No. 12-2502

IN THE

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.

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

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

SUMMARY OF ARGUMENT

"[O]ne thing is certain" about the Twenty-first Amendment: "the central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276 (1984). That straightforward principle resolves this case. After all, Missouri's Residency Requirements slam the door on out-of-state residents who wish to start a Missouri company and compete in the state's wholesale market. Such an attempt to play favorites cannot stand. The State's contrary arguments misread the case law and ignore the record.

1. Commerce Clause. On the primary question presented, the State's brief is notable for what it does *not* say. The State makes no attempt to defend the

Residency Requirements under the dormant Commerce Clause. Rather, it concedes the point and puts all its chips on the Twenty-first Amendment. But that maneuver fails twice over. First, the State ignores legislative history demonstrating that the Residency Requirements were enacted for the precise purpose of blocking competition. That fact, standing alone, is fatal for the State.

Second, even setting aside their protectionist intent, the Residency Requirements are invalid under *Granholm* v. *Heald*, 544 U.S. 460 (2005), and *Bacchus* because they discriminate in a way that is not inherent in the three-tier system. The State fights that conclusion on two grounds. It primarily argues that *Granholm* gives states *carte blanche* to discriminate as they please in the alcohol market, so long as that discrimination is not aimed at alcohol producers. Resp. Br. 22-45. That is flatly wrong. *Granholm* and the cases that preceded it condemn discriminatory liquor regulation in broad, vehement terms not limited to producers. They carve out (at most) a narrow exception for localism "inherent in the three-tier system"—an exception that does not save Missouri's Residency Requirements. *Wine Country Gift Baskets.com* v. *Steen*, 612 F.3d 809, 818 (5th Cir. 2010). The State's contrary reading ignores *Granholm*'s key teachings, relies disproportionately on the *Granholm* dissent—which the State cites 19 times—and improperly treats *Bacchus* and other decisions as overruled.

The State also argues that even aside from *Granholm*, the Residency Requirements survive because the interests they advance are closely tied to the Twenty-first Amendment's core concerns. Resp. Br. 45-65. But the State fails to explain how requiring wholesaling companies' officers, directors, and stockholders to live and vote in Missouri could advance the interests it identifies—warding off "potential vices of alcohol," "promot[ing] temperance," "combat[ing] underage drinking," and so on. Resp. Br. 53. That is because such a showing is impossible. The Residency Requirements have nothing to do with those goals. Indeed, the State's own designated witness admitted exactly that on the record—a concession the State tries hard to ignore. His concession, and the illogic of the State's assertions, doom its attempts to satisfy *Bacchus*.

Perhaps recognizing as much, the State tries to insulate its flimsy assertions from scrutiny by suggesting that the Court apply rational basis review. Resp. Br. 21, 49. But the Supreme Court has never applied rational basis review when analyzing a State's reasons for discrimination under the Commerce Clause and Twenty-first Amendment. The Court instead has required the state to "justify" its discrimination by showing that the interests it advances are "so closely related" to a "clear concern of the Twenty-first Amendment" that the Amendment trumps the Commerce Clause. *Bacchus*, 468 U.S. at 275-276. The State has made no such showing. Its effort to erect a trade barrier at the state line is unconstitutional.

2. Equal Protection. The State fares no better on the equal protection claim. The State's argument that the Twenty-first Amendment insulates it from equal protection review is plainly wrong. And its argument that any generic government interest it manages to think up automatically suffices under rational-basis review—even if that interest bears no apparent relationship to the Residency Requirements—is equally mistaken. On rational-basis review the State "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985). That is what the State seeks to do here. Its effort fails.

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT DOES NOT AUTHORIZE MISSOURI'S DISCRIMINATORY RESIDENCY REQUIREMENTS.

Missouri's Residency Requirements deny wholesale licenses to companies unless their officers, directors, and a majority of their owners reside in the state. *See* Mo. Rev. Stat. §§ 311.060.2(3), 311.060.3. The opening brief demonstrated (at 19-23) that those requirements discriminate on the basis of an interstate element, that they cannot meet the exacting scrutiny applied to such discriminatory laws, and that they accordingly are invalid under the dormant Commerce Clause.

As it did below, the State concedes the dormant Commerce Clause issue by its silence and argues only that the Residency Requirements are saved by the

Twenty-first Amendment. The State is wrong for two independent reasons. First, the statute's protectionist design renders it per se invalid. Second, the State's reading of *Granholm* is overbroad, and its attempt to satisfy *Bacchus* falls apart in the face of the record and the State's failure to substantiate its assertions.

