No. 12-2502

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Southern Wine & Spirits of America, Inc., Southern Wine & Spirits of Missouri, Inc., Harvey R. Chaplin, Wayne E. Chaplin, Paul B. Chaplin, and Steven R. Becker,

Plaintiffs-Appellants,

vs.

Division of Alcohol and Tobacco Control and Lafayette E. Lacy, Supervisor of Alcohol and Tobacco Control,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri
Case No. 11-4175-CV-C-NKL
The Honorable Nanette K. Laughrey, United States District Judge

AMICUS CURIAE BRIEF OF AMERICAN BEVERAGE LICENSEES IN SUPPORT OF DEFENDANTS-APPELLEES DIVISION OF ALCOHOL AND TOBACCO CONTROL, ET AL FOR AFFIRMANCE

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Corporate Disclosure Statement

The American Beverage Licensees is a New York non-profit corporation. It does not have any parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

INTERESTS OF AMICUS CURIAE[1]

A. The American Beverage Licensees

American Beverage Licensees (ABL) was created in 2002 after the merger of the National Association of Beverage Retailers (NABR) and the National Licensed Beverage Association (NLBA).

The ABL is an association representing licensed off-premises retailers (such as package liquor stores) and on-premises retailers (such as bars, taverns, restaurants) across the nation.

ABL has nearly 20,000 members in 34 states (some of which are within the jurisdiction of the Eighth Circuit Court of Appeals). Many of ABL's members are independent family owned operations who assure that beverage alcohol is sold and consumed responsibly by adults in conformity with the laws of the state in which each member does business.

ABL continually monitors federal legislation, judicial decisions and trends of concern to beverage alcohol retailers. ABL is strongly committed to working with others under effective regulation toward the responsible sale of beverage alcohol products.

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[1] No counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money for the preparation or submission of this brief. The National Beer Wholesalers Association contributed money to fund the preparation and submission of this brief, but its contents have been reviewed and approved solely by the American Beverage Licensees.

ABL believes that state laws concerning the structure of a state's beverage alcohol distribution system are entitled to judicial deference. ABL supports the defendants-appellees and urges affirmance of the District Court decision.

SUMMARY OF ARGUMENT

The trial court correctly concluded that Missouri's wholesaler residency law is a rational exercise of that state's power to structure its beverage alcohol system. There is evidence that the law was not enacted for a discriminatory purpose; rather, it was a legitimate response to the threat, in 1947, that the wholesaler and supplier tiers would be vertically integrated through affiliated corporations. The challenged law continues to express Missouri's Twenty-first Amendment interest in the structure of its three-tier distribution system and does not violate the dormant commerce clause.

Because the law is rational, it withstands an equal protection challenge.

The fact that one regulator is uninformed about the purpose and benefits of a law does not negate the legislative decision that the law is in a State's best interest.

The decision of the trial court should be affirmed.

ARGUMENT

THE DISTRICT COURT SHOULD BE AFFIRMED BECAUSE THE CHALLENGED LAW IS A RATIONAL EXERCISE OF MISSOURI'S RIGHT TO STRUCTURE ITS BEVERAGE ALCOHOL DISTRIBUTION SYSTEM

Introduction

It has long been recognized that "liquor" is "a lawlessness unto itself" [2] and that the Twenty-first Amendment, U.S. Const. Amed. XXI, gives states the primary responsibility for regulating traffic in wine, beer and spirits for use within their borders.

The last seven decades have demonstrated the utility and effectiveness of state-based regulation of beverage alcohol. Before and during National Prohibition, abuse of beverage alcohol was an acute problem generating constant public outcry. Because of effective state regulation, since repeal of National Prohibition it has been no more than a chronic problem.

[2] *Duckworth v Arkansas*, 314 U.S. 390, 398-399 (1941) (Jackson, J., concurring in result). (In the words of Justice Jackson: "The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular Constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to get out of legal bounds.' It was their unsatisfactory experience with that method that resulted in giving liquor an exclusive place in constitutional law as a commodity whose transportation is governed by a special, constitutional provision." *Id*.)

