No. 12-2502

IN THE

United States Court of Appeals for the Eighth Circuit

SOUTHERN WINE AND SPIRITS OF AMERICA, INC., *et al.*,

Plaintiffs-Appellants,

v.

DIVISION OF ALCOHOL AND TOBACCO CONTROL, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Missouri, No. 11-cv-04175-NKL
District Judge Nanette K. Laughrey

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs Southern Wine & Spirits of America, Inc.; Southern Wine & Spirits of Missouri, Inc.; Harvey R. Chaplin; Wayne E. Chaplin; Steven R. Becker; and Paul B. Chaplin filed suit against defendants the Missouri Division of Alcohol and Tobacco Control and Division Supervisor Lafayette Lacy. Plaintiffs alleged that defendants had denied Southern Wine & Spirits of Missouri, Inc. a state liquor wholesaler's license solely because the company is not owned, controlled, and run by Missouri residents, and despite the fact that the company is domiciled and physically located in Missouri. Plaintiffs alleged that this decision and the Missouri statute that drove it violate, *inter alia*, the dormant Commerce Clause and the Equal Protection Clause of the U.S. Constitution.

On cross-motions for summary judgment, the District Court entered final judgment for the defendants. The court held that the Twenty-first Amendment to the U.S. Constitution, which repealed Prohibition and authorized states to regulate alcohol, immunizes the discriminatory statute from Commerce Clause review. The court further held that the statute does not violate equal protection because the distinctions it makes between different licensees are supported by a rational basis.

That decision was erroneous. The Twenty-first Amendment does not immunize from Commerce Clause review state laws, like the one at issue here, that advance no concern of the Amendment and that instead are designed merely to protect local business from interstate competition. Moreover, the state law at issue here violates equal protection because the disability it imposes on interstate commerce has no rational basis. The judgment should be reversed**.**

Appellants request 20 minutes of oral argument per side. Oral argument would be useful to the Court given the multiple issues of constitutional law presented by this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eighth Cir. R. 26.1A, plaintiffs-appellants make the following corporate disclosures:

Southern Wine & Spirits of Missouri, Inc., is a wholly-owned subsidiary of Southern Wine & Spirits of America, Inc. There is no publicly held corporation owning ten percent or more of the stock of Southern Wine & Spirits of Missouri, Inc., and it has no subsidiaries or affiliates that have issued shares to the public.

Southern Wine & Spirits of America, Inc., has no parent corporation. There is no publicly held corporation owning ten percent or more of the stock of Southern Wine & Spirits of America, Inc., and it has no subsidiaries (except wholly owned subsidiaries) or affiliates that have issued shares to the public.

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OPENING BRIEF FOR PLAINTIFFS-APPELLANTS

INTRODUCTION

This case concerns Missouri's unlawful discrimination against interstate commerce. The State regulates alcohol sales through a licensing framework with 58 license categories. For 56 of those 58 types of licenses, there is no residency requirement; businesses may operate in Missouri regardless of where they or their owners are located. But businesses in the two categories at issue in this case—wholesalers who sell liquor, and wholesalers who sell other beverages stronger than beer—cannot. For those categories, and those categories alone, the State imposes a hyper-strict residency requirement: It bars the door not just to out-of-state companies, but even to *Missouri* companies unless (1) all their officers and directors have been Missouri residents for three years, (2) those officers and

directors are local voters and taxpayers, and (3) Missouri residents own and control most of the corporation. The effect: Missouri companies with in-state operations, but officers or owners who happen to live across state lines, are excluded from Missouri's wholesale liquor market.

Citing these provisions, the Division of Alcohol and Tobacco Control and the Division's Supervisor (collectively the "State") denied a wholesale license to appellant Southern Wine & Spirits of Missouri, Inc. ("SWS Missouri"), a Missouri corporation, because SWS Missouri has out-of-state officers and corporate parents. The State did so even though SWS Missouri is incorporated in Missouri and planned to conduct operations out of a Missouri warehouse staffed with Missouri management. That denial—and the statute on which it was based—flatly violate the Commerce Clause of the U.S. Constitution. Under the "dormant" aspect of the Commerce Clause, "[s]tate laws that discriminate against interstate commerce face a virtually per se rule of invalidity." *Granholm* v. *Heald*, 544 U.S. 460, 476 (2005) (citation omitted). They can be justified only by the "clearest showing," based on "concrete record evidence," that the discrimination is necessary to advance a legitimate interest and other alternatives are "unworkable." *Id.* at 490-493 (citations omitted). In the District Court, the State made nothing even close to such a showing. On the contrary, it agreed that the Missouri requirements are discriminatory and offered no evidence that other alternatives would not suffice.

Conceding the Commerce Clause point, the State nevertheless argued that its rules are saved by the Twenty-first Amendment, which gave states broad authority to regulate alcohol. The District Court accepted this argument. That was error. To be sure, the Twenty-first Amendment does "immuniz[e]" state liquor laws from Commerce Clause scrutiny in some circumstances. *Granholm*, 544 U.S. at 470. For one, it authorizes states to impose a "three-tier system" of liquor regulation, like Missouri's, that regulates producers, wholesalers, and retailers separately and requires that wholesalers be *physically located* in-state. *Id.* at 489. But that does not mean a state can shut the door to interstate commercial interests in any way it pleases. Instead, a discriminatory law is permissible only if it is "supported by a[ ] clear concern" of the Twenty-first Amendment. *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276 (1984). As courts have recognized, that means a state's desire to implement the three-tier system can justify discrimination against interstate commerce only if that discrimination is "inherent in the three-tier system itself." *Wine Country Gift Baskets.Com* v. *Steen*, 612 F.3d 809, 818 (5th Cir. 2010).

The statutory requirements at issue here do not meet that description. Unlike a requirement that a wholesaler be physically located in-state, a requirement that the wholesaler be locally *managed and controlled* does nothing to effectuate the three-tier system. The State conceded as much: Its representative testified that letting companies like SWS Missouri—i.e., Missouri companies with local

operations that happen to have out-of-state officers or owners—participate in the wholesale market "*doesn't erode the three-tier system*." J.A. 73 (emphasis added). The same representative admitted that the state lets an out-of-state wholesaler, with out-of-state management, participate in the market without ill effects for the three-tier system. J.A. 61-64, 73. And legislative history demonstrates that the Missouri legislature enacted the discriminatory provisions not to further the three-tier system, but to protect local businesses from out-of-state competition. Missouri's transparent violation of the dormant Commerce Clause is not immunized by the Twenty-first Amendment. Its discriminatory requirements cannot stand.

Though the Court need go no further, Missouri's requirements also violate the Equal Protection Clause of the Fourteenth Amendment. Equal-protection analysis requires a "real and substantial distinction" between SWS Missouri and other Missouri corporations that justifies treating SWS Missouri differently. *Southern Ry.* v. *Greene*, 216 U.S. 400, 417-418 (1910). The State has pointed to no such distinction. For this reason, too, the decision below should be reversed.

STATEMENT OF JURISDICTION

This civil action seeks to redress a deprivation, under color of state law, of rights secured by the U.S. Constitution. Plaintiffs filed suit in the U.S. District Court for the Western District of Missouri, invoking that court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a) and seeking declaratory and injunctive

relief pursuant to 28 U.S.C. §§ 2201 and 2202. The District Court entered final judgment on May 29, 2012. J.A. 99. Plaintiffs timely noticed their appeal on June 22, 2012. J.A. 101. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES FOR REVIEW

1. Whether Missouri's alcohol wholesaler residency requirements—which prohibit Missouri corporations that are physically located in Missouri and operate exclusively in Missouri, but have out-of-state management or control, from obtaining a permit to engage in alcohol sales—violate the dormant Commerce Clause, where the State conceded that the requirements are discriminatory and submitted no evidence that the discrimination is necessary.

