In the interim, the Trial Court grated Manna's September 28, 2009 Motion for Partial Summary Judgment on its Writ of Replevin, and ordered the return of Manna's seized food.

On October 19, 2009, the Trial Court, without briefing or a hearing, denied Manna's Motion for Preliminary and Permanent Injunctive Relief. At a hearing upon Manna's Motion for Reconsideration, the Trial Court invited the parties to file Cross-Motions for Summary Judgment on the Merits. The ODA and LCGHD filed their Motions for Summary Judgment on November 16, 2010, and on December 17, 2010, Manna filed a combined Motion for Partial Summary Judgment and Brief in Response to Defendants' Motion for Summary Judgment. Therein, it asserted the claims and defenses that are the subject of this appeal.

On February 10, 2010, the Trial Court issued an Opinion and Judgment Entry dismissing Manna's Complaint, and granting the Motions for Summary Judgment of ODA and LCGHD

FACTS

A. Background

Plaintiffs John and Jacqueline Stowers and their family maintain a small, private organic food cooperative,[1] named Manna Storehouse, in Lagrange, Ohio. John and Jackie have been married for 30 years and have eight children, ranging in age from six to 29.[2] All of these children, other than John and Jackie's oldest son, live with them at their rural home on State Route 303, outside of LaGrange, Ohio in Lorain County. John and Jackie's oldest son Chad, his wife Katie, and their four children, also live at the residence.[3] John and Jackie home-educate their children, and Chad and Katie do the same.[4]

The Stowers family adheres to a lifestyle consisting of religiosity, self sufficiency, and organic food. They raise their own lamb, make most of their food from scratch, home school their children, and even make some of their own clothes.[5] The entire family adheres to a relatively strict diet of organic food, i.e. grass-fed and Pasteur-raised animals and organic grains and produce.[6] The Stowers two eldest sons are also enlisted in the United States Navy.[7]

B. Manna Storehouse

John and Jackie started Manna Storehouse in 2001. Lacking business experience and acumen, but similarly not knowing how to characterize the activities of Manna Storehouse, they noted on their filing, at the advice of a friend who was an accountant, that Manna was both a cooperative and retail.[8]

Manna is effectively located in two rooms that are separate, from but connected to, John and Jackie's residence.[9] John and Jackie consider Manna to be a cooperative, rather than a typical

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1 Appellants use the term "cooperative" for lack of a better description. The term "buying club" is also, arguably applicable, depending upon the transaction at issue.

2 December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers.

3 Id.

4 Id.

5 Id.

6 Id.

7 Id.

8 Id.

9 Id.

commercial operation.[10] They and Manna's members share an interest in supporting locally-grown organic food over large-scale commercial farming, and in learning about and obtaining for their families what they fervently believe to be healthy and responsibly-grown food.[11] Thus, John and Jackie visit each food producer to ensure that their production, processing, storage and manufacturing processes are consistent with the philosophy of Manna Storehouse, i.e., sustainable agriculture that promotes the health of humans, the environment and animals. If a producer is acceptable to John and Jackie, then Manna Storehouse members begin to acquire food from that produce.[12]

i. Manna's Private Nature.

Manna only distributes food to its members, and only wishes to distribute food to its members. It is unlikely that one would become a member of Manna Storehouse, or even find out about its existence, unless he or she has a friend or family member who is already a member.[13] This is because Manna does not advertise to the public.[14]

Contrarily, to become a member of Manna Storehouse, one must (1) fill out an application; (2) review and approve of Manna Storehouse facilities, i.e. where the food is stored until pickup; (3) sit with Jackie Stowers for an interview that may be as long as several hours; and (4) pay an annual $10 membership fee.[15] The membership application inquires into issues beyond business interests, such as viewpoints about agriculture and the person's personal and family life.[16] One of the reasons for the stringent interview and membership criterion is that members come to the Stowers personal home, and are around John and Jackie and their children.[17] Accordingly, when John and Jackie cease to view a

10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.

member as "truthful and honest," they address the situation, and sometimes revoke the membership, or agree that the member will leave the group.[18]

Although Manna Storehouse maintains a password-protected website to facilitate members' ordering, it does not advertise to the public in any way.[19] *The only outward reference to its existence is a small sign next to the door to Manna Storehouse, indicating, truthfully, that Manna Storehouse is "a PRIVATE, not Public, Business."*[20] The sign further indicates that Manna storehouse has some limited hours, but is otherwise open to members by appointment only.[21]

ii. Manna's cooperative nature.

Appellants bring this lawsuit to obtain a declaration that Manna's cooperative behavior is beyond the reach of nebulous state licensure and regulation. Manna Storehouse is not in the business of simply "buying and reselling" food at a profit - - once a member, one still cannot simply walk into Manna and purchase food off of the shelf, as he would do in a retail grocery store. First, the class of activities Manna seeks to vindicate are far more limited than those of a commercial grocery store such as a Sam's Club: John and Jackie (1) pick up and transports food from local farmers; and (2) store the food for no more than 48 hours until Manna members come and pick it up.[22]

Secondly, Appellants are discerning in their membership. Unlike at Sam's Club or elsewhere, the Stowers only transact with "truthful and honest people;" they actually show/discuss their freezers, refrigerators, other storage methods with the members prior to the members joining Manna; and members "order together." In other words, members work to create an order for a case/bulk amount of something by each committing to take and pay for a certain amount of that case/bulk amount. The members thus direclty control what food comes to, and is stored at, Manna Storehouse.

Once one becomes a member of Manna Storehouse, he or she has access to acquiring food along with other Manna members. In doing so, costs are not established in a manner that typically

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18 Id.
19 Id.
20 Id., see also Exhibit A, Picture of Manna Storehouse door.
21 Id.
22 Id.

would be, or should be, considered "retail." The prices listed on the website are not set by John, Jackie, or Manna. Instead, they reflect the prices set by the particular supplier of the food.[23] While Manna does charge a fee, this fee is to cover costs associated with filling the order: the gasoline and wear and tear on vehicles necessary to pick up the food for the members, the electricity necessary to run the freezers that keeps the food cold, etc.[24]

The "ordering" process works as follows: (1) orders are due by Monday nights; (2) members place their orders for items; and if a sufficient amount of a particular item has been ordered; (3) the items are stored at Manna until they are pickup up on Monday or Tuesday of the next week; (4) members pay John or Jackie for the items at the time they pick up, and John or Jackie sends this money to the appropriate supplier.[25]

Manna allows members combine their resources to obtain items that are typically only sold in bulk. Members do this through a "split." A quintessential example of a split is where members wish to acquire beef from a grass-fed cow. Rather than one family having to pay for the entire cow, pay the farmer to slaughter the entire cow, and then store the entire cow in its personal freezer, the split method allows member families to purchase just a portion of that cow - - a cow that would not otherwise be slaughtered on those particular terms.[26] This same principle is applied to certain types of flour, nuts, rice and coffee beans, which are also sometimes only available in amount much larger than the average family would wish to purchase.[27] For example, through a split, a member may acquire ten pounds of flour even though that particular type of flour is sold in nothing smaller than a 50 pound bags.[28]

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23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.

Importantly, John and Jackie do not buy and then resell items that are on the split list. Instead, they only pick up the item up if members have ordered the *entire* cow, or the *entire* 25 pound bag.[29] Otherwise, the item is not available.

iii. Safety at Manna Storehouse.

Manna conducts the above processes in a safe manner. John and Jackie ensure that food items that must be refrigerated or frozen are kept at the proper temperature while (1) they are being transported (less than four hours) to Manna; and (2) they are being stored at Manna (for 24 to 48 hours).[30] John and Jackie routinely check the temperature of the refrigerators and the temperature is always between 34 and 38 degrees Fahrenheit.[31] They routinely check the temperatures of the freezers and the temperature is always between 26 and 28 degrees Fahrenheit.[32] Freezer efficacy is also observable to the naked eye, since ice is built up in the freezers so long as their temperature remains under 32 degrees Fahrenheit.[33]

These precautions have proven to be more than sufficient to ensure the health and safety of the food during the limited time that it is in Manna's possession: there are no reported cases of Manna Storehouse food making people ill, or otherwise being unsafe.[34] Manna Storehouse is clean and safe enough that all of its members approve of it.[35] Additionally, the food is already butchered by a government licensed butcher, and processed by a government-licensed processer;[36] or acquired from an otherwise "approved" source, such as United Natural Foods (an organic food distributor), or a small farmer who could himself sell the food.[37]

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29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id.

