

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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

v.

DIVISION OF ALCOHOL AND TOBACCO CONTROL *et al.*,  
Defendants-Appellees.

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

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*  
MISSOURI BEVERAGE CO. IN SUPPORT OF APPELLANT  
SOUTHERN WINE AND SPIRITS OF AMERICA, INC.  
SEEKING REVERSAL**

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**MOTION FOR LEAVE TO FILE  
BRIEF OF *AMICUS CURIAE***

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, *amicus curiae* Missouri Beverage Co. (“MoBev”) respectfully moves this Court for leave to file the enclosed brief in support of Plaintiffs-Appellants. All parties have consented to the filing of this brief.

MoBev has a concrete interest in this case. Since the year 2000, MoBev has been a wholesale solicitor of liquor in the state of Missouri, and it presently employs over 50 state residents and serves over 1400 retailer customers. As such, MoBev is subject to (and compliant with) all relevant wholesale solicitor licensing conditions—including the residency requirements in Mo. Rev. Stat. § 311.060, the constitutionality of which is at issue in this case. The outcome of this case will therefore have an immediate and potentially significant impact on MoBev’s rights and responsibilities, as well as on the marketplace in which it competes.

In that sense, MoBev is similarly situated to Major Brands, Inc., which supported the state as an *amicus* before the District Court. However, while a large wholesaler like Major Brands benefits from the state’s protectionist residency requirements—which primarily exclude other large wholesalers from the market—many smaller wholesalers like MoBev have opposing interests. In MoBev’s experience, the residency requirements lock in the larger wholesalers’ advantage because those wholesalers face less genuine competition for premium brands.

Simultaneously, the residency requirements harm smaller wholesalers like MoBev by shrinking the market of potential out-of-state investors and purchasers that might acquire a smaller wholesaler. An *amicus* brief is therefore desirable to provide the Court with a fuller understanding of the ways in which the residency requirements affect Missouri's wholesale liquor market.

Wherefore, MoBev respectfully moves this honorable Court for leave to file the enclosed brief.

Respectfully submitted,

/s/Thomas C. Goldstein

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September 13, 2012

## CERTIFICATE OF SERVICE

I certify that the foregoing motion and enclosed *amicus* brief were filed with the Clerk using the appellate CM/ECF system on September 13, 2012. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Thomas C. Goldstein

Thomas C. Goldstein

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## **RULE 26.1 DISCLOSURE**

*Amicus curiae* Missouri Beverage Co. is a closely held corporation. It has no parent company, and no publicly held corporation owns 10% or more of its stock.

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## INTEREST OF *AMICUS*<sup>1</sup>

*Amicus curiae* Missouri Beverage Co. (“MoBev”) is licensed by Defendants-Appellees as a wholesale solicitor of alcoholic beverages. MoBev’s license permits it to sell intoxicating liquor of all kinds to authorized wholesalers and retailers. MoBev files this brief in support of Plaintiff-Appellant Southern Wine’s appeal because MoBev’s experience illustrates how the residency requirements at issue in this case discriminate against interstate commerce and in so doing distort the marketplace and impair competition in Missouri without achieving any corresponding regulatory benefit.<sup>2</sup>

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no person other than the *amicus curiae* (including a party and party’s counsel) contributed money to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

<sup>2</sup> As used in this brief, the term “residency requirements” refers to the requirement that any wholesale solicitor or any wholesaler licensed to sell beverages containing more than 5% alcohol must be a “resident corporation,” Mo. Rev. Stat. § 311.060.2(3), defined as a corporation incorporated under the laws of Missouri:

[A]ll 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.

*Id.* § 311.060.3.

MoBev was originally named Pioneer Wholesale Liquor Company. Pioneer Wholesale had four employees and revenues of less than \$1 million per year. In January 2000, MoBev's current principal and president, Bill Reichhardt, purchased Pioneer Wholesale and renamed it. Reichhardt had an extensive background in the Missouri beverage industry, having previously worked at Major Brands, Inc. and Glazer's, Inc.—the two largest wholesalers in the state. In thirteen years of operation, MoBev has grown into a state-wide wholesaler providing a diverse array of products to over 1400 retailer customers. MoBev now generates revenues in excess of \$16 million per year, employs more than 50 Missouri residents, and occupies a 35,000-square-foot warehouse in St. Louis.