   Cases: *Granholm*, 544 U.S. 460; *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980); *Jones* v. *Gale*, 470 F.3d 1261 (8th Cir. 2006); *SDDS, Inc.* v. *South Dakota*, 47 F.3d 263 (8th Cir. 1995).

2. Whether Missouri's discriminatory requirements are nonetheless saved by the Twenty-first Amendment, where (a) the discrimination serves no Twenty-first Amendment interest and (b) the State conceded that the key provisions in question are not inherent in the state's "three-tier system."

   Cases: *Granholm*, 544 U.S. 460; *Bacchus*, 468 U.S. 263; *North Dakota* v. *United States*, 495 U.S. 423 (1986); *Wine Country*, 612 F.3d 809.

3. Whether Missouri's discriminatory requirements violate the Equal Protection Clause, given the lack of evidence that the discriminatory treatment is rationally related to any legitimate government objective.

Cases: *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985); *Southern Ry.*, 216 U.S. 400; *Parks* v. *Allen*, 409 F.2d 210 (5th Cir. 1969).

STATEMENT OF FACTS AND OF THE CASE

A. The Dormant Commerce Clause

The Commerce Clause provides that "[t]he Congress shall have the Power * * * to regulate Commerce with foreign Nations and among the several states." U.S. Const. art. I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Commerce Clause has long been understood to have a 'negative,' " or dormant, "aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 98 (1994). The dormant Commerce Clause has long been held to block states from "discriminat[ing] against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated." *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 307 n.15 (1997). Indeed, the Supreme Court has applied the doctrine for more than "a century and a half," *American Trucking Assocs.* v. *Smith*, 496 U.S. 167, 183 n.1 (1990), using it to invalidate dozens of laws that promote "economic Balkanization" by disfavoring out-of-state commercial interests. *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 577 (1997).

B. The Twenty-first Amendment

The Twenty-first Amendment, enacted in 1933, repealed Prohibition. It provides in relevant part:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. Amend. XXI §§ 1-2. By its terms, Section 2 simply gives states the power to regulate liquor transportation and importation; it does not say that those regulations are exempt from other provisions of the Constitution. And yet in the decades after the Twenty-first Amendment was adopted, some courts and commentators suggested that Section 2 supersedes the dormant Commerce Clause altogether in the liquor context and authorizes states to discriminate against out-of-state actors at will. *See Granholm*, 544 U.S. at 484-486 (discussing past cases).

The Supreme Court's modern cases reject that approach. They explain that while " '[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor" at all and "how to structure the liquor distribution system,' " *id.* at 488 (quoting *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 99-100 (1980)), the Amendment "did not entirely remove state regulation of alcoholic beverages from

the ambit of the Commerce Clause." *Bacchus*, 468 U.S. at 275. Quite the contrary: "[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," *Granholm*, 544 U.S. at 487, and a state liquor law's "discriminatory character" thus "eliminates the immunity afforded by the Twenty-first Amendment." *Id.* at 488 (citation omitted).

C. The Three-Tier System

Seizing on the broad authority provided by the Twenty-first Amendment, all states have adopted some variety of the "three-tier" system for regulating alcohol within their borders. Under that system, generally speaking, "alcoholic beverage producers (tier one) must be licensed by the state and can only sell to state-licensed wholesalers (tier two), who collect excise taxes * * * and provide the states with information about the supplier and the alcohol they purchase." B. Beliveau & M. Rouse, *Prohibition & Repeal: A Short History of the Wine Industry's Regulation in the United States*, 5 J. Wine Econ. 53, 57 (2010). "Wholesalers in turn sell to retailers (tier three)," and retailers sell to consumers. *Id.* This structure serves a number of purposes. "By requiring producers to sell [alcohol] through wholesalers," states aimed "to collect taxes more efficiently" and "to limit alcohol sales to minors." Fed. Trade Comm'n, *Possible Anti-Competitive Barriers to E-*

Commerce: Wine, July 2003, at 6.[1] The three-tier system likewise was designed "to prevent organized crime from gaining control of alcohol distribution." *Id.*

In sum, "[t]he hallmark of the three-tier system is a rigid, tightly regulated separation between producers, wholesalers, and retailers of alcoholic beverages," with the system "commonly described as an hourglass, with wholesalers at the constriction point." *Family Winemakers of Calif.* v. *Jenkins*, 592 F.3d 1, 5 (1st Cir. 2010). The Supreme Court has held that the three-tier system is " 'unquestionably legitimate.' " *Granholm*, 544 U.S. at 489 (quoting *North Dakota* v. *United States*, 495 U.S. 423, 432 (1986)). And it has stated in dicta that "[t]he Twenty-first Amendment * * * empowers [a state] to require that all liquor sold for use in th[at] State be purchased from a licensed in-state wholesaler." *Id.* (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring)).

D. Missouri Law

Missouri's alcohol-regulation system has the basic features described above. The first tier in Missouri is the "producer" category, which includes manufacturers, brewers, distillers, and winemakers. J.A. 29. The second tier is comprised of wholesalers, who buy from producers. *Id.* The third tier is comprised of retailers—bars, wine shops, package stores, supermarkets and the like—who buy

[1] *Available at* http://www.ftc.gov/os/2003/07/winereport2.pdf

from wholesalers and sell to consumers. *Id.*[2] Moreover, each of these tiers is subdivided into various licensure subcategories based on (among other things) the type of beverage the licensee sells. J.A. 30-34. In all, appellee the Division of Alcohol and Tobacco Control (the "Division"), which is in charge of licensing, issues 58 different types of licenses to participate in the three tiers. J.A. 31.

Of those 58 types of licenses, 56 are subject to no residency requirements. *Id.* Thus, for example, alcohol producers such as brewers or winemakers need not even be Missouri corporations, let alone meet the officer, ownership, or control requirements described above at pp. 1-2, to do business in Missouri. J.A. 30. The same goes for retailers of all sorts. *Id.* Indeed, even some wholesalers—those who sell beverages below 5 percent alcohol content, such as beer—may do business in Missouri regardless of their ownership structure or domicile. *Id.*

The situation is very different, however, for two particular categories of wholesalers—"Wholesaler-Solicitor, all kinds" and "Wholesaler-Solicitor, 22% alcohol or less." *Id.* Entities that wish to obtain these licenses, and participate in the Missouri wholesale market in liquor, wine, and the like, cannot do so unless they are domiciled in Missouri and operated, directed, and controlled by Missourians. J.A. 30, 60.

[2] Missouri also issues licenses for "solicitors," who buy alcoholic beverages from producers and sell them to wholesalers. J.A. 29. That licensure category does not alter the basic features of the three-tier system and is not relevant to this appeal.

The statute in question provides that "no wholesaler license shall be issued to a corporation for the sale of intoxicating liquor containing alcohol in excess of five percent by weight, *except to a resident corporation* as defined in this section." Mo. Rev. Stat. § 311.060.2(3) (emphasis added). It then defines "resident corporation," in relevant part, to be a Missouri corporation,

> all the officers and directors of which, and all the stockholders, who legally and beneficially own or control sixty percent or more of the stock in amount and in voting rights, shall be qualified legal voters and taxpaying citizens of the county and municipality in which they reside and who shall have been bona fide residents of the state for a period of three years continuously immediately prior to the date of filing of application for a license, provided that a stockholder need not be a voter or a taxpayer, and all the resident stockholders of which shall own, legally and beneficially, at least sixty percent of all the financial interest in the business to be licensed under this law[.]