Meanwhile, members of Manna are knowledgeable about the products they are getting, aware of any risks, and disclaim those risks.[38] Members of Manna engaged in informed consent: they are shown and review the premises, including not only the room, but the inside of the freezers and refrigerators where their food is temporarily stored.[39]

Finally, unlike at a grocery store, 95 percent of food passes through Manna within a matter of hours: Manna's only role is to obtain and store the food, and most members pick up their orders of frozen/refrigerated food the same day that the food comes into Manna.[40] Manna receives orders up through Monday night, pick the food up on Sunday and Monday, and members come on Mondays and Tuesday.[41] The longest any food is at Manna is typically 48 hours.[42]

Meanwhile, the Stowers, a family of *fourteen*, obtain lower prices and greater access to food through engaging in the splitting and ordering process with the members of Manna.[43] Moreover, if something is left over, the family is able to keep it and consume it on their own.[44]

C. Licensure

Despite these vast differences between Manna Storehouse and a commercial grocery store or commercial restaurant, the Department of Agriculture and Lorain County General Health District seek to impose regulations on John, Jackie and Manna that would put it out of business. Specifically, Defendants seek to characterize John, Jackie, and Manna as a "retail food establishment." Pursuant to R.C. 3717, this type of establishment needs a license. And in fact, it is a third degree misdemeanor, punishable by considerable fines and imprisonment, to operate a "retail food establishment" without a license.

To this end, on December 1, 2008, armed Lorain County Sheriff's Deputies surrounded and then aggressively raided John and Jackie's home, with guns drawn, and with the assistance of ODA

38 Id. See membership agreements.
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
44 Id.

and LCGHD, confiscated the family's personal food, cell phones, computers, and other personal possessions. Manna only brought this action after that occurrence, asking this Court to declare, amongst other things, that (1) Manna is not a retail food establishment under the governing statute; and (2) if the governing statute were read to embrace the limited and basic activities of Manna, then that statute is unconstitutional *as applied* to John, Jackie, and Manna.

D. Evidence before the Court on Summary Judgment

Before the Court are the December 16, 2009 affidavits of Jackie and Katie Stowers. They establish the facts above. Plaintiffs have also submitted the Exhibit C, a packet of several pictures of the front of Manna Storehouse and the Stowers' home, Exhibit D, a packet of sample membership agreements for Manna Storehouse. Also before the Court are the deposition transcripts of Charles Kirchner and James Boddy. They address many of the regulations that would apply to Manna, concede that there is reason to believe that many exempt entities pose similar or greater risks to the public than does Manna, and acknowledge that Manna would be responsible for complying with many regulations that do not pertain to Manna's particular business.

STANDARD OF REVIEW

Manna challenges the Trial Court's factual finding that Manna advertises to the general public. Otherwise, all issues for review are legal in nature. Purely legal issues are reviewed *de novo*.[45]

More specifically, this matter was before the Trial Court upon Manna's Complaint for Declaratory and Injunctive Relief. "When a declaratory judgment action is disposed of by summary judgment, review of the trial court's resolution of legal issues is *de novo*."[46]

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45 *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523.

46 *King v. W. Res. Group* (1997), 125 Ohio App.3d 1, 5, 707 N.E.2d 947.

ARGUMENT

First Assignment of Error: The Trial Court erred in concluding that Appellants' activities require licensure as a "retail food establishment."

A. The Trial Court erred in finding that Manna Storehouse advertises to the public.

The Trial Court erroneously concluded that Manna delivers food to members of the public, stating "[t]he members of the 'public' who purchase this food are people: (a) who have responded to Manna's internet website advertisement; (b) who have become 'members' of Manna Storehouse, *and* (c) who, as customers/consumers, are able to purchase natural/organic food and other products from Manna for their personal consumption * * *."[47] There are no facts in evidence to support this statement.

The affidavits of Jacqueline and Katherine Stowers, direct evidence, were extremely clear: *Manna Storehouse does not advertise to the public.*[48] No-directly inconsistent evidence was offered. In fact, the only potentially contradictory evidence offered was the mere fact that Manna Storehouse maintained a website that includes costs associated with certain food items. However, Jacqueline and Katherine were extremely clear that the sole purpose of this website was to facilitate orders amongst those who were already members of Manna Storehouse.[49] Lest there be any doubt, this evidence is corroborated by the facts that nearly all Manna members accrue through word of mouth referrals,[50] and all Manna members who used the website to order first completed an in-person interview with Jacqueline.[51] It is further corroborated by the fact that Manna engaged in no other form of advertising, and its only sign, a very small one near the family's second front door, indicated that Manna was a private business only.[52] Originally, the website was not password-protected

Neither party ever offered the Trial Court any evidence that any, much less *all,* members of Manna "responded to Manna's internet website advertisement," as the Court suggests. In assuming this fact, the Trial Court entirely lost its way, and manufactured a set of facts that quite likely shaded its

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47 Decision, pp. 4-5.
48 Affidavits.
49 Affidavits.
50 Id.
51 Id.
52 Id.

legal analysis of (1) whether Manna is a Retail Food Establishment; and (2) whether Retail Food Establishment regulations are constitutional as-applied to Manna Storehouse. This factual finding departs from the evidence before the Court upon summary judgment, and reversal thereof is mandated.

B. An Ohioan is not "retail," and required to obtain a "retail food establishment" license, where he does not distribute food to the general public.

i. Manna is not "retail" because it does not distribute food to the general public.

The Trial Court erred in concluded that Manna Storehouse is a retail food establishment, since Manna does not engage in retail sales of agricultural products to the general public. R.C. 3717.01(C) defines a "retail food establishment" as "a premises or part of a premises where food is stored, processed, prepared, manufactured, or otherwise held or handled *for retail sale*."[53] Thus, any storage, holding, or handling of food must be for a particular type of purpose, and even a particular type of sale: "*retail* sale." "Retail" is defined by R.C. 3717.01(C)(1) as "the sale of food to a person who is the ultimate *consumer*." "Consumer," in turn, is defined by Ohio Adm. Code 3717-1-01(B)(21) as, in part, a person "who is a member of *the public*." Consequently, Manna is only a "retail food establishment if it (1) holds, handles or stores food; (2) for sale; and (3) *to the public*. While Manna clearly holds and stores food, it clearly does not hold it for sale at all, much less sale to the public.

a. The Plain meaning of the term "public" demonstrates that Manna Storehouse is not public.

Even if cooperation amongst Manna members were characterized as "sale," which it is not, it could not be characterized as to "the public." This Court's initial inquiry must be into the meaning of the word "public." Although the word "public" is not defined in the Ohio Revised Code or Ohio Administrative Code, it is a word with a plain meaning.[54]

"*[T]he intent of the lawmakers is to be sought first of all in the language employed*, and if words be free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the

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[53] Emphasis added.

[54] *See Cawker v. Meyer,* 147 Wis. 320 ("it is very difficult, if not impossible, to frame a definition for the word 'public' that is simpler or clearer than the word itself."); *State v. Hensley,* 75 O.S. 255 ("The term 'public,' in its enlarged sense, takes in the entire community, the whole body politic, and a public trial means one which is not limited or restricted to any particular class of the community, but is open to the free observation of all.").

lawmaking body, there is no occasion to resort to other means of interpretation * * * The question is not what did the general assembly intend to enact, *but what is the meaning of that which it did enact*."[55] To the same end, R.C. 1.42, a codified standard of statutory construction, states: "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage."

Black's Law Dictionary defines "public" as "1. Relating or belonging to an entire community, state, or nation. 2. Open or available for all to use, share, or enjoy. 3. (Of a company) having shares that are available on an open market." The Trial Court adopted this definition, specifically noting the public to be "'the entire community,' i.e. what is 'public' is 'open and available to all.'"[56]

Pursuant to this definition, Manna's transactions with its members cannot possibly be characterized as "retail" because they are clearly not "to the public." First, the affidavits of Jackie and Katie Stowers demonstrate that Manna can by no means be said to belong to the entire community, state or nation: it is located on the private property of John and Jackie Stowers, is not open to the people who are not members, is conducted for the benefit of the Stowers and the members, and is conducted without government subsidization.[57]

By the same token, those affidavits, along with Manna's membership agreements and the affidavits of Manna members demonstrate that Manna is *not* available for all to use, share, or enjoy: again, only private members who have undergone an interview, paid a membership fee, and reviewed the facilities may cooperate with Manna to acquire agricultural products.[58] Finally, Manna is not a publicly traded company and there are no shares on the open market.[59] Defendants adduce no evidence to contravene these facts. Accordingly, no reasonable mind could conclude that Manna is a "retail food establishment" because it does not engage in "retails sales," which are, ostensibly, sales to "the public." Accordingly, Manna is clearly not "retail," and the Trial Court erred in declaring the contrary.