Regulation, while no longer the constant subject of debate, remains necessary. Public concern with both intemperate and underage consumption is obvious and justified. State enforcement powers are needed to curb excessive sales, to avoid disorderly market conditions and to ensure compliance with state regulatory schemes. The wholesaler tier plays a unique and pivotal role in state regulation under a three-tier distribution system, since wholesalers are the "funnel" through which beverage alcohol passes from supplier to retailer. *Granholm v. Heald*, 544 U.S. 460, 489 (2005).

As recognized by the trial court, the residency requirement for Missouri wholesalers is a rational exercise of Missouri's power to regulate beverage alcohol and to structure its beverage alcohol distribution system. The challenged statute "promote[s] greater accountability and responsibility on the part of" wholesalers and the fact that the requirements are imposed only upon wholesalers of liquor containing more than five percent alcohol by weight has a "rational basis" given the "greater risks of harm to the community" from higher alcohol content beverages. J.A. at 97-98.

Although Missouri lacks formal legislative history, there is strong evidence that, when initially passed, the challenged law was not the result of intentional discrimination whose purpose was solely to benefit in-state entities. Rather, it was a measured response to a threat to Missouri's three-tier distribution system posed

by a supplier who was attempting (through a wholly owned wholesaler subsidiary) to do its own distribution of beverage alcohol. Thus, the challenged residency requirement had a legitimate non-discriminatory purpose when first enacted in 1947. As recognized by the trial court it continues to have a legitimate purpose today. It is a reasonable regulation which, given "the states virtually complete control over … how to structure the liquor distribution system", should not be cast aside.[3]

[3] *Granholm*, 544 U.S. at 488, quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

Analysis

I.

That the Twenty-first Amendment grants states broad authority over how to structure their beverage alcohol distribution systems has been confirmed in numerous Supreme Court decisions going back to the repeal of National Prohibition through the recent decision in *Granholm.* See, e.g., *Capitol Cities Cable, Inc. v. Crist*, 467 U.S. 691, 712, 715 (1983) ("The States enjoy broad powers under Section 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders" and exercising state control over whether to permit "importation or sale of liquor and how to structure the liquor distribution system" is "the central power reserved by Section 2 of the Twenty-first Amendment."); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc*., 445 U.S. 97, 110 (1980) ("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."); and, *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333 (1936) (recognizing a state's right to "regulate or control the transportation of . . . liquor . . . from the time of its entry into the State… in the interest of preventing unlawful diversion into her territory").

The broad reach of state regulation of beverage alcohol is recognized and confirmed by numerous Acts of Congress. For example, the Webb-Kenyon Act, 27 U.S.C. § 122 was first enacted in 1913 and then re-enacted in 1935 after the repeal of National Prohibition.[4] The 1935 re-enactment serves as explicit post-Twenty-first Amendment Congressional recognition that states are the primary regulators of beverage alcohol within their borders and that state law must be respected.

More recently, in 2000 Congress enacted the "Twenty-first Amendment Enforcement Act", 27 U.S.C. § 122a(b) giving state Attorneys General the ability to avail themselves of federal court jurisdiction and injunctive relief to enforce state laws dealing with alcohol. In 2006, Congress passed the "Sober Truth in Preventing Underage Drinking Act", 42 U.S.C. § 290bb-25b. In that Act, Congress recognized that "alcohol is a unique product and should be regulated differently than other products" and that "states have primary authority to regulate alcohol distribution and sale, and the Federal Government should supplement and support these efforts." 42 U.S.C. at § 290bb-25b(b)(7).

[4] The Webb-Kenyon Act states: "The shipment or transportation…of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State…into any other State…which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State…is prohibited."

II.

In *Granholm*, a sharply divided court struck down New York and Michigan laws which permitted in-state wine makers to ship directly to consumers while prohibiting out-of-state wine makers from so doing. In Michigan, this was facially explicit in the statute. While the Court wrote that New York law was not explicit, it did find that in-state wineries using local fruit were the beneficiaries of a facially discriminatory benefit which was denied to the out-of-state wineries. The Court also found that both laws reflected intentional discrimination; that their motivation was to benefit in-state producers and products while burdening out-of-state producers and products. *Granholm*, 544 U.S. at 489. ("The instant case…involve straightforward attempts to discriminate in favor of local producers.").