Among Missouri wholesalers, MoBev is a medium- to small-sized operation. The Missouri wholesale market is dominated by two players: Major Brands (a Missouri corporation, which participated in the proceedings below as an *amicus* supporting Defendants); and Glazer's (a Texas-based distributor, which is exempt from Missouri's residency requirements through grandfathering). Major Brands and Glazer's control the lion's share of the market—each is believed to generate hundreds of millions of dollars in annual revenues, and they collectively represent most of the premium national brands. Another group of companies generates significant revenues mostly by wholesaling beer (*e.g.*, Lohr Distributing, which handles Anheuser-Busch). The next tier of wholesalers includes MoBev as well as

other companies that generate annual revenues of less than \$30 million each. Finally, a number of smaller wholesalers carry products from boutique wineries, distilleries, and breweries, and generate very low annual revenues.

MoBev's understanding of the discriminatory effect of the challenged residency requirements arises from its experience in 2009, when MoBev's principal began investigating options to sell the company. The goal was to sell MoBev as a going concern to another wholesaler that could use MoBev's infrastructure and retain its employees. In 2011, a firm specializing in mergers and acquisitions marketed MoBev to its nationwide list of clients. Many, including businesses outside Missouri, expressed interest. But upon learning of the residency requirements at issue in this case, national interest evaporated. The remaining potential buyers were larger wholesalers in Missouri, which wanted to acquire the company's franchise contracts while shedding its employees and infrastructure. Unwilling to accept those terms, MoBev took itself off the market.

MoBev's interest in this litigation is thus concrete and contrary to that of Major Brands, which participated as an *amicus* in the proceedings below. While large wholesalers like Major Brands benefit from the exclusion of still-larger multistate wholesalers, many small and medium-sized wholesalers like MoBev—as well as all suppliers, retailers, and consumers—stand to gain from interstate investment in the Missouri wholesale market.

## SUMMARY OF ARGUMENT

Defendants-Appellees concede that Missouri's residency requirements discriminate against interstate commerce. They plainly do so in order to advance a protectionist agenda. Consequently, the residency requirements are invalid under the dormant Commerce Clause unless Defendants-Appellees prove they are *necessary* to achieve a legitimate local purpose.

Missouri's discriminatory residency requirements fail this test because while liquor laws in general serve important goals, these particular residency requirements do not. Indeed, the state's own witnesses expressly disclaimed the notion that the residency requirements are important to effective regulation, or to the continued vitality of the state's three-tier system. The exceptions to the residency requirements—for beer wholesalers and for multistate distributor Glazer's, which sells hundreds of millions of dollars in alcohol to Missouri retailers—also belie the district court's conclusion that they “are an integral component of a three-tier system.” J.A. 93.

Because the residency requirements violate the dormant Commerce Clause, Defendants-Appellees can only prevail if the Court decides that the Twenty-First Amendment gives states *carte blanche* to discriminate in its regulation of wholesalers. But that holding would fly in the face of controlling law. The Twenty-First Amendment permits states to restrict importation and distribution to ensure

that temperance and order are not thwarted by an unregulated marketplace. It is not, however, a license for unabashed protectionism. Thus, to decide whether the Twenty-First Amendment or the dormant Commerce Clause prevails, the Court must balance the state and federal interests. When, as here, residency requirements manifest discriminatory intent, that fact tips the balance decisively against the state. But even independent of bad intent, when a state liquor law threatens the federal goal of national unity without meaningfully advancing the core concerns of the Twenty-First Amendment, the federal interest prevails.

## ARGUMENT

### **I. The Residency Requirements Discriminate Against Interstate Commerce.**

The residency requirements plainly and concededly discriminate against interstate commerce in violation of the dormant Commerce Clause. In this context, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Ore. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Ore.*, 511 U.S. 93, 99 (1994). Here, the parties have stipulated that “the residency requirements . . . treat non-residents engaged in interstate commerce less favorably than Missouri residents engaged in intrastate commerce.” J.A. 31.

“Discriminatory laws motivated by simple economic protectionism are subject to a virtually *per se* rule of invalidity, which can only be overcome by a

showing that the State has no other means to advance a legitimate local purpose.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-39 (2007) (internal quotation marks and citations omitted). “A finding that state legislation constitutes ‘economic protectionism’ may be made on the basis of either discriminatory purpose, or discriminatory effect.” *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (internal citations omitted). In this case, both the purpose and effect of the residency requirements demonstrate protectionism.

