No. 12-2502

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Southern Wine & Spirits of America, Inc., *et al.*,
Plaintiffs-Appellants,

vs.

Division of Alcohol and Tobacco Control, *et al.*,
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

BRIEF OF APPELLEES

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SUMMARY OF THE CASE

Appellees, the Missouri Division of Alcohol and Tobacco Control and Supervisor Lafayette E. Lacey (collectively, the "Division"), agree with the substance of Appellants' Summary of the Case and Statement Regarding Oral Argument with the exception of Appellants' paragraph arguing that the district court's decision in granting summary judgment in favor of the Division was erroneous. The district court's grant of summary judgment in favor of the Division was correct for the reasons set forth below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF THE ISSUES

1. Whether Missouri's liquor wholesaler residency requirements—which are part of Missouri's three-tier liquor distribution licensing system and require that certain of a wholesaler corporation's shareholders and all of a wholesaler corporation's officers and directors be citizens, taxpayers, and voters of Missouri—are protected by the Twenty-first Amendment to the United States Constitution from Southern Wine's Commerce Clause challenge.

Cases: *Granholm v. Heald*, 544 U.S. 460 (2005); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009); *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006).

2. Whether, in light of the Twenty-first Amendment, Missouri's liquor wholesaler residency requirements—which ensure that the individuals controlling a corporate distributor of liquor within Missouri are invested in the State of Missouri by requiring them to be citizens, taxpayers, and voters in Missouri—are rationally related to a legitimate government objective.

Cases: *Granholm v. Heald*, 544 U.S. 460 (2005); *Schutz v. Thorne,* 415 F.3d 1128, 1135 (10th Cir. 2005); *Grand River Enters. Six Nations v. Beebe*, 574 F.3d 929, 944 (8th Cir. 2009).

STATEMENT OF FACTS

Because Southern Wine's Statement of Facts primarily consists of legal argument and contains several unsupported assertions, the Division sets forth the following facts.

A. The Twenty-first Amendment to the United States Constitution

In the over 200 years since the states ratified the United States Constitution, it has been amended only seventeen times, resulting in twenty-seven amendments. Of those twenty-seven amendments, the transportation and importation of liquor has been the subject of two. Intoxicating liquors and their impact on public health and safety were and continue to be a major concern of the states.

These concerns first resulted in the prohibition of the manufacture, sale, transportation, and importation of intoxicating liquors altogether through the Eighteenth Amendment in 1919. After almost fourteen years of "Prohibition," and after increased corruption and lawlessness caused by the resulting black market in alcohol, the states ratified the Twenty-first Amendment to the Constitution, repealing the Eighteenth Amendment. Notably, the Twenty-first

Amendment is the only constitutional amendment ever ratified by the people in state conventions.

When repealing the Eighteenth Amendment and allowing the potential for the manufacture, sale, transportation, and importation of intoxicating liquors within the states, Section 2 of the Twenty-first Amendment simultaneously granted to the states broad power to regulate the distribution of intoxicating liquors within their borders: "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. With this language, the states reserved for themselves the constitutional right to regulate the distribution of alcohol within their borders. Under this section of the Twenty-first Amendment, states are authorized to, among other things, ban the consumption and sale of liquor altogether, take control over the liquor distribution system themselves, or create three-tier liquor distribution systems requiring the distribution to be carried out solely by state residents. *Granholm v. Heald*, 544 U.S. 460, 488–89 (2005).

After ratification of the Twenty-first Amendment, numerous states adopted and enforced alcohol distribution systems with residency requirements that discriminated against out-of-state individuals and entities in the licensing of wholesalers and retailers of liquor. *See Granholm*, 544 U.S. at 518 n.6 (Thomas, J., dissenting) (citing Economic Localism in State Alcoholic Beverage Laws--Experience Under the *Twenty-first Amendment*, 72 Harv. L. Rev. 1145, 1148–49 & n.25 (1959), and citing states' residency requirements enacted shortly after ratification of the Twenty-first Amendment). For over seventy years following the ratification of the Twenty-first Amendment, states have continued to operate under such systems. Indeed, numerous states continue to require residency for a wholesaler to obtain a license to distribute liquor. (*See infra* note 2).

B. Missouri's three-tier system and in-state wholesaler residency requirements

Like the states described above, Missouri established a system for the distribution of liquor within its borders that is commonly referred to as a "three-tier system." (J.A. 29). In a three-tier system, first-tier producers sell their alcoholic beverages to second-tier in-state wholesalers. The wholesalers then distribute the alcoholic beverages to

third-tier in-state retailers for sale to the ultimate consumer. *See Granholm v. Heald*, 544 U.S. 460, 466–67 (2005).

Missouri's three-tier system actually consists of four categories of licenses: (1) producers; (2) solicitors; (3) wholesalers; and (4) retailers. (J.A. 29). The producers consist of the manufacturers, brewers, distillers, and winemakers. (*Id.*) Solicitors may acquire alcoholic beverages from the producers and sell to Missouri's wholesalers. (*Id.*) Both producers and solicitors may sell to Missouri wholesalers, and the wholesalers then sell to Missouri's retailers for sale to the ultimate consumer. (*Id.*)

The Division issues approximately 58 different types of licenses under these four categories. (J.A. 31). Of the 58 types of licenses, only three are wholesaler licenses: wholesale all liquor (LWS), wholesale 22% or less (22WS), and wholesale 5% or less (5WS). (J.A. 25). All other licenses are for producers, solicitors, and retailers, and those licenses are not at issue in this litigation.

In establishing its three-tier liquor distribution system, Missouri set forth various requirements for entities and individuals to obtain each type of license. Similar to many other states, Missouri set forth

certain residency requirements for corporations seeking to obtain wholesaler licenses for the sale of intoxicating liquor containing alcohol in excess of five percent by weight (LWS and 22WS). (J.A. 27).

Specifically, Section 311.060.2(3) R.S.Mo. states that "[n]o 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." (emphasis added).

Section 311.060.3 R.S.Mo. defines "resident corporation" as follows:

> A "resident corporation" is defined to be a corporation incorporated under the laws of this state, *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[.]

(emphasis added).

Section 311.060.4 R.S.Mo. defines "financial interest" as follows:

> The term "financial interest" as used in this chapter is defined to mean all interest, legal or beneficial, direct or indirect, in the capital devoted to the licensed enterprise and all such interest in the net profits of the enterprise, after the payment of reasonable and necessary operating business expenses and taxes, including interest in dividends, preferred dividends, interest and profits, directly or indirectly paid as compensation for, or in consideration of interest in, or for use of, the capital devoted to the enterprise, or for property or money advanced, loaned or otherwise made available to the enterprise, except by way of ordinary commercial credit or bona fide bank credit not in excess of credit customarily granted by banking institutions, whether paid as dividends, interest or profits, or in the guise of royalties, commissions, salaries, or any other form whatsoever.

We refer to Sections 311.060.2(3), 311.060.3, and 311.060.4 collectively as the "residency requirements." (J.A. 29).

Missouri's residency requirements are part of its Liquor Control Law. *See* § 311.010–§ 311.880. Missouri law states that "[t]he provisions of [Missouri's Liquor Control Law] establish vital state regulation of the sale and distribution of alcohol beverages in order to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals such as maintaining an orderly

marketplace composed of state-licensed alcohol producers, importers, distributors, and retailers." § 311.015 R.S.Mo.

Producers, solicitors, retailers, and wholesalers of lower-alcohol-content liquor are not similarly situated to wholesalers of higher-alcohol-content liquor. Manufacturers produce the liquor for distribution. Wholesalers act as the first line of defense in the distribution of alcohol within the state. After receiving the alcohol from in-state or out-of-state entities or individuals, the wholesalers are responsible for distributing alcohol to retail locations within Missouri. Southern Wine has correctly described wholesalers as the "constriction point" between manufacturers and retailers. (*See* Plaintiffs.-Appellants' Brief 31, ECF No. 3950378). The liquor is then sold by retailers at retail locations within Missouri to the ultimate consumers.

In their role as the tier responsible for distributing liquor to retailers within Missouri, wholesalers face less public scrutiny than manufacturers and retailers. For example, at the retail level, as the sellers of alcohol to individuals in Missouri for actual consumption at physical locations in Missouri, the managing officer of the retail location in Missouri and the employees who are physically present in Missouri

at the point of sale are subject to greater scrutiny by the community, law enforcement, and the media, among others. Such focused scrutiny does not occur at the wholesale level, which is somewhat more abstract to the average individual when compared to a retail sale.

Missouri's General Assembly set forth requirements for retail corporations with such considerations in mind. For example, with regard to retail corporations, the General Assembly required that the "managing officer of such corporation [be] of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village." § 311.060.1 R.S.Mo.

Similarly, Missouri's determination regarding the requirements for wholesalers of higher-alcohol-content liquor within Missouri was made in the context of the unique circumstances surrounding the position of wholesalers within its three-tier distribution system.

Accordingly, though reference has been made to the numerous other licenses issued by the Division to the other tiers, those license requirements are not at issue here and do not aid this Court because Missouri's differing requirements are based upon the unique circumstances present at each tier of Missouri's three-tier system.