Id. § 311.060.3. Under these provisions, in order to qualify as a "resident corporation," a company must meet five requirements: (1) it must be a Missouri corporation; (2) all its officers and directors must have been Missouri residents for three straight years prior to the filing of the application; (3) all its officers and directors must be qualified legal voters and taxpaying citizens of Missouri, as well as of the city and county in which they reside; (4) 60 percent of the stock in the corporation must be legally or beneficially owned or controlled by entities who have been residents of Missouri for at least three years; and (5) the stockholders who are Missouri residents must own, legally and beneficially, at least 60 percent

of all the "financial interest" in the corporation.[3] Henceforth, we refer to these five requirements as the "Residency Requirements." The first of the Residency Requirements bars foreign-domiciled corporations from Missouri's wholesale alcohol market. The latter four bar even *Missouri*-domiciled corporations from that market unless those corporations are composed entirely of local officers and directors and are owned and controlled by mostly local interests.[4]

The State Legislature added these requirements to Missouri's Code in 1947, *see* Act of May 21, 1947, § 1, 1947 Mo. Laws 370, 372, a year after the State's Attorney General opined that the liquor control law then on the books did not bar foreign corporations from obtaining wholesale licenses, *see* ADD14 (Missouri Att'y Gen. Op., May 17, 1946). The text of the 1947 enactment said nothing about the reason for the change. Amendment sponsor Senator M.C. Matthes, however, made the legislative motivation abundantly clear. According to a newspaper account, Senator Matthes "explained" the measure in the General Assembly by telling his fellow legislators that "an effort had been made to drive some Missouri firms out of business" and that the Residency Requirements were

[3] The statute originally required that 90 percent of the stock be owned or controlled by Missouri residents. This was reduced to 60 percent in 1987. *See* Act of Aug. 12, 1987, § A, 1987 Mo. Laws 734, 734.

[4] Corporations already licensed as wholesalers on January 1, 1947, were exempted from having to meet these requirements, and to this day a wholesaler that does not meet the requirements continues to operate in Missouri under this grandfathering provision. J.A. 61. We discuss the significance of that fact *infra* at pp. 31-32, 36.

"*intended to prevent a few big national distillers from monopolizing the wholesale liquor business in Missouri*[.]" *Telegrams Favoring Veto Flood Governor's Desk on Liquor Bill*, Jefferson City Post-Tribune, May 9, 1947, at 1 ("1947 Post-Tribune Article")[5] (emphasis added).

E. SWS Missouri's License Application

Appellant Southern Wine & Spirits of America, Inc. ("Southern Wine"), a Florida corporation, is the largest distributor of wine, spirits, beer and various non-alcoholic beverages in the United States; the company and its subsidiaries operate in 35 states and the District of Columbia. In March 2011, Southern Wine created SWS Missouri as a wholly-owned subsidiary. SWS Missouri is organized under the laws of the Missouri. J.A. 25. It was incorporated for the purpose of operating as a wholesaler in Missouri. J.A. 27. The parties stipulated that SWS Missouri planned (and plans) to operate out of facilities physically located in the state. *Id.* On July 1, 2011, SWS Missouri applied to the Division for the necessary wholesaler's license. *Id.*

On July 11, however, appellee Lafayette Lacy, the Division's Supervisor, denied SWS Missouri's application. J.A. 46-47. The Division acknowledged that SWS Missouri met all other statutory and regulatory criteria for licensure as a

[5] *Available at* http://newspaperarchive.com/jefferson-city-post-tribune/1947-05-09. Because the online text is small, and a larger text size is available only by subscription, we have included this document in the Addendum. *See* ADD20.

Missouri wholesaler; it denied SWS Missouri a license solely on the ground that the company did not fulfill all of the Residency Requirements. JA. 46-47, 65.

SWS Missouri met the first of those requirements (regarding corporate domicile) because it is incorporated in Missouri. It met none of the latter four, however. Its officers and directors neither live nor are qualified voters in Missouri. (All are Florida residents.)[6] J.A. 25-26. And it is neither owned nor controlled by 60 percent Missouri interests, because it is wholly owned by Southern Wine. J.A. 25. The Division accordingly informed SWS Missouri that it could not participate in the Missouri wholesale alcohol market, despite the fact that it is a Missouri corporation that planned to operate entirely in Missouri.

F. Proceedings Below

Plaintiffs filed suit, arguing that the Residency Requirements plainly discriminate against out-of-state economic interests in violation of the dormant Commerce Clause. J.A. 17-21. They also argued, *inter alia*, that the requirements violate the Equal Protection Clause. *Id.*

The State responded by conceding—indeed, stipulating—that the Residency Requirements discriminate against interstate commerce: "The parties agree that

[6] Many of those officers, and all of the directors, are the individual appellants in this case: Harvey R. Chaplin, chairman and chief executive officer of Southern Wine and SWS Missouri; Wayne E. Chaplin, president and chief operating officer of both companies; Steven R. Becker, executive vice president and treasurer of both companies; and Paul B. Chaplin, a director of both companies.

the Missouri statutes and the residency requirements described herein treat non-residents engaged in interstate commerce less favorably than Missouri residents engaged in intrastate commerce." J.A. 31. Moreover, the State made no attempt to argue that the Residency Requirements satisfy the "rigorous scrutiny" to which such facially discriminatory statutes are subject under the dormant Commerce Clause. *Jones* v. *Gale*, 470 F.3d 1261, 1270 (8th Cir. 2006) (citation omitted). Instead, it argued that the discriminatory provisions were immunized from Commerce Clause scrutiny by Section 2 of the Twenty-first Amendment. J.A. 45.

Plaintiffs replied that the Residency Requirements "serve[d] no objective of the state" relevant to the Twenty-first Amendment and therefore could not be immunized by that provision. Dist. Ct. Docket No. 48 at 10. They observed that the only objectives to which defendants could point—"combating underage drinking, promoting responsible consumption, and ensuring accountability"—were not advanced by requiring that a Missouri wholesaler have local officers and owners. *Id*. at 9. Moreover, they pointed out that the Division's designated witness, Deputy State Supervisor Mike Schler, had actually conceded in deposition testimony that the Residency Requirements played no role whatever in Missouri's liquor control regime or the three-tier system:

> Q: [T]he Missouri resident corporation requirement, it doesn't really impact the distribution system in the state for liquor, does it?

A: *Correct. I don't think it impacts the distribution system*.

* * *

Q: This lawsuit doesn't erode the three-tier system, does it?

A: *No*.

Q: So * * * if the Court decided that [SWS Missouri] should be licensed * * * that doesn't erode the three-tier system, does it?

A: *I don't see it doing anything*.

J.A. 72-73 (emphases added).

The District Court nonetheless entered summary judgment in favor of the defendants, holding that the discriminatory Residency Requirements were immunized from Commerce Clause scrutiny by the Twenty-first Amendment and that they did not violate equal protection. J.A. 86-98. On the first point, the court held that "the language of *Granholm* * * * allows Missouri to discriminate in favor of in-state wholesalers"—regardless of the degree to which that discrimination advances the interests at the heart of the Twenty-first Amendment—because "[r]egulations that discriminate in favor of in-state wholesalers are an integral component of a three-tier system[.]" J.A. 93-94. On the second point, the court held "the Twenty-first Amendment defeats the need for an equal protection analysis" and that "in any case, the residency requirements easily satisfy the rational basis test." J.A. 97.

