No. 08-10146

In the United States Court of Appeals for the Fifth Circuit

SIESTA VILLAGE MARKET LLC, doing business as SIESTA MARKET;
KEN TRAVIS; KEN GALLINGER; MAUREEN GALLINGER; DR ROBERT BROCKIE;
Plaintiffs - Cross-Appellees

v.

JOHN T STEEN, JR, Commissioner of the Texas Alcoholic Beverage Commission;
GAIL MADDEN, Commissioner of the Texas Alcoholic Beverage Commission;
JOSE CUEVAS, JR, Commissioner of the Texas Alcoholic Beverage Commission;
Defendants - Cross-Appellants

(caption continued on inside cover)

On Appeal from the United States District Court
Northern District of Texas, Dallas Division

RESPONSE TO PETITION FOR *EN BANC* REVIEW

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for
Civil Litigation

JAMES C. HO
Solicitor General
State Bar No. 24052766

PHILIP A. LIONBERGER
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1823
[Fax] (512) 474-2697

COUNSEL FOR DEFENDANTS

WINE COUNTRY GIFT BASKETS.COM; K&L WINE MERCHANTS; BEVERAGES & MORE INC; DAVID L TAPP; RONALD L PARRISH; JEFFREY R DAVIS

Plaintiffs - Appellants - Cross-Appellees

v.

ALLEN STEEN, in his official capacity as administrator of the Texas Alcoholic Beverage Commission

Defendant - Appellee - Cross-Appellee - Cross-Appellant

GLAZERS WHOLESALE DRUG COMPANY INC; REPUBLIC BEVERAGE COMPANY

Intervenor Defendants - Appellees - Cross-Appellants

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants-Cross-Appellees

Siesta Market Plaintiffs
- Siesta Village Market LLC, d.b.a. Siesta Market
- Ken Travis
- Ken Gallinger
- Maureen Gallinger
- Dr. Robert Brockie

Wine Country Plaintiffs
- Wine Country Gift Baskets.com
- K&L Wine Merchants
- Beverages & More Inc.
- David L. Tapp
- Ronald L. Parrish
- Jeffrey R. Davis

Attorneys for Plaintiffs–Appellants-Cross-Appellees (Siesta Market Plaintiffs)

- Robert D. Epstein
EPSTEIN COHEN DONAHOE & MEDES
50 S. Meridian Street, Suite 505
Indianapolis, IN 46204

- William M. Boyd
BOYD VEIGEL P.C.
P.O. Box 1179
McKinney, TX 75070

- Professor J. Alexander Tanford
Indiana University School of Law
211 South Indiana Avenue
Bloomington, IN 47405-7001

Attorneys for Plaintiffs-Appellants-Cross-Appellees (Wine Country Plaintiffs)

- Kenneth W. Starr
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017

- Susan E. Engel
- Elizabeth M. Locke
- Soraya F. Rudofsky
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005

- James F. Basile
- Tracy K. Genesen
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104

- Sterling W. Steves
STERLING W. STEVES, P.C.
1406 Thomas Place
Fort Worth, TX 76107

Defendants-Appellees-Cross-Appellants (The State)

- John T Steen, Jr.,
  Comm'r Tex. Alco. Bev. Comm'n
- Gail Madden,
  Comm'r Tex. Alco. Bev. Comm'n
- Jose Cuevas, Jr.,
  Comm'r Tex. Alco. Bev. Comm'n
- Alan Steen,
  Admin'r Tex. Alco. Bev. Comm'n

Attorneys for Defendants-Appellees-Cross-Appellants

- James C. Ho
  Solicitor General
- Philip A. Lionberger
  Assistant Solicitor General
- James Carlton Todd
  Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548

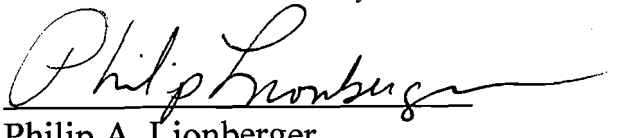
Intervenor Defendants-Appellees-Appellees-Cross-Appellants