C. Southern Wine's attempt to obtain a Missouri liquor wholesaler license

Appellant Southern Wine & Spirits of America, Inc. ("SWSA") is a Florida corporation with its principal place of business in Miami, Florida. (J.A. 10). SWSA operates in 32 states and the District of Columbia as the largest distributor of wine, spirits, beer, and various non-alcoholic beverages in the United States. (J.A. 12). Notably, SWSA operates as a licensed solicitor in Missouri and may sell intoxicating liquors to licensed Missouri wholesalers for distribution within Missouri. (*Id.*)

Appellants Harvey R. Chaplin, Wayne E. Chaplin, Paul B. Chaplin, and Steven R. Becker (collectively "the individual Appellants") are Florida residents owning, either individually or as trustees and beneficiaries of trusts created for their benefit, over 97% of the voting shares and more than 51% of all of the shares of SWSA. (J.A. 13). Appellants Harvey R. Chaplin, Wayne E. Chaplin, and Steven R. Becker are officers and directors of SWSA and Appellant Southern Wine & Spirits of Missouri, Inc. ("Southern Missouri"). (J.A. 10–11). Appellant Paul B. Chaplin is a director of SWSA and Southern Missouri. (J.A. 11).

Southern Missouri was created by SWSA (a Florida corporation) and the individual Appellants (Florida shareholders, officers, and directors of SWSA) as a wholly-owned subsidiary of SWSA because SWSA and the individual Appellants want to operate as a wholesaler of alcoholic beverages in Missouri. (J.A. 13). Southern Missouri was created as a Missouri corporation. (J.A. 10, 13).

Because Southern Missouri's shareholder is a Florida corporation and its officers and directors are Florida residents, Southern Missouri cannot become a licensed Missouri wholesaler because it does not meet the residency requirements. (J.A. 28–29, 31, 89). Accordingly, the Division denied Southern Missouri's July 1, 2011 application for a Missouri wholesaler liquor license. (J.A. 13).

Now, these Florida residents wish to strike down Missouri's residency requirements and act as part of Missouri's vital wholesale tier responsible for distributing liquor to retail locations throughout Missouri. In an effort to do so, they have claimed Missouri's residency requirements violate the Dormant Commerce Clause and the Equal Protection Clause of the United States Constitution.

SUMMARY OF THE ARGUMENT

This case is a direct challenge to a State's constitutional right to regulate the distribution of intoxicating liquors within its borders under the Twenty-first Amendment to the United States Constitution. Almost 80 years of state action and Supreme Court precedent establish Missouri's authority, under the Twenty-first Amendment, to regulate the distribution of intoxicating liquors within its borders through a "three-tier system " that requires that alcohol pass through licensed, in-state wholesalers.

Both the majority and the dissent in the 2005 United States Supreme Court case *Granholm v. Heald* agreed that the Twenty-first Amendment protects states' rights to require that the wholesale tiers in their three-tier systems be state residents. *See* 544 U.S. 460, 489 (2005); *id.* at 518 (Thomas, J., dissenting) ("Even today, the requirement that liquor pass through a licensed in-state wholesaler is a core component of the three-tier system."). Even though a *unanimous* Supreme Court in *Granholm* agreed the Twenty-first Amendment gave the states virtually complete control over how to structure their liquor wholesale licensing schemes—even to the point of denying licenses to out-of-state

individuals and entities—Southern Wine wants this Court to declare unconstitutional Missouri's requirements that the individuals actually controlling the wholesaler corporation be citizens, taxpayers, and voters of Missouri.

To make such a request of this Court, Southern Wine claims the Twenty-first Amendment gives states the power to require an "in-state presence," but argues that states do not have the power to give real meaning to such a requirement when the would-be wholesaler is a corporation. Southern Wine further ignores the unique place the distribution of liquor has in the states and ignores the natural incentives an invested Missouri resident has to protect the public health and safety of Missouri in the distribution of liquor.

Missouri's determination that only invested Missouri citizens should have the right to control the distribution of liquor within Missouri is a determination protected by the Twenty-first Amendment and is rationally related to, among other things, Missouri's goals in controlling the distribution of liquor within Missouri, enforcing its liquor distribution laws, and protecting the public health and safety of Missouri.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, applying the same standard as the district court. *See Preston v. City of Pleasant Hill*, 642 F.3d 646, 651 (8th Cir. 2011); *see also Winthrop Res. Corp. v. Eaton Hydraulics, Inc.*, 361 F.3d 465, 468 (8th Cir. 2004). Summary judgment is proper "if the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The moving party bears the burden of informing the Court of the basis of its motion. *Celotex Corp.*, 477 U.S. at 323. Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing that there is sufficient evidence to allow a reasonable jury to return a verdict in its favor. *See id.* at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which a jury could reasonably find for the plaintiff." *Smith v. Int'l Paper Co.*, 523 F.3d 845, 848 (8th Cir. 2008); *see also Anderson*, 477 U.S. at 248. To

establish the existence of a genuine issue of material fact and overcome a motion for summary judgment, the nonmoving party "'may not merely point to unsupported self-serving allegations.' [It] 'must substantiate [its] allegations with sufficient probative evidence that would permit a finding in [its] favor.'" *Int'l Paper Co.*, 523 F.3d at 848 (citations omitted).

On appeal, this Court's "review of the evidence includes only the record that was before the District Court when it ruled on the summary judgment motion." *Minnesota Supply Co. v. Raymond Corp.*, 472 F.3d 524, 533 (8th Cir. 2006) (citing *Cameo Homes v. Kraus-Anderson Constr. Co.*, 394 F.3d 1084, 1088 n.2 (8th Cir. 2005); *see also Winthrop Res. Corp.*, 361 F.3d at 469 (citing *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413 (8th Cir. 1988) (stating that only the evidence and arguments raised when contesting summary judgment are preserved for *de novo* review)).

"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).

ARGUMENT

Under the Twenty-first Amendment to the United States Constitution and the United States Supreme Court's most recent decision analyzing that Amendment, *Granholm v. Heald*, 544 U.S. 460, 488–89 (2005), Missouri's residency requirements for liquor wholesalers are protected from Southern Wine's constitutional challenges.

Indeed, in *Granholm*, the United States Supreme Court addressed the issue presented in this case—the constitutionality of states' wholesale and retail residency requirements within their three-tier liquor distribution systems—and stated that such residency requirements are "unquestionably legitimate" under the Twenty-first Amendment. *Granholm*, 544 U.S. at 488–89. Specifically, when the states expressed concern that the Supreme Court's ruling in *Granholm* (regarding the treatment of out-of-state *goods*) could "call into question the constitutionality of the three-tier system" because the states' three-tier systems include residency requirements at the wholesale and retail levels, the Supreme Court in *Granholm* stated:

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. *The Twenty-first Amendment grants the state*

> *virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system*. A state which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its law effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. *We have previously recognized that the three-tier system itself is unquestionably legitimate. 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. (emphasis added) (citations and internal quotation marks omitted). In reaching this conclusion, the Supreme Court in *Granholm* cited with approval Justice Scalia's statement in a previous concurring opinion that "[t]he 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." *Id*. at 489 (citing *North Dakota v. United States*, 495 U.S. 423, 447 (1990) (Scalia, J., concurring in judgment)) (emphasis added). Accordingly, the Supreme Court in *Granholm* confirmed that states' determinations that only residents should distribute liquor within their borders are protected by the Twenty-first Amendment.

The Supreme Court's analysis in *Granholm* applies directly to this case and dictates that Southern Wine's claims must fail. At the district court level, Southern Wine first ignored *Granholm*, then argued that *Granholm* did not protect policies in three-tier systems that discriminate at the wholesale level, but rather stood for the proposition that such discriminatory policies are "virtually per se invalid" and should be struck down under the Commerce Clause without further inquiry. (*See* Pls.' Sugg. in Supp. of Mot. Summ. J., District Court Dkt. No. 34; *see also* Pls.' Reply Suggestions Supp. Mot. Summ. J. 7–8, District Court Dkt. No. 48).

In sharp contrast, now Southern Wine candidly recognizes and concedes that *Granholm* concluded that discriminatory policies at the wholesale and retail levels of states' three-tier systems are protected by the Twenty-first Amendment. Specifically, Southern Wine concedes that:

> 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.

***

> Of course, the three-tier system necessarily requires *some* discrimination; specifically, it requires that wholesalers (and retailers) be located 'in-state.'

(Plaintiffs.-Appellants' Brief 3, 24, ECF No. 3950378) (hereinafter "Pls.-Appellants' Br.") (emphasis in original).

But after acknowledging *Granholm's* direction, Southern Wine, without any support from *Granholm*, argues that the Supreme Court's guidance in *Granholm* should be limited to protecting only discriminatory policies relating to a vague "physical presence" within the State. (*See* Pls.-Appellants' Br. 30–31).

To be certain, Southern Wine appears to acknowledge that it is perfectly constitutional to discriminate between a resident of two different states concerning the distribution of alcohol, *i.e.*, to permit in-state natural persons to be wholesalers, but prohibit out-of-state natural persons. Yet, Southern Wine requests the Court to find that extending such a requirement to the ultimate owners of a corporation is a violation of the Constitution.

