

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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

vs.

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

---

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

---

**BRIEF OF THE NATIONAL BEER WHOLESALERS ASSOCIATION AND  
THE MISSOURI BEER WHOLESALERS ASSOCIATION AS *AMICI CURIAE*  
IN SUPPORT OF DEFENDANTS-APPELLEES  
AND FOR AFFIRMANCE OF THE DISTRICT COURT JUDGMENT**

---

Paul E. Pisano  
1101 King Street, Suite 600  
Alexandria, Virginia 22314  
703-683-4300

*Of Counsel:*  
STEPHEN M. DIAMOND  
1140 Asturia Avenue  
Coral Gables, Florida 33134  
305-569-9882

MICHAEL D. MADIGAN  
*Counsel of Record*  
KATHERINE E. BECKER  
222 South Ninth Street, Suite 3150  
Minneapolis, Minnesota 55402  
612-604-2000

*Counsel for Amici Curiae*

## **RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

The National Beer Wholesalers Association is a Virginia non-profit corporation. It does not have any parent corporation and there is not any publicly held corporation that owns 10% or more of its stock.

The Missouri Beer Wholesalers Association is a Missouri non-profit corporation. It does not have any parent corporation and there is not any publicly held corporation that owns 10% or more of its stock.

**TABLE OF CONTENTS**

**CORPORATE DISCLOSURE** ..... ii

**TABLE OF AUTHORITIES** .....iv

**INTERESTS OF *AMICI CURIAE*** ..... 1

**ARGUMENT**.....3

    I.    Introduction .....3

    II.   Policy Underlying the Challenged Missouri Statutes .....3

    III.  The District Court Correctly Interpreted and Applied the Twenty-first  
          Amendment and the *Granholm* Decision to Appellants’ Dormant  
          Commerce Clause Challenge ..... 7

    IV.  The District Court Correctly Dismissed Appellants’ Equal Protection  
          Challenge to the Missouri Physical Presence Law..... 12

**CONCLUSION**..... 17

**TABLE OF AUTHORITIES**

**CONSTITUTIONAL PROVISIONS**

U.S. Constitution Twenty-first Amendment..... *Passim*

**CASES**

*Arnold’s Wines, Inc. v. Boyle*,  
571 F.3d 185 (2<sup>nd</sup> Cir. 2009).....8, 9, 10

*Bowen v. Gilliard*,  
483 U.S. 587 (1987).....13

*California Retail Liquor Dealers Assn’n v. Midcal Aluminum, Inc.*,  
445 U.S. 97 (1980).....8, 11

*Capital Cities Cable, Inc. v. Crisp*,  
467 U.S. 691, 714 (1984) .....11

*Cooper v. McBeath*,  
11 F.3d 547 (5<sup>th</sup> Cir. 1994) .....12

*Craig v. Boren*,  
429 U.S. 190 (1976).....14

*Dandridge v. Williams*,  
397 U.S. 471 (1970).....13

*F.C.C. v. Beach Communications, Inc.*,  
508 U.S. 307 (1993).....13, 14, 16

*Granolm v. Heald*,  
544. U.S. 460 (2005)..... *Passim*

*Ferguson v. Skrupa*,  
372 U.S. 726 (1963).....17

*High Life Sales Co. v. Brown-Forman Corp.*,  
823 S.W.2d 493 (Mo. 1992).....5

<i>Lehnhausen v. Lake Shore Auto Parts, Co.</i> , 410 U.S. 356 (1973).....	13, 14
<i>Lyng v. Automobile Workers</i> , 485 U.S. 360 (1988).....	13
<i>Manuel v. State of Louisiana</i> , 982 So.2d 316 (La. Ct. App. 2008) .....	4
<i>May Department Stores v. Supervisor of Liquor Control</i> , 530 S.W.2d 460 (Mo.App.1975) .....	5
<i>McBud of Missouri, Inc. v. Siemens Energy &amp; Automation, Inc.</i> , 68 F.Supp.2d 1076 (E.D. Mo. 1999) .....	7
<i>North Dakota v. United States</i> , 495 U.S. 423 (1990).....	<i>Passim</i>
<i>Sermchief v. Gonzales</i> , 600 S.W.2d 683 (Mo. 1983).....	7
<i>Sullivan v. Stroop</i> , 496 U.S. 478 (1990).....	13
<i>United States Railroad Retirement Bd. v. Fritz</i> , 449 U.S. 166 (1980).....	13, 14, 16
<i>Vaughan v. EMS</i> , 744 S.W.2d 542 (Mo.App.1988) .....	5
<i>Williamson v. Lee Optical of Okla., Inc.</i> , 348 U.S. 483 (1955).....	17

