No. 12-2502

IN THE U.S. 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 U.S. District Court
For the Western District of Missouri

BRIEF OF THE ATTORNEYS GENERAL OF ARKANSAS, DELAWARE, MISSISSIPPI, NEBRASKA, SOUTH DAKOTA, TEXAS, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND FOR AFFIRMANCE OF THE DISTRICT COURT

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INTEREST OF *AMICI CURIAE*

Virtually every state, including all of the *amici* states, have three-tier systems for regulating the liquor industry that include in-state residency requirements for wholesalers. And many states, including *amici* such as Arkansas,[1] have in-state requirements for the officers, directors, and shareholders of liquor wholesalers. The residency requirements are integral parts of those states' three-tier schemes for regulating the structure of the alcoholic beverage industry within the states. Appellants' attack on the Missouri residency requirement calls into question the states' ability to define what it means to be an "in-state wholesaler" and make distributors accountable to state regulators and the consuming public through residency requirements.

The *amici* states have an interest in this case under Rule 29(c)(3) of the Federal Rules of Appellate Procedure. They are authorized to file this amicus brief without the consent of the parties or leave of court under Rule 29(a) of the Federal Rules of Appellate Procedure.

[1] *See* Ark. Code Ann. § 3-4-606.

ARGUMENT

I. UNDER *GRANHOLM*, MISSOURI'S RESIDENCY REQUIREMENT IS A VALID EXERCISE OF THE STATE'S POWERS UNDER THE TWENTY-FIRST AMENDMENT.

A. The Legal Standard

The Twenty-first Amendment provides that the "transportation or importation in to 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, § 2. "Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *North Dakota v. United States*, 495 U.S. 423, 433 (1990).

Granholm v. Heald is the Supreme Court's most recent analysis of the relationship between the Twenty-first Amendment and the Commerce Clause. 544 U.S. 460 (2005). The *Granholm* Court adopted an analytical framework based upon the dichotomy between discriminatory state regulations that impede the flow of liquor products in interstate commerce (which are subject to ordinary Commerce Clause scrutiny) and state regulations that merely affect the structure of the liquor industry within the state (which are protected by the Twenty-first Amendment). *Id.* at 489. The Court emphasized that 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." *Id.* at 588 (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). Therefore, "the three-tier system itself is unquestionably legitimate.'" *Id.* (quoting *North Dakota*, 495 U.S. at 432).

Appellants focus much of their brief on the old "core concerns" test, which was used in pre-*Granholm* cases such as *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and asked whether the state's polices were supported by the core concerns of the Twenty-first Amendment. But the *Granholm* Court did not even mention the core concerns test. Indeed, Justice Thomas noted in his dissenting opinion that the majority "*sub silentio* cast[] aside that test," *see Granholm*, 544 U.S. at 524 (Thomas, J., dissenting), and the majority never disputed this point. Instead, the *Granholm* majority succinctly summarized the applicable standard as follows: "State polices are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489.

B. Missouri's Law Complies With The Applicable Legal Standard.

The residency requirements of Missouri and the *amici* states treat out-of-state liquor products the same as their domestic equivalents. Therefore, the laws are valid under the *Granholm* rule. *Id.*; *see also id.* at 484-85 ("The Amendment did not give States the authority to pass nonuniform laws in order to discriminate

against out-of-state goods."). The residency requirements do not prohibit any disfavored, out-of-state goods from entering the states' borders. Nor do the laws erect regulatory barriers that might dissuade producers from shipping liquor products to the states. The residency laws bear no resemblance to the laws at issued in *Granholm*, which discriminated against out-of-state wineries and were "the product of an ongoing, low-level trade war." *Id.* at 473. To the contrary, the residency requirements are merely a component of the states' decisions to "funnel sales through the three-tier system," which is within their powers under the Twenty-first Amendment. *Id.* at 489; *see also North Dakota*, 495 U.S. at 447 (Scalia, J., concurring) ("The Twenty-first Amendment . . . empowers North Dakota to require all liquor sold for use in the state be purchased from a licensed in-state wholesaler.").