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55 *Beau v. Lindley* (1978), 56 Ohio St.2d 310, 383 N.E.2d 907, 10 O.O.3d 438, citing *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574. (Emphasis added).

56 Decision, p. 4.

57 December 16, 2009 affidavits of Jacqueline and Kathryn Stowers.

58 Id.

59 Id.

b. Ohio's historic treatment of the term "public" in the food regulation context demonstrates that Manna Storehouse is not public.

Even If the term "public" is not plain and unambiguous, then the particular meaning it has acquired in the context of Ohio food regulation clearly demonstrates that Manna is not public. Again, the latter clause of R.C. 1.42 provides that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." The distinction between public and private has been addressed in numerous Ohio Attorney General Opinions.[60]

In *1946 OAG 1024*, the Ohio Attorney General ruled that a company-owned establishment that only served food to its own employees on the premises was not required to have a license because it "did not serve the public."[61] In concluding that this establishment was not offering meals to the public, the Ohio Attorney General found that *even though food safety was a concern*, "we cannot construe a law to cover ground which we are sure it ought to cover, unless by its own terms it does so. If it fails to regulate something which is just as much in need of regulation as that which is within its terms the defect is for legislative correction, and not for enlargement by construction."[62]

Similarly, in *1954 OAG 3700*, the issue was whether a county children's home or a county infirmary was "held out to the public" so as to constitute a "food service operation," as defined by former R.C. 3732.01. In that opinion, the Ohio Attorney General concluded that a county children's home or county infirmary did not constitute a food service operation because the food service was offered only to those who were employed or housed at the institution, and thus not to the public.[63]

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60 These opinions focused on the meaning of "public" in the context of a "food service operation" as defined by former R.C. 3732.01 which provided, in part, as follows: "A food service operation, commonly known as a restaurant, is defined as any structure or building. . . which is kept, maintained, advertised, or *held out to the public* to be a place where meals or lunches are served for a consideration. . . ." (Emphasis added). Thus the determination of whether a food distributor was a "food service operation" often depended on whether the establishment was *held out to the public*.

61 *1946 OAG 1024*

62 *Id.*

63 *Id.* at 187-188

Finally, in *1920 OAG 1240*, the Ohio Attorney General determined that a company-owned eating establishment located in or on the premises of a manufacturing plant that sold sandwiches and coffee in addition to candies, gum, soft drinks, tobaccos and related items only to the employees of such a plant was not public, so as to constitute a food service operation.

Thus, per R.C. 1.42, the term "public" has acquired a particular meaning in the context of "food service operations" which should be applied here when dealing with "retail food establishments." The Ohio Attorney General's interpretation giving a particular meaning to the term "public" must be applied to R.C. 3717.21 as is mandated by the Ohio rules of construction.

Pursuant to this "acquired meaning" of "public" in Ohio food regulation, all evidence demonstrates that Manna is not public. The affidavits of Jackie and Katie indicate that, just as with the operations denoted in the Ohio Attorney General opinions above, who served only employees of a particular workplace, Manna only distributes food to a discreet and limited class: Manna Storehouse members.[64] In fact, it would not be surprising if many employment interviews were actually shorter than the sometimes two-hour interviews Jackie performs[65] prior to admitting one as a member of Manna. There are only approximately 100 members, and no person who is not a member is permitted to obtain food from Manna.[66]

Moreover, all evidence also demonstrates that Manna, like the operations at issue in the Ohio Attorney General opinions, Manna does not hold itself out to the pubic: it does not advertise;[67] the sign on its door indicates that it is "a PRIVATE not public, business;[68] and its website, which has always been for the limited purpose of facilitating member orders, is password protected.[69] And in fact, although it has occasionally happened, it is unlikely that one would become a member of Manna Storehouse, or

64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.

even find out about its existence, unless he or she has a friend or family member who is already a member.[70]

Despite all of this, the Trial Court erroneously concluded that Manna delivers food to the general public, stating "[t]he members of the 'public' who purchase this food are people: (a) who have responded to Manna's internet website advertisement; (b) who have become 'members' of Manna Storehouse, *and* (c) who, as customers/consumers, are able to purchase natural/organic food and other products from Manna for their personal consumption * * *."[71] This analysis eviscerates the very meaning of what is public and what is private. If one follows it to its logical end, every Thanksgiving dinner and church potluck in the state of Ohio requires a retail food establishment license: members of a family are also "people," and "members of the public." This construction of the word "public" thus invites absurd results, when in fact, Ohio courts are required to interpret statutes so as to avoid absurd results.

The positions of ODA and the LCGHD similarly invite the creation absurd results, and require ignoring of cannons of statutory construction. They would have the Court read the statute as though the word "retail," and thus the "public" requirement, does not exist. Parts of a statute must be interpreted so as to render the entire statute effective. R.C. 1.47(B) states "[i]n enacting a statute, it is presumed that the entire statute is intended to be effective." But if "retail" is read to include a quintessentially private membership organization like Manna, and is thus read to regulate an Ohioan any time there is the holding of food, then what effect does the word "retail" have? The answer: none.

For the convenience of their enforcement, Defendants would have this Court read the word "retail" out of the statute. It must refrain from doing so: because Manna does not sell to the general public, it is not retail, and because it is not retail, it is not subject to retail food establishment licensure and regulation.

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70 Id.

71 Decision, pp. 4-5.

Second Assignment of Error: **The Trial Court erred in finding that R.C. 3717 is constitutional as applied to Appellants.**

A. Application of R.C. 3717 licensure requirements to Appellants violates their property rights, rights to do business and earn a living, natural rights, and/or privacy rights.

The Trial Court erred in finding R.C. 3717 and OAC 3717 constitutional as applied to Manna, as against John and Jackie's property rights, attendant right to earn a livelihood and freedom to contract, and inherent, natural right to cooperate with friends and neighbors to acquire food.

After perhaps considering, but failing to do any written analysis of, these claims, the Trial Court concluded the following: (1) "[t]he Court holds that R.C. 3717.01, et seq. and O.A.C. 3717-1-01, et. seq. are not unconstitutional as applied to plaintiffs;"[72] and (2) "R.C. 3717.21 is a constitutional application of the police power granted to the general assembly."[73] Appellants do not contest that passage of R.C. 3717.21 is within the scope of the police power of Ohio's legislative branch.

However, Appellants do maintain that *application* of R.C. 3717 and OAC 3717 transgresses basic constitutional principles, both in that it ignores Appellants' constitutional rights, and concomitantly renders the legislature's police power limitless (a police power without limits renders the express protections of the Ohio Constitution a nullity).[74] This position is firmly established by the following.

i. Application of R.C. 3717 to Appellants contravenes Appellants' rights under Section 1, Article I of the Ohio Constitution.

Application or R.C. 3717 to Appellants is violative of their constitutional rights under Section 1, Article I of the Ohio Constitution. Section 1, Article 1 of the Ohio Constitution provides the following: "All men are, by nature, free and independent, and have certain inalienable rights, among

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[72] Decision, p. 8.

[73] Decision, p. 7.