- Glazer's Wholesale Drug Co., Inc.
- Republic Beverage Company
  (Now known as Republic National Distributing Company)

Attorneys for Intervenor Defendants-Cross-Appellants

- Dee J. Kelly, Sr.
- Marshall M. Searcy
- William N. Warren

KELLY HART & HALLMAN LLP
201 Main St., Suite 2500
Fort Worth, TX 76102-3194



Philip A. Lionberger

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Defendant - Appellee - Cross-Appellant

GLAZERS WHOLESALE DRUG COMPANY INC; REPUBLIC BEVERAGE COMPANY
Intervenor Defendants - Appellees - Cross-Appellants

On Appeal from the United States District Court
Western District of Texas, Pecos Division

RESPONSE TO PETITION FOR *EN BANC* REVIEW

INTRODUCTION

Plaintiffs' en banc petition gives the impression that no reasonable judge could have possibly reached the result adopted by the panel. This impression is made

possible only because Plaintiffs do not mention the key passage from *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005), that commands this result—the same result that was also reached by the only other federal court of appeals to address this same issue to date. *See Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2nd Cir. 2009). In sum, Plaintiffs' petition turns this Court's standard for en banc review on its head—by seeking review in order to *create* the very intercircuit split the panel sought to *avoid*.

Plaintiffs' case can be reduced to the following core theme: States should never treat out-of-state businesses differently from in-state businesses.

The fatal flaw in their case, however, is this: Unlike violations of the Equal Protection Clause of the Fourteenth Amendment, laws that conflict with the dormant Commerce Clause can be blessed by Congress. Article I, Section 8 of the Constitution expressly authorizes Congress "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. That includes the power to authorize States to regulate commerce—including state laws that treat in-state businesses differently from out-of-state businesses—in order to further any number of worthy policy objectives. *See, e.g., Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce

Clause."); *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983) (same).

Time and time again, Congress has authorized States to grant preferential treatment to in-state businesses over out-of-state businesses, in a number of contexts. And when Congress has done so, the role of the judiciary has been limited to enforcing the policy judgments of the States accordingly—as this Court and other courts have repeatedly acknowledged. *See, e.g.*, *Liberty Mut. Ins. Co. v. La. Dep't of Ins.*, 62 F.3d 115, 118 (5th Cir. 1995) ("[B]y the McCarran-Ferguson Act, Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance. The Court has squarely rejected the argument that discriminatory state insurance taxes may be challenged under the Commerce Clause despite the McCarran-Ferguson Act.") (citation and quotations omitted); *Ne. Bancorp*, 472 U.S. at 174-75 (construing Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841, *et seq.*).

So too here. Indeed, Congress has not only enacted statutes authorizing States to channel the distribution of alcohol exclusively through in-state distributors. *See, e.g.*, 37 Stat. 699, 27 U.S.C. § 122 (Webb-Kenyon Act). Congress also incorporated that rule directly into the U.S. Constitution, through the Twenty-first Amendment.

All nine justices in *Granholm* agreed that, by adopting the Twenty-first Amendment and earlier laws, Congress authorized States to favor in-state distributors over out-of-state distributors in the distribution and transportation of alcohol. To be sure, the justices were sharply divided over whether States may discriminate against out-of-state *producers* in favor of in-state producers. But they unanimously agreed that States may grant preferential treatment to in-state *distributors* over out-of-state distributors. Indeed, virtually every State in the Union has established so-called "three-tier systems"—laws that inherently favor in-state distributors over out-of-state distributors, by channeling alcohol exclusively through in-state wholesalers and in-state retaliers, before reaching the consumer. *See* Defts' Reply Br. at 15-18.

Conspicuously, Plaintiffs do not mention the key passage from the majority opinion in *Granholm* that confirms the constitutionality of three-tier systems and other State laws that grant preferential treatment to in-state distributors over out-of-state distributors. The following passage from *Granholm* blesses such laws, noting that the Twenty-first Amendment gives States "virtually complete control" over the distribution—but not the production—of alcohol:

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure

> the liquor distribution system." [*Ca. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)]. A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." *North Dakota v. United States*, [495 U.S. 423, 432 (1990)]. *See also id.*, at 447 . . . (SCALIA, J., concurring in judgment) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler"). State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers.