**FEDERAL STATUTES**

STOP Underage Drinking Act, Pub.L.No. 109-422, 42 U.S.C. 290bb-25b .....	11
---	----

**STATUTES**

Mo. Rev. Stat., Chap. 311 .....3,10  
Mo. Rev. Stat. § 311.060 .....6

**OTHER AUTHORITIES**

Raymond B. Fosdick and Albert Scott, *Toward Liquor Control*,  
Harper & Brothers, at 43 (1933) .....5  
  
Jefferson City Daily Capital News article entitled “Governor Hears Liquor Men  
Tell of Pressurizing,” dated May 17, 1947 .....7  
  
2007 Economic Census, U.S. Census Bureau,  
<http://www.census.gov/econ/industry/hierarchy/i4248.htm>..... 1  
  
“Preventing Excessive Alcohol Consumption,” The Community Guide, Centers for  
Disease Control and Prevention,  
<http://www.thecommunityguide.org/alcohol>.....4

## INTERESTS OF AMICI CURIAE

Since 1938, the National Beer Wholesalers Association (“NBWA”) has served as the national membership organization of the beer distributing industry representing over 2,000 family-owned licensed beer distributors, including hundreds of beer distributors in the Eighth Circuit.<sup>1</sup> Its members reside in all fifty states. According to the most recent economic census survey, U.S. beer distributor direct sales reached \$52.2 Billion Dollars. Beer distributors employed 105,889 individuals and paid \$4.8 Billion Dollars in wages. *See* 2007 Economic Census, U.S. Census Bureau; <http://www.census.gov/econ/industry/hierarchy/i4248.htm>. As a whole, the beer industry pays over \$5 Billion Dollars in state and local taxes.

The Missouri Beer Wholesalers Association (“MBWA”) represents the interests of its 35 members in advocacy for beer distribution. Its members have licenses issued by Missouri to buy from brewers and sell to licensed retailers. Its members sell both beer, and in several cases, sell alcohol that is greater than 5% by weight under appropriate licenses.

This case implicates the essential interests of NBWA, MBWA, and their respective members. If successful, Appellants’ challenge to Missouri law would undermine Missouri’s right under the Twenty-first Amendment to structure the liquor distribution system within the state and, specifically, to create a three-tier

---

<sup>1</sup> This Brief is filed with the written consent of all parties.

distribution system tailored to the needs of its citizens. Through its delicately balanced and historically tested regulatory scheme, Missouri has established a transparent and accountable distribution system to serve a wide variety of fundamental interests including but not limited to preventing illegal sales to minors, keeping organized crime out of the liquor industry, preventing counterfeit alcohol from being sold, preventing monopolies within the industry, inhibiting overly aggressive marketing, moderating consumption, collecting taxes, creating orderly distribution and importation systems, and preventing a recurrence of the problems that led to the enactment of Prohibition.

The District Court below correctly interpreted *Granholm v. Heald*, 544 U.S. 460 (2005), appropriately upheld the challenged “in presence” laws, and wisely concluded that those laws represented an appropriate exercise of Missouri’s authority under the Twenty-first Amendment. For the reasons that follow, NBWA and MBWA (collectively hereafter referred to as “*Amici*”) respectfully submit that the District Court appropriately dismissed the dormant Commerce Clause and Equal Protection challenges to Missouri law.



## ARGUMENT

### **I. Introduction.**

This appeal arises out of a legal challenge by Plaintiffs-Appellants (hereinafter referred to as “Appellants”) to a Missouri Statute, enacted pursuant to the State’s Twenty-first Amendment authority, which required corporate distributors of alcohol in excess of five percent by weight,<sup>2</sup> and their majority owners, directors, and officers, to be physically present in the State.

*Amici* submit this Brief in support of Defendants-Appellees (hereinafter referred to as “Appellees”). *Amici* urge the Court to affirm the District Court decision in all respects. In the interest of avoiding the repetition of arguments made persuasively by Appellees, this Brief will focus on the policies that underlie the challenged statute and the reasons why, under the Twenty-first Amendment, it does not run afoul of either the dormant Commerce Clause or the Equal Protection Clause.