Plaintiffs timely appealed.

SUMMARY OF ARGUMENT

1. The decision below should be reversed, first and foremost, because Missouri's discriminatory Residency Requirements are invalid under the dormant Commerce Clause and are not rescued by the Twenty-first Amendment.

a. There is no serious question that the Residency Requirements violate the dormant Commerce Clause. The State stipulated that those requirements discriminate against interstate commerce. And it did not even try to meet the "rigorous scrutiny," *Jones*, 470 F.3d at 1270, to which discriminatory laws are subject by making a "clear[ ] showing," based on "concrete record evidence," that the discrimination is necessary and other alternatives are "unworkable." *Granholm*, 544 U.S. at 490-493. Instead, it made no showing, and it put in no such evidence. The Residency Requirements do not survive Commerce Clause scrutiny.

b. The question for the Court thus becomes whether these discriminatory provisions are nevertheless immunized by the Twenty-first Amendment. The District Court concluded that they are because (i) the three-tier system is valid under the Twenty-first Amendment and (ii) "[r]egulations that discriminate in favor of in-state wholesalers are an integral component of a three-tier system[.]" J.A. 94. That logic collapses at the second step. The court failed to recognize that not *all* regulations that discriminate in favor of in-state wholesalers are "integral" to the three-tier system. And here, the discriminatory regulations blocking SWS

Missouri from the Missouri wholesale market—the Residency Requirements—demonstrably are *not* integral to that system. The State's witnesses conceded that the requirements have nothing to do with the system's operation. And the requirements do not advance the policies—promotion of temperance, limitation of sales to minors, elimination of crime in alcohol distribution—that underlie the Twenty-first Amendment. On the contrary, the legislative history makes clear that the requirements were motivated by protectionism, pure and simple. In short, Missouri's discriminatory policies are not "supported by a[ ] clear concern of the Twenty-first Amendment." *Bacchus*, 468 U.S. at 276. That is the test, and the Residency Requirements cannot meet it. They are invalid.

2. The District Court separately should be reversed on equal-protection grounds because the Residency Requirements bear no rational relationship to any legitimate government interest. Every interest the State identified below—avoiding underage drinking, subjecting corporations to Missouri enforcement mechanisms, promoting an orderly market, and so on—has nothing to do with, and is not advanced by, the Residency Requirements. The classification created by those requirements accordingly bears no "reasonable and just relation to the things in respect to which [it] is imposed." *Southern Ry.*, 216 U.S. at 417-418. And the one purpose it *does* advance—protectionism—is invalid on rational basis review. The Residency Requirements can and should be struck down on this ground too.

ARGUMENT

I. MISSOURI'S RESIDENCY REQUIREMENTS VIOLATE THE DORMANT COMMERCE CLAUSE.

This Court first must determine whether the Residency Requirements "violate[ ] the Commerce Clause without consideration of the Twenty-First Amendment" before examining whether the Amendment saves them. *Beskind* v. *Easley*, 325 F.3d 506, 513-514 (4th Cir. 2003); *accord Granholm*, 544 U.S. at 472-476 (analyzing compliance with the dormant Commerce Clause before proceeding to Twenty-first Amendment analysis). That determination is quickly made here, for the State effectively conceded the dormant Commerce Clause point below and in any case could not defend its requirements under the applicable test.

A. Discriminatory Laws Violate The Dormant Commerce Clause Unless They Meet "Rigorous" Scrutiny.

When determining whether a law violates the dormant Commerce Clause, the Court must first examine "whether the challenged law discriminates against interstate commerce"—that is, whether it effects "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *South Dakota Farm Bur*. v. *Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003) (quoting *Oregon Waste*, 511 U.S. at 99). "A law 'overtly discriminates' against interstate commerce if it is discriminatory on its face, if it has a discriminatory purpose, or if it has a discriminatory effect." *Jones*, 470 F.3d at 1267 (citation omitted). Such

laws are "*per se* invalid unless the [State] can demonstrate, under rigorous scrutiny," that the discrimination advances a legitimate local interest and that the State has "no other means" to do so. *Id.* at 1270 (citation omitted); *accord Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979); *SDDS, Inc.* v. *South Dakota*, 47 F.3d 263, 271 (8th Cir. 1995). The "burden is on the State to show that the *discrimination* is demonstrably justified." *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 344 (1992) (emphasis in original). To carry that burden, the State must make a " 'clear[ ] showing,' " based on "concrete record evidence," that the discrimination is necessary and other alternatives are "unworkable." *Granholm*, 544 U.S. at 490-493 (quoting *C & A Carbone, Inc.* v. *Clarkstown*, 511 U.S. 383, 393 (1994)).

B. Missouri Concedes That Its Requirements Are Discriminatory And Has Made No Effort To Meet The "Rigorous" Scrutiny Applicable To Such Laws.

Here, there is no question that the Residency Requirements are discriminatory. The State conceded as much, stipulating that the challenged provision "treat[s] non-residents engaged in interstate commerce less favorably than Missouri residents engaged in interstate commerce." J.A. 31. But even if it had not, the conclusion would be obvious. The Residency Requirements give Missouri corporations with local officers, directors, and owners access to the Missouri wholesale alcohol market while flatly denying that same access to Missouri corporations that are located and operate in the state but happen to have

out-of-state leadership or ownership. Mo. Rev. Stat. § 311.060.3; *see supra* at 11. That is the very definition of "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *South Dakota Farm Bur.*, 340 F.3d at 593. Many courts have recognized as much. They have held similar residency requirements—including some in the context of alcohol licensing—to be facially discriminatory and have subjected them to the strictest Commerce Clause scrutiny. *See Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 40 (1980) (state law is discriminatory under the Commerce Clause where it "overtly prevents foreign enterprises from competing in local markets"); *Cooper* v. *McBeath*, 11 F.3d 547, 549 (5th Cir. 1994) (three-year residency requirement and 51% local ownership requirement are discriminatory); *Southern Wine & Spirits of Tex., Inc.* v. *Steen*, 486 F. Supp. 2d 626, 628 (W.D. Tex. 2007) (one-year residency requirement is discriminatory); *Peoples Super Liquor Stores, Inc.* v. *Jenkins*, 432 F. Supp. 2d 200 (D. Mass. 2006).

The Residency Requirements, in short, are "discriminatory on [their] face." *Jones*, 470 F.3d at 1269. They also have a discriminatory purpose: As set forth above at p. 12, their legislative sponsor unabashedly told the General Assembly that the requirements were "intended to prevent a few big national distillers from monopolizing the wholesale liquor business in Missouri[.]" ADD20. The State accordingly must overcome the rigorous scrutiny described above—a clear

showing, based on concrete record evidence, that (i) the State is advancing a legitimate local interest by discriminating and (ii) there are no feasible non-discriminatory means to the same end.