[74] The Trial Court's decision twists Appellants' arguments on this front to a point at which they bear no resemblance to what Appellants' actually argued, stating "Plaintiffs claim that R.C. 3717.21 is unconstitutional, depriving them of the natural rights guaranteed to them under Section 1, Article I of the Ohio Constitution." (Decision, pp. 4-5). This assertion fundamentally misconstrues Appellant's arguments upon summary judgment because (1) Appellants' Motion for Summary Judgment made no facial challenges to R.C. 3717; (2) Appellants argument therein related to the aforesaid rights is prefaced with several pages describing the "as-applied" cause of action, and how it works; (3) although Appellants' Motion for Summary Judgment devoted three pages to natural rights background, it devoted approximately five pages to more tangible constitutional rights, such as those of property, contract, privacy, and doing business/earning a living.

which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."[75] This provision is "the starting point for all questions of individual rights in Ohio,"[76] and was intended to serve as a limitation on the state's police power.[77]

Although the Supreme Court of Ohio has equivocated as to the meaning of the protections articulated in Section 1, it has interpreted the language to mean the following:

> The inalienable right of enjoying liberty and *acquiring property*, guaranteed by the first section of the bill of rights of the constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are *necessary* for the *common* welfare.[78]

The Court emphasized the importance of using the preamble and Section 1, Article I to create a *context* for constitutional construction: "[t]he word 'liberty,' as used in the first section of the bill of rights, does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are *necessary* for the *common* welfare."[79] (Emphasis added). Consequently no analysis of an application of the police power can be divorced from Section 1, Article I: this section invalidates an application of the police power that is not *necessary* for the welfare of *all*.

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[75] Section 1, Art. I, Ohio Constitution.

[76] See *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570 (Young, concurring and dissenting).

[77] See *Daugherty v. Wallace* (1993), 87 Ohio App.3d 228, 235-236, 621 N.E.2d 1374 (noting that this section is one of the specific limitations on the state's police power).

[78] *Palmer v. Tingle* (1896), 55 Ohio St. 423, 36 W.L.B. 315, 45 N.E. 313

[79] Id., citing *People v. Marx*, 99 N. Y. 377, 2 N. E. 29; *Bertholf v. O'Reilly*, 74 N. Y. 509; *In re Jacobs*, 98 N. Y. 98. Emphasis added. See also see also *In Re W.C. Reilly* (1919), 31 Ohio Dec. 364, 23 Ohio N.P. (N.S.) 65 (relying upon the language of Article I, Section I to invalidate a municipal ordinance that attempted to criminalize the conduct of "employing any person as a special guard during any industrial disturbance or strike, unless such person shall first have been empowered to act as such special guard by the director of public safety."); *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570, citing *Palmer & Crawford v. Tingle* (1896), 55 Ohio St. 423, 45 N.E. 313, and holding that "Section 1, Article I, Ohio Constitution, together with Section 2, Article I, Ohio Constitution, * * * make it quite clear that, under the Ohio Constitution's Bill of Rights, every person has inalienable rights under natural law which cannot be unduly restricted by government, which is formed for the purpose of securing and protecting those rights, and that all governmental power depends upon the consent of the people. * * * In that sense, the Ohio Constitution confers greater rights than are conferred by the United States Constitution, * * * In general, this provision guaranteeing the enjoyment of life and liberty confers upon the individual the right to do whatever he or she wishes to do so long as there is no valid law proscribing such conduct and so long as the conduct does not infringe upon rights of others recognized by the common law."

The Supreme Court of Ohio further acknowledges that Section 1, Article I creates a broad right of privacy: "[t]he right to privacy has been described as '*the right to be let alone*; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the *clear needs* of the community living under a government of law."[80] Further, "[a] right of privacy is derived from natural law, * * * is embraced within the absolute rights of personal security and personal liberty, * * * and includes not only freedom from physical restraint, but also the right 'to be let alone'; *to determine one's mode of life*, whether it shall be a life of publicity or of privacy; and to order one's life and manage one's affairs in a manner that may be most agreeable to him *so long as he does not violate the rights of others or of the public*."[81]

One need not stretch the imagination to conclude that these natural rights embrace the right to privately[82] cooperate with one's friends and neighbors to obtain agricultural products to provide for one's family: this activity is central to the Stowers' family's mode of life, and does not violate the rights of others or of the public. Indeed the activity is perfectly peaceful - - Manna cooperates with friends and neighbors to support local agriculture, and to combine resources with friends and neighbors to (1) acquire products that may not otherwise be available to an individual or single family; and (2) acquire such goods at a lower cost. There is no evidence of harm accruing from this peaceful agrarian practice that is axiomatically rooted in our nation's traditions and history, and thus there is no "clear need" to invasively regulate Manna, and deprive it of its right to privacy.

ODA and LCGHD wish to, without clear need, upset this peaceful arrangement: labeling Manna a retail food establishment would force John and Jackie to open up their personal home and records to government agents[83] for routine inspections.[84] If John and Jackie were to engage in the

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80 *State v. Williams (2000)*, 88 Ohio St.3d 7, 722 N.E.2d 1018. See also *Housh v. Peth* (1956), 165 Ohio St. 35, 39, 59 O.O. 60, 62, 133 N.E.2d 340, 343.

81 *Housh v. Peth* (1956), 165 Ohio St. 35, 39, 59 O.O. 60, 62, 133 N.E.2d 340, 343.

82 Please see above for a thorough discussion of the private nature of John, Jackie, and Manna's conduct.

83 In this instance, these would be the same government agents that precipitated the aggressive December 1, 2008 raid on John and Jackie's home.

84 R.C. 3717.27(B) states that "a person holding a retail food establishment license shall permit the licensor to inspect the retail food establishment for purposes of determining compliance with this chapter and the rules adopted

harmless but beneficial conduct of continuing to cooperate with the friends and neighbors, all private members, to acquire food for their families, after having their retail food establishment license terminated under R.C. 3717.29, they would be subjected to criminal prosecution that carries with it imprisonment and economic ruin. Under R.C. 3717.99 provide that anyone who operates a retail food establishment without a license is guilty of a second degree misdemeanor, an offense carrying imprisonment, and subject to the maximum fine for a second degree misdemeanor for each day that they engage in such cooperative behavior. These prohibitions clearly run afoul of John and Jackie's right to privacy, and right to engage in contracts that do not harm others.

ii. Application of R.C. 3717 to Appellants contravenes Appellants' rights under Section 19, Article I of the Ohio Constitution.

The Trial Court erred in granting summary judgment against Manna because application or R.C. 3717 to it violates John and Jackie's constitutional rights, as expressed in Section 19, Article I of the Ohio Constitution. Section 19, Article I states "Private property shall ever be held inviolate, but subservient to the public welfare."[85] In aggregating this provision with Section 1, Article I, the Supreme Court of Ohio stringently protects the use of property:

> "Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, *no matter how great the weight of other forces*."[86]

In Ohio, these "venerable rights associated with property" are not confined to the mere ownership of property. Rather, the Supreme Court of Ohio recently acknowledged that "[t]he rights related to property, i.e., to *acquire, use, enjoy,* and dispose of property, are among the most revered in our law and traditions."[87]

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under it * * *. On request of the licensor, the license holder shall permit the licensor to examine the records * * *." R.C. 3717.27(B) further states, "the issuing licensor may use the inspection report to suspend or revoke the license * * *."

[85] Section 19, Art. I, Ohio Constitution.

[86] *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1129 (internal citations omitted).

[87] *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1128 (internal citations omitted).

Application of R.C. 3717 to Appellants is a direct denial of their opportunity to use their property so as to store food for others thereon. If John, Jackie, and Manna are subjected to Retail Food Establishment regulations, they will no longer be permitted to operate Manna Storehouse because they will be subject to regulations that will have the effect of destroying Manna. Most pointedly, Manna would be subject to OAC 3717-1-06.1(S), which prohibits a retail food establishment from operating in or adjacent to a private home. Manna is currently operated out of a room adjacent to, and effectively, within the Stowers family home.[88] Consequently, application of the retail food establishment designation, licensure, and regulatory regimen to Manna would destroy it, depriving Manna of its fundamental right to use property, and thus rendering the designation unconstitutional as applied.

iii. Application of R.C. 3717 to Appellants contravenes Appellants' rights, under the Ohio Constitution, to do business and earn a living.

The Trial Court erred in granting summary judgment against Appellants because application or R.C. 3717 to Appellants is violative of their constitutional rights to do business and earn a living. "The right to labor or earn one's livelihood in any legitimate field of industry or business is a right of property, and any unlawful or unreasonable interference with or abridgement of such right is an invasion thereof, and a restriction of the liberty of the citizen as guaranteed by the Constitution."[89] To this end, the Supreme Court of Ohio acknowledges that, in Ohio, "the right to do business" is a right "equally sacred" to "free speech."[90] Put another way, this right is one of several "strands in an owner's bundle of property rights."[91]

The Supreme Court of Ohio also notes, in *State v. Williams*, that Section 1, Article I can and should be applied so as to guarantee not only a right of privacy, but also a "right to pursue a lawful

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88 December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers.