Writing for the majority in *Granholm*, Justice Kennedy held that discrimination against out-of-state producers or products is not saved by the Twenty-first Amendment, noting that even in the 1930s such discrimination was controversial. *Granholm*, 544 U.S. at 485-486. The *Granholm* Court also referred to the congeries of direct shipping laws in all the states – including some reciprocity provisions existing in 2005 – as a reflection of an ongoing small-scale trade war. *Granholm*, 544 U.S. at 473. In contrast, no court has ever referred to a traditional three-tier distribution system with physical presence and residency requirements in these terms. Nor has any state ever imposed a reciprocity

provision for a residency requirement with regard to its two lower tiers. The *Granholm* Court noted that the Brandeis decisions permitting discrimination at the producer tier generated contemporaneous controversy. *Granholm*, 544 U.S. at 485-486. Wholesaler residency and physical presence requirements did not generate such controversy.

While striking the challenged laws at issue there, the *Granholm* Court made clear that its statement that the Twenty-first Amendment did not save "discriminatory" state laws was to be read narrowly. Not only did it speak only of discrimination against producers and products,[5] it explicitly declared the three-tier distribution system "unquestionably legitimate".[6]

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[5] It did quote some generic dormant Commerce Clause language from other opinions which referred to discrimination more broadly, but only referred in its own language to producers and products.

[6] *Granholm,* 544 U.S. at 489, quoted from *North Dakota v. United States*, 495 U.S. 423, 432 (1990), which recognized that "in-state" wholesalers are an integral component of three-tier systems. The Supremacy Clause inquiry in *North Dakota* was whether the State was discriminating against the Federal government because some other retailer was better treated. The plurality held that as a retailer of intoxicating liquors the Federal government was no worse off than any other such retailer because all other retailers had to buy from licensed in-state wholesalers. Only because of this requirement could the plurality be assured that there was no retailer receiving better terms and conditions of sale than those available to the Federal government if the Federal government bought from licensed in-state wholesalers. Justice Scalia concurred, adding that the Twenty-first Amendment authorized the state to require the Federal government – as well as other retailers – to purchase only from licensed in-state wholesalers. Funneling distribution

III.

In this case, it is not necessary to determine if the Twenty-first Amendment shields even a purely protectionist law with regard to the lower two tiers of a three-tier distribution system. Here, the trial court did not simply uphold the challenged law as being within a zone of complete immunity. Rather, the court implicitly determined that the Twenty-first Amendment at least safe-guarded rational beverage alcohol legislation dealing with the structure of in-state distribution.

Post-*Granholm* jurisprudence recognizes that dormant commerce clause challenges to state beverage alcohol regulation are treated differently when the regulations involve the lower two rungs (wholesaler and retailer) of the three- tier system.[7] This may not necessarily mean that such laws are always immune to a commerce clause challenge. It is possible that a statute dealing with wholesalers or retailers which the court was confident lacked *any* public purpose and was merely protectionist in intent might not be saved by the Twenty-first Amendment. But that question is not before this Court. Here, the challenged statute is rational, with a public purpose recognized and enunciated by the trial court.

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through licensed in-state wholesalers guaranteed a level playing field for all North Dakota retailers.

[7] *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190-192 (2nd Cir. 2009) and *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809,819-820 (5th Cir. 2010), *cert. den.*, 131 S.Ct. 1609 (2011).

IV.

Although the residency requirement is immune from a dormant commerce clause challenge, it also must survive some form (possibly relaxed) of Equal Protection rationality review. See, *Craig v. Boren*, 429 U.S. 190, 205 (1976) ("Our view is, and we hold, that the Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment."). It is noteworthy that the Supreme Court has never held that the Twenty-first Amendment is irrelevant in a judicial review of mere economic classification involving regulation of beverage alcohol.