As explained in Plaintiffs-Appellants’ brief and addendum, the only legislative history that speaks to the residency requirements’ purpose is the sponsor’s statement that “it was intended to prevent a few big national distillers from monopolizing the wholesale liquor business in Missouri by requiring 90 per cent of a wholesale firm’s stock to be owned by persons who have lived in Missouri at least three years.” Add. 20. This Court, the Supreme Court, and other courts of appeals have historically relied on precisely this sort of evidence to find discriminatory intent. *See, e.g., Jones v. Gale*, 470 F.3d 1261, 1269 (8th Cir. 2006) (holding that “statements by lawmakers” provide strong evidence of discriminatory intent) (citation omitted); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352 (1977) (pointing to a statement by a single state commissioner as evidence of discriminatory purpose); *Family Winemakers of Calif. v. Jenkins*, 592



F.3d 1, 7 (1st Cir. 2010) (finding discriminatory purpose on the basis of sponsor's statement).<sup>3</sup>

Alongside discriminatory intent, the residency requirements also have the effect of discriminating against interstate commerce. Competition among wholesalers in Missouri is structured by both the liquor laws and the franchise laws. Before a manufacturer or solicitor may sell alcohol in Missouri, it must appoint a wholesaler in Missouri to handle the brands. *See* Mo. Code Regs. tit. 11 § 70-2.270(5). Generally, though not always, a supplier designates only one wholesaler per brand in the state and enters into a franchise agreement with that wholesaler. *See* Mo. Rev. Stat. §§ 407.405, 410, 413 (setting forth requirements for franchisors). Wholesalers compete by luring brands away from each other, but their ability to do so is often limited by their size. This is so because different producers often gravitate to different-sized wholesalers. Large wineries, distilleries, and breweries require large wholesalers that can handle substantial volume. Smaller brands often have greater promotional needs but lesser infrastructure needs, and therefore appoint smaller wholesalers.

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<sup>3</sup> Indeed, the evidence in this case is unusually strong. In other cases, sponsors spoke benignly about their desire to advance domestic businesses, but the Court nevertheless inferred discriminatory intent. *See, e.g., Bacchus*, 468 U.S. at 270-71 (holding that a statute intended to “promote the establishment” of the domestic fruit wine industry had a discriminatory purpose). Here, by contrast, the sponsor eschewed subtlety and directly stated his intent to block interstate businesses from accessing the local market, making inferences unnecessary.

The residency requirements have stifled competition for premium brands by preventing multistate wholesalers (with one exception) from acquiring any share of the Missouri market. The residency requirement statute was enacted in 1947. From that time forward, Major Brands has steadily grown to assume a dominant position in the state market. By acquiring its competitors, Major Brands became the largest distributor in Missouri by a substantial margin.<sup>4</sup> In fact, from 1988 to 1997, Major Brands held a near-monopoly over premium brands in Missouri. Any semblance of competition for those brands was only restored when Glazer's entered the state in 1997,<sup>5</sup> but the residency requirements ensure that no other multistate wholesaler can repeat that feat, and market realities ensure that no smaller wholesalers can challenge the current leaders. Thus, the residency requirements have blessed two beneficiaries by insulating them from interstate competition: Major Brands, whose position at the top of the Missouri distribution hierarchy is locked in; and Glazer's, which effectively gets to play by its own set of rules.

Nonresident businesses are not the only parties that suffer from the state's protectionism. As evidenced by MoBev's unsuccessful attempt to find a buyer, small and medium-sized wholesalers in Missouri are stuck. They cannot grow

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<sup>4</sup> See Major Brands, *Company History*, <http://www.majorbrands.com/history.html>.

<sup>5</sup> See Glazer's, *Missouri*, <http://www.glazers.com/locations/missouri/Pages/default.aspx>. Glazer's acquired a license issued prior to the enactment of the residency requirements in 1947, and thus benefits from a grandfathering provision that exempts it from those requirements. See Mo. Rev. Stat. § 311.060.3.

substantially because they cannot ever hope to match the scale of Major Brands or Glazer's. And their options to sell their businesses are severely limited by the residency requirements, so that they cannot get value for their investments. While some of those wholesalers may prefer to continue to operate without interstate competition, others, like MoBev, suffer from the lack of options. Suppliers in Missouri and elsewhere likewise suffer from a lack of choices in the state wholesale market, and suppliers that normally work with multistate wholesalers like Southern Wine must develop a separate infrastructure to deal with the Missouri market.