89 *Yee Gee v. City and County of San Francisco* (D. C.) 235 F. 757, 759.

90 *Eastwood Mall v. Slanco* (1994), 68 Ohio St.3d 221, citing *Crosby v. Rath* (1940), 136 Ohio St. 352, 355-356, 16 O.O. 496, 497, 25 N.E.2d 934, 935.

91 *Eastwood Mall*, supra, citing *Bresnick v. Beulah Park Ltd. Partnership* (1993), 67 Ohio St.3d 302, 303, 617 N.E.2d 1096, 1097 (citing *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419, 435, 102 S.Ct. 3164, 3176, 73 L.Ed.2d 868, 882).

occupation free from government interference"[92] Thus, Ohio Courts heed the hallowed principles articulated by in *Meyer v. Nebraska,* i.e. that the right to earn a living is a substantive right with meaning and vitality:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to * * * engage in any of the common occupations of life, * * * and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' (citing numerous cases).[93]

This right to earn a living is one permutation of the right to contract with one's friends, neighbors, and associates for the provision of goods and services. The Supreme Court of Ohio emphasizes "[t]he right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to speak without restraint."[94] Restrictions on such fundamental rights must be narrow, and must be necessary for all:

> Contracts and compacts have been entered into between men, tribes, and nations during all time from the earliest dawn of history; and the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our constitution, and *it may be restrained only in so far as it is necessary for the common welfare and the equal protection and benefit of the people*. That such restraint of the right and liberty of contract is for the common, public welfare, and equal protection and benefit of the people, must appear, not only to the general assembly, in the face of popular clamor, or the pressure of the lobby, but also to the courts; and *it must be so clear that a court of justice, in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people* * * *[95]

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[92] *Williams*, supra, citing *Time, Inc. v. Hill* (1967), 385 U.S. 374, 413, 87 S.Ct. 534, 555, 17 L.Ed.2d 456, 481 (Fortas, J., dissenting), stating "*Every individual has the right to pursue a lawful occupation free from government interference unless the public good so requires."* See also *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock, Landing & Slaughter-House Co*. (1884), 111 U.S. 746, 757, 4 S.Ct. 652, 660, 28 L.Ed. 585, 591.

[93] *Meyer v. Nebraska*, 262 U. S. 390, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045, 29 A. L. R. 1446, *Lawton v. Steele*, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385, 388.

[94] *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust* (App. 4 Dist. 2004), 156 Ohio App.3d 65, 95, 804 N.E.2d 979, 1002 (citing *Nottingdale Homeowner's Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 36, 514 N.E.2d 702).

[95] *Palmer*, supra. Despite such strong language, the right to contract in Ohio is perpetually under fire. Ohio legislators routinely pass laws that limit legitimate economic activity. Meanwhile, courts continuously find reasons to nullify plainly written contracts between consenting adults—be it an unjustified finding that the contact is "ambiguous," "unconscionable," or "void by public policy." Just last year, the Ohio Supreme Court was one Justice away from nullifying a surrogacy contact, even though all Justices conceded that no law prevented it. The ostensible effect of such policies, unsurprisingly, is to drive up costs and prices, to limit participation in Ohio's economy, and to drive employers out of the state.

Here, application of the retail food establishment designation to Manna directly deprives John and Jackie of the right to earn a living and do business. Pursuant to R.C. 3717.21, "no person * * * shall operate a retail food establishment without a license [and] no person shall fail to comply with any other requirement of this chapter * * *." Meanwhile, R.C. 3717.29(B) permits the board of health to "suspend or revoke a retail food establishment license on determining that the license holder is in violation of any requirement of this chapter or the rules adopted under it * * *." Application of retail food establishment laws would place Manna in constant imperilment of being arbitrarily closed by state action: If labeled a retail food establishment, John and Jackie would be charged with a host of irrelevant responsibilities, which, if they failed to adhere to, could result in the loss of their license, and therefore, in the cessation of Manna Storehouse.

As a "license holder," OAC 3717-1-02.4(B) would apply to Manna, and require that, on-the-spot, "during inspections," that John and Jackie "demonstrate knowledge" of the following:

- The relationship between the prevention of foodborne disease and the personal hygiene of a food employee, even though Manna does not handle food.
- The "significance of the relationship between maintaining the time and temperature of time/temperature controlled for safety food and the prevention of foodborne illness" even though Manna does not heat, cool, or serve food to the public.
- The "hazards involved in the consumption of raw or undercooked meat, poultry, eggs, and fish," even though Manna does not serve such things.
- "[T]he required food temperatures and times for safe cooking of time/temperature controlled for safety food including eggs, fish, meat, and poultry," even though Manna does not cook food.
- "[T]he required temperatures and times for the safe refrigerated storage, hot holding, cooling, and reheating of time/temperature controlled for safety food," even though Manna does not heat food, hold hot food, cool food, or reheat food.
- The "relationship between the prevention of foodborne illness and the management and control of the following: * * * Hand contact with ready-to-eat foods," even though Manna does not serve or distribute ready-to-eat foods or have hand contact with them.
- "major food allergens including milk, egg, fish, tree nuts, wheat, peanuts, and soybeans," even though Manna does not serve food to its members or select food for is members.
- "the source of water used and measures taken to ensure that it remains protected from contamination such as providing protection from backflow and precluding the creation of cross

> connections," even though Manna does not serve water to its members or otherwise use water in storing or transporting food for members.

For the simple reason that John, Jackie and Manna do not engage in these activities, there is a high likelihood, if not a certainly, that they would not be able to "demonstrate knowledge," when put to them on-the-spot by a health department inspector.[96]

Consequently, if labeled a retail food establishment, there is a high likelihood, if not an ostensible certainty, that Manna would lose its license and then cease to be able to operate. This would destroy John and Jackie's fundamental rights to use and acquire property, earn a living, contract, and retain privacy. As such, given the evidence before this Court, a reasonable mind could come to only one conclusion: the retail food establishment designation, and its attendant regulations deprive John, Jackie, and Manna of their fundamental natural, property, business, and contract rights when it is applied to them.

B. Application of R.C. 3717 licensure requirements to Appellants violates their due process and equal protection rights.

The Trial Court erred in granting summary judgment against Manna, where it posited meritorious claims that R.C. 3717, as applied to it, violates John and Jackie's rights to both due process and equal protection. In short, Application of R.C. 3717 to Appellants results in the unconstitutionally equal treatment of unequal parties: imposition of the retail food establishment designation and regulations upon John, Jackie, and Manna Storehouse violates their due process and equal protection rights because it treats them as though they are either a commercial grocery store or a commercial restaurant, when, in fact, they are neither.

Section 2, Article I of the Ohio Constitution provides that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit * * *." Meanwhile, Section 16, Article I guarantees that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law * * *." These are the

[96] December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers.

Ohio Constitution's equal protection due process guarantees, and they incorporate federal precedent on due process and equal protection.[97] This Court is also free to provide greater protection to Manna.[98]

Unlike the fundamental rights to use property, maintain privacy, do business and earn a living, articulated above, these claims are approached under mere rational basis review. However, even at this level of review, courts have intervened to invalidate statutes like R.C. 3717 when applied heavy-handedly to individuals such as the Stowers and Manna Storehouse. As just a few examples, in *Craigmiles v. Giles*, *Cornwell v. Hamilton*, and *Merrifield v. Lockyer*, federal courts ruled that regulations of very basic human activities, engaged in pursuant to the earning of an honest living, went too far, and therefore violated equal protection and due process rights when applied to the particular plaintiffs. The topics address by each of these cases warrants special mention because of its high degree of similarity to the regulatory matter before the Court.

In *Cornwell*, the Court confronted the attempted regulation of an "African hair braider" who engaged in "natural hair care" and asserted that she should be permitted to braid hair without fulfilling California's cosmetology licensing requirement.[99] The Court observed that under the Equal Protection Clause "'sometimes the grossest discrimination can lie in *treating things that are different as though they were exactly alike*.'"[100] This comports with the common constitutional understanding that "equality can be denied when government fails to classify, with the result that its rules or programs do not

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97 *Bd. of Lucas Cty. Commrs. v. Waterville Twp. Bd. of Trustees* (2007), 171 Ohio App.3d 354, 870 N.E.2d 791 (acknowledging that "[t]he Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and of Section 2, Article I, Ohio Constitution, are functional equivalents,"); and *State v. Gardner* (2008), 118 Ohio St.3d 420, 889 N.E.2d 995 (recognizing "We have held that '[t]he 'due course of law' clause of Section 16, Article I of the Ohio Constitution , has been considered the equivalent of the 'due process of law' clause in the Fourteenth Amendment.'").