In short, Southern Wine wants to replace the Missouri State Legislature's judgment regarding the extent of in-state presence

required at the wholesale level with its own self-serving determination as to what "physical presence" should be required. Southern Wine leaves the Court to guess at the extent of the physical presence required, but assures the Court that Missouri's residency requirements requiring that decision makers in a corporation be Missouri residents are too much while its unsupported "plan[s] to conduct operations out of a Missouri warehouse staffed with Missouri management" are enough. (*See* Pls.-Appellants' Br. 2). Southern Wine's argument ignores the analysis set forth in *Granholm* and the deference given states' determinations of how to structure their liquor distribution systems by the Twenty-first Amendment.

Missouri's residency requirements represent the Missouri General Assembly's judgment as to how to structure Missouri's three-tier liquor distribution system, which is designed "to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals such as maintaining an orderly marketplace composed of state-licensed alcohol producers, importers, distributors, and retailers." Mo. Rev. Stat. § 311.015. As Missouri courts have long recognized, "[t]he liquor business stands on a different plane

than other commercial and business operations. It is placed under the ban of the law and is differentiated from all other occupations. No person has an inherent or natural right to engage therein. Those who engage in the business of the sale of liquor have no legal rights except those expressly granted by statute and by license." *Vaughn v. Ems*, 744 S.W.2d 542, 547 (Mo. Ct. App. 1988); *May Dept. Stores, Inc. v. Supervisor of Liquor Control*, 530 S.W.2d 460, 468 (Mo. Ct. App. 1975) (same).

Specifically, in creating a three-tier liquor distribution system composed of producers, in-state wholesalers, and in-state retailers, the Missouri General Assembly determined that the individuals seeking to be wholesalers "of intoxicating liquor containing alcohol in excess of five percent by weight" within Missouri must be invested residents of Missouri and that such individuals cannot avoid these requirements simply by creating a legal fiction (*i.e.,* a corporation) within Missouri. *See id.* § 311.060. Such requirements are authorized by the Twenty-first Amendment and are rationally related to Missouri's legitimate government objectives.

Accordingly, as set forth below, this Court should reject Southern Wine's attacks—including Southern Wine's arguments (1) ignoring the presumption that Missouri's residency requirements are valid under the Twenty-first Amendment; (2) seeking to restrict the United States Supreme Court's holding in *Granholm*; (3) replacing the Missouri General Assembly's judgment with its own; and (4) treating Missouri's residency requirements as though they were regulations relating to the distribution of pencils rather than alcohol—and affirm the District Court's grant of summary judgment in favor of the Division.

I. Missouri's Residency Requirements Are Protected From Southern Wine's Dormant Commerce Clause Challenge By The Twenty-First Amendment.

As highlighted above and set forth more fully below, in 2005, the United States Supreme Court analyzed the interplay between the Dormant Commerce Clause and the Twenty-first Amendment in great detail, including within the context of states' three-tier liquor distribution systems. *See Granholm*, 544 U.S. 460. Ultimately, the *Granholm* court concluded that, although the Twenty-first Amendment does not protect from Dormant Commerce Clause scrutiny regulations that discriminate against out-of-state liquor, the Twenty-first

Amendment does protect states' determinations regarding who will distribute and sell liquor within their borders, because the primary purpose of the Twenty-first Amendment was to give states the right to structure their liquor distribution systems. *Id*. at 488-89. Accordingly, the U.S. Supreme Court has already essentially concluded that Missouri's residency requirements (*i.e*., Missouri's determination as to who will distribute liquor within its borders) are protected by the Twenty-first Amendment from Southern Wine's Commerce Clause challenge. Southern Wine's arguments to the contrary were rejected by the district court and should be rejected by this Court as well.

A. The Supreme Court stated in *Granholm* that the primary purpose of Section 2 of the Twenty-first Amendment was to give states the right to structure their liquor distribution systems as they wish.

Section 2 of the Twenty-first Amendment states: "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, § 2.

In *Granholm*, the United States Supreme Court undertook an extensive analysis of states' rights to regulate the distribution of

intoxicating liquors within their borders under Section 2 of the Twenty-first Amendment. In that case the Court reviewed constitutional challenges to New York's and Michigan's laws allowing in-state wineries to sell wine directly to consumers but prohibiting out-of-state wineries from doing so. 544 U.S. at 465–66. Ultimately, the Supreme Court held those laws were invalid because the Twenty-first Amendment does not allow states "to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state *producers*." 544 U.S. at 493 (emphasis added).

In doing so, however, the Supreme Court carefully narrowed its decision to a holding that discrimination against *out-of-state liquor* is not authorized by the Twenty-first Amendment. By contrast, the Court confirmed that states have the power under the Twenty-first Amendment to structure their liquor distribution systems to discriminate against non-resident entities and individuals at the wholesale and retail tiers in a three-tier liquor distribution system as long as "they treat liquor produced out of state the same as its domestic equivalent." *Id*. at 488–89. Thus, as explained in more detail below, while the out-of-state product or producer cannot be the object of

discrimination, states' liquor distribution systems, which are at the core of the Twenty-first Amendment's protections, can discriminate against non-residents at the wholesale level.

In reviewing the Twenty-first Amendment, the Supreme Court in *Granholm* first focused on the Wilson and Webb-Kenyon Acts—which preceded Prohibition and the ratification of the Twenty-first Amendment—and the cases interpreting those Acts. *Id.* at 476–84. The Supreme Court in *Granholm* found the Wilson and Webb-Kenyon Acts gave the states broad power to regulate the distribution of liquor so long as they regulated domestic and imported liquor on the same terms. *Id.* at 481–84. Ultimately, the Supreme Court in *Granholm* concluded that the history leading up to the ratification of the Twenty-first Amendment "provides strong support for the view that § 2 restored to the states the powers they had under the Wilson and Webb-Kenyon Acts." *Id.* at 484.

Accordingly, the Supreme Court noted that the purpose of the Twenty-first Amendment was to grant states broad powers in creating their systems for liquor distribution, but not to discriminate against *out-of-state goods*:

> 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. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against *out-of-state goods*, a privilege they had not enjoyed at any earlier time.

Id. at 484–85 (emphasis added).

Because the aim of the Twenty-first Amendment was to give states the constitutional authority to create a system to regulate the distribution of alcohol within its borders, but did not give states the authority to discriminate against out-of-state liquor in the creation of such a system, the Supreme Court in *Granholm* found New York's and Michigan's laws discriminating against out-of-state wineries were not saved by the Twenty-first Amendment and, later in the opinion, analyzed those laws under the Dormant Commerce Clause. *Id.* at 486–89, 493.

Immediately after finding New York's and Michigan's laws involving out-of-state products were not saved by the Twenty-first Amendment because they discriminated against out-of-state goods, however, the Supreme Court confirmed that its reasoning applied solely to discrimination against out-of-state products and that, because the aim of the Twenty-first Amendment was to give states "virtually

complete control over . . . how to structure the liquor distribution system," states' laws creating three-tier distribution systems with residency requirements at wholesale and retail tiers are protected by the Twenty-first Amendment. *Id.* at 488–89. The Court explained:

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal, supra*, at 110, 100 S.Ct. 937. A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. *We have previously recognized that the three-tier system itself is "unquestionably legitimate."* *North Dakota v. United States*, 495 U.S., at 432, 110 S.Ct. 1986. See also id., at 447, 110 S.Ct. 1986 (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*").

Id. at 488–89 (emphasis added).

With this statement, the Supreme Court in *Granholm* (1) recognized the states' fear that the Court's decision would call into question the constitutionality of their three-tier systems because many of their three-tier systems included residency requirements

discriminating against non-residents (*see infra* note 2, citing state statutes with residency requirements in place at the time *Granholm* was decided); and (2) allayed that fear by stating that the Twenty-first Amendment does protect the states' ability to structure their liquor distribution systems, including their ability to establish three-tier systems that discriminate against non-residents at the wholesale and retail levels. *See id.* (citing *North Dakota*, 495 U.S. 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.")). Accordingly, the Supreme Court in *Granholm* reviewed the type of residency requirements at issue here and stated they are protected by the Twenty-first Amendment.

Southern Wine's argument that the analysis the *Granholm* Court performed for residency requirements targeted at producers is the same analysis that should be used for residency requirements targeted at wholesalers is contrary to the express language of *Granholm*. The Supreme Court in *Granholm* did not, as Southern Wine claims, limit its finding that the Twenty-first Amendment protects states' residency

requirements within three-tier systems to only those regulations that require some minimum "physical presence." (*See* Pls.-Appellants' Br. 30–31). When it rendered its opinion, the Supreme Court in *Granholm* was well aware that numerous states began adopting "in-state" *residency requirements* immediately after the ratification of the Twenty-first Amendment, that numerous states had these "in-state" *residency requirements* at the time it rendered its opinion, that the states' *residency requirements* varied to some degree, and that many of those regulations required more than the "physical presence" Southern Wine claims should be the standard.[1] *See, e.g.*, *Granholm*, 544 U.S. at 518 n.6 (Thomas, J., dissenting) (listing certain states' residency requirements *and* certain states' physical presence requirements).