In sum, the residency requirements discriminate on their face. Because that discrimination is animated by protectionist motives and has a discriminatory effect, the residency requirements are invalid under the dormant Commerce Clause unless they are absolutely necessary to achieve a legitimate local purpose. As explained in the next Part, they fail that test.

## **II. The Residency Requirements Serve No Legitimate Regulatory Purpose.**

The residency requirements fail to serve or achieve any legitimate regulatory purpose. Missouri's liquor laws are intended "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. But the

state has not shown—and it cannot show—that the residency requirements serve these goals. The burden is on the state to “demonstrate, under rigorous scrutiny,” that the residency requirements are the only way to “advance a legitimate local interest.” *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994).

It bears noting at the outset that Missouri has never been particularly restrictive with regard to alcohol. Indeed, Missouri’s liquor laws are popularly regarded as “among the most permissive” in the nation.<sup>6</sup> While the state is of course concerned with underage drinking and public safety, and while its regulators are professional and beyond reproach, the state recognizes and celebrates the role that alcoholic beverages play in its history, culture, and economy. For example, Anheuser-Busch, America’s leading brewer, is a revered corporate citizen of St. Louis, and its brewery there is a landmark.<sup>7</sup> And the state government has recently taken measures to reinvigorate the wine industry, which competes nationally and internationally.<sup>8</sup> Thus, to the extent that the Twenty-First

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<sup>6</sup> *Missouri*, Wikipedia, [http://en.wikipedia.org/wiki/Missouri#Laissez-faire\\_alcohol\\_and\\_tobacco\\_laws](http://en.wikipedia.org/wiki/Missouri#Laissez-faire_alcohol_and_tobacco_laws).

<sup>7</sup> See Anheuser-Busch, *About Anheuser-Busch*, <http://anheuser-busch.com/index.php/our-company/about-anheuser-busch/>.

<sup>8</sup> See Missouri Wine & Grape Bd., *About the Missouri Wine & Grape Bd.*, <http://www.missouriwine.org/missouri-wine-a-grape-board>.

Amendment is about promoting temperance by reducing consumption generally, Missouri is an unlikely standard bearer.

It is also worth enumerating the regulations that are not being challenged in this case, for those are the provisions that truly serve the state's legitimate interests. First, nobody is challenging the existence of Missouri's three-tier system itself. The parties recognize that Missouri is entitled, like every other state, to require that producers—wherever located—sell first to wholesalers, who sell to retailers, who then sell to customers. As we all know, that system is “unquestionably legitimate” under the Supreme Court's precedents. *See North Dakota v. United States*, 495 U.S. 423, 432 (1986). But Mike Schler—the deputy state supervisor for the Missouri Division of Alcohol and Tobacco Control, who was authorized to testify on behalf of the Division—testified that this lawsuit will not impact or erode that system. J.A. 72-73.

Second, nobody challenges that wholesalers must be present in Missouri. This case does not challenge the rule that wholesalers must be Missouri corporations. Mo. Rev. Stat. § 311.060.3. Likewise, nobody disputes that wholesalers must have resident managing officers, that such officers must be of good moral character, and that the state has the authority to vet those individuals. *Id.* § 311.060.1. Furthermore, nobody disputes that Missouri wholesalers must keep storage facilities in the state, which shall be subject to regulatory

requirements and inspections as required by law. *See* Mo. Code Regs. tit. 11 § 70-2.140(2). These requirements are not being challenged because they are clearly related to core concerns of liquor regulation. All wholesalers must adhere to them, and the state would have no trouble enforcing them against a company with nonresident owners.

Third, nobody is challenging any of the laws governing the conduct of wholesalers' business. Licensed wholesalers must comply with statutes and regulations relating to pricing, promotions, product storage, and recordkeeping, to name a few. *See generally* Mo. Rev. Stat. ch. 311; Mo. Code Regs. tit. 11, div. 70, ch. 2. For example, wholesalers cannot offer different prices to different retailers, Mo. Rev. Stat. § 311.332.1; they must report their prices for every product every month, *see* Mo. Code Regs. tit. 11 § 70-2.190(1), and they cannot offer more than a nominal (1%) discount for high-quantity purchases, *id.* § 70-2.190(2)(D). Wholesalers must also secure permits for all of their salesmen to act as such. *Id.* § 70-2.200(3). Wholesaler advertisements must include a series of mandatory truthful statements about the advertised product, and refrain from making other statements. *Id.* § 70-2.240(3), (5).