A. The Residency Requirements Are Invalid Because They Constitute "Mere Economic Protectionism."

The State's best argument is to use some *dicta* from *Granholm* about the three-tier system's legitimacy to contend that the Supreme Court has immunized all discriminatory liquor regulations, so long as the discrimination is not aimed at alcohol producers. Resp. Br. 24-25. That argument misconstrues *Granholm*, as we explain *infra* at 9-18. But this Court need not even wade into that issue because this case concerns a liquor law enacted with protectionist intent. And laws with such an intent have been singled out for invalidation by the Supreme Court.

1. The Supreme Court held in *Bacchus* that the Twenty-first Amendment does not shield state laws that constitute "mere economic protectionism." 468 U.S. at 276. It thus invalidated a state law after concluding that "the purpose of the exemption was to aid [local] industry" and that "the effect of the exemption is clearly discriminatory." *Id.* at 271. *Granholm* reaffirmed that rule, explaining that "[s]tates may not enact laws that burden out-of-state producers or shippers *simply to give a competitive advantage to in-state businesses*." 544 U.S. at 472 (emphasis added). And *Granholm* added that the Twenty-first Amendment "did not give

States the authority to pass non-uniform laws in order to discriminate against out-of-state goods." *Id.* at 484-485.

Courts of appeals analyzing *Granholm* and *Bacchus* have understood those teachings for what they are—a condemnation of alcohol laws motivated by protectionist intent. In *Jelovsek* v. *Bredesen*, 545 F.3d 431 (6th Cir. 2008), the Sixth Circuit held that under *Bacchus* and *Granholm* the Twenty-first Amendment does not shelter "economic protectionism." *Id.* at 436-437 (citation omitted). It struck down a law whose stated purpose was to benefit local businesses. *Id.* at 438. And in *Dickerson* v. *Bailey*, 336 F.3d 388 (5th Cir. 2003), the Fifth Circuit cited *Bacchus* and held that a state "may not use the Twenty–First Amendment as a veil to hide from constitutional scrutiny its parochial economic discrimination against out-of-state wineries." *Id.* at 407. *Accord Brooks* v. *Vassar*, 462 F.3d 341, 354 (4th Cir. 2006); *Bainbridge* v. *Turner*, 311 F.3d 1104, 1112 (11th Cir. 2002).

That principle dooms the Residency Requirements because the legislative history demonstrates that they were enacted to protect local industry from competition. The bill's sponsor, Sen. M.C. Matthes, "explained" the measure on the General Assembly floor by telling fellow legislators that "an effort had been made to drive some Missouri firms out of business." ADD20. He said his bill was "*intended to prevent a few big national distillers from monopolizing the wholesale liquor business in Missouri*[.]" *Id.* (emphasis added). Two other news articles

from 1947, submitted by the State's own *amici*, only underscore that protectionist intent. The first separately reports on the very same statement by Matthes. *See* Joplin Globe, *Donnelly Is Urged To Veto Liquor Bill*, May 10, 1947 (Exhibit C to American Beverage Licensees Amicus Br.). The second quotes counsel for Missouri's wholesalers as saying the requirement that wholesalers be majority-owned by "resident Missourians" would " 'protect small businesses against huge corporations' which 'threaten the small businessman in Missouri.' " Jefferson City Daily Capital News, *Governor Hears Liquor Men Tell of Pressurizing*, May 17, 1947 (Exhibit A to National Beer Wholesalers Association Amicus Br.). That article also quotes a former state legislator who "attacked the bill's constitutionality" and "said it was discriminatory." *Id.*

The legislative sponsor's floor statement constitutes a blatant admission of protectionist intent. Indeed, as one *amicus* brief points out, this Court and the Supreme Court rely on just this sort of statement to find protectionist intent and infer such intent even when the protectionist admission is far less overt. Missouri Beverage Co. Amicus Br. 6-7 (citing *Jones* v. *Gale*, 470 F.3d 1261, 1269 (8th Cir. 2006), and *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 352 (1977)). That conclusion is only reinforced here given that the statement comes from the bill's sponsor. After all, "a sponsor's statement to the full [legislature] carries considerable weight" in determining statutory meaning. *Corley* v. *United*

States, 556 U.S. 303, 318 (2009). The clear protectionist motive suffices under *Bacchus* and *Granholm* to require the law's invalidation.