The trial court carefully reviewed and rejected Southern's Equal Protection claim. Southern argued that the law never had any legitimate purpose, but was intended just to shelter in-state entities. This is clearly not the case.[8] The law was

[8] In its motion to file an *amicus curiae* brief, Missouri Beverage Co. complains that it (an in-state company) is harmed by the residency law because that law shrinks the "market of potential out-of-state investors or purchasers that might acquire a smaller wholesaler." That the residency requirement burdens in-state economic interests severely undercuts the commerce clause challenge being made here. See *Baude v. Heath*, 538 F.3d 608, 615 (7th Cir. 2008) (Involving a commerce clause challenge to a face-to-face sales requirement where the Court in response to allegations by *amicus curiae* Indiana wineries, who supported the challengers, that small in-state wineries were also harmed by the statute opined "But if what the [*amicus curiae* Indiana Wine Growers] Guild says is true, then the statute –

enacted for sensible reasons. And it continues to be a sensible rule – one that is stringent enough to be effective, but not unnecessarily rigid, and thus clearly immune from the challenge that it is simply protectionist in intent and effect.

The challenged Missouri law was enacted in 1947 in response to a particular circumstance, which was not that of out-of-state competition *per se*, but a threat to the state's three-tier distribution system. At that time, Continental Distilling, a wholly owned subsidiary of Publicker Industries, was attempting in Missouri and elsewhere to do its own distribution through its own wholly owned subsidiary, Continental Sales. Business Week, Sept. 28, 1946, p. 17. Exhibit A. In Florida, in the previous year, a court had permitted this, holding that a corporate structure created earlier could not be rejected as a mere ruse to evade state beverage alcohol law. *State ex rel. Continental Distilling Sales Co. v. Vocelle*, 27 So.2d 728 (Sp. Ct. of Fla., 1946). This is what Sen. M.C. Matthes, who sponsored the legislation, was reacting to when he said "it was intended to prevent a few big national distilleries from monopolizing the wholesale liquor business in Missouri…" Jefferson City Post-Tribune, May 9, 1947, p. 1. Exhibit B. See also Joplin Globe, May 10, 1947. Exhibit C.

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although economically bad for Indiana's wineries – must be sustained against a challenge under the commerce clause.").

That a law was passed to enhance a State's ability to regulate beverage alcohol rather than merely to protect in-state entities should end the inquiry. But, the law still makes sense. Post-Prohibition beverage alcohol regulation reflects a "belt and suspenders" regulatory approach, a combination of incentives and constraints, to permit the sale and consumption of beverage alcohol in an unstimulated way. Residency is an element of this comprehensive regulation. It reflects a belief, and a plausible one, that it is easier to regulate wholesalers who are themselves physically present and living in the state.

Lawful behavior results from a combination of coerced constraint and shared values. Prohibition and its failure taught this. Law enforcement does not work without public opinion behind it; conversely, effective enforcement helps shape public opinion. Obedience to law cannot be enforced only through the watchfulness of the policeman or the threat of a padlock on the business. Public pressure and internalized norms are important components of obedience to law. The State of Missouri has a right to employ this tool in its effort to create effective beverage alcohol regulation.

A residency requirement makes state beverage alcohol regulation effective in three ways. First, the threat of enforcement is more serious when both the person and the property of a wholesaler is subject to legal sanction. Second, social pressure from those within the state are also more effective in constraining

wholesaler behavior that would violate either the letter or the spirit of the regulation. Third, residency encourages wholesaler compliance with regulation because those controlling the wholesaler will have to witness and live with the results of any efforts to over-stimulate sales in contravention of law.

The in-state resident wholesaler, the fulcrum of the state's regulatory system, is not an absentee. This is important. The Fosdick and Scott report, the first comprehensive program of post-Repeal regulation, emphasized this in rejecting tied houses: "The 'tied-house' system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident, he was beyond local social influence." Fosdick and Scott, Toward Liquor Control (1933) at p. 43.

Missouri's wholesaler residency law is a sensible one, imposing residency both on managers and a majority – a controlling interest – of corporate ownership, ensuring that control is exercised by individuals residing in-state. In *Indiana Wholesale Wine and Liquor Company v. Indiana*, 662 N.E.2d 950 (Indiana Court of Appeals 1996), adopted in part and vacated in part by *Indiana Wholesale Wine and Liquor Company v. Indiana*, 662 N.E.2d 950; 695 N.E.2d 99 (Supreme Court of Indiana 1998), the court, in rejecting Indiana's residency law, was skeptical because that law imposed residency requirements *only* on shareholders of a

licensee corporation: "Conversely, the residency of those with actual operational control over a corporation – the board of directors and officers – is unregulated by the requirement." *Indiana Wholesale Wine and Liquor Company*, 662 N.E. at 963. The Missouri law has no such regulatory gap.