For example, at the time of *Granholm*, the three-tier system in Michigan—whose direct shipment laws were at issue in that case—allowed a corporation to be licensed as a liquor wholesaler only "if all stockholders of the corporation have resided in this state for not less

[1] For this reason, and others as set forth more fully below, the cases cited by Southern Wine incorrectly limited the Supreme Court's holding in *Granholm* in a way that was neither discussed nor intended by the Supreme Court.

than 1 year immediately preceding the date of issuance of the license." *See* Mich. Comp. Laws Ann. § 436.1601(4) (West 2012). In addition, at least 20 states had actual residency requirements, as opposed to "physical presence" requirements, at the time the *Granholm* opinion was issued, and of those, at least 10 states had residency requirements for corporations that flowed through to shareholders, officers, and/or directors.[2]

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[2] *See* Alaska Stat. § 04.11.430 (2005) (actual residency requirement); Ark. Code Ann. § 3-4-606(a)(1) (2005) (actual residency requirement); Ark. Code Ann. § 3-4-606(a)(2) (2005) (residency requirement for corporations flowing through to shareholders, officers, and/or directors); 235 Ill. Comp. Stat. Ann. 5/6-2(a)(1), (10a) (West 2005) (actual residency requirement); Ind. Code Ann. 7.1-3-21-3 (West 2005) (actual residency requirement); Ind. Code Ann. § 7.1-3-21-5 (West 2005) (residency requirement for corporations flowing through to shareholders, officers, and/or directors); Iowa Code Ann. §§ 123.3 (34)(c), (e), 123.124, 123.127(1)(a)(3) (West 2005) (actual residency requirement & residency requirement for corporations flowing through to shareholders, officers, and/or directors) (requiring wholesalers to have a class A or AA permit, which requires that the applicant be a "person of good moral character," which itself has a residency requirement); La. Rev. Stat. Ann. § 26:80(A)(2) (2005) (actual residency requirement); La. Rev. Stat. Ann. § 26:80(C) (2005) (residency requirement for corporations flowing through to shareholders, officers, and/or directors); Me. Rev. Stat. Ann. tit. 28-A, § 1401(5) (2005) (actual residency requirement); Md. Code Ann., Art. 2B § 2-401(a), (West 2005) (actual residency requirement); Md. Code Ann., Art. 2B § 9-101(a)–(b) (West 2005) (actual residency requirement & residency requirement for corporations flowing through to shareholders, officers, and/or directors); Mass. Gen. Laws Ann. ch. 138, § 15 (West 2005) (actual residency requirement & residency

Indeed, although the Supreme Court's reasoning in *Granholm* is clear in and of itself, the four-Justice *Granholm* dissent provides further evidence that the majority was stating that the Twenty-first Amendment protects discriminatory three-tier licensing schemes that require "*in-state residency or physical presence* as a condition of obtaining licenses." *Granholm*, 544 U.S. at 518 (Thomas, J., dissenting) (emphasis added). The *Granholm* dissent, written by Justice Thomas and joined by Chief Justice Rehnquist and Justices Stevens and

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requirement for corporations flowing through to shareholders, officers, and/or directors); Mich. Comp. Laws Ann. § 436.1601 (West 2005) (actual residency requirement & residency requirement for corporations flowing through to shareholders, officers, and/or directors); Miss. Code Ann. §§ 67-1-57(c), 67-1-59, 67-3-21 (2005) (actual residency requirement & residency requirement for corporations flowing through to shareholders, officers, and/or directors); Neb. Rev. Stat. Ann. § 53-125(1) (LexisNexis 2005) (actual residency requirement); N.D. Cent. Code Ann. § 5-03-01(1) (West 2005) (actual residency requirement); Okla. Stat. Ann. tit. 37, § 527(1) (West 2005) (actual residency requirement); R.I. Gen. Laws § 3-5-10(a)(1) (2005) (actual residency requirement); S.C. Code Ann. § 61-6-110(2) (2005) (actual residency requirement); Tenn. Code Ann. § 57-3-203 (f)(1) (2005) (actual residency requirement & residency requirement for corporations flowing through to shareholders, officers, and/or directors); Tex. Alco. Bev. Code Ann. § 6.03(a), (k) (West 2005) (actual residency requirement & residency requirement for corporations flowing through to shareholders, officers, and/or directors); W. Va. Code Ann. § 11-16-8(a)(1) (West 2005) (actual residency requirement & residency requirement for corporations flowing through to shareholders, officers, and/or directors); Wis. Stat. Ann. § 125.04(5)(a)(2) (West 2005) (actual residency requirement).

O'Connor, agreed with the majority that the Twenty-first Amendment gives states the power to adopt licensing schemes that discriminate against non-resident individuals and entities at the wholesale and retail levels in a three-tier system. *Id.* at 517–18. The *Granholm* dissent believed, however, that the majority's concession that discrimination was proper at the wholesale and retail levels in a three-tier licensing system supported the dissent's view that discrimination at the producer level was also proper. *See id.* at 497–527.

The dissent's characterization of the majority's holding numerous times throughout its opinion is instructive:

- "[T]he Court concedes that the Webb-Kenyon Act allows States to pass laws discriminating against out-of-state wholesalers." *Id.* at 500.
- "Like the Webb-Kenyon Act, the Twenty-first Amendment was designed to remove any doubt regarding whether state monopoly and licensing schemes violated the Commerce Clause, *as the majority properly acknowledges*." *Id.* at 517 (emphasis added).

- "The Court, by contrast, concedes that a State could have a discriminatory licensing or monopoly scheme." *Id.* at 520.

The *Granholm* dissent also stated that "[p]rivate licensing schemes discriminated as well, *often by requiring in-state residency or physical presence as a condition of obtaining licenses*." *Id.* at 518 (emphasis added). Notably, immediately after this statement, the *Granholm* dissent cited numerous states' residency requirements enacted shortly after ratification of the Twenty-first Amendment, *including residency requirements, like Missouri's, that required shareholders, officers, and/or directors of a corporation to be residents of the state. See id.* at 518 n.6 (citing Ind. Stat. Ann. § 3730(c) (1934) (requiring that "at least fifty-one per cent of the voting stock of such corporation shall, at all times, while such permit remains in force, be owned by persons who are bona fide residents of the State of Indiana"); 5 Mich. Comp. Laws § 9209-32 (Supp. 1935) (permitting the issuance of licenses to manufacturers "only when a majority of the stockholders are citizens and only when twenty-five per cent or more of the capital stock is owned by citizens of the state of Michigan"); 1 S. D. Code § 5.0204 (1939) (requiring that all of the stockholders for a newly organized

corporation be "resident[s] of South Dakota for more than one year"); Wis. Stat. § 176.05(9) (1937) (stating that the provision requiring persons to have "resided in this state continuously for at least one year prior to the date of filing the application" applies "to all officers and directors of any such corporation.")).

Immediately after this statement and citation to residency requirements very similar to Missouri's, the *Granholm* dissent stated:

> Even today, the requirement that liquor pass through a licensed in-state wholesaler is a core component of the three-tier system. *As the Court concedes, each of these schemes is within the ambit of the Twenty-first Amendment, even though each discriminates against out-of-state interests.*

Id. at 518 (emphasis added). Accordingly, the Supreme Court in *Granholm* was fully aware of the types of residency requirements included in states' three-tier systems, including residency requirements relating to shareholders, officers, and directors of corporations, and that states had been utilizing such requirements in those systems for decades under the Twenty-first Amendment, when it declared those systems to be "unquestionably legitimate." *See id.* at 489 (majority opinion).

Indeed, the Supreme Court in *Granholm* did not take any steps to respond to or seek to limit the *Granholm* dissent's repeated characterization of its holding. The Supreme Court in *Granholm* took no such steps because it is plain from the language and reasoning in *Granholm* that the dissent's characterizations are correct. The majority and the dissent in *Granholm* (and, therefore, a unanimous Supreme Court) agreed that "the *Twenty-first Amendment* was designed to remove any doubt regarding whether state monopoly and licensing schemes violated the *Commerce Clause*," *see id.* at 517 (Thomas, J., dissenting), and, therefore, that states' residency requirements, like those at issue here, are saved by the Twenty-first Amendment.

B. Missouri's residency requirements are protected by the reading of the Twenty-first Amendment endorsed by *Granholm*.

Courts in Missouri would agree with the *Granholm* court's assessment and have recognized the important interest states have in structuring their liquor distribution systems under the Twenty-first Amendment. The Missouri Supreme Court has noted that:

> Liquor distribution is an area that has always been heavily regulated by state government; moreover, the methods of distribution and extent of regulation vary enormously from state to state. It is evident that in this area what one state

> may approve and even encourage, another state may prohibit and declare illegal. This principle even has constitutional endorsement by reason of the Twenty–First Amendment to the United States Constitution repealing Prohibition. Thus, the interest that a particular state has in construing and applying liquor control legislation in its own state is apparent.

High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 497-98 (Mo. 1992).

It is against this backdrop that this Court must review and reject Southern Wine's arguments. Missouri's residency requirements are a part of Missouri's three-tier liquor distribution licensing system created under the Twenty-first Amendment. The residency requirements represent Missouri's decision that only individuals and entities made up of individuals with significant personal investment in Missouri should be responsible for the distribution "of intoxicating liquor containing alcohol in excess of five percent by weight" within Missouri. *See* Mo. Rev. Stat. § 311.060.2(3). Because the Twenty-first Amendment protects such policies when they "treat liquor produced out of state the same as its domestic equivalent," *see Granholm*, 544 U.S. at 489, the district court properly entered summary judgment in favor of the Division.