### **II. Policy Underlying the Challenged Missouri Statutes.**

Missouri regulates the sale and distribution of alcohol within its borders through a “three-tier system” of licensed and structurally separate producers, distributors, and retailers. *See* Mo. Rev. Stat., Chap. 311. The purpose of the three-tier system is, in part, to avoid the harmful effects of vertical integration in the

---

<sup>2</sup> For purposes of this Brief, “alcohol” refers to intoxicating liquor containing alcohol in excess of five percent by weight.

industry by restricting producers, distributors, and retailers to one level of activity. Experience has proven that vertical integration and “tied houses” lead to excessive retail capacity, cutthroat competition for market share, and overstimulated sales, which ultimately leads to intemperate consumption. It was widely recognized that prior to prohibition, “tied houses” were a root cause of alcohol abuse and related problems because retailers were pressured to sell product by any means including selling to minors, selling after hours, and overselling to intoxicated customers.<sup>3</sup>

The United States Supreme Court has expressly recognized that the three-tier system is “unquestionably legitimate.” *See Granholm v. Heald*, 544 U.S. 460, 488,489 (2005). The underlying policy was recently elaborated upon more extensively in *Manuel v. State of Louisiana*, 982 So.2d 316, 330 (La. Ct. App. 2008):

Under the three-tier system, the industry is divided into three tiers, each with its own service focus. No one tier controls another. Further, individual firms do not grow so powerful in practice that they can out-muscle regulators. In addition, because of the very nature of their operations, firms in the wholesaling tier and the retailing tier have a local presence, which makes them more amenable to regulation and naturally keeps them accountable. Further, by separating the tiers, competition, a diversity of products, and availability of products are enhanced as the economic incentives are removed that encourage wholesalers and retailers to favor the products of a particular supplier (to which wholesaler or retailer might be tied) to the exclusion of products from other suppliers.

---

<sup>3</sup> These remain a concern of policymakers to this day. *See*, for example, “Preventing Excessive Alcohol Consumption,” The Community Guide, Centers for Disease Control and Prevention, <http://www.thecommunityguide.org/alcohol>.

(emphasis added).

The benefits of a “local presence” to effective control of alcohol were noted in *Toward Liquor Control*, the seminal work on alcohol regulation:

The tied-house system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales.

Raymond B. Fosdick and Albert Scott, *Toward Liquor Control*, Harper & Brothers, at 43 (1933).

The Missouri Supreme Court has recognized the importance of effectively regulating alcohol, in particular, the middle tier of the three-tier system:

The control of liquor distribution is an important state interest in Missouri. See *Vaughan v. EMS*, 744 S.W.2d 542, 547 (Mo.App.1988), and *May Department Stores v. Supervisor of Liquor Control*, 530 S.W.2d 460, 468 (Mo.App.1975). 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).

The Missouri Legislature has also determined that the wholesale tier is particularly critical to the three-tier system because liquor being sold in the state flows through licensed wholesalers where it is subject to audit and examination by

the State's alcohol regulators and tax collectors. In addition, by interposing independent wholesalers between producers and retailers, Missouri prevents the domination of retailers by those who care nothing about temperance or local laws. Recognizing that locally-based distributors are more responsive to community concerns and more amenable to effective enforcement measures, Missouri enacted Mo. Rev. Stat. § 311.060, which imposed requirements guaranteed to ensure a local presence. In pertinent part, the Statute provides that “[n]o wholesale 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 defined in this section.” *Id.* § 311.060.2(3). The Statute further provides that “all corporate officers, directors, and shareholders who own or control sixty percent or more of the Company’s stock must be Missouri residents for at least three years, as well as voters and taxpaying citizens of the county and municipality in which they reside.” *Id.* § 311.060.3.

Based upon one 1947 newspaper article, Appellants would have the Court believe that the sole motivation for passing Mo. Rev. Stat. § 311.060 was to discriminate against out-of-state distributors. *Appellants’ Brief* at 8 (citing to a Jefferson City Post-Tribune article entitled “Telegrams Favoring Veto Flood Governor’s Desk on Liquor Bill” dated May 9, 1947). The gist of that article was that there were a “flood of telegrams” urging the Governor to veto the Bill.

However, as evidenced by the attached Article entitled “Governor Hears Liquor Men Tell of Pressurizing,” the two distributing companies opposing the Bill fabricated many, if not most, of the stock telegrams, which, it turned out, originated from vacant lots or fictitious addresses. *See* Jefferson City Daily Capital News article entitled “Governor Hears Liquor Men Tell of Pressurizing,” dated May 17, 1947, attached hereto as Exhibit A. This was discovered during a special hearing called by Governor Donnelly. Ultimately, the Governor refused to veto the Bill. As evidenced by this article, one purpose of the Bill was to prevent the development of a “monopoly” within the industry,<sup>4</sup> a purpose which is certainly consistent with the aforementioned policy underlying the three-tier and tied house laws, namely preventing vertical integration and preventing the domination of retailers by absentee vendors.