544 U.S. at 488-89. Based on this passage from *Granholm*, the Second Circuit reached precisely the same result as that adopted by the panel here. As Judge Calabresi observed, under *Granholm*, courts "can only come out one way." *Arnold's Wine*, 571 F.3d at 201 (Calabresi, J., concurring).

Plaintiffs' en banc petition is thus fatally flawed. The panel decision faithfully applied *Granholm*, and created no intracircuit or intercircuit split of authority in doing so. To the contrary, it is Plaintiffs who ask this Court to *create* an intercircuit split, by granting en banc review of a panel decision carefully crafted to *avoid* such a split.

For these reasons, the petition should be denied.

ARGUMENT

I. THE PETITION TURNS THE COURT'S STANDARD FOR EN BANC REVIEW ON ITS HEAD—ATTACKING A PANEL RULING FOR *AVOIDING* AN INTERCIRCUIT SPLIT BY FAITHFULLY FOLLOWING U.S. SUPREME COURT PRECEDENT.

"This case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000). As in any case challenging the validity of a duly enacted state or federal law, we should begin with the constitutional text. And the plain meaning of the Twenty-first Amendment is clear. States may regulate "[t]he transportation or importation . . . of intoxicating liquors" "into any State . . . for delivery or use therein." U.S. CONST. amend. XXI, § 2.

In *Granholm*, the justices disagreed over whether the Twenty-first Amendment authorizes States to favor in-state alcohol producers over out-of-state producers. But the Court was unified in affirming the constitutionality of three-tier systems and other state laws that—like the laws upheld by the Second Circuit and the panel here—favor in-state alcohol distributors over out-of-state distributors.[1]

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1. *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-16 (1996) (observing that "the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders" and that "[t]he States' regulatory power over this segment of commerce is . . . largely 'unfettered by the Commerce Clause'") (quoting *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939)); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964) ("This Court made clear in the early years following adoption of the Twenty-first

A. Plaintiffs' Position Contradicts the Views of All Nine Justices in *Granholm*—and the Laws of Virtually Every State in the Union.

1. In *Granholm*, the Supreme Court invalidated State laws that favor in-state *producers* of alcohol over out-of-state producers. But at the same time, the Court also reaffirmed as "unquestionably legitimate" the validity of the three-tier system of alcohol distribution, in a case involving state liquor laws in Michigan and New York. 544 U.S. at 465. Both Michigan and New York law generally required all wine producers to distribute their wine through each State's three-tier system. Under Michigan law, alcohol could be distributed through licensed in-state distributors—"in-state retailers . . . are the final link in the chain, selling alcoholic beverages to consumers at retail locations and, subject to certain restrictions, through home delivery." *Id.* at 469. New York's licensing scheme likewise "channel[ed] most wine sales through the three-tier system." *Id.* at 470.

Despite the fact that such systems plainly discriminate against out-of-state distributors at both the wholesale and retail levels, all nine Justices in *Granholm* unanimously reaffirmed that "States can mandate a three-tier distribution scheme in

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Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. . . . This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned.") (collecting cases).