The State responds by asking this Court to ignore the legislative history. It argues that newspaper articles are treated as inadmissible hearsay. Resp. Br. 56. That is sometimes true. But when it comes to legislative events, the Supreme Court and other courts have relied on news articles as legislative history, especially where (as here) no formal legislative history is available. *See, e.g.*, *Morse* v. *Republican Party of Va*., 517 U.S. 186, 206 n.22 (1996) (examining "contemporary news accounts" given that "the Commonwealth maintains limited legislative history records"); *In re Wooldridge*, 393 B.R. 721, 727 (Bankr. D. Idaho 2008) (relying on news reports "in the absence of more formal legislative history"); *United States* v. *Louisiana*, 225 F. Supp. 353, 375-376 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965) (admitting newspaper accounts of the legislative history of Louisiana's Constitution). And there can be no reliability concerns here given that two separate newspapers reported on the same legislative floor statement.

The State also argues that the article should be rejected "in light of the fact that Missouri's Legislature has expressly stated the purpose of the Liquor Control Law." Resp. Br. 57 (citing Mo. Rev. Stat. § 311.015). But the provision the State cites is merely a general purpose clause that applies to the *entire* Liquor Control Law—a full chapter of the Missouri Code, including hundreds of provisions.

Moreover, the clause was added in 2007, some 60 years after the Legislature enacted the Residency Requirements. *See* Senate Bill No. 299 (2007).[1] It sheds no light on the reason for the Residency Requirements in particular.

The State finally argues that even if the article "is reviewed for substance," it merely "support[s]" the idea that "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*[.]" Resp. Br. 57-58 (emphasis added). This is a transparent attempt to rewrite history. The first half of the quoted passage is what the law's sponsor actually said; the italicized half is the State appellate lawyers' own invention.

The conclusion is inescapable: "[T]he challenged residency requirement[s] constitute[ ] nothing more than 'mere economic protectionism' and work[ ] only to insulate [state] residents from outside competition." *Glazer's Wholesale Drug Co.* v. *Kansas*, 145 F. Supp. 2d 1234, 1247 (D. Kan. 2001). Under *Granholm* and *Bacchus*, they must be struck down.

B. *Granholm* Does Not Authorize Unlimited Discrimination Against Wholesalers And Retailers.

If the Court were to conclude that the law's protectionist intent did not resolve the case, it would then need to address the State's *Granholm* argument.

[1] *Available at* http://www.senate.mo.gov/07info/pdf-bill/tat/SB299.pdf.

The State argues that *Granholm* categorically immunizes all discrimination aimed at wholesalers—i.e., that while the State "may not discriminate against out-of-state liquor producers," "it may discriminate all it wants" against out-of-state interests in the other tiers. *Peoples Super Liquor Stores, Inc.* v. *Jenkins*, 432 F. Supp. 2d 200, 221 (D. Mass. 2006). The argument was rejected in *Peoples Super*, and should be rejected here, because it misses the point of *Granholm*. That case's fundamental teaching—repeated early and often—was that the Twenty-first Amendment *does not authorize discrimination*.

Granholm's premise was simple: "[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." 544 U.S. at 487. The Court emphasized that a statute's "invalidity is fully established by its facial discrimination against interstate commerce * * * despite the fact that the law regulates the sale of alcoholic beverages[.]" *Id.* at 488 (citation omitted). And it wrote that a law's "discriminatory character *eliminates the immunity afforded by the Twenty-first Amendment*." *Id.* (emphasis added). That, the Court explained, is why "[w]hen a state statute * * * discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the Court has "generally struck down the statute without further inquiry," even when it pertains to liquor regulation. *Id.* at 487 (citation omitted). *Granholm*, in

short, "emphatically re-affirmed" that the Twenty-first Amendment does not "rescue[ ]" discriminatory statutes. *Peoples Super*, 432 F. Supp. 2d at 220.

Of course, the Court went on in dicta to reassure states that "the three-tier system itself is 'unquestionably legitimate,' " *Granholm*, 544 U.S. at 489 (quoting *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990)), and to suggest by way of a "see also" citation that the Twenty-first Amendment empowers states as part of the three-tier system " 'to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.' " *Id.* (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)). The question is what the Court meant by those statements given its unambiguous condemnation, just a few sentences earlier, of discriminatory liquor regulation.

The Fifth Circuit has provided the best answer. It explained that if the *Granholm* dictum is authoritative, that must mean the three-tier system enjoys "constitutional approval" and under the three-tier system "wholesalers and retailers may be required to be within the State." *Wine Country*, 612 F.3d at 818, 820. But the "legitimizing" of a preference for local business, the Fifth Circuit recognized, was an exception—a "caveat to the [Supreme Court's] statement that the Commerce Clause is violated if state law authorizes 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' " *Id.* at 818-819 (quoting *Granholm*, 544 U.S. at 472). The court

harmonized this strict antidiscrimination rule and narrow exception by recognizing that under *Granholm* "[t]he discrimination that would be questionable * * * is that which is *not inherent in the three-tier system itself*." *Id.* at 818 (emphasis added). And it went on to explain that while the "physical location of businesses" is "a critical component of the three-tier system," durational residency requirements of the sort at issue here are not. *Id.* at 821.