98 *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing, *e.g., City of Mesquite v. Aladdin's Castle, Inc.* (1982), 455 U.S. 283, 293, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152, 162 (" * * * [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); and *California v. Greenwood* (1988), 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30, 39 ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."). See, also, *Pruneyard Shopping Ctr. v. Robins* (1980), 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741, 752.

99 *Cornwell*, 80 F.Supp.2d at 1102, 1104-05.

100 *Cornwell,Id.* at 1103 & n. 2 (quoting *Jenness v. Fortson,* 403 U.S. 431, 442, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971)).

distinguish between persons who, for equal protection purposes, should be regarded as differently situated."[101]

Applying these principles, The court concluded that Cornwell could not "reasonably be classified as a cosmetologist as it is defined and regulated presently," and "[e]ven if [she] were defined to be a cosmetologist, *the licensing regimen would be irrational as applied to her because of her limited range of activities*," which over-lapped only minimally with the types of activities covered by the statute.[102] Thus, even when confronted with evidence that some would-be hairbraiders actually engaged in *some* cosmetology-like activities, the Court observed that "the overlap is both minimal and irrelevant,"[103] concluding that *"[e]ven if Cornwell were defined to be a cosmetologist, the licensing regimen would be irrational as applied to her because of her limited range of activities.*"[104]

The *Cornwell* court posited the following example: "[a]n illustration of Plaintiffs' argument would be if the State were to require that all professionals-be they budding architects, lawyers, or cosmetologists-attend a cosmetology training program. This statutory requirement would treat all individuals in an equal manner. The constitutional violation would be in drawing the classification so broadly that the requirement for such a license is irrational because the professions are different."[105] The rationality of a state's licensing requirements is "thus dependent on determining the range of Plaintiffs' activities."[106] Thus, due to the limited range of "cosmetology" activities performed by the plaintiff, Court concluded that force-fitting her and other African hair-braiders into the cosmetology designation and licensing requirements violated Cornwell's due process and equal protection rights.

In *Craigmiles,* the Sixth Circuit Court of Appeals confronted an analogous situation in a different context, and concluded that the inclusion of casket merchants within the licensing requirement

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101 Lawrence H. Tribe, American Constitutional Law 1438 (2d ed. 1988)
102 *See id.* at 1108, 1110, 1115.
103 Id.
104 Id.
105 Id.
106 Id.

for funeral directors violated equal protection and due process.[107] The casket retailers in *Craigmiles* argued that their business was so *different* from funeral directors that the government's interest in public health and safety in regulating funeral directors was not implicated.[108]

The court cited the district court's findings that requiring casket sellers to learn the skills of funeral directors did not further health and safety, because casket sellers did not engage in funeral activities, such as cleaning and embalming corpses. The court did discern one possible reason for regulating casket merchants: "The quality of the caskets used potentially threatens public health."[109] However, the court rejected this rationale for lack of a relationship to the licensing requirement, which ensured that "the only difference between the caskets [sold by licensed and unlicensed persons] is that those sold by licensed funeral directors were systematically more expensive."[110]

Similarly, in *Merrifield v. Lockyer*,[111] a pest control professional argued that California's pest-control licensing statutes, which required all persons engaged in structural pest control to obtain licenses, with certain statutory exemptions, were intended for pesticide-based pest control, and that he should be exempt from such requirements because he did not use pesticides.[112]

The Court drew significance from the finding that some of "those *exempted* under the current scheme are more likely to be exposed to pesticides than [the regulated plaintiff]."[113] The Court found that the irrational exemptions undercut the rationale for requiring licensure of the plaintiff, and were inherent evidence of the arbitrariness of the licensing requirement. "Needless to say, while a government need not provide a perfectly logical solution to regulatory problems, it cannot hope to survive rational basis review by resorting to irrationality."[114] "Here, however, when applying the state's own rationale for requiring pest controllers such as Merrifield to [be subject to regulation], the exemption

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107 312 F.3d at 222.
108 *Id.*
109 *Id.* at 225 (emphasis omitted)
110 *Id.* at 225-26.
111 *Merrifield v. Lockyer* (9th Cir., 2008), 547 F.3d 978.
112 Id..
113 Id.
114 Id., at 991, 992.

scheme cannot be said to rest on a rational basis. * * * [t]he government has undercut its own rational basis for the licensing scheme by [regulating the plaintiff and not others who are similarly situated]."[115]

In other words, the exemption from a license was given to those who were likely to interact with public health and safety risks while those who were less likely to pose such a risk were required to remain part of the scheme.[116] In light of this, the Court concluded that "the exemption scheme is not supported by a rational basis review."[117]

In all three cases, federal courts could have simply rubber-stamped the respective state legislatures and regulators actions as in the name of "public health," and therefore, beyond constitutional critique. After all, cosmetology dealing with hair care, funeral arrangements dealing with dead bodies, and pest control dealing with the trapping of animals in residential areas ("structural pest control implicates a state's health and public safety interest.") all arguably impact public health. Instead, however, the courts determined that the licensing schemes failed to classify, and were more heavy-handed than was appropriate. In doing so, the courts articulated clear equal protection and due process limitations on regulatory power: (1) regulations may not treat different-situated parties the same; (2) regulations may not fail to classify; and (3) regulations may not promulgate arbitrary exemptions. These same tests demonstrate that John, Jackie, and Manna cannot be constitutionally characterized as a retail food establishment.

j. When applied, R.C. 3717 and OAC 3717 fail to classify, and instead treat Manna Storehouse like a commercial grocery store and/or restaurant.

The attempt to superimpose the retail food establishment designation and regulations on to John, Jackie, and Manna is unconstitutional because it (1) treat them the same as a commercial grocery store or restaurant; and (2) therefore fails to classify; and (3) creates arbitrary exemptions that do not include Manna. The retail food establishment licensing scheme is intended to govern large commercial grocery stores who sell to the general public, rather than small private membership cooperatives that only

115 Id.
116 Id., 992.
117 Id.

acquire food with private members, who specifically approve of acquisition, retention, and distribution practices.

This is proven by the regulations mandates themselves: Manna Storehouse would lose its retail food establishment license if it failed to answer, on the spot during an inspection, any one of a number of inquiries that could be posed by an inspector, even though Manna does not engage in the potentially threatening activities that the inquiries are designed to guard against. As a "license holder," OAC 3717-1-02.4(B) would apply to Manna, and require that, on the spot "during inspections," John or Jackie "demonstrate knowledge" of all of the concepts articulated on pages 21 and 22, *infra,* even though Manna does not operate within those areas, and neither John nor Jackie have reason to learn these intricate details of running a restaurant or commercial grocery store.

This regulatory scheme was clearly crafted to apply to (1) large commercial operations that engage in arms-length transactions with the general public; and (2) establishments that serve food to the general public. Most of it does not apply to Manna. Just ask the Department of Agriculture's own expert, who acknowledged the following: "Not everything applies to every - - like you said, it depends on what you're doing and how you're handling it whether or not certain things apply, [but under the law it applies]."[118]

However, the evidence before the Court demonstrates that Manna's activities only "minimally overlap" with those of the aforesaid establishments: Manna picks up food for its members and temporarily stores that food for the members.[119] Otherwise, it does not engage in the type of activities that R.C. 3717 and OAC 3717 are intended to regulate: the state's own expert Mr. Kirchner concedes in his deposition that these regulations would bind John, Jackie, and Manna, but are all really intended for entities that serve food to the general public, such as commercial grocery stores and

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[118] October 27, 2009 Deposition of Charles Kirchner, pp. 67-68.

[119] December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers.

restaurants.[120] In fact, Manna's activities are more akin to those of a head of household getting groceries and putting them in the freezer then they are to the activities of a commercial grocer or restaurant.

Consequently, Manna is analogous to the African hair braider in *Cornwell* who only braided hair and was not a cosmetologist, the casket merchants in *Craigmiles* who were not funeral directors, and the pest controller in *Merrifield* who did not use chemical pesticides. Manna simply picks up and temporarily stores food for its private members. Thus it is not the same as a commercial grocer or restaurant, and its activities only minimally overlap, and it should not and cannot be regulated as a retail food establishment.

iii. The State undermines its own rationale for attempting to regulate Manna Storehouse.