the exercise of their authority under the Twenty-first Amendment," *id.* at 466 (citing *North Dakota*, 495 U.S. at 432; *id.* at 447 (Scalia, J., concurring)), and that "the three-tier system itself is 'unquestionably legitimate,'" *Granholm*, 544 U.S. at 489. *See Arnold's Wine*, 571 F.3d at 190 & n.2 (recognizing "the *Granholm* Court's express affirmation of the legality of the three-tier system"; "[t]he *Granholm* dissenters specifically endorsed the constitutionality of the three-tier system as well"). *See also Granholm*, 544 U.S. at 496 (Stevens, J., dissenting) (affirming "distribution systems that gave discriminatory preferences to local retailers and distributors"); *id.* at 517 (Thomas, J., dissenting) ("The widespread, unquestioned acceptance of the three-tier system of liquor regulation, and the contemporaneous practice of the States following the ratification of the Twenty-first Amendment confirm that the Amendment freed the States from negative Commerce Clause restraints on discriminatory regulation.") (citation omitted); *id.* at 518 (Thomas, J., dissenting) ("[T]he three-tier system[,] [a]s the Court concedes, . . . is within the ambit of the Twenty-first Amendment, even though [it] discriminates against out-of-state interests."); *id.* at 520 (Thomas, J., dissenting) ("the Twenty-first Amendment allow[s] States to discriminate against out-of-state wholesalers and retailers . . . [t]he Court . . . concedes that a State could have a discriminatory licensing . . . scheme"); *id.* at 521-22 (Thomas, J., dissenting) (noting

"[t]he Court's concession that the Twenty-first Amendment allowed States to require all liquor traffic to pass through in-state wholesalers and retailers").

This result follows inexorably from the text and history of the Twenty-first Amendment, which "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" *Granholm*, 544 U.S. at 488 (quoting *Midcal*, 445 U.S. at 110). The Court observed that "States may . . . funnel sales through the three-tier system," *id.* at 489, and "[s]tate policies are protected under the Twenty-first Amendment" so long as "they treat liquor produced out of state the same as its domestic equivalent." *Id.* The Court thus made clear that nothing in the *Granholm* ruling could be construed to "call into question the constitutionality of the three-tier system." *Id.* at 488.

Notably, the Supreme Court did not just bless the three-tier system as a whole. It specifically acknowledged that the three-tier system may limit both retail location sales *and* direct shipping exclusively to in-state retailers. As *Granholm* noted, in-state retailers are the "final link in the chain, selling alcoholic beverages to consumers [1] at retail locations and . . . [2] through home delivery." 544 U.S. at 469. The Court further observed that, under Michigan law, only in-state retailers—and not out-of-state retailers—may ship alcohol directly to consumers. *See id.* (citing MICH. COMP. LAWS §§ 436.1111(5), .1203(2)-(4)).

In response to these critical passages, the en banc petition says—nothing. Their silence is telling—and fatal to Plaintiffs' petition.

2. Not only is Plaintiffs' theory of law incompatible with *Granholm*—their position, if adopted, would lead to breathtaking results. Plaintiffs have never denied that their theory would require the invalidation of the laws of all 48 continental States, as well as Hawaii and the District of Columbia, governing either the in-store purchase or direct shipping and home delivery of alcohol. Put simply, if Plaintiffs are right, then virtually no State's three-tier system is safe. *See* Defts' Reply Br. at 15-18.

All 48 continental States, as well as Hawaii and the District of Columbia, have adopted a three-tier system for regulating alcohol that favors both wholesalers and retailers who have established a retail outlet or distribution center somewhere within the State, over their counterparts who have not. In each of those jurisdictions, wholesalers may supply alcohol to retailers for in-store sales only if the wholesaler has a distribution center in the State. Likewise, in each jurisdiction, in-store purchases of alcohol from out-of-state retail outlets for consumption back in the home State are either strictly forbidden or severely limited in volume. And within the specific context of direct shipping by retailers, of the approximately 28 States that permit such sales, 21 States require the retailer first to establish a retail outlet in the State.

Such laws are ubiquitous, and have been repeatedly upheld as constitutional, notwithstanding the nondiscrimination principle that courts have invoked in other contexts, for one simple reason: Alcohol enjoys a unique status under the U.S. Constitution. The Twenty-first Amendment expressly recognizes the regulatory prerogative of the States over "[t]he transportation or importation . . . of intoxicating liquors" "into any State . . . for delivery or use therein." U.S. CONST. amend. XXI, § 2. Plaintiffs may not agree with this principle as a policy matter—but there are no grounds for granting en banc review in order to rewrite it.[2]

B. Plaintiffs, by Their Own Admission, Seek To Create the Intercircuit Split That the Panel Followed Supreme Court Precedent To Avoid.