**III. The District Court Correctly Interpreted and Applied the Twenty-first Amendment and the *Granholm* Decision to Appellants’ Dormant Commerce Clause Challenge.**

The Supreme Court has repeatedly acknowledged that the “Twenty-first Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.”

---

<sup>4</sup> In ascertaining legislative intent or the purpose of a statute, it is appropriate to examine “the problems sought to be remedied and the circumstances and conditions existing at the time of enactment.” *Sermchief v. Gonzales*, 600 S.W.2d 683, 688 (Mo. 1983); *See McBud of Missouri, Inc. v. Siemens Energy & Automation, Inc.*, 68 F.Supp.2d 1076, 1082 (E.D. Mo. 1999).

*Granholm v. Heald*, 544 U.S. 460, 488-89 (2005) (quoting *California Retail Liquor Dealers Assn'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 (1980)). Accordingly, the Twenty-first Amendment alters dormant Commerce Clause analysis of state law governing the importation of alcohol. *Id.* at 460. Specifically, the Court has held that states may “funnel sales through the three-tier system” which, it has recognized, is “unquestionably legitimate.” *Granholm v. Heald*, 544 U.S. 460, 488-489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). While holding that facially discriminatory state liquor laws pertaining to producers and products are subject to dormant Commerce Clause challenge, the *Granholm* Court specifically noted that “state policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent.” *Id.* at 489.<sup>5</sup> Appellants concede that the Twenty-first Amendment immunizes at least certain state alcohol laws from Commerce Clause scrutiny, including laws establishing a “three-tier system” and laws which require, “that wholesalers be physically located in-state.” *Appellants’ Brief* at 3. Appellants attempt to argue that the challenged Missouri law does not fall within the exemption.

---

<sup>5</sup> As expressed by the *Arnold’s Wines* Court, “*Granholm* is best seen as an attempt to harmonize prior court holdings regarding the power of states to regulate alcohol within their borders – a power specifically granted to the states by the Twenty-first Amendment – with the broad policy concerns of the Commerce Clause.” *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2<sup>nd</sup> Cir. 2009).

The challenged Missouri law, however, does not differentiate between in-state or out-of-state producers or products. Rather, it simply requires corporate alcohol distributors and their majority owners, directors, and officers to be physically present in the state and more effectively regulated by Missouri's alcohol and taxing authorities. *See North Dakota v. United States*, 495 U.S. 423, 447 (1990) (Scalia J., concurring) (“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”). Also, this law was enacted pursuant to Missouri's authority to “structure [its] distribution system,” an area over which it has “virtually complete control.” *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005) As such, the physical presence law is protected by the Twenty-first Amendment and Appellants' dormant Commerce Clause challenge fails.

A recent Second Circuit case is instructive here. In *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2<sup>nd</sup> Cir. 2009), the Second Circuit upheld a New York law which permitted in-state retailers the exclusive right to sell, deliver, and transport wine directly to New York customers, but prohibited out-of-state retailers from doing so. Although the New York law did not require the owners of the retailers to be residents, it is nonetheless applicable here for its analysis. Specifically, the *Arnold's Wines* Court upheld the law on the basis that the Twenty-first Amendment immunized the statute from dormant Commerce Clause attack.

Noting that the Supreme Court in *Granholm* held that “the three-tier system itself is unquestionably legitimate,” *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005) (quoting in part with *North Dakota v. United States*, 495 U.S. 423, 432 (1986)), the *Arnold’s Wines* Court found that the retail licensing laws fell squarely within the State’s authority to institute “a three-tier system for the regulation of alcoholic beverages . . . [without discriminating] against out-of-state producers in violation of the Commerce Clause . . . and are thus a valid exercise of the state’s rights under the Twenty-first Amendment”). *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 192 (2009).

Here, as recognized by the Court below, Missouri has exercised its rights to establish a comprehensive statutory scheme to regulate the sale and distribution of alcoholic beverages through the three-tier system. Mo. Rev. Stat., Chap. 311. The State seeks to funnel sales of alcohol through the “unquestionably legitimate” three-tier system. Missouri’s system achieves several important policy goals, including the promotion of responsible and prudent sales practices by requiring the distributors of alcohol, and their majority owners and decision makers, to have deep roots within the communities in which they sell.