C. Subsequent Court of Appeals decisions have confirmed the Division's reading of *Granholm* and support that Missouri's residency requirements are protected by the Twenty-first Amendment.

The Courts of Appeals for the Second and Fourth Circuits have correctly read *Granholm* and have set forth a straightforward analysis of its holding. Specifically, the Second Circuit confirmed the Division's analysis above in *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009). In *Arnold's Wines*, the court applied the Supreme Court's holding in *Granholm* to a case where the appellant argued that New York's law, allowing in-state retailers to sell to consumers but barring out-of-state retailers from doing so, violated the Commerce Clause. *Id.* at 188–92. The *Arnold's Wines* court stated:

> *Granholm* validates evenhanded state policies regulating the importation and distribution of alcoholic beverages under the Twenty-first Amendment. It is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause.

Id. at 190. "Because New York's three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers, we need not analyze the regulation further under the Commerce Clause principles." *Id.* at 191. Accordingly, under

Granholm, New York's laws allowing in-state retailers to sell to consumers but barring out-of-state retailers to sell directly to consumers were protected by the Twenty-first Amendment. *Id.* at 192.

Similarly, the Fourth Circuit, when faced with a constitutional question comparing in-state retailers and out-of-state retailers, relied upon *Granholm* in resolving the question. Specifically, in *Brooks v. Vassar*, when reviewing the plaintiff's argument that a Personal Import Exception (allowing individual consumers to import into Virginia one gallon or four liters of wine and beer without requiring the wine and the beer to be sold through the three-tier system) was unconstitutional, the Fourth Circuit readily dismissed the argument by 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.'" 462 F.3d 341, 344–46, 352 (4th Cir. 2006).

As in *Arnold's Wines* and *Brooks*, this Court's analysis of the present case should confirm the district court's determination that,

because Missouri's residency requirements relate to the structure of Missouri's liquor distribution system within a three-tier system and treat in-state and out-of-state liquor the same, they are protected by the Twenty-first Amendment, as already established by *Granholm*.[3]

D. The Fifth Circuit dicta and district court cases cited by Southern Wine to support its reading of *Granholm* are contrary to the plain language of *Granholm* and to the interpretations of the Second and Fourth Circuits above.

Rather than analyze the applicable reasoning of *Arnold's Wines* and *Brooks*, Southern Wine relies upon other post-*Granholm* authorities for dicta about liquor regulations and the protections of the Twenty-first Amendment or for reasoning that simply misreads *Granholm* outright or places limitations on its holding that were never intended by the Supreme Court. Indeed, Southern Wine's concession that *Granholm* has held that "some discrimination" is protected by the

[3] Contrary to Southern Wine's claim, the analysis in *Arnold's Wines* and *Brooks* applies equally here. As conceded by Southern Wine, based upon *Granholm*, those courts rejected challenges by out-of-state entities who wanted to be treated the same as in-state entities. (*See* Pls.-Appellants' Br. 33 n.12). Their analyses of and application of *Granholm* show that Southern Wine's similar claims must be rejected. There is nothing within *Arnold's Wines* or *Brooks* to support Southern Wine's claim that *Granholm*'s conclusion is limited to requirements relating to the vague "physical presence" espoused by Southern Wine.

Twenty-first Amendment shows that even Southern Wine disagrees with some of the cases it cited. (*See* Pls.-Appellants' Br. 24).

Unlike *Arnold's Wines* and *Brooks*, the discussion in *Wine Country Gift Baskets.Com v. Steen*, 612 F.3d 809 (5th Cir. 2010), is dicta and cannot be reconciled with *Granholm*. In *Wine Country*, the Fifth Circuit reviewed a Commerce Clause challenge to Texas' laws allowing in-state liquor retailers to sell directly to consumers. *Id.* at 811. While the *Wine Country* court correctly held that such a discriminatory regulation was saved by the Twenty-first Amendment after *Granholm*, the *Wine Country* court suggested that such regulations must relate to a "critical component" of the *Wine Country* court's idea of a model three-tier system. *Id.* at 819–21. As already discussed, the Supreme Court in *Granholm* declared that states' regulations establishing liquor distribution systems that treat out-of-state liquor the same as in-state liquor are protected by the Twenty-first Amendment even if they discriminate against out-of-state entities and individuals. Accordingly, the Supreme Court in *Granholm* found that states' three-tier systems, with similar but varying residency requirements, are "unquestionably legitimate."

The only other post-*Granholm* cases cited by Southern Wine are district court cases that incorrectly construe *Granholm* or improperly rely on pre-*Granholm* authority. [4]

For example, in *Siesta Village Market, LLC v. Granholm*, the court found that a law allowing in-state retailers to sell direct to consumers violated the Dormant Commerce Clause because it discriminated against out-of-state retailers. 596 F. Supp. 2d 1035, 1037–40 (E.D. Mich. 2008). The *Siesta Village* court found it significant that "[o]ut-of-state retailers, on the other hand, only have access to Michigan consumers if they open a location in Michigan, become part of the three-tier system, and obtain an SDM license." *Id.* at 1039. The *Siesta Village* court stated that *Granholm* did not allow *any* discrimination against out-of-state interests and utilized the analysis the Supreme Court used in *Granholm* for out-of-state liquor. *Id.* at 1039–40. As set forth above, that analysis of *Granholm* is incorrect.

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[4] Southern Wine's cite to *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010) does not assist this Court because the regulations being challenged there were directed at producers, *see id.* at 4, and *Granholm* has already established that discriminatory regulations at the producer level are not saved by the Twenty-first Amendment. *See Granholm*, 544 U.S. at 489.

Of course, Southern Wine concedes that *Granholm* allows discrimination but attempts to limit the Supreme Court's holding in *Granholm* solely to "physical location." Accordingly, even Southern Wine disagrees with the *Siesta Village* court's analysis.

A similar misreading of *Granholm* occurred in *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200 (D. Mass. 2006). There, the court found the Supreme Court's analysis in *Granholm* relating to regulations discriminating against producers must apply to its Commerce Clause review of residency requirements at the retailer level after stating:

> *Granholm* cannot be held to sanction protectionist policies at any of the tiers. As the four-member dissent points out, there is no principled basis for not allowing States to discriminate against out-of-state liquor producers, but allowing such discrimination against out-of-state retailers.

Id. at 221. Again, this reasoning is inconsistent with Southern Wine's recognition that *Granholm* does sanction discrimination and with *Granholm* itself, which expressly approved discrimination against out-of-state wholesalers. *Granholm*, 544 U.S. at 489. In addition, the *Granholm* dissent's statements set forth above show it took issue with the majority's determination that discrimination against out-of-state

retailers and wholesalers is allowed while discrimination against out-of-state liquor producers is not allowed; the dissent believed discrimination should be allowed against producers, as well. *Granholm*, 544 U.S. at 517–20 (Thomas, J., dissenting). The *Jenkins* court, however, misreads the dissent's argument to mean the Supreme Court in *Granholm* would not allow any discrimination against out-of-state retailers and adopts that misreading.

Southern Wine & Spirits of Texas, Inc. v. Steen, 486 F. Supp. 2d 626 (W.D. Tex. 2007), also fails to support Southern Wine's claims because it fails to consider *Granholm* properly. First, the court in *Steen* primarily relied upon a decision rendered by the Fifth Circuit approximately eleven years before *Granholm*, *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994)—a decision that is no longer applicable after *Granholm*. *See Steen*, 486 F. Supp. 2d at 629–33 (primarily relying on *Cooper*).

Second, the defendants in *Steen* incorrectly conceded that they bore "the burden of establishing that the discriminatory [residency and citizenship] statutes [at the wholesale level] advance 'a legitimate local purpose that cannot be adequately served by reasonable and

nondiscriminatory alternatives.'" *Id.* at 630. Defendants' concession was incorrect because the Supreme Court in *Granholm* had already established that residency requirements at the wholesale level of a three-tier system were "unquestionably legitimate" and were not subject to the analysis *Granholm* established for statutes that discriminated against non-resident producers. *Granholm*, 544 U.S. at 488–89.

Finally, perhaps misled by the defendants' incorrect concession, the *Steen* court failed to appreciate the distinction drawn by the Supreme Court in *Granholm* between regulations on producers on the one hand (not protected) and wholesalers and retailers on the other (protected) in relation to the Twenty-first Amendment. Specifically, the *Steen* court stated:

> Texas has made no more a compelling case for banning out-of-state residents from holding permits and licenses for the wholesaling, distributing, or importing of alcoholic beverages in Texas than New York and Michigan did [in the *Granholm* case] for restricting the shipment of wine into those states by out-of-state producers.

Steen, 486 F. Supp. 2d at 632.