Sixty percent is sufficient to assure that a controlling interest of ownership is resident within the state. On the other hand, the Missouri law is not unduly restrictive.

V.

Southern argues that the law in any event is not rational because the residency requirement is (1) not imposed on retailers and (2) not imposed on beer wholesalers.

The trial court correctly rejected the retailer criticism, finding the legislative distinctions rational:

> [T]he residency requirements easily satisfy the rational basis test. The need for greater accountability in liquor distribution is a primary reason for the creation of the three-tier system in the first place, and imposing a requirement that the leadership of a wholesaler be present in the State can rationally be assumed to promote greater accountability and responsibility on the part of the wholesaler towards the community. The fact that the requirements are only imposed on wholesalers and not on retailers does not render it irrational, as retailers are more visible in the community and thus are likely subject to greater pressure from the public and law enforcement than wholesalers acting in an irresponsible manner. J. A. at 97-98.

The trial court's analysis of the rational basis for the challenged legislation is correct.

It is not simply that retailers are different from wholesalers and that they do not need to be constrained by the same rules. The trial court found that retailers were more likely to be vulnerable to public opinion (pressure), given their known identity and location easily accessible to public protest. There is nothing irrational, moreover, about focusing regulatory concern on the wholesaler tier, the tier which is the keystone of state regulatory efforts because it is the narrow part of the distribution funnel through which beverage alcohol must pass. It is at the wholesaler tier that state regulators can most easily insure that all taxes have been paid, that only registered products are being sold, and that the products are only distributed to appropriately licensed retailers.

It is also not irrational to focus particular regulatory attention upon beverages of higher alcohol content. As the trial court found:

> [T]he fact that the General Assembly of Missouri chose to impose residency requirements upon liquor containing more than five percent alcohol by weight, but did not impose similar restrictions on beer has a rational basis given that greater risks of harm to the community may result from consumption of beverages with higher alcohol content. J. A. at 98.

Many states regulate beverage alcohol differently depending on alcohol content. Indeed, numerous states and the Federal government differentiate in regulation and/or taxation depending on alcohol content.

The issue was brought to legislative consciousness in 1947 by the efforts of Publicker to enter spirits wholesaling. The state responded to that problem. It need not address all problems, and, it can in any event plausibly consider that relatively low alcohol beer distribution poses a lesser threat to public order and safety than beverages with higher alcohol content. See, *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955).

VI.

Southern also insists that the law lacks any regulatory purpose and effectiveness because a state regulator who testified said he did not find the law particularly useful. While this is perhaps troubling, it is not dispositive.

Laws are passed by the legislature. That an individual regulator is unable to articulate a reason for the law may reflect on his experience or his insight. But it is not a conclusive judgment on the effectiveness or importance of the law. Regulation is often ministerial, rather than adjudicative or legislative. Regulators often work within a system, but do not understand it or cannot well articulate its purposes. If all laws were vulnerable to challenge in such cases, few laws would survive.

That the regulator testified that he did not have serious problems with Glazers, a grandfathered non-resident wholesaler, does not suggest that abandoning

residency in its entirety would not pose a regulatory problem or a risk of a regulatory problem which the legislature might appropriately choose to avoid.

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Fed. R. App. P. 29(C) that the foregoing *amicus* brief was prepared in 14-point Times New Roman proportionally typeface and contains 3,383 words, according to the count of Microsoft Word Office Suite 2000.

BY: *s/Anthony S. Kogut*
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Dated: December 7, 2012

ANTI-VIRUS CERTIFICATION FORM

Case Name: *US Airways, Inc. v O'Donnell, et al*

Docket Number: 09-2271

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BY: *s/Heather Devereaux*

Dated: December 7, 2012 Heather Deveraux

CERTIFICATE OF SERVICE

I certify that the foregoing *amicus* brief was filed with the Clerk using the appellate CM/ECF system on December 7, 2012, all counsel of record are registered CM/ECF users, and service will e accomplished by the CM/ECF system.

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