The State did not carry that burden here, nor did it attempt to. Its briefing never even addressed the "legitimate local interest" portion of the test. It put in no evidence, "concrete" or otherwise, showing how that portion of the test might be met. And while the State did make assertions that the discrimination advances its interests with respect to the *Twenty-first Amendment*, those assertions—discussed at greater length *infra* at pp. 33-39—do not remotely carry its Commerce Clause burden. The State argued, for example, that the Residency Requirements "ensure[ ] that corporate wholesalers have a true 'in-state' presence." Dist. Ct. Docket No. 43 at 11. But that is a tautology, akin to justifying discriminatory legislation on the basis that it discriminates. The State argued that the requirements "place[ ] wholesalers within easy reach of Missouri's enforcement arm and subject[ ] them to scrutiny within the State of Missouri." *Id.* at 12. But in-state corporations such as SWS Missouri already *are* within reach of Missouri's "enforcement arm" and subject to the scrutiny of state regulators; as the Fifth Circuit observed in rejecting a similar argument, if Missouri "desires to scrutinize its applicants thoroughly, as is its right, it can devise nondiscriminatory means

short of saddling" applicants' officers, directors and owners "with the 'burden' of residing in" a particular state. *Cooper*, 11 F.3d at 554.

Finally, the State argued that the challenged provisions "help[ ] to * * * prevent the excesses and harms that led to Prohibition." Dist. Ct. Docket No. 43 at 12. But that is a bare assertion. The State never attempted to explain *how* the Residency Requirements help to prevent any such "excesses and harms"; much less did it support the assertion with a "clear[ ] showing" based on "concrete record evidence." *Granholm*, 544 U.S. at 490, 493 (citation omitted). "[U]nsupported assertions" simply are "not enough" to carry the State's burden. *Id.* at 490.

In any event, even if the State had attempted to demonstrate a legitimate local interest advanced by Missouri's discrimination, that would make no difference because it made no effort whatsoever to fulfill the other half of the test—that the State had "no other means to advance" that interest. *Jones*, 470 F.3d at 1267 (citation omitted). It was the State's burden "to justify [the measure] both in terms of the local benefits flowing from the statute and the unavailability of a nondiscriminatory alternative adequate to preserve the local interests at stake," *id.* (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)), and it failed to do so. The Residency Requirements accordingly violate the dormant Commerce Clause and can only be saved if authorized by the Twenty-first Amendment.

II. THE TWENTY-FIRST AMENDMENT DOES NOT AUTHORIZE THE DISCRIMINATORY RESIDENCY REQUIREMENTS.

The District Court concluded that the Residency Requirements *are* saved by the Twenty-first Amendment, on the theory that *Granholm* approved the three-tier system and that discrimination in favor of in-state wholesalers is "integral" to that system. J.A. 93-94. That is wrong. Of course, the three-tier system necessarily requires *some* discrimination; specifically, it requires that wholesalers (and retailers) be located "in-state." *Granholm*, 544 U.S. at 469, 489. But that does not mean—as the District Court appeared to conclude—that states can discriminate in favor of in-state wholesale interests in any and all other ways, even where the discrimination is *not* integral to the three-tier system. The Supreme Court has rejected that proposition. It has explained, instead, that such discrimination is permissible only if it is "supported by," and "closely related to," a "clear concern of the Twenty-first Amendment." *Bacchus*, 468 U.S. at 275-276 (citation omitted). The Residency Requirements do not come close to meeting that test. The Twenty-first Amendment accordingly does not save them from invalidation.

A. *Granholm* And Its Predecessors Acknowledge Broad State Power To Regulate Liquor But Also Require Adherence To The Commerce Clause's Non-Discrimination Principle.

1. The Pre-*Granholm* Cases.

The Supreme Court has long sounded two themes in its Twenty-first Amendment cases: On the one hand, states have broad power to regulate alcohol;

on the other, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm*, 544 U.S. at 487-488; *accord Bacchus*, 468 U.S. at 276; *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 578 (1986); *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 327-328 (1989). As the District Court recognized, these two principles exist in a "tense relationship" with one another. J.A. 90. But the Supreme Court long ago devised a test to resolve that tension, and determine which constitutional provision prevails, in a given case: "The question in each case is 'whether the interests implicated by a state regulation are *so closely related* to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict' " with the dormant Commerce Clause. *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 347 (1987) (emphasis added) (quoting *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984)); *accord Bacchus*, 468 U.S. at 275-276 (reciting test). The Court more recently put the test another way, instructing courts faced with a discriminatory state liquor law to ask "whether the principles underlying the Twenty-first Amendment are sufficiently implicated" by the law's discriminatory aspect "to outweigh the Commerce Clause principles that would otherwise be offended." *Bacchus*, 468 U.S. at 275. If the discriminatory provision is not "*supported* by any *clear concern* of the Twenty-first Amendment," *id.* at 276 (emphases added), then the Amendment cannot save it.

2. *Granholm*.

Granholm continued to apply the *Bacchus* framework. In *Granholm*, consumers and out-of-state wineries challenged state laws that permitted in-state wineries, but not out-of-state wineries, to sell wine directly to consumers. 544 U.S. at 465. The Court began by analyzing the laws under the dormant Commerce Clause. It found "no difficulty" in concluding that they "discriminate[ ] against interstate commerce." *Id.* at 476. And it rejected the defendant states' efforts to meet the rigorous scrutiny applicable to discriminatory laws, explaining that their "unsupported assertions" of a legitimate state interest did not suffice. *Id.* at 490.

The Court thus turned to the question whether the Twenty-first Amendment saved the state laws by "immuniz[ing]" them from Commerce Clause scrutiny. *Id.* at 470. It held that the answer was no. The Court explained that the "aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use," but that the Amendment "did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Id.* at 484-485. It reiterated that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Id.* at 486-487. And it held that the particular laws under challenge in *Granholm*—laws discriminating against out-of-state producers of alcohol—were invalid under *Bacchus*, which had struck down a Hawaii liquor

excise tax that exempted certain alcoholic beverages produced in that state. *Id.* at 487-488. The Court explained that *Bacchus* "foreclose[d] any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny." *Id.*

Having concluded that the challenged laws could not stand, the Court addressed the defendant states' argument that "invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system." *Id.* at 488. The Court's rejoinder is at the heart of this case:

> This does not follow from our holding. * * * States may * * * 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., at 432. *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.

Id. at 488-489 (some citations omitted; third omission in the original).

That, in a nutshell, is the same argument Appellants make here. The three-tier system is "unquestionably legitimate." *Id.* at 489. But that does not mean states can graft on top of that three-tier system discrimination against out-of-state interests that goes well beyond the system's requirements.

B. *Granholm* Does Not Insulate All Discrimination Against Wholesalers From Commerce Clause Scrutiny.

The District Court relied almost entirely on *Granholm* for its holding below. The court recognized that *Granholm* articulated a robust non-discrimination rule for the tier at issue in that case—namely, "*producers* of alcoholic goods." J.A. 92 (emphasis added). As the court saw things, however, the situation for wholesalers (and retailers) was exactly the opposite. The court understood the *Granholm* Court's repeated references to "producers"[7] to mean that the dormant Commerce Clause's protections apply *only* to that tier, leaving states free to discriminate against wholesalers and retailers. *See* J.A. 93-94.[8] Likewise, the court understood the *Granholm* passage reproduced above—with its endorsement of the three-tier system and of requirements that liquor "be purchased from a licensed in-state wholesaler"—to mean that *any and all* discrimination against out-of-state interests is permissible in the wholesale tier. J.A. 92-94. After all, the court wrote, "[r]egulations which discriminate in favor of in-state wholesalers are an integral component of a three-tier system." J.A. 93.

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[7] *See, e.g.*, *Granholm*, 544 U.S. at 486 ("the Twenty-first Amendment * * * does not displace the rule that States may not give a discriminatory preference *to their own producers*") (emphasis added); *id.* at 489 ("State policies are protected under the Twenty-first Amendment when they treat *liquor produced out of state* the same as its domestic equivalent.") (emphasis added).