In *Arnold's Wine, Inc. v. Boyle*, 571 F.3d 185 (2nd Cir. 2009), the Second Circuit addressed constitutional claims that were, by all accounts, identical to those presented here. And that court reached the identical conclusion that the panel reached in this case. In doing so, the court embraced the State's interpretation of *Granholm v. Heald*—and rejected Plaintiffs' constitutional claims as "directly foreclosed by" *Granholm*. 571 F.3d at 191.

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2. For their part, Plaintiffs purport not to take issue with the three-tier system (*see* Pet. at 12), but that is misleading. The alcohol sold by Texas retailers has been funneled through the three-tier system; the alcohol sold by Plaintiffs has not. Unless Texas's entire system for structuring alcohol distribution is struck down—that is, unless Plaintiffs *are* challenging the three-tier system—Plaintiffs' claims are wholly non-redressable, as they will still be attempting to sell a product that has not passed through the mandatory tiers.

Specifically, the Second Circuit held that the "express" terms of the Twenty-first Amendment override the "implied" limits of the Commerce Clause, *id.* at 188-90—so long as States "do not discriminate against out-of-state *producers*," *id.* at 192 (emphasis added). It upheld the entirety of the three-tier *distribution* system—including provisions that funnel alcohol exclusively through in-state (while excluding out-of-state) wholesalers and retailers. And it specifically rejected Plaintiffs' constitutional objections to any state law that "grants in-state retailers benefits not afforded to out-of-state retailers." *Id.* at 190. Under *Granholm*, "we can only come out one way," as Judge Calabresi explained in his concurring opinion. *Id.* at 201. In his words, ruling for Plaintiffs would be "ignoring" *Granholm*. *Id.*

Arnold's Wine thus solidifies the consensus that already exists among all nine Justices in *Granholm*, and virtually every State in the union, *see* Defts' Reply Br. at 15-18—as well as every federal court of appeals now to have addressed these issues, *see Arnold's Wine*, 571 F.3d at 190 (citing *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006)).

* * *

En banc review is rarely warranted—and this case is no exception. To the contrary, the petition invites the Court to stand the traditional standard for en banc review on its head. The primary aim of en banc rehearing is to avoid intercircuit

conflicts and to demand faithful application of Supreme Court precedent. This petition, by contrast, asks the Court to do precisely the opposite: to create a direct split with a unanimous panel of the Second Circuit, by ignoring the controlling passage in *Granholm*.

II. THE INTERCIRCUIT AND INTRACIRCUIT SPLITS ALLEGED BY PLAINTIFFS DO NOT EXIST—PLAINTIFFS FOCUS ON CASES THAT DISTINGUISH AMONG PRODUCERS (RATHER THAN RETAILERS), AND THAT REGULATE BASED ON THE DOMICILE OF BUSINESS OWNERS (RATHER THAN THE LOCATION OF RETAIL OUTLETS).

Contrary to Plaintiffs' contentions (Pet. at 13-15), the panel decision does not conflict with any precedent of this or any other circuit. Plaintiffs do not cite a single court of appeals ruling anywhere in the nation that invalidates the authority of States to engage in differential treatment of liquor retailers and wholesalers based on their physical presence within or absence from its jurisdiction.

For their part, Plaintiffs cite cases striking down state statutes that discriminate against out-of-state wineries and alcohol *producers*. *See Granholm v. Heald*, 544 U.S. 460 (2005); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003). But those decisions are plainly distinguishable under both the express text of the Twenty-first Amendment and the majority ruling in *Granholm*, which plainly permit States to differentiate at the *wholesale and retail levels*. Indeed,

Plaintiffs' lead case on this score—this circuit's decision in *Dickerson*, *see* Pet. at 14-15—explicitly confirmed its inapplicability to this case: "the legal issue before us is Texas's discriminatory treatment of out-of-state wineries vis-a-vis in-state wineries, *not the legitimacy of Texas's three-tier system*." *Dickerson*, 336 F.3d at 409 (emphasis added).