And wholesalers must submit monthly excise tax reports indicating the volume of liquor sold. *Id.* § 70-2.090(2).<sup>9</sup> None of these requirements are challenged here because they also are clearly related to core regulatory concerns.

Against the backdrop of these rules, it is impossible to conclude that the residency requirements are anything but superfluous. The Supreme Court has identified the “core of the State’s power under the Twenty-first Amendment” as actions “promoting temperance, ensuring orderly market conditions, and raising revenue.” *North Dakota*, 495 U.S. at 432. The residency requirements add nothing to the regulations that actually further those goals, nor do they prevent underage drinking or curb organized crime. This is so because whether a wholesaler’s owners, directors, and officers live in Missouri or not, the wholesaler must abide by all substantive regulations relating to the conduct of its business, or else face penalties including the loss of its license. *See* Mo. Rev. Stat. § 311.720.

To their credit, the state’s witnesses conceded the obvious point that the residency requirements serve essentially no regulatory function. Mr. Lafayette Lacy, the Supervisor of Alcohol and Tobacco Control, testified that the residency

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<sup>9</sup> However, wholesalers themselves do not pay the excise taxes—that responsibility falls on the primary American source of the product, *i.e.*, the manufacturer or solicitor. *See* Mo. Dep’t of Public Safety, *FAQs: Manufacturers, Wholesalers, Solicitors*, [http://www.atc.dps.mo.gov/licensing/faqs\\_mfg\\_wholesale\\_solicitors.asp#f6](http://www.atc.dps.mo.gov/licensing/faqs_mfg_wholesale_solicitors.asp#f6); *see also* Mo. Rev. Stat. § 311.275.3 (defining “primary American source of supply” to be the manufacturer or importer).

requirements do not protect the citizens of Missouri “[f]rom a public safety standpoint.” J.A. 51. Mike Schler likewise testified that resident and nonresident wholesalers would have an equal incentive to promote responsible drinking. J.A. 67. And while he suggested that in some cases the collection of excise taxes might be more difficult, J.A. 79-80, that point is not persuasive: resident and nonresident businesses have an equal incentive to accurately report taxes; solicitors and not wholesalers actually pay the taxes, *see* note 9, *supra*; and Lacy and Schler both acknowledged that they had not faced any problems in regulating nonresident wholesaler Glazer’s, including with regard to excise taxes, J.A. 52, 63-64, 80.

In the court below, however, both Defendants and *amicus* Major Brands stressed that requiring the owners of wholesalers to be Missouri residents ensures that those wholesalers are tied to the communities they serve, which promotes the goals of temperance by creating additional personal incentives for upright behavior. This argument is flawed on several levels.

First, there is simply no evidence that the legislature enacted the residency requirements to instill community spirit. Instead, the argument constitutes a mere “*post hoc* rationalization” for protectionist policy, and it is “inadequate to survive the scrutiny invoked by the facial discrimination” of the residency requirements. *Hughes v. Oklahoma*, 441 U.S. 332, 338 n.20 (1979). Second, the state has an array of nondiscriminatory alternatives to achieve the goal of enhanced community



engagement. If the state is concerned that wholesalers who lack the proper incentives will flood Missouri's cities with liquor, it can regulate—as it has done—pricing, promotional schemes, recordkeeping, and sales volume. It can also impose additional regulations on retailers, who constitute an essential bridge between wholesalers and customers. *Cf.* J.A. 70 (testimony that the “retailer level” has the “most impact” on sales to minors). Third, the state's argument is empirically denied by the presence of Glazer's, headquartered in Dallas, which the state's own witness conceded is “a good company.” J.A. 78. Fourth, nobody is challenging the requirement that the managing officer of a Missouri wholesaler must reside in the state, or that the wholesaler must have an in-state facility. Consequently, every wholesaler already must have a prominent employee with ties to Missouri.

Finally, in the context of Missouri's geography, it simply makes no sense to use state borders to define communities. In terms of total area, Missouri is the twenty-first-largest state in the United States—larger than Florida, Wisconsin, and New York. Its two largest cities, Kansas City and St. Louis, are approximately 250 miles apart. It defies reason to argue that residents of Kansas City are somehow members of the St. Louis community, and vice versa, but residents of Kansas City, Kansas, or East St. Louis, Illinois—both part of the same metropolitan areas as their Missouri counterparts—are not. *See S. Wine & Spirits of Tex., Inc. v. Steen*, 486 F. Supp. 2d 626, 631-32 (W.D. Tex. 2007) (rejecting the state's community-

welfare argument after considering Texas's geography). And Missouri shares its border with eight different states. Thus, "[t]he examples are endless and reflect the futility of [the] community-welfare argument." *Id.* at 632.