Appellants’ challenge to this personal presence requirement is nothing less than a challenge to Missouri’s Twenty-first Amendment authority to “structure the distribution system” and to maintain a three-tier system. As recognized by the



Supreme Court, this authority confers “virtually complete control” to Missouri in determining “how to structure the liquor distribution system.” *Granholm v. Heald*, 544 U.S. 488-89 (2005) (quoting *California Retail Dealers Ass’n v. Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). The critical component of Missouri’s system is the wholesale tier. The three-tier system has been likened to an hourglass with the distribution tier as the constriction point. Because all alcohol is funneled through in-state distributors with a mandated physical presence, they are most amenable to audit, compliance checks, and community pressure to sell alcohol responsibly.<sup>6</sup>

As noted by the Supreme Court, state alcohol laws enjoy a unique legal status under the Constitution and, “[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*, 495 U.S. at 433 (emphasis added) (also citing e.g. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)). These conclusions recognize that the Twenty-

---

<sup>6</sup> Since the *Granholm* decision in 2005, Congress has again spoken with regard to the “primacy” of state liquor laws. Specifically, the STOP Underage Drinking Act states: “Alcohol is a unique product and should be regulated differently than other products by the States and Federal Government. States have primary authority to regulate alcohol distribution and sale, and the Federal Government should support and supplement these State efforts.” STOP Underage Drinking Act, Pub.L.No. 109-422, 42 U.S.C. 290bb-25b.

first Amendment embodies an extraordinary expression of our national will enacted just 79 years ago.<sup>7</sup>

Appellants have failed to meet their burden with respect to the challenged statute in all respects. The physical presence law does not discriminate against either out-of-state producers or products. It simply requires alcohol distributors and their majority owners and decision makers to be physically present in the state. It was enacted pursuant to Missouri's Twenty-first Amendment authority to structure its distribution system. As such, the law is beyond the reach of Appellants' dormant Commerce Clause challenge.<sup>8</sup>

#### **IV. The District Court Correctly Dismissed Appellants' Equal Protection Challenge to the Missouri Physical Presence Law.**

Appellants assert that the physical presence law should be stricken for the "separate and independent reason" that it violates the Equal Protection Clause. Appellants concede, as they must, that the challenged law does not embody a

---

<sup>7</sup> The adoption of the Twenty-first Amendment reflects the recognition by both Congress and the States that alcohol is potentially dangerous because of its intoxicating character, that its misuse can give rise to serious threats to the public's health, safety, and welfare, and that states therefore require wide latitude to develop solutions tailored to their citizenry.

<sup>8</sup> Appellants argue that the Court should follow *Cooper v. McBeath*, 11 F.3d 547 (5<sup>th</sup> Cir. 1994). As noted by Appellees, however, that case was tacitly overruled by *Granholm v. Heald*, 544 U.S. 460 (2005), which was decided a decade after *Cooper*. To at least some extent, Appellants' acknowledge this by virtue of their concession that three-tier laws and laws which require that wholesalers be physically present in the state are immune from dormant Commerce Clause challenge. It is also noteworthy that *Cooper* fails to even mention the three-tier system, which the *Granholm* Court found was "unquestionably legitimate."

suspect or quasi-suspect category and accordingly does not implicate a “strict scrutiny” standard of review. Rather, the statute regulates the sale of alcohol as a matter of social and economic policy.

As such, the challenged classification is entitled to a “strong presumption of validity.” *Lyng v. Automobile Workers*, 485 U.S. 360, 37 (1988). Furthermore, it is incumbent upon those challenging such a classification “to negative every conceivable basis which might support it.” *Lehnhausen v. Lake Shore Auto Parts, Co.*, 410 U.S. 356, 364 (1973).

As stated by the Supreme Court,

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *See Sullivan v. Stroop*, 496 U.S. 478, 485, 110 S.Ct. 2499, 2504, 110 L.Ed.2d 438 (1990); *Bowen v. Gilliard*, 483 U.S. 587, 600-603, 107 S.Ct. 3008, 3016-3018, 97 L.Ed.2d 485 (1987); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174-179, 101 S.Ct. 453, 459-462, 66 L.Ed.2d 368 (1980); *Dandridge v. Williams*, 397 U.S. 471, 484-485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970).