Plaintiffs also invoke cases invalidating alcohol regulations that favor certain distributors based on nothing more than the domicile of their owners. *See, e.g.*, *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994); *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200 (D. Mass. 2006). By contrast, the state interests championed in this case turn not on the domicile of the owners (a constitutionally suspect consideration, as Defendants have acknowledged throughout this litigation), but on the location of their retail outlets and distribution centers—a critical issue for law enforcement.

In sum, Plaintiffs' effort to invalidate Texas law "ignor[es] too much of the background jurisprudence" while disregarding "some of [*Granholm*'s] most specific language." *Arnold's Wine*, 571 F.3d at 201 (Calabresi, J., concurring). The panel was right to reject it.

CONCLUSION

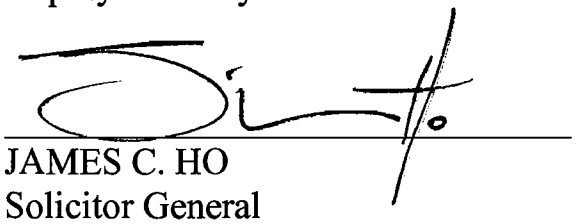
The petition for en banc review should be denied.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation



JAMES C. HO
Solicitor General
State Bar No. 24052766

PHILIP A. LIONBERGER
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P. O. Box 12548 (MC 059)
Austin, Texas 78711
[Tel.] (512) 936-1700
[Fax] (512) 474-2697

COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that two true and correct copies of the above and foregoing document, along with a computer disk copy of the brief in Adobe Portable Document Format, were served by Federal Express Next Day Air Delivery and U.S. Certified Mail, Return Receipt Requested, on March 10, 2010 to:

•Robert D. Epstein
EPSTEIN COHEN DONAHOE & MEDES
50 S. Meridian Street, Suite 505
Indianapolis, IN 46204
Attorneys for Plaintiffs-Appellants-Cross-Appellees (Siesta Market Plaintiffs)

•Professor J. Alexander Tanford
Indiana University School of Law
211 South Indiana Avenue
Bloomington, IN 47405-7001
tanford@indiana.edu
Attorneys for Plaintiffs-Appellants-Cross-Appellees (Siesta Market Plaintiffs)

•Dee J. Kelly, Sr.
•Marshall M. Searcy
•William N. Warren
•Marianne Marsh Auld
•David E. Keltner
KELLY HART & HALLMAN LLP
201 Main St., Suite 2500
Fort Worth, TX 76102-3194
dee.kelly@khh.com
marshall.searcy@khh.com
bill.warren@khh.com
Attorneys for Intervenor Defendants-Cross-Appellants

•Kenneth W. Starr
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
kstarr@kirkland.com
Attorneys for Plaintiffs-Appellants-Cross-Appellees (Wine Country Plaintiffs)

•James F. Basile
•Tracy K. Genesen
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
jbasile@kirkland.com
tgenesen@kirkland.com
Attorneys for Plaintiffs-Appellants-Cross-Appellees (Wine Country Plaintiffs)

•Susan E. Engel
•Elizabeth M. Locke
•Soraya F. Rudofsky
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, DC 20005
seengel@kirkland.com
elocke@kirkland.com
srudofsky@kirkland.com
Attorneys for Plaintiffs-Appellants-Cross-Appellees (Wine Country Plaintiffs)

•Sterling W. Steves
STERLING W. STEVES, P.C.
1406 Thomas Place
Fort Worth, TX 76107
sterlingw@sterlingsteves.com
Attorneys for Plaintiffs-Appellants-Cross-Appellees (Wine Country Plaintiffs)

Counsel also certifies that on March 10, 2010, twenty-one paper copies of the Defendants' Response to Petition for Rehearing En Banc, along with a computer disk copy of the brief in Adobe Portable Format, were dispatched to the clerk, as addressed below, via Federal Express Next Day Air Delivery:

Charles R. Fulbruge, III, Clerk
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, Louisiana 70130

Philip A. Lionberger