That is exactly right. Given *Granholm*'s unwavering criticism of commercial discrimination, it is much more logical to limit the three-tier carve-out to its terms (as we do) than to read it as broadly as possible (as the State does). And by its terms, what the Court blessed in *Granholm* was merely the "*three-tier system*" and a requirement for "*in-state*" wholesalers. 544 U.S. at 489 (emphases added). The "three-tier system" simply refers to a system in which producers, wholesalers, and retailers of alcohol are separated. FTC, *Possible Anticompetitive Barriers to E-Commerce: Wine* 5-7 (July 2003) (cited in *Granholm*, 544 U.S. at 466). That system arguably requires the wholesaler's presence in the state because states can "readily inspect in-state wholesalers and retailers on-site, run compliance checks, and punish violators with the loss of a license, fines, and other penalties." *Id.* at 30. But it certainly does not require state citizenship for the wholesaler's panoply of officers, directors, and stockholders, as Missouri's Residency Requirements demand. The State's own witness admitted as much. J.A. 72-73.

His admission was clearly correct in light of the facts that (i) most states do not have such requirements as part of their three-tier systems and (ii) Missouri itself already has a grandfathered liquor wholesaler (Glazer's) that meets none of the Residency Requirements, and its market participation has not undercut the three-tier system. *See* Opening Br. 31-32. The Residency Requirements cannot be tacked on to the three-tier system and justified under that system; they are exogenous to it.

Moreover, the requirements bear no connection to the goals of state liquor regulation, as we discuss below. *See infra* at 20-26. If a state "desires to scrutinize its applicants thoroughly, as is its right, it can devise nondiscriminatory means short of saddling" the corporation's officers, directors and owners "with the 'burden' of residing in" a particular state. *Cooper* v. *McBeath*, 11 F.3d 547, 554 (5th Cir. 1994). As one attorney general correctly explained, wholesaler residency requirements simply do not "undergird the State's special interest in preserving the traditional 'three-tier system' of alcohol distribution." Indiana Att'y Gen. Advisory Op. No. 09-40, Sept. 14, 2009, at 5.

As for *Granholm*'s use of the term "in-state," it simply means what it says—the business is located in the state. *Granholm* itself used the term that way, explaining that "New York's *in-state presence requirement* runs contrary to our admonition that States cannot require an out-of-state firm *to become a resident* in

order to compete on equal terms." 544 U.S. at 475 (citation omitted; emphases added). Moreover, when *Granholm* offered its parenthetical endorsement of an "in-state" requirement, it was describing the three-tier system. *See id.* at 489. And as we have explained, nothing in the three-tier system requires anything more than presence—and at the most corporate domicile—for wholesalers.

Granholm, in short, blesses the three-tier system, but no more. Discrimination not "inherent in the three-tier system"—such as Missouri's requirements—must be struck down under *Granholm*'s overarching non-discrimination rule. *Wine Country*, 612 F.3d at 818.

3. The State reads *Granholm* very differently. According to the State, *Granholm* creates a brave new world in which the Twenty-first Amendment flatly forbids discrimination against out-of-state alcohol *producers* and yet countenances any and all discrimination against out-of-state alcohol *wholesalers and retailers*. Resp. Br. 21-30. Thus, under the State's approach, a state presumably could impose a $100,000 license fee for wholesalers with non-resident stockholders and a $100 fee for wholesalers with resident stockholders. That blatant discrimination would be immune from scrutiny, under the State's theory, because it is not aimed at the producer tier.

That is not a plausible reading of *Granholm*. As explained in the opening brief (at 29-30), the cases leading up to *Granholm* struck down discrimination

against retailers and wholesalers, *see, e.g.*, *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 346-352 (1987), and articulated a non-discrimination rule applicable to *all* liquor regulation, not just the producer tier, *see id.* at 347; *Bacchus*, 468 U.S. at 276. *Granholm* did not purport to overrule those decisions. On the contrary, it explicitly refused to overturn *Bacchus* and deemed it controlling. *Granholm*, 544 U.S. at 488. It is impossible to imagine that *Granholm*, which endorsed non-discrimination in sweeping terms, nevertheless meant to make it *easier* for states to discriminate against two of the three liquor-regulation tiers. Yet that is what the State claims. Its reading should be rejected. The more sensible understanding is that *Granholm*'s approval of the three-tier system is merely an application of the *Bacchus* test: The non-discrimination rule applies uniformly, as it always has, but where a discriminatory law is inherent in the three-tier system, it is so closely related to the Twenty-first Amendment's core concerns that it passes muster.