[8] In interpreting *Granholm* this way, the court relied on two decisions from other circuits. *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185, 191 (2d Cir. 2009); *Brooks* v. *Vassar*, 462 F.3d 341 (4th Cir. 2006). We discuss those decisions *infra* at p. 33.

The District Court misread *Granholm* twice over.

First, *Granholm* did not categorically limit the dormant Commerce Clause's protections to producers. To be sure, *Granholm* did articulate a forceful non-discrimination rule as to producers—but that is simply because producers happened to be the plaintiffs. State regulation of liquor wholesalers or retailers was not before the Court. *See Wine Country*, 612 F.3d at 818-820 (acknowledging that *Granholm* was focused only on producers and conducting independent analysis in case involving discrimination against retailers); *accord Siesta Village Market, LLC* v. *Granholm*, 596 F. Supp. 2d 1035, 1038 (E.D. Mich. 2008); *Jenkins*, 432 F. Supp. 2d at 221.

Nor would such a categorical distinction between producers and wholesalers have been consistent with the Supreme Court's prior precedents. In both *324 Liquor Corp.*, 479 U.S. at 346 -352, and *Midcal*, 445 U.S. at 110, the Court concluded that *retail* and *wholesale* pricing requirements violated federal Commerce Clause interests embodied by Sherman Act, and were not saved by the Twenty-first Amendment, even though they ostensibly treated in-state and out-of-state liquor equally. Moreover, cases like *324 Liquor Corp.* and *Bacchus* have long explained that state alcohol regulation is subject to the dormant Commerce Clause's non-discrimination principle, and have recited the "so closely related to the powers reserved by the Twenty-first Amendment" test, without ever suggesting

that that principle or that test are arbitrarily limited to producers alone. *324 Liquor Corp.*, 479 U.S. at 347; *Bacchus*, 468 U.S. at 276. It defies common sense to imagine that *Granholm* meant to overturn all of those decisions *sub silentio*. The District Court's construal of *Granholm* to permit *blanket* authorization to discriminate in the wholesale tier cannot withstand scrutiny. It furthers none of the purposes of either the Twenty-first Amendment or the dormant Commerce Clause. It should be rejected.

Second, the District Court likewise erred in construing *Granholm*'s endorsement of the three-tier system to mean that *all* discrimination against out-of-state interests is categorically permissible in the wholesale tier. J.A. 93-94. When the *Granholm* Court reaffirmed the constitutionality of the three-tier system—and in particular the right of states to funnel alcohol distribution through in-state wholesalers within that system—it insulated from Commerce Clause scrutiny only discrimination that is "*inherent in the three-tier system itself*." *Wine Country*, 612 F.3d at 818 (emphasis added); *accord Arnold's Wines*, 571 F.3d at 191 (recognizing that under *Granholm* discriminatory regulations that are "*integral parts*[ ] of the underlying three-tier systems" are permissible) (emphasis added). Any broader reading would, once again, be inconsistent with cases such as *324 Liquor Corp.*, *Midcal*, and *Granholm*, which recognize that the Commerce Clause imposes a check on states' freedom to regulate.

The sort of discrimination at issue in this case—most particularly, the officer, director, and control portions of the Residency Requirements—assuredly is neither essential to, nor inherent in, the three-tier system. The three-tier system requires that wholesalers be "within that state." *Wine Country*, 612 F.3d at 815; *accord Granholm*, 544 U.S. at 469, 489 (three-tier system requires that wholesalers be located "in-state"). That physical presence is integral to the three-tier system because it allows the state to make wholesalers "the constriction point" in between producers and retailers, *Family Winemakers*, 592 F.3d at 5, and to regulate and inspect wholesalers more easily than if they were located elsewhere. But nothing about the three-tier system requires that those in-state wholesalers also be owned and run by in-state officers, directors, and shareholders. The courts have recognized as much. In *Wine Country*, for example, the Fifth Circuit observed that the "physical location of businesses" is "a critical component of the three-tier system," while the "legal residence of owners" is not. 612 F.3d at 821.

More importantly, the State has conceded as much in this litigation. The State's designated witness testified that the failure to adhere to the Residency Requirements does not "impact[ ] the distribution system" and does not "erode the three-tier system." J.A. 72-73. If that were not clear enough, he testified: "I don't see it doing anything." J.A. 73. And he admitted that the State already *has* a licensed liquor wholesaler (Glazer's) that meets none of the Residency

Requirements due to a grandfathering arrangement, and that Glazer's participation in the market has not undercut the three-tier system in any way. J.A. 61-64, 73.

Finally, even if the State had not conceded the point, a simple fact makes clear that the Residency Requirement are not necessary to the three-tier system: *Only 10 other states* have such requirements for wholesalers.[9] The remaining 39 states, plus the District of Columbia, operate three-tier systems without requiring that wholesalers have resident owners, officers, and directors. That is proof positive that the Residency Requirements are not essential to the three-tier system.

In light of that fact, and the State's testimonial concessions, it was error for the District Court to conclude that the Residency Requirements are essential to the three-tier system and insulated from Commerce Clause scrutiny. Here, SWS Missouri is a Missouri corporation that, if licensed, will conduct its wholesale operations out of a Missouri warehouse that is staffed with, among other employees, a Missouri managing officer. J.A. 27, 69, 71. These "in-state" aspects

[9] *See* Ark. Code Ann. § 3-4-606(a); Ind. Code §§ 7.1-3-21; La. Rev. Stat. Ann. § 26:80; Md. Code Ann., art. 2B, § 9-101; Mass. Gen. Laws ch. 138, § 18; Mich. Comp. Laws § 436.1601; Miss. Code Ann. § 67-3-21; Okla. Stat. tit. 34, § 527(1); Tenn. Code Ann. § 57-3-203; W. Va. Code § 11-16-8(a)(1). Moreover, the attorneys general of at least two of these states—Indiana and Tennessee—have opined that such requirements are no longer valid following *Granholm*. *See Tenn. Residency Requirements for Alcoholic Beverages Wholesalers & Retailers*, Tenn. Att'y Gen. Op. No. 12-59, 2012 WL 2153491 (June 6, 2012); Indiana Att'y Gen. Advisory Op. No. 09-40, Sept. 14, 2009, at 5 (ADD21) (concluding that residency requirements applicable to supermajority of wholesaler shareholders do not "somehow undergird the State's special interest in preserving the traditional 'three-tier system' of alcohol distribution" (citing *Granholm*, 544 U.S. at 488)).

of SWS Missouri's wholesale business more than satisfy the structural requirements for the effective functioning of a three-tier system, as the State itself concedes. J.A. 72-73.[10] If the State seeks to regulate in a discriminatory fashion *beyond* these structural requirements, it is not entitled to avoid constitutional scrutiny by simply reciting the "three-tier" mantra. Instead, as we next discuss, the State must survive the test articulated in *Bacchus*.

C. The Residency Requirements Do Not Further the Underlying Principles of the Twenty-first Amendment.

Since Missouri's Residency Requirements are not essential to the three-tier system, they can survive review only if the discrimination they perpetrate is "supported by," and "closely related to," some *other* "clear concern of the Twenty-first Amendment." *Bacchus*, 468 U.S. at 275-276. It is not. The Twenty-first Amendment accordingly does not save the Residency Requirements from invalidation.