Further, just as in Merrified, the government's very rationale for attempting to regulate John, Jackie, and Manna, here the risk of danger to the general public's health, is undermined by the statute's exemption of activities that are more potentially hazardous than those of John, Jackie, and Manna.[121] Remarkably, expert from both the Lorain County General Health District and the Ohio Department of Agriculture concede that R.C. 3717 exempts a host of activities that potentially pose a greater threat to public health than John, Jackie, and Manna's limited activities,[122] including the following: (1) nonprofit organizations;[123] (2) persons who "annually maintains five hundred or fewer birds;" and "offers the eggs from those birds directly to the consumer from the location where the chickens are raised and slaughtered or at a farm product auction;"[124] (3) Persons who raise, slaughter, and process up to 1,000 chickens and sells the meat directly to consumers from place where it is processed or

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120 Deposition of Charles Kirchner, throughout, but for instance, p. 18, 27, 28, 31.

121 See *Merrifield*, supra. (holding "The possibility that non-pesticide-using pest controllers might interact with pesticides or will need the skill to suggest pesticide use when it would be more effective is the very rationale that government's counsel proffered, and we relied upon, in upholding the requirement that Merrifield obtain a license under due process grounds. We cannot simultaneously uphold the licensing requirement under due process based on one rationale and then uphold Merrifield's exclusion from the exemption based on a completely contradictory rationale. Needless to say, while a government need not provide a perfectly logically solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality.").

122 Depositions of James Boddy, Charles Kirschner.

123 R.C. 3717.22(B)(4).

124 R.C. 3717.22(B)(8).

at a farm auction;[125] (4) persons who raise, slaughter, and process meat and sells it directly to consumers;[126] (5) persons who sell food at a registered Farm product auction;[127] (6) persons who sell food at a "cottage food production operation;"[128] and (7) persons who sell food at a festival or celebration that is organized by the state or a political subdivision, that is fruits or vegetables from a cottage food operation; fruit butter; eggs; or chicken meat.[129]

The state's expert, Mr. Kirchner, concedes that each of these exemptions potentially poses a threat equal to or greater than any threat poses by the Stowers.[130] James Boddy, Director of the Lorain County General Health District, makes the same concessions.[131] And it does not take much imagination to understand how this may be true: as just one example, R.C. 3717.22(B)(10) exempts someone who raises, slaughters, processes, and sell meat, but does not exempt the Stowers, who raise meat, and then have it slaughtered and processed at government-approved facilities.[132]

Drawing a distinction between the two that is clearly inversely proportionate to the public health risks posed is both arbitrary and irrational. Put in the terms of *Merrifield*, when applying the state's own rationale for requiring small private membership cooperatives such as Manna to be regulated, the exemption scheme cannot be said to rest on a rational basis - - " [t]he government has undercut its own rational basis for the licensing scheme by [regulating the plaintiff and not others who are similarly situated]."[133]

Meanwhile, this Court is further confronted with another staggering evidentiary reality: no food distributed through Manna Storehouse has ever caused harm to any member.[134] The Court in *Cornwell* found it significant that the supposedly potentially-dangerous activities had never caused harm or garnered complaints:

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125 R.C. 3717.22(B)(9).
126 R.C. 3717(B)(10).
127 R.C. 3717 (B)(11).
128 R.C. 3717 (B)(11).
129 R.C. 3717 (B)(15).
130 October 27, 2009 Deposition of Charles Kirchner, pp. 78-86.
131 Deposition of James Boddy.
132 December 16, 2009 Depositions of Jacqueline and Kathryn Stowers.
133 Id.
134 Id.

> Although use of chemicals, or lack of proper sanitary, disinfection, and sterilization procedures could cause injury to consumers, the actual incidence of this problem appears to be extremely rare.... [T]here is no evidence provided that even one case involving the spread of a parasite, or contracting AIDS or some other highly communicable disease, has occurred in a cosmetology salon or barbershop setting." (*Id.* at 34.) This lack of real life physical harm is reflected in the paucity of complaints regarding hairbraiding (*see* Perry Supp. Decl. ¶ 7) and is admitted to by Defendants.[135]

Here, the evidence is clear: No food distributed through Manna has ever been unsafe, caused harm, or resulted in safety-related complaints.[136]

One these bases, the Court must apply the due process and equal protection tests set forth in *Cornwell*, *Craigmiles*, and *Merrified.* In applying these tests to the evidence, reasonable minds could arrive at only one conclusion, that conclusion being that there is no genuine as to any material fact, and that the retail food establishment designation and regulations may not constitutionally be imposed upon Manna.

C. The state's police power does not permit the state to override Appellants' aforesaid constitutional rights, so as to preclude them from privately and cooperatively acquiring food with member friends and neighbors.

i. The Police Power has limits.

The Trial Court erred in concluding, to the extent that it did so, that the imposition of retail food establishment licensing upon private cooperative activity is a proper exercise of the state police power. No reasonable mind could conclude that the regulation of John, Jackie, and Manna is *necessary* to protect *the general public*. Moreover, if the police power is found to empower the legislature to reach, regulate, control, and eviscerate the very basic and private activity of Appellants, then the power has no limits, and Ohioans' constitutional rights have no efficacy - - they can be subsumed by any regulation at any time. This belies both basis constitutional construction and traditional police power jurisprudence.

In Ohio, the police power is not unlimited. The Supreme Court of Ohio notes the following:

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135 *Cornwell*, supra.

136 December 16, 2009 Affidavits of Jackie Stowers, Katie Stowers.

> Under the police power, society may restrict the use of property without making compensation therefor, if the restriction be reasonably necessary for the prevention of the public health, morals, or safety. This is so, because all property within the state is held subject to the implied condition that it will be used as not to injure the equal right of others to use and benefit of their own property * * * The police power, however, is based upon *public necessity. There must be essential public need for the exercise of the power in order to justify its use*."[137]

Clearly, the police power is only properly exercised when "public necessity" or "essential public need" is demonstrated - - it may only be exercised to interfere with fundamental rights when ***necessary*** to protect the ***public***.[138] This analysis embraces two components: (1) an application of law must be absolutely necessary to achieve the desired result; and (2) an application of law must be for the welfare of the general public.

Thus, in determining whether an interference with property rights is unduly burdensome or beyond the necessities of the situation, Ohio courts should be "extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power."[139] And for good reason: "the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were *per se* valid."[140]

Ohio Supreme Court precedent is replete with examples of appropriate invalidations of the police power. In *City of Cincinnati v. Correll*, the Supreme Court of Ohio held that a regulation unduly interfered with property rights and small business. The Court began by noting the proper standard for police power analysis:

> Legislative bodies may not, under the guise of protecting the public interest, interfere with private business by imposing arbitrary, discriminatory, capricious or unreasonable restrictions upon lawful business.[141]

In other words, "the judgment of the general assembly in such cases is not conclusive."[142]

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137 *State ex. rel. Killeen Realty Co. v. City of East Cleveland* (1959), 169 Ohio St. 375, 160 N.E.2d 1, citing *Pritz v. Messer*, 112 Ohio St. 628, at 637, 149 N.E. 30, at 33; *City of Youngstown v. Kahn Bros. Building Co*., 112 Ohio St. 654, at 661.

138 *Palmer v. Tingle* (1896), 55 Ohio St. 423, 36 W.L.B. 315, 45 N.E. 313.

139 *City of Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 49 N.E.2d 412, 414.

140 Id., at 546.

141 Id. (emphasis added).

142 Id.

Similarly, in *Olds v. Klotz*, the Court struck down a statute regulating the hours of retail grocery stores as an invalid exercise of the police power. The Court observed that the regulation of business is only within the police power when "*the relation to the public interest and the common good is substantial* and the terms of the law or ordinance are reasonable and not arbitrary in character."[143] In striking the regulation the Court articulated a concern about the right to be left alone being "frittered away" by virtue of the police power:

> This court cannot protect the rights of property and liberty of contract if it allows the passage of an ordinance of the character involved here. Constitutional rights cannot be frittered away little by little until the substance is gone and only the shadow remains. Such a regulation would open the way to the extension of government regulation and control to businesses of all kinds and could only result in restrictions on the right of private property and liberty of contract contrary to the principles of constitutional government as they have been interpreted by the courts of the states and nation from the inception of free government in America.[144]

Further, in *Direct Plumbing Supply, Inc. v City of Dayton*, the Court struck down the a regulation requiring the labeling, registration, and licensing of plumbing equipment and inventory, noting that the burden imposed by the regulation was "unduly oppressive upon individuals and in excess of the benefits conferred upon the public," and "unreasonably interfere[d] with rights of private property and freedom of contract beyond the necessities of the situation. These cases demonstrate that analysis of whether a liberty-impinging regulation is a valid exercise of the state's police power, particularly as applied to a particular situation is to be treated with great gravity.

ii. Regulation of John, Jackie, and Manna is not "necessary."