That understanding is supported by decisions from multiple jurisdictions. Many authorities have rejected the idea that *Granholm* immunizes all discrimination in the wholesale and retail tiers. *See, e.g.*, *Wine Country*, 612 F.3d at 818-820; *Siesta Village Market, LLC* v. *Granholm*, 596 F. Supp. 2d 1035, 1037-40 (E.D. Mich. 2008); *Southern Wine & Spirits of Texas, Inc.* v. *Steen*, 486 F. Supp. 2d 626, 633 (W.D. Tex. 2007); *Peoples Super*, 432 F. Supp. 2d at 221; *Tenn. Residency Requirements for Alcoholic Beverages Wholesalers & Retailers*, Tenn.

Att'y Gen. Op. No. 12-59, 2012 WL 2153491 (June 6, 2012); Indiana Att'y Gen. Advisory Op. No. 09-40, *supra*, at 5. And they have continued to strike down discrimination in those tiers. *See Steen*, 486 F. Supp. 2d at 633; *Siesta Village*, 596 F. Supp. 2d at 1040; *Peoples Super*, 432 F. Supp. 2d at 221. The State's only answer to these authorities is that *all* are wrongly decided. Resp. Br. 39-45. Not so. The decisions differ in some of their conclusions. But all correctly recognize that the State's fundamental premise—that after *Granholm* states have unfettered power to discriminate in the wholesale and retail tiers—is wrongheaded.

4. The State argues that even if *Granholm*'s carve-out is limited to the three-tier system, the Residency Requirements survive because they *are* part of the three-tier system. Resp. Br. 19-20. It argues, in other words, that we are splitting hairs; given the states' primary role in liquor regulation, it says, each state should have unfettered power to define the three-tier system and how much "in-state" presence to require. *Id.*

The State is correct up to a point; states have substantial control over "how to structure the liquor distribution system." *Granholm*, 544 U.S. at 495 (citation omitted). But that does not mean states can redefine the three-tier system to bake in as much discrimination as they like. As courts have recognized, that approach has no stopping point because most anything can be defined as a variation on the three-tier system. *See, e.g.*, *Anheuser-Busch, Inc.* v. *Schnorf*, 738 F. Supp. 2d 793,

807 (N.D. Ill. 2010). A state could, for example, issue wholesale licenses only to companies whose officers and stockholders were all *born* in the state and describe that requirement as part of the three-tier system. Or it could require its wholesalers and their stockholders to divest themselves of all business interests outside the state, on the theory that that would make wholesalers more eager to please state regulators and keep their only source of income. That cannot be what *Granholm* had in mind. Only by limiting *Granholm*'s carve-out to discrimination "inherent in the three-tier system," *Wine Country*, 612 F.3d at 818, is the exception prevented from swallowing *Granholm*'s non-discrimination rule.

5. The State offers several other arguments regarding *Granholm*, none convincing. First, it observes that a few states had durational residency and citizenship requirements on the books when *Granholm* was decided, and that the *Granholm* dissent cited some of those laws. Resp. Br. 29-34. From that premise, the State asserts that *Granholm* "*reviewed the type of residency requirements at issue here* and stated they are protected by the Twenty-first Amendment." Resp. Br. 28 (emphasis added). That is a stretch. In fact, *Granholm* "reviewed" state laws that dealt with a different issue altogether—direct wine shipping—and that lacked any durational residency or citizenship requirements of the type Missouri imposes. *See* 544 U.S. at 469-470. The Court's statement in dicta that the three-tier system is "legitimate," in a case in which such residency and citizenship

requirements were not at issue, hardly means the Court blessed every state law on the books anywhere in the nation.

Finally, the State argues that two circuit court decisions support its assertion that *Granholm* categorically eliminates dormant Commerce Clause scrutiny in the wholesale and retail tiers. Resp. Br. 37-39 (citing *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185, 191 (2d Cir. 2009), and *Brooks*, *supra*). The State is correct that there is language in both cases that supports its approach. But as we explained in the opening brief (at 33 n.10), both *Arnold's Wines* and *Brooks* addressed the claim that states should not be able to discriminate *at all* in the wholesale and retail tiers, and that states accordingly could not even mandate in-state presence or domicile for those tiers. *See Arnold's Wines*, 571 F.3d at 190-192; *Brooks*, 462 F.3d at 344-346. The two courts recognized that that assertion could not be reconciled with *Granholm*. *See Arnold's Wines*, 571 F.3d at 191. They also recognized that, given the arguable necessity for in-state wholesale and retail presence in the three-tier system, the plaintiffs' claim amounted to "a frontal attack on the constitutionality of the three-tier system itself." *Id.* at 190. Neither rationale applies here. *Arnold's Wines* and *Brooks* did not confront the argument we advance. They are of limited help to the State.