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[10] The decisions on which the District Court relied are distinguishable on this basis. In *Arnold's Wines* and *Brooks*, the Second and Fourth Circuits rejected challenges by *out-of-state* retailers, with no physical presence in the state, who wanted to be treated the same as *in-state* retailers. The courts concluded that those challenges failed because *Granholm* established that the three-tier system involves "in-state" retailers and wholesalers, 544 U.S. at 469, and the plaintiffs' positions thus "challeng[ed] the three-tier system itself." *Brooks*, 462 F.3d at 352; *Arnold's Wines*, 571 F.3d at 192 & n.3. This case is entirely different. It involves an *in-state* wholesaler, with *in-state* operations. Appellants' position thus does not challenge the three-tier system. The ground on which *Arnold's Wines* and *Brooks* rested their holdings does not apply.

1. The Supreme Court over the years has identified various "clear concern[s]," *id.*, of the Twenty-first Amendment. It has written that the Amendment's objectives include "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432. It has said the Amendment allows states "to combat the perceived evils of an unrestricted traffic in liquor," *Bacchus*, 468 U.S. at 276, and to determine "whether to permit importation or sale of liquor," *Midcal*, 445 U.S. at 110. The State in this case has suggested that its discrimination furthers the Amendment's goals by promoting responsible consumption, preventing sales to minors, bringing wholesalers within the reach of Missouri's "enforcement arm," and preventing unidentified "excesses" that led to Prohibition. Dist. Ct. Docket No. 43 at 11-12. And the State's designated witness suggested below that the Residency Requirements could ensure the easy collection of excise taxes. J.A. 62-63, 79-80.

But on inspection, none of these concerns even remotely justifies the Residency Requirements. Requiring an in-state wholesaler to have all local officers and directors, and a super-majority of local shareholders, does nothing to promote temperance or responsible consumption; those concerns are entirely unrelated to the Residency Requirements. The requirements do nothing to help raise revenue; SWS Missouri would pay the same fees and taxes as any other wholesaler. The requirements have no apparent relationship to fighting the

"perceived evils" of unrestricted liquor imports, *Bacchus*, 468 U.S. at 276, or combating crime; the State has offered no reason to believe, and we are aware of none, that there is any connection between those issues and the Residency Requirements (particularly for Missouri corporations, such as the Appellant). The requirements do nothing to fight underage drinking; as we discuss in more detail *infra* at pp. 42-43, it would make no sense to combat that evil by imposing additional requirements on *wholesalers*, who do not sell to the public. The requirements do nothing to bring a wholesaler within reach of the State's "enforcement arm"; as already discussed, a domestic corporation—or, for that matter, any corporation doing business in the State under a State license—is *already* within the reach of that enforcement arm. And as for excise taxes: In Missouri, it is the *manufacturer* or *solicitor*—not the wholesaler—that pays the excise tax on liquor within the three-tier system. *See* Missouri Dep't of Public Safety, Alcohol & Tobacco Control, *FAQs: Manufacturers, Wholesalers, Solicitors* ("The Primary American Source of the product pays the excise tax. That is, the Solicitor or Manufacturer is required to pay the excise taxes.");[11] *see also, e.g.*, Missouri Dep't of Public Safety, Alcohol & Tobacco Control, *Solicitor–Monthly Excise Tax Reporting* (taxes paid by solicitor on sales of out-of-state wine

[11] *Available at* http://www.atc.dps.mo.gov/licensing/faqs_mfg_wholesale_solicitors.asp#f6

and spirits).[12] That concern certainly does not justify the discriminatory treatment imposed by the Residency Requirements. In short, the Residency Requirements are not even *loosely* related to any of these purported concerns. Much less are they "so closely related" that the state can justify blatant discrimination. *Bacchus*, 468 U.S. at 275 (citation omitted).

Nor does the Court need to take our word for these propositions, for the facts of this case uniformly support them. First, the State's designated witness conceded many of them below: He could not identify any particular problem the Residency Requirements were intended to address, J.A. 59-60, 65-66, and he affirmatively agreed that, to his knowledge, the Residency Requirements do not fight organized crime, prevent the sale of alcohol to minors, promote temperance, or preserve Missouri's three-tier structure. J.A. 66-67, 70, 72-73, 76. Second, the notion that any of the Twenty-first Amendment concerns listed above justify the discriminatory Residency Requirements is belied by the fact that Missouri sees fit to impose those requirements on only *two of its 58 categories of licensees*. *See supra* at p. 10. Third, that notion is (again) belied by the fact that Glazer's, an out-of-state company, has been licensed as a wholesale liquor distributor in Missouri for decades, and that company's participation in the market has caused the State no problems. J.A 61-64, 73. Finally, it is belied by the fact, discussed above, that at

[12] *Available at* http://atc.dps.mo.gov/excise_tax/outstate_shipping_wine_spirits.asp

least 39 states do not impose wholesaler residency requirements like those here at issue.

2. In fact, despite the State's effort to point to supposed benign purposes, the legislative history reveals that the Residency Requirements were really motivated by a desire to protect Missouri wholesalers from out-of-state competition. As the legislation's sponsor put it, the requirements were "intended to prevent a few big national distillers from monopolizing the wholesale liquor business in Missouri[.]" ADD20. That history only reinforces the conclusion that the Residency Requirements are not immunized by the Twenty-first Amendment. After all, the Supreme Court has held that "the central purpose of the [Twenty-first Amendment] was *not* to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276 (emphasis added). And it has explained that "laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* This is just such a law, as its sponsor admitted on the floor of the legislature. It accordingly is not "supported" by a "clear concern of the Twenty-first Amendment." *Id.* at 276. Like the discriminatory statute at issue in *Bacchus*, it must be struck down.

3. Even if they were not pretextual, the concerns the State has advanced are a particularly poor fit here because Appellant SWS Missouri is a *Missouri*

corporation. Thus even if the State could make a case for its corporate domicile requirement under the Twenty-first Amendment—for example, on the theory that the State's "enforcement arm" would have less power to reach a foreign-domiciled company—that rationale would not help the argument here. SWS Missouri, after all, is an in-state corporation and can be regulated like any other. The State therefore must explain instead why the remaining four Residency Requirements—officer and director residency, officer and director voting status, residency of shareholders, and residency of those who wield corporate control—are tied to a "clear concern" of the Twenty-first Amendment. *Bacchus*, 468 U.S. at 276. The State plainly can make no such showing. Those four requirements have no bearing on the goals the Amendment is intended to advance.

4. The conclusion that residency requirements such as those at issue here do not implicate the underlying principles of the Twenty-first Amendment is supported by several cases. In *Cooper*, for example, the Fifth Circuit applied the *Bacchus* test and concluded that the state's asserted interest of "facilitating background checks" in upholding durational residency requirement for liquor permit applicants was "not within the 'core concerns' of the Twenty-first Amendment." 11 F.3d at 555. And in *Glazer's Wholesale Drug Co.* v. *Kansas*, 145 F. Supp. 2d 1234 (D. Kan. 2001), the wholesaler plaintiff challenged Kansas prerequisites to obtaining a wholesaler license that included ten-year minimum

prior residency for officers, directors and stockholders—requirements very similar to those challenged here. The court concluded that those provisions clearly violated the dormant Commerce Clause. *Id.* at 1242. It then applied the test set forth in *Bacchus* to determine whether the provisions were nevertheless authorized by the Twenty-first Amendment, and it concluded that they were not. *Id.* at 1244-46. It wrote that "the residency requirement *has nothing to do with the manner of liquor distribution in Kansas* or compliance with governing standards applicable to such distribution." *Id.* at 1246. And it rejected other justifications— including promotion of temperance and protecting the public—as "generic" and unrelated to the particular residency provisions at issue. *Id.* at 1242; *accord* Indiana Att'y Gen. Advisory Op. No. 09-40, Sept. 14, 2009, at 5 (ADD21) ("Requiring 60% of a wholesaler's owners to have resided in Indiana for five years has no apparent relationship to collecting revenue, inspecting inventory, monitoring sales practices, or preventing underage drinking," nor does it "somehow undergird the State's special interest in preserving the traditional 'three-tier system' of alcohol distribution.").