In sum, the residency requirements do not serve a legitimate regulatory purpose, and they cannot be upheld on that basis.

### **III. The Twenty-First Amendment Does Not Give States *Carte Blanche* to Discriminate in the Wholesale Tier.**

The district court acknowledged most of the above, but it nevertheless upheld the residency requirements on the ground that the Twenty-First Amendment shields discrimination in the wholesaler tier from Commerce Clause scrutiny, even though it does not do the same for producers. That was error.

The Twenty-First Amendment is not a trump card. Rather, as the Supreme Court has held, "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." *Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) (quotation marks and citation omitted). Thus, when the state interest in regulating liquor collides with a federal interest, courts must balance the two to determine which prevails. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984). "The question . . . is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by

the [residency requirements] to outweigh the Commerce Clause principles that would otherwise be offended.” *Bacchus*, 468 U.S. at 275.<sup>10</sup> In this case, the clear answer is “No.”

First, whatever the merit of the district court’s rationale with regard to regulations that are motivated by principles underlying the Twenty-First Amendment and calibrated to achieve the goals of temperance, there simply is no cogent defense of a liquor law adopted with protectionist intent. As the Supreme Court has held:

Doubts about the scope of the [Twenty-First] Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. . . . State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.

*Bacchus*, 468 U.S. at 276. In light of the clear protectionist motive behind the residency requirements, the Court need go no further before invalidating them. In essence, the weight on the state’s side of the balance is zero. And crucially, it is zero whether the statute at issue deals with producers, wholesalers, or retailers: An improper motive is unlawful regardless of the target.

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<sup>10</sup> This test is substantially the same as the test advanced by Plaintiff-Appellant. *See* Appellant Br. 24 (arguing that “discrimination is permissible only if it is ‘supported by,’ and ‘closely related to,’ a ‘clear concern of the Twenty-first Amendment’”) (citation omitted).

Even putting aside the issue of protectionist intent, the district court's conclusion that the Twenty-First Amendment immunizes the residency requirements is incorrect because it misreads the meaning of the Supreme Court's holding in *Granholm v. Heald*, 544 U.S. 460 (2005). In *Granholm*, the Court struck down two state statutes that discriminated against out-of-state producers that sought to ship wine directly to in-state customers. *Id.* at 493. While the case involved producers, the Court never suggested that a different analysis would apply to wholesalers; nor did the Court ever state that the Twenty-First Amendment would protect a policy like Missouri's residency requirements. If anything, *Granholm* reinforced the point that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Id.* at 487.

Plaintiff-Appellant's Brief cogently explains why the test of *Bacchus* remains the appropriate framework to consider discrimination in the wholesaler tier. *See* Appellant Br. 28-33. And indeed, when the states in *Granholm* urged that *Bacchus* "should be overruled or limited to its facts," the Court "decline[d] their invitation." 544 U.S. at 488. Thus, whether the statute regulates producers or wholesalers, the Court still must balance the statute's effectiveness in achieving its Twenty-First Amendment objectives against its negative Commerce Clause effects. As demonstrated in Parts I and II, *supra*, the harm to interstate commerce is both apparent and severe, and the regulatory interest is virtually nonexistent.

This case is striking for the extremity of its facts. The residency requirements are not only discriminatory, but were adopted for protectionist reasons. Furthermore, they apply only to a narrow subset of Missouri licensees—they do not even apply to all wholesalers, as both beer wholesalers and Glazer’s are exempt. The state’s own witnesses have repeatedly and candidly admitted that the residency requirements achieve no substantial regulatory benefit. And the rationalizations offered by the state to the court below do not withstand even cursory scrutiny. To uphold the residency requirement here, the Court must adopt a staggeringly broad reading of the Twenty-First Amendment, out of sync with at least three decades of Supreme Court precedent. It should refuse to do so.

### CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the attached *amicus* brief complies with the length and type-volume limitations set forth in Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it is proportionally spaced, has a 14-point typeface, and contains 4255 words.

/s/ Thomas C. Goldstein

Thomas C. Goldstein

## CERTIFICATE OF SERVICE

I certify that the foregoing *amicus* brief was filed with the Clerk using the appellate CM/ECF system on September 13, 2012. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Thomas C. Goldstein

Thomas C. Goldstein