Licensure and extensive regulation of Manna Storehouse is not necessary: there has never been a complaint about the health or safety of food acquired through Manna.[145] Manna does not produce or prepare food, but instead only engages in the relatively nonthreatening activities of transporting and temporarily storing food for its members - - activities that the average mother or

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143 *Olds v. Klotz* (1936), 131 Ohio St. 447, 451, 3 N.E.2d 371, 373.

144 *Id.* at 452, 3 N.E.2d at 374

145 Id.

grandmother engages in on a regular basis.[146] Finally, licensing will add no value to the health or safety of the food, since the food is already perfectly safe. Manna already stores refrigerated and frozen goods at the proper temperatures, does not need a license to understand how to do so, and would do the same if licensed (but for the fact that the regulations attendant with licensure would destroy the operation entirely).[147]

iii. Regulation of John, Jackie, and Manna is not necessary to protect "the public."

If Manna Storehouse is "public," then everything from family dinners to church potlucks are pubic, and subject to state regulation. However, all evidence indicates that imposition of regulation upon John, Jackie, and Manna would not advance the interests of *the general public*. "[T]o be subject to regulation by the police power, *the business regulated must be clothed with a public interest*.[148] Certainly, to be subject to regulation, the features of a business sought to be regulated must be *vital to a substantial section of the public* and be of such a character as to require protection for the public from the standpoint of health or general welfare. The relationship between the regulated feature of the business and the public must be such that the public welfare demands that the business be reasonable in its conduct *as it affects the public*. As stated by Chief Justice Taft in *Wolff Packing Company v. Court of Industrial Relations:*

> The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois and the other cases, must be such as to create a *peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public*. * * * It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.'* * * *It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared.* * * * If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground * * *."[149]

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146 Id.

147 December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers.

148 *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

149 *Wolff Packing Company v. Court of Industrial Relations,* 262 U. S. 522, 43 S. Ct. 630, 633, 67 L. Ed. 1103, 27 A. L. R. 1280.

Here, Manna is anything but "clothed with a public interest;" no feature "touches the public;" and imposition of the retail food establishment regulations would be a quintessential example of "running the public interest argument into the ground." The evidence in support of this conclusion, *inter alia* that Manna only deals with private members, does not transact with the public, and does not advertise to the public, is incontrovertible. It is well documented in an earlier section of this brief explaining why Manna does not distribute food to the public, and the Court is respectfully referred to that section.[150]

The same evidence demonstrating that regulation of Manna is not necessary, nor for the public interest, demonstrates that regulation of Manna "goes beyond the necessities of the situation." Applying the police power to John, Jackie, and Manna merely has the effect of destroying a livelihood and a way of life, and in doing so, it adds no value to society, since food distributed through Manna is already safe. In the same light, the "burden" imposed upon Manna is clearly "undue." In summation, if the police power is found to empower the legislature to reach, regulate, control, and eviscerate this basic, private activity, then the power knows no limits, and Ohioans constitutional rights have no efficacy.

Thus, all evidence demonstrates that the police power should not be imposed so as to interfere with and destroy John, Jackie, and Manna's fundamental rights. As such, the Trial Court erred in concluding that application of retail food establishment licensure and its regulations to Manna is a valid exercise of the state's police power.

Third Assignment of Error: **The Trial Court's order is final and appealable as to all of Appellants' as-applied challenges.**

The Trial Court's order is a final appealable order.[151] For a judgment to be final and appealable, the requirements of R.C. 2505.02 and Civ.R. 54(B), if applicable, must be satisfied.[152] Pursuant to R.C. 2505.02, an order is both final and appealable if it resolves all claims against all

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150 Please see above, pp. 17-20.

151 At the time of this filing, this Court is entertaining the litigants' Joint Motion for Limited Remand, so that Appellants' search and seizure claims may be voluntarily dismissed. While voluntary dismissal entirely disposes of the issue, without prejudice to Appellants, absent such a remand, Appellants concede that the Trial Court's Order dismisses their entire Complaint, and thus, although without analysis, implicitly disposes of this claim.

152 *General Acc. Inc. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 21, 540 N.E.2d 266.

parties."[153] The Supreme Court of Ohio states the rule as follows: "[t]he absence of Civ.R. 54(B) language will not render an otherwise final order not final. Thus, when all claims and parties are adjudicated in an action, Civ.R. 54(B) language is not required to make the judgment final.[154]

Here, the Trial Court clearly did not address Manna's search and seizure claims. However, upon voluntary dismissal of those claims, the issue turns to Manna's assertions that R.C. 3717 cannot be constitutionally applied to it. On page eight of its decision, the Trial Court states "[T]he Court holds that R.C. 3717.01, et seq. and O.A.C. 3717-1-01, et seq. are not unconstitutional as applied to plaintiffs." While this "holding" appears to be in a section related to Manna's due process and equal protection claims (the Decision states above, in bold that "Plaintiffs claim that R.C. 3717.21. . . are unconstitutional as applied *because Manna is different from other entities classified as 'retail food establishments*.'"), the actual language in the "holding" is not limited to Manna's due process and equal protection claims. Instead, it is written in a sweeping and absolute manner - - one that would appear to necessarily include Manna's claims related to property rights, the right to earn a living and do business, and Section 1, Article I.

While much of the Trial Court's decision, particularly pages five through seven, superfluously analyze claims that Manna did not make (such as claims for exemption and facial challenges to the statute), and while Manna certainly would have appreciated a more meticulous analysis of the claims it *did* make, it must nevertheless give way to the Trial Court's absolutist language on page 8 of its decision: The Trial Court's decision, though with little meaningful analysis, rules on all of Manna's as-applied claims. As such, the Court's order is final and appealable, and this Court possesses jurisdiction over this case.

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153 *Dellagnese v. First Federal Savings & Loan Assn.* (Feb. 20, 1991), 9th Dist. No. 14809, at 2, 1991 WL 21542, citing *Norvell v. Cuyahoga Cty. Hospital* (1983), 11 Ohio App.3d 70, 71, 463 N.E.2d 111; see, also, *Bench Signs Unlimited v. Stark Area Regional Transit Authority*, 9th Dist. No. 21574, 2003-Ohio-6324, at ¶ 3.

154 *General Acc. Inc. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 21, 540 N.E.2d 266, citing See *Commercial Natl. Bank v. Deppen* (1981), 65 Ohio St.2d 65, 19 O.O.3d 260, 418 N.E.2d 399; *Wise v. Gursky* (1981), 66 Ohio St.2d 241, 20 O.O.3d 233, 421 N.E.2d 150; see, also, *Harleysville Mut. Ins. Co. v. Santora* (1982), 3 Ohio App.3d 257, 3 OBR 289, 444 N.E.2d 1076.

CONCLUSION

Manna is not a retail food establishment, and even if it were, application of retail food establishment licensing and regulation to Manna would be unconstitutional. Consequently, this Court should reverse the Trial Court, and grant Manna the declaratory and injunctive relief that it requests in its Complaint.

Respectfully submitted,

Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State St.
Columbus, Ohio 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
MThompson@OhioConstitution.org
Counsel for Appellants

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following this 6th day of July, 2010:

Abraham Cantor
Johnnycake Commons
Johnnycake Ridge Road, Suite 4F
Concord, Ohio 44060
acantor@abrahamcantor.com

Scott Serazin
Assistant County Prosecutor
Lorain County General Health District
9880 South Murray Ridge Road
Elyria, Ohio 44035
Scott.Serazin@LCProsecutor.org

James R. Patterson
Assistant Attorney General
Ohio Department of Agriculture
8995 East Main Street
Reynoldsburg, OH 43068
JPatterson@agri.oh.gov

Maurice A. Thompson (0078548)