As with *Siesta Village* and *Jenkins*, in using *Granholm* to justify its decision, the *Steen* court used the opinion in *Granholm* in a way the

Supreme Court in *Granholm* explicitly sought to avoid with its language quoted above.[5]

E. *Bacchus* and the other pre-*Granholm* cases cited by Southern Wine do not support Southern Wine's claims.

The Supreme Court's analysis in *Granholm* in 2005 resolves the questions posed to this Court. Nevertheless, Southern Wine asks this Court to review this case under the earlier Supreme Court's 1984

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[5] As with the cases cited by Southern Wine, the opinions of the Tennessee and Indiana Attorneys General also errantly apply the Supreme Court's holding in *Granholm* in their analysis of their state three-tier systems. *See* Tennessee Residency Requirements for Alcoholic Beverages Wholesalers and Retailers, Tenn. Att'y Gen. Op. No. 12-59 (June 6, 2012); *see also* Ind. Att'y Gen. Advisory Op. 09-40 (Sept. 14, 2009). As an initial matter, in Missouri, an Attorney General's opinion does not have any binding effect upon the courts and has "no more weight than that given the opinion of any other competent attorney." *Gershman Inv. Corp. v. Danforth*, 517 S.W.2d 33, 36 (Mo. banc 1974); *see also Comm. for a Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 510 n.4 (Mo. banc 2006) ("[A]n Attorney General's opinion . . . is not effective to make or to declare the law."). In the past, this Court has given Attorney General opinions the same weight that such an opinion would receive in state court. *See, e.g.*, *Rogers Grp., Inc. v. City of Fayetteville*, 629 F.3d 784, 787 n.4 (8th Cir. 2010) ("This [Attorney General] opinion does not control our interpretation of Arkansas law, however, because attorney general opinions are not binding precedent under Arkansas law."); *Mills v. City of Grand Forks*, 614 F.3d 495, 498–99 (8th Cir. 2010) (applying North Dakota's law that attorney general opinions serve as controlling law until superseded by a judicial decision).

decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Southern Wine's reliance upon *Bacchus* fails for two reasons. First, the *Bacchus* Court's analysis of the Twenty-first Amendment was in the context of discrimination against *out-of-state products*, *see id.* at 265, and has since been refined by *Granholm*. Second, even if the *Bacchus* Court's "core concern" analysis were still applicable, the Supreme Court in *Granholm*, for good reason, has already found that residency requirements within three-tier systems relate to a core concern of the Twenty-first Amendment and are protected. *See Granholm*, 544 U.S. at 488–89.

Similarly, the other pre-*Granholm* cases cited by Southern Wine do not somehow limit the Supreme Court's holding in *Granholm* regarding residency requirements in three-tier systems.

1. It is uncertain whether the Bacchus *"core concerns" test still governs the analysis of requirements within the three-tier system.*

As an initial matter, Southern Wine's claim that "*Granholm* continued to apply the *Bacchus* framework" is incorrect. Indeed, the *Granholm* dissent notes:

> [T]he Court does not even mention, let alone apply, the "core concerns" test that *Bacchus* established. The Court instead

> *sub silentio* casts aside that test, employing otherwise-applicable negative Commerce Clause scrutiny and giving no weight to the Twenty-first Amendment and the Webb-Kenyon Act.

Granholm, 544 U.S. at 524 (Thomas, J., dissenting).

Rather, the Supreme Court in *Granholm* reviewed *Bacchus* and stated that "*Bacchus* forecloses any contention that *§ 2 of the Twenty-first Amendment* immunizes discriminatory direct-shipment laws from *Commerce Clause* scrutiny." *Id.* at 487–88 (majority opinion). As discussed previously, however, the Supreme Court's review in *Granholm* and use of *Bacchus* was in the context of discrimination against out-of-state *products*, which the Supreme Court in *Granholm* distinguished from discrimination against non-residents at wholesale and retail levels of a three-tier system. *See id.* at 487–89. For that reason, *Bacchus* does not apply to the present case.

In *Bacchus*, plaintiffs challenged a state excise tax that exempted certain in-state alcoholic beverages from the tax and, therefore, discriminated against out-of-state liquor. *Bacchus*, 468 U.S. at 265. In reviewing whether the Twenty-first Amendment saved this discrimination against out-of-state liquor, the *Bacchus* Court stated:

> The question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended. Or as we recently asked in a slightly different way, "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 express federal policies."

Id. at 275–76 (citations omitted).

In *Bacchus*, the state did "not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledge[d] that the purpose was 'to promote a local industry.'" *Id.* at 276. Accordingly, the *Bacchus* Court found the only reason for the discrimination against out-of-state liquor was "economic protectionism," did not relate to a core concern of the Twenty-first Amendment, and was in violation of the Commerce Clause. *Id.*

The *Bacchus* Court's analysis does not apply to this case because it is a case dealing with discrimination against *out-of-state producers* and *Granholm* has since provided its Twenty-first Amendment analysis for such cases.

2. To the extent the Bacchus *"core concerns" test still exists, the Supreme Court in* Granholm *has already concluded Missouri's residency requirements within its three-tier system pass that test.*

In addition, even if the *Bacchus* "core concerns" test were still applicable, the Supreme Court in *Granholm* has provided the answer: Because a core concern of the Twenty-first Amendment was to allow states to choose who could distribute liquor within their borders (*i.e.*, how to structure the liquor distribution system), three-tier systems with wholesaler and retailer licensing requirements that discriminate against non-residents are "unquestionably legitimate." *See Granholm*, 544 U.S. at 488–89. Indeed, the Supreme Court in *Granholm* made its pronouncement regarding three-tier systems and state policies that "treat liquor produced out of state the same as its domestic equivalent" immediately after reviewing *Bacchus*. *Id.* at 487–89.

3. Missouri's residency requirements are also rationally related to other "core concerns" of the Twenty-first Amendment, including the public health and safety, enforcement, and structural concerns.

Missouri's residency requirements address additional core concerns of the Twenty-first Amendment as expressed by the Supreme Court, including public health and safety, enforcement, and concerns

relating to the maintenance of a uniform system for controlling the distribution of liquor.

As the district court has already found, Missouri's justifications for its residency requirements go well beyond the pure economic protectionism espoused by the defendant in *Bacchus*. (J.A. 93–94, 97–98). Missouri's residency requirements are designed to provide wholesalers with the incentive to combat the perceived evils of an unrestricted traffic in liquor, promote temperance and responsible consumption, *see Bacchus*, 468 U.S. at 276 (recognizing promoting temperance as a legitimate purpose of the Twenty-first Amendment), fight underage drinking, ensure orderly market conditions, *see North Dakota*, 495 U.S. at 432 (recognizing ensuring orderly market conditions as a legitimate purpose of the Twenty-first Amendment), and bring the individual wholesalers closer to the state's enforcement arm, *see Granholm*, 544 U.S. at 523–24 (Thomas, J., dissenting), by ensuring the distribution of liquor within Missouri is being controlled by Missourians with an invested interest in the public health and safety of Missouri.

Missouri's residency requirements are part of Missouri's Liquor Control Law. The Missouri General Assembly has stated that "[t]he provisions of [Missouri's Liquor Control Law] establish vital state regulation of the sale and distribution of alcohol beverages in order to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals such as maintaining an orderly marketplace composed of state-licensed alcohol producers, importers, distributors, and retailers."[6] Mo. Rev. Stat. § 311.015. Accordingly, and understandably, Missouri's residency requirements play an essential role in Missouri's three-tier system.

Specifically, utilizing the power granted it by the Twenty-first Amendment to address public health and safety concerns associated with the distribution of liquor, the Missouri General Assembly determined that, in order to ensure their accountability on both legal and social levels, wine and liquor wholesalers must have more than mere physical presence in the state. Instead, they must have a genuine

[6] While Southern Wine has tried to argue that a newspaper clipping should be read as legislative history (which the Missouri legislature does not have), the Court should only consider Missouri's actual listed purposes for its liquor control law. The impermissibility of relying on this newspaper clip is discussed in more depth below.

investment in their community as evidenced by their status as voters, taxpayers and citizens for at least three years prior to licensure. *Id.* § 311.060.

However, the General Assembly was not so naive as to believe that the accountability it was seeking by requiring a genuine, ongoing and real investment in Missouri's communities could not be evaded altogether by corporate wholesalers. Even though a corporation may be domiciled in Missouri, the individuals who actually control the corporation and determine its behavior (i.e., its officers, directors, and principal shareholders) could live a thousand miles away without even the remotest interest in—or accountability for—protecting the public health and safety of Missouri or complying with Missouri law. The General Assembly thus pierced the fictitious veil of corporate "presence" and insisted that the individuals who actually control the corporations exhibit the same degree of investment in Missouri's communities (and thus have the same degree of accountability) as though they were the individual licensees rather than their corporate creation.

Here, Southern Wine represents the type of attenuated relationship to Missouri the General Assembly explicitly sought to avoid

in licensing its liquor wholesalers. Indeed, not only is there one corporate veil between this would-be wholesaler and the Missourians to whom it should be accountable, there are two. Southern Missouri (the Missouri corporation formed by Florida residents) is a wholly owned subsidiary of a Florida corporation. The principal shareholders of that corporate parent are Florida residents with no record of actual presence—and no real assurance of accountability (either legal or societal)—just as the General Assembly feared.

Southern Missouri is precisely the type of corporate "front" that the Missouri General Assembly explicitly sought to exclude and with good reason. These "shareholders of the shareholder" do not have any additional incentive above and beyond a fear of having a license revoked to safeguard the public health of Missouri, to ensure enforcement of Missouri's liquor laws, and to comply with those laws. They have no additional incentive to concern themselves with the potential vices of alcohol or to promote temperance or combat underage drinking within Missouri. Rather, their primary incentive is to sell as much liquor as possible as fast as possible within Missouri.