C. The Residency Requirements Do Not Survive The *Bacchus* Test.

For all of these reasons, *Granholm* cannot be read to categorically insulate Missouri's discriminatory Residency Requirements. Instead, the Residency Requirements are saved only if the interests they advance are "so closely related" to a "clear concern of the Twenty-first Amendment" that the Amendment trumps the Commerce Clause. *Bacchus*, 468 U.S. at 275-276. The Residency Requirements cannot meet that test for three simple reasons. First, they do not advance any of the interests now put forward by the State. Second, the State's designated witness *admitted* that they do not advance those interests. And third, as already discussed, the legislative history demonstrates that the Residency Requirements were actually designed to shield local companies from competition.

1. The State responds, as an initial matter, by arguing that *Bacchus* "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." Resp. Br. 48. That is incorrect. As already discussed, the State's understanding of the supposed "Twenty-first Amendment analysis" enshrined by *Granholm*—no discrimination in the production tier, unlimited discrimination in the other tiers—is deeply flawed. But so is its claim that that analysis supplants the *Bacchus* test. Far from overruling or abrogating *Bacchus*, *Granholm* applied it. *See* 544 U.S. at 488. The State itself eventually

acknowledges as much, agreeing that *Granholm*'s approval of the three-tier system can be understood as an application of the *Bacchus* "clear concerns" test. Resp. Br. 49. In any event, *Bacchus* remains good law until the Supreme Court says otherwise. *See Agostini* v. *Felton*, 521 U.S. 203, 237 (1997). And Missouri's Residency Requirements cannot meet it.

2. The State next argues that its Residency Requirements in fact meet the *Bacchus* test. Its arguments, however, are paper-thin on their own terms, and they are contradicted by the State's own designated witness and the legislative history.

a. The State asserts that the 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, fight underage drinking, [and] ensure orderly market conditions[.]" Resp. Br. 50. It provides no explanation on any of these points. And in fact, all are completely conclusory. A wholesaling company merely buys alcohol from producers and sells it to retailers. How does requiring such a company's officers, directors, and stockholders to *live* in Missouri—as opposed to simply requiring the *company* to be located or domiciled in-state—provide the company added incentive to "combat the perceived evils of an unrestricted traffic in liquor," whatever that means? How do these stringent residency requirements, above and beyond corporate presence, "promote temperance and responsible consumption"? How do they "fight

underage drinking"? The answer is that they do not. The State's assertions are "generic." *Glazer's*, 145 F. Supp. 2d at 1242. And generic assertions repeatedly have been rejected by the courts. *See* Opening Br. 38-39. That is as it should be. After all, the question under *Bacchus* is whether the interests the discriminatory law advances are "so closely related" to a "clear concern of the Twenty-first Amendment" that the Commerce Clause is displaced. 468 U.S. at 275-276. Where the discriminatory law does not advance the asserted interests, that test is not met.

b. The State next asserts that its Residency Requirements "bring the individual wholesalers closer to the state's enforcement arm." Resp. Br. 50. But once again, there is no explanation. A corporate residency requirement, and certainly a corporate domicile requirement, would more than suffice to give the state its full panoply of enforcement powers. *See Cooper*, 11 F.3d at 549; *Beskind* v. *Easley*, 325 F.3d 506, 515-516 (4th Cir. 2003); *see also CTS Corp*. v. *Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations[.]").[2] Indeed, Missouri's Code gives the State and its law

[2] Tellingly, the State's *amici* have made this exact point in the past. In *Granholm*, a brief filed by 33 attorneys general—only seven of whom support Missouri here—confirmed that businesses located in-state "are plainly subject to a State's regulations and enforcement powers" and "to all inspections, subpoenas, taxes, record retention requirements, and license sanctions that the State may impose." Br. of Ohio *et al.* as Amici Curiae Supporting Petitioners, 2004 WL 1743941, at *14 (July 29, 2004). The National Beer Wholesalers Association's *Granholm* brief

enforcement officials broad authority to enforce the law and levy penalties against *all* licensees. Mo. Rev. Stat. §§ 311.610 – 311.880. The additional requirement that the corporation's officers, directors, and stockholders live in Missouri adds no arrows to the State's enforcement quiver.

c. The State next says the Missouri legislature 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 investment in their community[.]" Resp. Br. 51-52. Accordingly, the State says, "[t]he General Assembly * * * pierced the fictitious veil of corporate 'presence.' " *Id.* at 52.