*F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

The need for caution in the exercise of judicial review is particularly critical with regard to alcohol regulations for two reasons. First, by its nature, all alcohol regulation fundamentally represents a balance between unfettered competition and

availability, on the one hand, and strict control, on the other. State Legislatures, according to local norms and standards, must determine how that balance should be achieved and where the appropriate balance point should be fixed – an exercise “where the legislature must necessarily engage in a process of line-drawing.” *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). That subjective judgment, forged within the give and take of the political arena by the community’s local elected representatives, should not be set aside unless there is “no conceivable basis which might support it.” Second, these particular legislative judgments enjoy a special status by virtue of the Twenty-first Amendment and, accordingly, are entitled to the greatest deference by any reviewing Court.

The highly deferential “rational basis” standard of review is premised upon the separation of powers doctrine and is designed “to preserve to the legislative branch its rightful independence and its ability to function.” *F.C.C. v. Beach Communications*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973)). Nowhere should such review be exercised more carefully than when examining a classification enacted pursuant to the Twenty-first Amendment regulating members of the liquor industry.<sup>9</sup>

---

<sup>9</sup> The seminal case discussing the relationship between the Twenty-first Amendment and the Equal Protection Clause is *Craig v. Boren*, 429 U.S. 190 (1976). While it is true that the Court rejected the argument that the Twenty-first Amendment immunized state liquor laws from all equal protection challenges, the holding in that case was limited to the following statement: “[The Supreme] Court

As discussed in the prior section, there is indeed a rational basis for Missouri's physical presence law. In fact, the policy underlying that law lies at the core of Missouri's three-tier system and tied house laws, namely that alcohol must be funneled through in-state wholesalers whose majority owners, directors, and officers are physically present in the state, are amenable to enforcement by the state, and are responsive to the norms and standards of their host communities.

Appellants have conceded that the Twenty-first Amendment immunizes certain state alcohol laws from Commerce Clause scrutiny, including laws establishing a "three-tier system" and laws which require "that wholesalers be physically located in-state." *Appellants' Brief* at 3. This concession reflects the recognition that such laws are supported by sound public policy. Obviously, as noted by the District Court, if such laws are supported by sufficient policy for this purpose, a rational or "conceivable" basis exists for purposes of Equal Protection analysis.

Appellants' constitutional challenge therefore is narrowly focused on the rationality of imposing more stringent in presence requirements upon wholesalers

---

has never recognized sufficient 'strength' in the [Twenty-first] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause." *Id.* at 462 (emphasis added). Accordingly, contrary to Appellants' assertion, the Supreme Court has not addressed the application of the Twenty-first Amendment to an Equal Protection challenge to a liquor law that does not involve a suspect classification or infringe upon a fundamental constitutional right (as here).

selling intoxicating liquor with an alcohol content of more than five percent by weight as opposed to wholesalers selling less potent alcohol (whose majority owners, directors, and officers need not be residents). There can be no doubt, however, that if it is rational to require that corporate distributors be resident corporations in order to promote among alcohol distributors greater accountability and greater sensitivity to community concerns, it is certainly rational to extend that requirement to the decision makers within that corporate distributor. It is also certainly rational to require a greater physical presence with regard to alcohol that is more potent and therefore potentially more harmful to the public health, safety and welfare.

As noted in *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (involving the classification of governmental beneficiaries), defining the class of persons subject to a regulatory requirement “inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.” This conclusion applies with equal force to a classification which “delineates the bounds of the regulatory field.” *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993). Such legislative line-drawing “renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the

Legislature must be allowed to approach a perceived problem incrementally. *Id.*; see *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955); see also *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“courts do not substitute their social and economic beliefs for the judgment of legislative bodies” after the *Lochner* era).

The judgment of the Missouri Legislature to require a greater physical presence for alcohol wholesalers falls into this category. While the Court, in its subjective judgment, might draw that line differently, *Amici* respectfully suggest that it should not interfere with this legislative prerogative and the Legislature should be permitted to construct or deconstruct liquor regulations on an incremental basis as it sees fit. In light of the authority under which this classification was enacted and the subjective nature of this classification, Appellants’ Equal Protection challenge must fail.

### **CONCLUSION**

For the foregoing reasons, *Amici* respectfully submit that the District Court decision be affirmed in all respects and that Appellants’ appeal be dismissed.

Respectfully submitted,

December 6, 2012

/s/ Michael D. Madigan  
Michael D. Madigan  
*Counsel of Record*  
Katherine E. Becker  
Madigan, Dahl & Harlan, P.A.  
222 South Ninth Street, Suite 3150  
Minneapolis, Minnesota 55402  
612-604-2000  
Counsel for *Amici Curiae*

Paul E. Pisano  
1101 King Street, Suite 600  
Alexandria, Virginia 22314  
703-683-4300

*Of Counsel:*  
Stephen M. Diamond  
1140 Asturia Avenue  
Coral Gables, Florida 33134  
305-569-9882



## STATEMENT OF RELATED CASES

So far as is known to *Amici Curiae* National Beer Wholesalers Association and Missouri Beer Wholesalers Association, there are no related cases pending in the Eighth Circuit Court of Appeals.

## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 4,035 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

December 6, 2012  
Date

/s/ Michael D. Madigan  
Signature of Filing Party

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the counsels of record on this 6<sup>th</sup> day of December, 2012.

December 6, 2012  
Date

/s/ Michael D. Madigan  
Signature of Filing Party

Government Hears Liquor Men Tell Of Pressurizing 25 Salesmen Toured the State Inspiring Wires on New Liquor Bill

Speakers for the Continental and Kinsey Distilling Sales Companies told Gov. Phil M. Donnelly Friday they insure telegraphic campaign against a liquor bill, which placed more than 700 telegrams on the Governor's desk.

A special hearing lasting more than two hours, the Governor quizzed Thomas J. Nolan, Kansas City, representative of the Kinsey firm, about the mechanics of the telegraphic campaign.

The Governor inquired about telegrams from various salesmen and some from Illinois but Nolan said he had nothing about them.

State Inspectors in Check Later Donnelly told a news conference that state liquor inspectors had conducted a "spot check" on his inspectors and found that some dealers whose names were signed to telegrams did not know what they were signing.

Joseph P. Halpin of Kansas City, representing the Continental firm, said at the hearing that "a lot of telegrams came in that we were sending about the bill."

George Alvord of Kansas City, another salesman, said that two distributors owned by Public Liquor Industries, Inc., of Chicago, had been contacted by "a man" who called "snappy" telegrams.

Donnelly, who must act on the bill by May 21, took the issue under advisement.

TORNADO LASHES KANSAS TOWN



The principal and students of the Cassoday, Kansas, school view the wreckage of one of the school buildings after a tornado struck the small east-central Kansas community. No one was killed or injured. Damage to the town and outlying farm buildings was estimated at \$50,000.

Truman Concerned About Upped Prices Farm Real Estate

WASHINGTON, May 16.—(AP)—President Truman today asked Secretary of Agriculture Anderson to call a conference of Government agencies and farm organizations to combat a "serious problem" in farm real estate prices.

In a letter to Anderson, Mr. Truman said: "From this conference, I hope there will emerge a specific program of methods of discouraging further inflation in farm real estate prices and unwelcome speculation of farm real estate."

While on the whole agricultural land is being sold at a profit, the fact remains that there are a large number of farmers, including veterans, who are going heavily into debt to purchase land at inflated prices.

Fear Difficulties Coming The farmers are likely to find themselves in a difficult position if farm products decline to lower levels, he said.

Mr. Truman said banks and other lenders should give "careful consideration" to the problem of farm real estate.

Donnelly, who must act on the bill by May 21, took the issue under advisement.

Good Fishing Reported By State Commission

Crappie fishing is excellent and white perch fishing is good at Lake of the Ozarks, the State Game Commission reported today.

Best news comes from Lake Taneyanno after opening, the commission said. Crappie fishing is good everywhere on Lake Wappapello, while white perch are being taken in fair frequency.

Crappie fishing is good everywhere on Lake Wappapello, while white perch are being taken in fair frequency.

Crappie fishing is good everywhere on Lake Wappapello, while white perch are being taken in fair frequency.

Crappie fishing is good everywhere on Lake Wappapello, while white perch are being taken in fair frequency.

Crappie fishing is good everywhere on Lake Wappapello, while white perch are being taken in fair frequency.

Joint Senate and House Committee Approves Aid Plan

Indicates Truman Will Get Full \$350,000,000 for Foreign Relief

WASHINGTON, May 16.—(AP)—The full \$350,000,000 foreign relief program President Truman has asked for was agreed to today by a Senate-House conference committee.

The committee acted as a whole on the \$350,000,000 program of helping Greece and Turkey.

The committee acted as a whole on the \$350,000,000 program of helping Greece and Turkey.

The committee acted as a whole on the \$350,000,000 program of helping Greece and Turkey.

The committee acted as a whole on the \$350,000,000 program of helping Greece and Turkey.

AMG in Germany Warns People in Food Shortages

Some Blunt Words Used in Attempt to Curb Disturbances

BERLIN, May 16.—(AP)—The American Military Governor of Hesse told the German people tonight that the death penalty will be invoked if necessary to curb disturbances stemming from protests over a shortage of food.