Exactly. The analysis in *Glazer's* applies with equal force to this case. The Residency Requirements are not "supported by any clear concern of the Twenty-first Amendment," *Bacchus*, 468 U.S. at 276, and the District Court's award of summary judgment to Appellees should be reversed.

III. MISSOURI'S RESIDENCY REQUIREMENTS VIOLATE THE EQUAL PROTECTION CLAUSE.

The District Court should also be reversed for a separate and independent reason. The Residency Requirements violate the Equal Protection Clause of the Fourteenth Amendment because they treat similarly situated persons unequally without any rational basis.[13]

1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Generally, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights," *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993), will be sustained "if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440.

The courts have made clear, however, that a state cannot employ "arbitrary or unreasonable [liquor] licensing procedures" consistently with the Equal Protection Clause. *Parks* v. *Allen*, 409 F.2d 210, 211 (5th Cir. 1969). Moreover, the Supreme Court repeatedly has held that "promotion of domestic business

[13] The District Court asserted that "the Twenty-First Amendment defeats the need for an equal protection analysis." J.A. 97. That is clearly incorrect. It is well-established that "the operation of the Twenty-first Amendment does not alter the application of equal protection standards." *Craig* v. *Boren*, 429 U.S. 190, 209 (1976); *see also Granholm*, 544 U.S. at 486 ("[S]tate laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment.").

within a State, by discriminating against foreign corporations"—or foreign officers, directors or owners—"that wish to compete by doing business there, is not a legitimate state purpose." *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 880 (1985); *see also Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 571-572 (1949) ("After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny[.]"). Thus when a state subjects such an entity to a "more onerous rule" than "domestic corporations for the same privilege," the state must show that "such classification [is] based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed." *Southern Ry.*, 216 U.S. at 417-418. The classification must have a "substantial basis." *Id*. at 417.

2. The Residency Requirements fail that test. SWS Missouri is a Missouri corporation with Missouri facilities seeking a license to do business as a liquor wholesaler in the State. However, SWS Missouri is treated differently from other similarly situated entities in connection with that license *solely* on the basis of the citizenship and residency of its officers, directors and shareholders. That distinction fails the equal-protection test no matter how framed. For reasons we have already discussed, it is not rationally related to a legitimate state interest; it is

arbitrary; it lacks a substantial basis; and its only demonstrable purpose—protectionism—is invalid.

a. The State's primary argument below in support of this discrimination was borrowed from the *Granholm* dissent: " '[P]resence ensures accountability.' " Dist. Ct. Docket No. 43 at 11-12 (quoting *Granholm*, 544 U.S. at 523 (Thomas, J., dissenting)). But SWS Missouri *is* present in the state in every relevant sense. It is incorporated in the state; it plans to do business in the state; there is a managing officer in charge of its in-state affairs; and its in-state office and property are subject to state regulation, inspection, tax, and judicial process. *See Granholm*, 544 U.S. at 523 (Thomas, J., dissenting) (noting that "it is easier to regulate in-state wholesalers" because a state can "inspect[ ] the premises and attach[ ] the property of in-state entities"). The accountability rationale is not plausible.

b. The State suggested that the state's liquor laws in general are designed to "combat illegal underage drinking." Dist. Ct. Docket No. 43 at 11. Perhaps so—but that goal has no connection to the particular Residency Requirements challenged here. After all, barring corporations with out-of-state directors and shareholders from becoming *wholesalers* has nothing to do with underage drinking; wholesalers do not sell directly to consumers. J.A. 66. Moreover, it is worth noting that Missouri lets out-of-state *retailers* such as Walmart sell directly to consumers. J.A. 30, 70-72. If the residency of directors and shareholders were

somehow relevant to the goal of curbing underage drinking—which it is not—it would make no sense to target out-of-state wholesalers but not out-of-state retailers. The underage drinking rationale fails.

c. The State next suggested that its liquor laws generally are designed to "maintain[ ] an orderly marketplace." Dist. Ct. Docket No. 43 at 11. Once again, that may be so, but the *particular* requirements at issue here have nothing to do with that goal. There is no apparent reason—and the State has supplied none—to believe the marketplace would be any less "orderly" if a domestic corporation like SWS Missouri were to hold a wholesaler's license. Indeed, the notion that out-of-state control of a domestic licensee has any bearing on the marketplace's orderliness is belied by the fact that the other 56 types of Missouri alcohol licensees—including other wholesalers—can be licensed regardless of their locus of control. *See supra* at p. 10. It likewise is belied by the fact that an out-of-state wholesaler, Glazer's, has long been licensed in Missouri without any negative impact on the "orderly marketplace" the State seeks. J.A. 61-64, 73.

d. The State's designee offered another conceivable state interest during his deposition: facilitating the collection of excise taxes. J.A. 62-63, 79-80. But as already discussed, those taxes are collected from *solicitors*, not wholesalers. *See supra* at 35. This justification for the law is completely irrational.

e. Another possible justification is that Missouri is concerned that "persons connected with organized crime" may get into the liquor business. *Coolman* v. *Robinson*, 452 F. Supp. 1324, 1329 (N.D. Ind. 1978). But the Division's representative disavowed this purpose, testifying that the Division was unaware of any purpose the "resident corporation" requirements might serve other than facilitating excise tax collection and that he did not think the requirements bore any relation to the "safety of Missouri citizens." J.A. 53, 65-69, 76; *see Nordlinger* v. *Hahn*, 505 U.S. 1, 15 (1992) (rational basis review "does require that a purpose * * * 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker") (citation omitted). And in any event, the assertion that the requirements could be justified by fear of organized crime is belied, once again, by the fact that only two of 58 types of alcohol licenses are subject to them. As a federal district court recently wrote in striking down a state law that barred grocery stores from selling liquor and wine while permitting drugstores to do so: "[T]he attenuated or non-existent relationship between the Statute's classification and any number of potential legislative goals leaves the Court with no other conclusion than that the Statute offends the Equal Protection Clause and, for that reason, must be struck down as unconstitutional." *Maxwell's Pic-Pac, Inc.* v. *Dehner*, No. 3:11–CV–18–H, 2012 WL 3527043, at *13 (W.D. Ky. Aug. 14, 2012).

In the end, Missouri is left with no viable basis for its law; discriminating against a wholesaler because some of its shareholders and directors do not live in the state bears no "rational relation to some legitimate end." *Romer* v. *Evans*, 517 U.S. 620, 631 (1996). That, no doubt, is because the Residency Requirements actually were motivated by a desire to protect Missouri business from out-of-state competition. But *that* state interest will not do because "promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose." *Metropolitan Life*, 470 U.S. at 880. The only demonstrable rationale for the Residency Requirements—protectionism—only reinforces the fact that they cannot survive equal-protection review.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the attached Brief is proportionally spaced, has a 14-point typeface, and contains 10,465 words.

/s/ Dominic F. Perella
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CERTIFICATE OF SERVICE

I certify that the foregoing Brief was filed with the Clerk using the appellate CM/ECF system on September 6, 2012. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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