States have long required "liquor to be shipped through in-state wholesalers because it is easier to regulate in-state wholesalers and retailers." *Granholm*, 544 U.S. at 523-24 (Thomas J., dissenting). "State officials can better enforce their regulations by inspecting the premises and attaching the property of in-state entities; presence ensures accountability." *Id.* (quotations and citation omitted). To ensure accountability, facilitate taxation, and make distributors within easy reach of the state's enforcement arm, some states have adopted residency requirements with various degrees of strictness.

Appellants concede that wholesalers are the "constriction point" between producers and retailers and, as such, occupy a unique position within the three-tier system. Appellant's Br., at 31. But they fail to recognize that, in granting "virtually complete control" over the structure of the liquor business, *Granholm*, 544 U.S. at 588, the Twenty-first Amendment necessarily gives states the autonomy and flexibility to determine what it means to be an "in-state wholesaler." The essence of "control" is that each state is empowered to make its own regulatory judgments about what requirements should be enacted with respect to each tier. Some states may require the in-state residency of all directors, officers, and stockholders; some may require out-of-state wholesalers to merely file articles of incorporation and obtain a post office box; and still others may require something in between these extremes, such as a requirement of an in-state warehouse and in-state staff. Such differences in state laws are an inevitable result of the federalism principles enshrined in the Twenty-first Amendment, and they do not lessen the "unquestionably legitimate" status of such laws. *See Brooks v. Vassar*, 462 F.3d 341, 352-54 (4th Cir. 2006) (stating that any argument "that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart is nothing different than an argument challenging the three-tier system itself [and] . . . is foreclosed by the Twenty-first Amendment and the Supreme court's decision in *Granholm*, which upheld the three-tier system as

'unquestionably legitimate'"). The district court correctly applied *Granholm*, and this Court should affirm.

II. MISSOURI'S RESIDENCY REQUIREMENT HAS A RATIONAL BASIS AND, THEREFORE, IS VALID UNDER THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause of the Fourteenth Amendment provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. Wholesalers of liquor products are not a suspect class under the Equal Protection Clause, and so the State prevails if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Knapp v. Hanson*, 183 F.3d 786, 789 (8th Cir. 1999); *see also Georgia Manufactured Housing Ass'n, Inc. v. Spalding County*, 148 F.3d 1304, 1307 (11th Cir. 1998) ("The proper inquiry is concerned with the *existence* of a conceivably rational basis, not whether that basis was actually considered by the legislative body. As long as reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational, the legislation survives rational-basis scrutiny."). Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (internal citations omitted). A "classification neither involving fundamental rights nor proceeding along suspect

lines is accorded a strong presumption of validity . . . [and] courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.*

Under this framework, the district court properly determined that Missouri's residency requirements for wholesalers survive rational-basis review. As discussed above, the Supreme Court has held that in-state wholesalers are an important part of the three-tier system. Justice Thomas, joined by Chief Justice Rehnquist and Justices Stevens and O'Connor, likewise noted that "presence ensures accountability." *Granholm*, 544 U.S. at 523-24 (Thomas J., dissenting). The fact that some states may require a *real* in-state presence to further their accountability, enforcement, and taxation objectives is hardly irrational.

CONCLUSION

The district court properly held that Missouri's residency requirement for in-state wholesalers was valid under the Commerce Clause and Equal Protection Clause and authorized by the Twenty-first Amendment. Therefore, this Court should affirm the judgment in favor of Missouri.

Respectfully Submitted,

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CERTIFICATES OF COMPLIANCE AND SERVICE

Pursuant to FRAP 32(a)(7)(C), undersigned counsel certifies that this brief complies with the type-volume limitations of FRAP 32(a)(7). Excluding those portion of the brief exempted from limitations by FRAP 32(a)(7)(B)(iii), the brief contains 1,451 words. The brief was prepared with Microsoft Office Word 2010 and typed using Times New Roman 14-point font.

I further certify that on this 7th day of December, 2012, I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that counsel for all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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