Missouri residents, however, have additional incentive to be concerned with the perils of liquor distribution and consumption within their communities and with the enforcement of and compliance with Missouri's liquor laws. Their children drive the streets of Missouri. They interact with other Missouri residents on a regular basis. They are within easy reach of community leaders and the Division. Ultimately, they are subject to greater community and regulatory accountability.

As stated in the *Granholm* dissent, "'[p]resence ensures accountability.'" *Granholm*, 544 U.S. at 523 (Thomas, J., dissenting). The dissent did not qualify "presence" as Southern Wine wishes this Court to do; that is, the dissent did not indicate that mere corporate presence was enough to ensure accountability. In fact, the district court recognized that a corporation only acts through its officers, and thus individualized residency and presence was required to achieve "individualized accountability for the people in charge of a liquor wholesaling company." (J.A. 94).

"Even today, the requirement that liquor pass through a licensed in-state wholesaler is a core component of the three-tier system." *Id*. at 518.

The Missouri General Assembly understood this fact and sought to maximize accountability for wholesalers by requiring that they be present in Missouri *and* that their presence be more than mere residence (and certainly more than a mere corporate presence). The special status of liquor within the United States justifies Missouri's determination that its distributors should have local, individualized accountability within Missouri. Such accountability helps to regulate the distribution of alcohol products in Missouri and prevent the excesses and harms that led to Prohibition. Missouri's residency requirements require that its corporate wholesalers be truly "in-state" by requiring that the individuals who control the corporation's actions have a personal presence in and individual commitment to Missouri; a personal presence that adds incentive to protect the public health of Missouri, brings those individuals within easier reach of the Division, and brings those corporate individuals within easier reach of authorities in Missouri seeking to deter organized crime.

Accordingly, even if *Bacchus* is applicable to the present case, Missouri's residency requirements pass the "core concerns" test and are protected by the Twenty-first Amendment, as set forth in *Granholm*.

Southern Wine's arguments to the contrary ignore these and other self-evident facts. Indeed, because its arguments to the contrary are weak and unsupported, Southern Wine now seeks to claim a snippet from a newspaper article that was not introduced into the record at the district court level is "legislative history" and supports its claims. (*See* Pls.-Appellants' Br. 12–13). Southern Wine's claim is a severe overreach for several reasons.

As an initial matter, the newspaper article produced by Southern Wine was not included in the record at the district court. Newspaper articles are generally considered hearsay evidence and deemed inadmissible. *See Nooner v. Norris*, 594 F.3d 592, 603 (8th Cir. 2010) (declaring that "[n]ewspaper articles are 'rank hearsay'"); *see also Cantrell v. Superior Loan Corp.*, 603 S.W.2d 627, 643 (Mo. Ct. App. 1980) ("The newspaper article obviously was hearsay."); *In re Marriage of Wessel*, 953 S.W.2d 630, 631 (Mo. Ct. App. 1997). Further, as this Court is aware, Missouri does not have formal legislative history to aid courts in determining legislative intent. *Roosevelt Fed. Sav. & Loan Ass'n v. Crider*, 722 S.W.2d 325, 328 n.3 (Mo. Ct. App. 1986). Moreover, the language within the newspaper article is not even, as the

Appellants' Brief suggests, a quote from a legislator. (Pls.-Appellants' Br. 12–13; Pls.-Appellants' Addendum 20). Rather, the language cited by Southern Wine purports to paraphrase two comments made by a Missouri senator. Southern Wine's attempt to cast a newspaper article purporting to include paraphrases, without actual quotes or context, as "legislative history" must be rejected—especially in light of the fact that Missouri's Legislature has expressly stated the purpose of the Liquor Control Law. *See* Mo. Rev. Stat. § 311.015.

In addition, and more importantly, even if the article snippets are reviewed for substance, they do not support Southern Wines' conclusion that the Missouri residency requirements were enacted purely for economic protectionism. The article states the amendment at issue "was intended to prevent a few big national distillers from monopolizing the wholesale liquor business in Missouri by requiring 90 percent of a wholesale firm's stock to be owned by persons who have lived in Missouri at least three years." (Pls.-Appellants' Addendum 20). As set forth above, Missouri has numerous legitimate reasons, other than economic protectionism, for requiring that its liquor wholesalers be controlled by Missouri residents. This newspaper article and the

statements within it support that the Missouri Legislature was concerned that the control of the distribution of liquor within Missouri could be taken over by national distributors with no reason to be concerned with the public health and safety concerns associated with distribution of alcohol within the State of Missouri.

Similarly, Southern Wine argues that Missouri's residency requirements cannot be related to the "core concerns" of the Twenty-first Amendment because only ten other states have similar residency requirements. (Pls.-Appellants' Br. 32). Such an argument, however, is akin to saying that the fact that no states currently ban the distribution of liquor altogether means such a law would not be protected by the Twenty-first Amendment. Both arguments are clearly rejected in *Granholm*.

Indeed, the fact that at least ten other states have such residency requirements and at least twenty states have residency requirements that are more than a "physical location" requirement, and have had such requirements since shortly after adoption of the Twenty-first Amendment, *support* the argument that Missouri's residency requirements should be protected by the Twenty-first Amendment.

First, these laws show that the states understood the Twenty-first Amendment allowed and protected them. Second, these laws show that a large portion of the United States agrees that, given the perils associated with the distribution of liquor, it is better for wholesalers to be comprised of in-state residents.

Similar to its citation to a newspaper article, Southern Wine's repeated reference to other licenses within Missouri's three-tier system do not support its claims. (Pls.-Appellants' Br. 9–11). Quite simply, the other licenses and requirements associated with those licenses are irrelevant.

Those licenses are not similarly situated to the licenses at issue. To claim otherwise ignores the facts and circumstances surrounding those licenses and the practical realities likely considered by the Missouri General Assembly in setting forth requirements for those licenses.

With regard to the residency requirements associated with the licenses at issue, the General Assembly understandably targeted wholesalers distributing liquor *with a higher alcohol content*; "intoxicating liquor containing alcohol in excess of five percent by

weight" to be exact. Mo. Rev. Stat. § 311.060.2(3). The General Assembly was justified in its decision to require greater accountability for those wholesalers distributing liquor with greater amounts of alcohol.

As Southern Wine admits, the other licenses referenced are directed to manufacturers, retailers, and wholesalers distributing alcohol with lower liquor content, such as beer wholesalers. (Pls.-Appellants' Br. 9–11). With regard to manufacturers, the Supreme Court has already found a distinction between manufacturers on the one hand and wholesalers and retailers on the other such that similar limitations on manufacturers would be improper according to *Granholm*. *Granholm*, 544 U.S. 488–89.

With regard to retail corporations, the General Assembly has required that the "managing officer of such corporation [be] of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village." Mo. Rev. Stat. § 311.060.1. At the retail level, the managing officer of the retail location in Missouri and the employees who are physically present in Missouri at the point of sale, as the sellers of alcohol to individuals in Missouri for actual consumption,

are subject to great scrutiny in the State of Missouri and elsewhere by the community, including, potentially, law enforcement and the media. Such focused scrutiny does not occur at the wholesale level.

With regard to beer wholesalers, the General Assembly was justified in its decision to require greater accountability for those wholesalers distributing liquor with greater amounts of alcohol. Beer presents different social risks than wine and liquor because it contains less alcohol. In addition, at the time the Missouri General Assembly was enacting the residency requirements, the low cost of beer and the lack of speedy and refrigerated distribution networks made beer production and distribution a local matter.

The General Assembly,[7] in promulgating the residency requirements, was addressing a legitimate concern with the distribution of higher-alcohol-content liquor within Missouri and understood that the residency requirements would provide the

[7] As discussed further in note 12, *infra*, Southern Wine's reliance on the statements of Division employees is misplaced. Certainly, those individuals cannot be said to speak for Missouri's General Assembly, the legislative body responsible for determining how Missouri's liquor distribution system should be structured in light of the concerns associated with allowing liquor to be distributed within Missouri.

localized, individual accountability the General Assembly believed was necessary to address those concerns.[8]

4. Similar to Bacchus*, the other pre-*Granholm *cases cited by Southern Wine do not support its claims here.*

Southern Wine's reliance upon *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980) and *324 Liquor Corp. v. Duffy,* 479 U.S. 335 (1987) for the proposition that *Granholm* did not intend to draw a broad categorical distinction between residency requirements directed at producers and residency requirements directed at wholesalers or retailers is misplaced. Neither case deals with residency requirements. Rather, both cases deal with resale price maintenance, which, at the time, was a *per se* violation of the Sherman Act.[9] *324 Liquor Corp.*, 479 at 350 ("[The State's] resale price maintenance system directly conflicts with the 'familiar and

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[8] Southern Wine's repeated reference to an out-of-state wholesaler operating as a wholesaler in Missouri under the grandfather provision to the residency requirements does not negate this analysis. Grandfather provisions are common in legislation and do not somehow negate the entire purpose of the statutes to which they belong.

[9] Notably, this premise has since been abandoned. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881–82 (2007) (application of per se rule is unwarranted as to vertical agreements to fix minimum resale prices).

substantial' federal interest in enforcement of the antitrust laws."); *Midcal,* 445 U.S. at 110 (same).