This argument suffers from several flaws. First, the supposed "determinations" and veil-piercing initiatives attributed to the General Assembly are fictitious. The Assembly made no such findings. Quite the contrary, the only available legislative history reveals that the Residency Requirements were designed to protect local business. *See supra* at 6-8.

Moreover, the State's purported concern for "investment in the community" collapses when it attempts to explain *why* that matters to liquor regulation. Non-residents, it says, "have no additional incentive to concern themselves with the potential vices of alcohol or to promote temperance or combat

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made the same point. *See* Br. of National Beer Wholesalers Association as Amicus Curiae in Support of Petitioners, 2004 WL 1731150, at *22-*23 (July 29, 2004).

underage drinking within Missouri." Resp. Br. 53. Once again, these are the vaguest of truisms. The State never explains how requiring wholesalers to have officers, directors, and stockholders who are state residents bolsters the fight against the "vices of alcohol," "promote[s] temperance," or "combat[s] underage drinking" in ways that would not occur absent these citizenship requirements. Nor could it. These goals have nothing to do with *wholesaling*, and officer-director-stockholder citizenship requirements would not advance those goals anyway.

That is why courts have rejected nearly identical "stake in the community" arguments as "futil[e]" and unpersuasive. *See Steen*, 486 F. Supp. 2d at 631-632. As the *Glazer's* court wrote, "[s]ummarily excluding a nonresident from the right to distribute liquor in [the State] just because the applicant has not resided in the State * * * for ten years cannot be said to genuinely bear on whether the applicant will comport himself according to governing standards and distribute liquor in the state in a moral and ethical manner." 145 F. Supp. 2d at 1246-47. Just so. The reasons the State identifies to support its Residency Requirements may be "reasons why alcohol regulations *in general* and the three-tier system are valid," but "none of those reasons justifies the discrimination * * * that follows from Defendants' construction of the Act." *Anheuser-Busch*, 738 F. Supp. 2d at 810-811.[3]

[3] The *amicus* brief filed by the Missouri Wine and Spirits Association asserts, based on extra-record facts and Internet research, that SWS Missouri misstated facts on its license applications and that its behavior "illustrates why Missouri

3. No more is needed to strike down the Residency Requirements. But in fact there are two additional reasons why they cannot claim shelter under the Twenty-first Amendment: The State's own designated witness disavowed the rationales it now advances in its brief, and the legislative history demonstrates that those rationales are pretextual.

a. As explained in the opening brief (at 15-16), the Division of Alcohol and Tobacco Control designated Deputy State Supervisor Mike Schler as its Rule 30(b)(6) representative in this litigation. And Schler testified that the Residency Requirements played *no role* in Missouri's liquor control regime or the three-tier system. Asked whether the Residency Requirements "impact the distribution system in the state for liquor," he said no. J.A. 72. Asked whether removal of the Residency Requirements would "erode the three-tier system," he said no. J.A. 73. And he agreed that, to his knowledge, the Residency Requirements do not fight organized crime, prevent the sale of alcohol to minors, or promote temperance. J.A. 66-67, 70, 72-73, 76. These statements represent the testimony of a State

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looks behind the corporate façade." MWSA Amicus Br. 15-18. This argument is both inaccurate and irresponsible. In fact, SWS Missouri revealed right on its license applications the supposedly nefarious facts to which MWSA points at pages 17-18. The managing officer on the revised application was employed by Southern Wine, despite MWSA's suggestion to the contrary. And the Division's witnesses testified in deposition that SWS Missouri's application was denied *solely* because of the company's inability to meet the Residency Requirements. J.A. 49. MWSA's 11th-hour attempt to impugn a potential competitor, and to do so using inaccurate "evidence" that cannot be tested, should be rejected out of hand.

official who regulates liquor. And they flatly contradict the rationales advanced by the State's lawyers. *Compare* Resp. Br. 49-55. Those rationales did not suffice on their own terms to meet the *Bacchus* test, and they certainly cannot suffice in light of record evidence exposing them as chimerical.

The State attempts to ignore this damning evidence. It never mentions Schler's name or the substance of his testimony. Instead, it argues in a pair of footnotes that Schler "cannot be said to speak for Missouri's General Assembly" and that under the rational-basis test the Court looks at any goals the legislature might conceivably have had, not the goals it actually had. Resp. Br. 61 n.7, 68 n.13. The State is far off base. First of all, the *Bacchus* test does not stop with what the legislature said about its discriminatory laws; it goes on to examine whether the State has demonstrated that the interests those laws *actually advance* are "so closely related" to a "clear concern of the Twenty-first Amendment" that the Amendment trumps the Commerce Clause. *Bacchus*, 468 U.S. at 275-276. The Schler testimony demonstrates that the Residency Requirements advance no interests related to the Twenty-first Amendment. And the State is "certainly bound" by that testimony just as if the State itself had been deposed. *R&B Appliance Parts, Inc.* v. *Amana Co., L.P.*, 258 F.3d 783, 786 (8th Cir. 2001).