In the greatest language since the end of the war, Dr. James R. Newman warned the German people in an address prepared for radio delivery that he was ready to use American occupation troops to "search all places and seize and confiscate all food stuffs" if food hoarding continued.

He said he would implement a "zero tolerance" policy against hoarding and other "black market" activities.

Warnings of Stern Measures Dr. Newman declared that he prepared to take a "zero tolerance" policy against hoarding and other "black market" activities.

He said he would implement a "zero tolerance" policy against hoarding and other "black market" activities.

He said he would implement a "zero tolerance" policy against hoarding and other "black market" activities.

He said he would implement a "zero tolerance" policy against hoarding and other "black market" activities.

Phone Strikers Trickling Back To Their Jobs

Senate OKs Deficiency Appropriation Bill

WASHINGTON, May 16.—(AP)—The Senate today approved a \$135,418,000 appropriation bill to maintain the post office and several other Government agencies through June 30.

Senators in conference with the House, which voted \$23,240,000 less for the Senate.

Senators in conference with the House, which voted \$23,240,000 less for the Senate.

Senators in conference with the House, which voted \$23,240,000 less for the Senate.

Senators in conference with the House, which voted \$23,240,000 less for the Senate.

Senators in conference with the House, which voted \$23,240,000 less for the Senate.

Senators in conference with the House, which voted \$23,240,000 less for the Senate.

19,000 More Went To Work Friday

Southwestern Bell One of Few Territories Still Holding Out

WASHINGTON, May 16.—(AP)—Pickets which members of the Telephone Installation Workers Union have been making for weeks disappeared in many areas today, leaving other workers free to resume normal telephone service.

The pickets will be back in a few days, however, said President Ernest Weaver of the union, the Association of Communications Equipment Workers agreed to join, if his organization and the Western Electric Company fail to reach an agreement.

Negotiations by union and company representatives continued in Detroit, Cleveland and some other places.

Progress toward settling the strike by members of the National Association of Telephone Equipment Workers organized by Western Electric Company was indicated tonight by a union official.

It came down half a mile from Indian Well, a natural rock formation near the strike.

At White Shirts, Lt. Col. Harold H. ...

At White Shirts, Lt. Col. Harold H. ...

Officials Seek 15 Per Cent More Pigs

WASHINGTON, May 16.—(AP)—The Agriculture Department today recommended a 15 per cent increase in pig production for 1947.

The department said the increase in pigs is needed since prospects point to less beef and veal in 1947.

The department said the increase in pigs is needed since prospects point to less beef and veal in 1947.

Film Communists To Be Subpoenaed

LOS ANGELES, May 16.—(AP)—A House subcommittee today subpoenaed Communist film makers.

The committee took with it the names of scores of Communist and Communist sympathizers.

The committee took with it the names of scores of Communist and Communist sympathizers.

Boy Drops in Cistern Near Harrisonville

HARRISONVILLE, Mo., May 16.—(AP)—A boy was drowned in a cistern at the rear of the home here today.

The boy's body was recovered from the bottom of the cistern, which contained ten feet of water, by a neighbor.

The boy's body was recovered from the bottom of the cistern, which contained ten feet of water, by a neighbor.

May Goes on Stand In War Fraud Trial

WASHINGTON, May 16.—(AP)—Andrew J. May, former chairman of the House Military Affairs committee, today went on the stand in a trial charged with fraud charges.

He testified that Garrison paid \$25,000 to the military.

He testified that Garrison paid \$25,000 to the military.

Army Using 350 German Scientists in Research

FRANKFURT, Germany, May 16.—(AP)—Importation of 350 German scientists to American military research centers is under way.

The German scientists in the United States are employed on a possible reduction of 40,000 in the strength of the Navy and the Army.

The German scientists in the United States are employed on a possible reduction of 40,000 in the strength of the Navy and the Army.

57-17-Year-Olds Flee From Alcoa, Friday

Five inmates of the Intermediate Reformatory at Alcoa fled today, returning to their barracks after attending church services early last night.

The five inmates fled today, returning to their barracks after attending church services early last night.

The five inmates fled today, returning to their barracks after attending church services early last night.

House Would Cut Money for Navy

WASHINGTON, May 16.—(AP)—The House today voted to cut \$100 million from the Navy's fiscal year 1948 appropriation.

The House today voted to cut \$100 million from the Navy's fiscal year 1948 appropriation.

The House today voted to cut \$100 million from the Navy's fiscal year 1948 appropriation.