Ultimately, *324 Liquor Corp.* and *Midcal* provide no support for Southern Wine's arguments and actually support the district court's conclusion. Indeed, in each case, the Supreme Court explicitly recognized that the Twenty-first Amendment expanded each State's power to regulate alcoholic beverages within its borders and that, with this expansion of State power, there was a corresponding limitation of Congress's power under the Commerce Clause to regulate alcoholic beverages. *See Midcal,* 445 U.S. at 108 (finding Congress's interstate commerce power to regulate alcoholic beverages "is directly qualified by § 2"); *324 Liquor Corp.,* 479 U.S. at 346 ("§ 2 directly qualifies the federal commerce power.").

The Supreme Court's declaration in *Granholm* that the three-tier system is unquestionably legitimate cites to its previous language in *Midcal*: "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." *Granholm*, 544 U.S. at 488 (citing *Midcal*, 445 U.S. at 110); *see also 324 Liquor Corp.*,

479 U.S. at 346 (internal quotation marks omitted) ("Section 2 grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.").

Accordingly, even in the cases on which Southern Wine relies, the United States Supreme Court acknowledged that the Commerce Clause does not come into play when a state regulation pertains to the structure of the liquor distribution system, as the challenged Missouri residency requirements do. The cases cited by Southern Wine do not limit *Granholm*'s holding. The Supreme Court in *Granholm* held that residency requirements at the wholesale and retail levels of a three-tier system (*i.e.,* regulations relating to the structure of the liquor distribution system that do not discriminate against out-of-state products) are "unquestionably legitimate" and protected from Commerce Clause challenge by the Twenty-first Amendment. *Granholm*, 544 U.S. at 488–89.[10]

[10] Though they are not cited substantively by Southern Wine, Southern Wine also cites to *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986) and *Healy v. Beer Institute*, 491 U.S. 324 (1989) as pre-*Granholm* cases addressing the Twenty-first Amendment. Those cases are of no assistance to this Court, however,

Similarly, Southern Wine's reliance on *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994), a 5th Circuit opinion rendered 11 years before *Granholm*, is misplaced. Because *Cooper* was decided before *Granholm*, the *Cooper* court did not have the Supreme Court's analysis in *Granholm* to guide it as it considered a Commerce Clause challenge to several provisions of the Texas Alcoholic Beverage Code that required a period of Texas citizenship and/or residency before a mixed beverage permit could issue. *Cooper,* 11 F.3d at 549–50. Without the guidance of *Granholm*, in an analysis similar to that presented by Southern Wine in the present case, the *Cooper* court placed a "towering" burden on the State to demonstrate that "the statutes advance 'a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* at 553. After determining the State had not met this towering burden, far from presuming the validity of

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because the regulations at issue in those cases sought to control the price of liquor in other states. As the *Brown-Forman* Court found, the Twenty-first Amendment is not implicated at all because such regulations are an attempt to "regulate sales in other States of liquor that will be consumed in other States" and the Twenty-first Amendment only gives a state authority to control sales of liquor within that state. *Brown-Forman*, 476 U.S. at 585 (emphasis added). That is not the case here.

the provisions at issue,[11] the *Cooper* court quickly found the provisions at issue were not saved by the Twenty-first Amendment. *Id.* at 553–56. As set forth above, the Supreme Court in *Granholm*, in addressing states' concerns that the constitutionality of the regulations within their three-tier system that discriminate against non-residents would be called into question, rejected the *Cooper* court's analysis and conclusion when it found that such residency requirements are "unquestionably legitimate" and protected by the Twenty-first Amendment.[12]

F. The district court correctly granted summary judgment in favor of the Division on Southern Wine's Commerce Clause claims because Missouri's residency requirements are protected by the Twenty-first Amendment.

Because Missouri's residency requirements are protected by the Twenty-first Amendment, the district court was correct in adopting *Granholm's* analysis and properly entered summary judgment in favor

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[11] The *Cooper* court appears to have ignored the United States Supreme Court's earlier dictate that "[g]iven 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).

[12] Likewise, *Glazer's Wholesale Drug Co. v. Kansas*, 145 F. Supp. 2d 1234 (D. Kan. 2001) is another pre-*Granholm* case that does not assist the Court here in light of the Supreme Court's analysis in *Granholm*.

of the Division on Southern Wine's Commerce Clause claims. Southern Wine's arguments to the district court failed to overcome the protections of the Twenty-first Amendment as discussed in *Granholm* and were properly rejected. Southern Wine's arguments to this Court likewise fail, and this Court should affirm the protections of the Twenty-first Amendment, the United States Supreme Court's holding in *Granholm*, and the District Court's entry of judgment on Southern Wine's Commerce Clause challenge.

II. Judgment Was Properly Entered On Southern Wine's Equal Protection Claims Because Missouri's Residency Requirements, A Part Of Missouri's Three-Tier Liquor Distribution System, Are Presumed To Be Valid Under The Twenty-First Amendment And Rationally Related To A Legitimate Government Objective.

Section I of the Fourteenth Amendment, commonly referred to as the Equal Protection Clause, states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Southern Wine's argument that Missouri's residency requirements are invalid under this Clause fails in light of the Twenty-first Amendment and Missouri's justification for those requirements.

In reviewing Southern Wine's Equal Protection Clause challenge to Missouri's residency requirements, this Court should give deference to Missouri's determination as to how to structure its liquor distribution system under the Twenty-first Amendment. As the United States Supreme Court has stated: "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).

In this case, Southern Wine concedes they cannot establish they are members of a suspect class or that obtaining a Missouri liquor wholesale license is a fundamental right. (*See* Pls.-Appellants' Br. 40). The standard of review in such a case under an Equal Protection Clause claim is the rational basis test. *Schutz v. Thorne*, 415 F.3d 1128, 1135 (10th Cir. 2005). (*See* Pls.-Appellants' Br. 40). Under the rational basis test, courts will uphold a law if it is rationally related to a legitimate end.[13] *Id.*

[13] Southern Wine's brief suggests that this Court should stop its inquiry into whether there is a "legitimate state interest" after considering the deposition testimony of Mike Schler. (*See* Pls.-Appellants' Br. 44). However, to do so would go against the United States Supreme Court's holding in *FCC v. Beach Commc'ns, Inc.*, which indicated that

> Under rational basis review, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Moreover, "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" Under this standard, "statutory classifications will be set aside only if no grounds can be conceived to justify them." Nor should courts in reviewing challenged classifications "(1) second guess the 'wisdom, fairness, or logic' of legislative choices; (2) insist on 'razor-sharp' legislative classifications; or (3) inquire into legislative motivations."

Id. at 1136 (citations omitted); *see also Grand River Enters. Six Nations v. Beebe*, 574 F.3d 929, 944 (8th Cir. 2009) (citing *FCC v. Beach*

"[w]hether the posited reason for the challenged distinction actually motivated Congress is 'constitutionally irrelevant' . . . ." 508 U.S. 307, 318 (1993); *see also id.* at 315 (citations omitted) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of 'legislative facts' explaining the distinction 'on the record,' has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. 'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'"). Therefore, this court must consider, as did the district court, any and all legitimate state interests in determining whether the rational basis test is met and cannot, according to the Supreme Court's holding in *Beach Commc'ns, Inc.*, limit itself to the deposition testimony of a member of the *executive* branch—who, as a member of the executive branch, lacks authority to speak for the legislature—in determining *legislative* intent.

Commc'ns, Inc., 508 U.S. 307, 313, 315 (1993) and stating that, under rational basis review, "[t]he challenger must 'negative every conceivable basis which might support' the legislation").

In this case, the Court's rational basis review must consider the protections of the Twenty-first Amendment. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980) ("[T]he Twenty-first Amendment [and other parts of the Constitution] . . . must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case"). In addition, the Court's rational basis review must account for the Supreme Court's consideration in *Granholm* of the Twenty-first Amendment and its purpose and its finding that states' residency requirements, like Missouri's, are "unquestionably legitimate" under the Twenty-first Amendment. 544 U.S. at 488–89.

Given the residency requirements' presumption of validity under the Twenty-first Amendment, the United States Supreme Court's finding that three-tier systems are "unquestionably legitimate," and Southern Wine's burden "to negative every conceivable basis which might support it," Southern Wine simply cannot meet its burden to

establish that Missouri's residency requirements are invalid under the Equal Protection Clause.

Indeed, in addition to the purpose of the Twenty-first Amendment and the protections afforded by it as set forth by *Granholm*, the Division has provided numerous bases for the district court and now this Court to find Missouri's residency requirements are rationally related to a legitimate end (*see* discussion in Part I.C.3. and J.A. 97–98); therefore, Southern Wine cannot "negative every conceivable basis which might support [the residency requirements]." Moreover, the Missouri Supreme Court has recognized that "the control of liquor distribution is an important state interest in Missouri." *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 497 (Mo. 1992).

Southern Wine has not and cannot overcome the residency requirements' presumption of validity, and, therefore, the district court correctly entered summary judgment on Southern Wine's Equal Protection Clause claims. The decision of the district court should be affirmed.

CONCLUSION

For the foregoing reasons, the district court's entry of summary judgment in favor of the Division should be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify this brief was produced using Microsoft Office Word 2007 using the proportionally spaced Century Schoolbook and contains 13,973 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii). The brief has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the counsels of record on this 30th day of November, 2012.

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