Second, the State's repeated suggestion (Resp. Br. 21, 49, 68 n.13) that rational-basis review applies to the *Twenty-first Amendment*, and not just to the

Equal Protection Clause, is flat wrong. No case of which we are aware has ever employed that sort of deference when applying *Bacchus*. Instead, the Supreme Court and other courts have taken a hard look at the interests advanced by the State to determine whether they "justify" the particular discrimination at issue and whether they stand up to practical examination. *Bacchus*, 468 U.S. at 276; *Beskind*, 325 F.3d at 515-516; *Glazer's*, 145 F. Supp. 2d at 1242.

b. Finally, whatever the interplay between *Granholm* and *Bacchus*, they clearly agree on one fundamental point: The Twenty-first Amendment does not permit "mere economic protectionism." *Bacchus*, 468 U.S. at 276; *Granholm*, 544 U.S. at 472, 484-485; *accord id.* at 523 (Thomas, J., dissenting). This is such a case. *See supra* at 5-9. For that reason, too, if the Court reaches the *Bacchus* test, it should conclude that the State's protectionist law does not advance any interests at the heart of the Twenty-first Amendment. The Residency Requirements should be struck down.

II. THE RESIDENCY REQUIREMENTS VIOLATE THE EQUAL PROTECTION CLAUSE.

The Residency Requirements separately should be invalidated because they violate the Equal Protection Clause. As set forth in the opening brief (at 40-45), the Residency Requirements have no connection to the governmental interests the State has suggested. What is more, the State's designated witness *admitted* to that lack of connection. *Id.* at 15-16, 36. The discriminatory classification imposed by

the Residency Requirements lacks a "substantial basis" and cannot stand. *Southern Ry.* v. *Greene*, 216 U.S. 400, 417 (1910).

1. The State offers only two passing responses to our equal-protection argument, both wrong as a matter of law. First, the State argues that "the Court's rational-basis review must consider the protections of the Twenty-first Amendment" in some unspecified way. Resp. Br. 70; *see also id.* at 68. That is simply not so, as the opening brief explained. The Supreme Court has held in no uncertain terms that "the operation of the Twenty-first Amendment *does not alter the application of equal protection standards*." *Craig* v. *Boren*, 429 U.S. 190, 209 (1980) (emphasis added). *Granholm* reaffirmed that rule, citing *Craig* for the proposition that "state laws that violate other provisions of the Constitution [than the Commerce Clause]," including the "Equal Protection Clause," are "not saved by the Twenty-first Amendment." *Granholm*, 544 U.S. at 486.

The State's only other argument is a naked appeal to the standard of review—a standard which it misperceives. The State says, correctly, that under rational-basis review the Court examines whether there is any conceivable basis for the statutory classification. Resp. Br. 69. But it then leaps to the conclusion that under that standard, all the State has to do is *assert* some possible "conceivable basis" and the inquiry is over. *See id.* at 71 (arguing that Southern Wine cannot prevail because "the Division has provided numerous bases * * * to find

Missouri's residency requirements are rationally related to a legitimate end"). That is not correct. On rational-basis review the State "may not rely on a classification *whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational*." *City of Cleburne*, 473 U.S. at 447 (emphasis added); *accord Armour* v. *City of Indianapolis*, 132 S. Ct. 2073, 2081 (2012).

That is a perfect description of the State's defense here. The State's equal-protection argument cross-references its earlier asserted bases for the Residency Requirements—that they ward off the potential "vices" of alcohol, promote temperance, combat underage drinking, bring the wholesaler closer to the government's enforcement arm, and so forth. Resp. Br. 70; *see id.* at 49, 53. But at the risk of repetition, while these are laudable goals, they bear no relationship to the requirement that wholesalers' officers, directors, and shareholders reside in Missouri. As explained *supra* at 21, the State already enjoys its full panoply of enforcement powers over an in-state, Missouri-domiciled company like SWS Missouri even without the discriminatory requirements. As for temperance and underage drinking, it is important to recognize that wholesalers have exactly zero points of commercial contact with Missouri consumers. It is impossible to understand—and the government does not explain—how the wholesaler could have any bearing on those goals, much less how the physical location of the wholesaler's officers, directors, and shareholders has anything to do with them.

The State's brief, in short, is thick with invocations of temperance, public health, and enforcement objectives. But *never once* does the State articulate a mechanism by which the residence of a wholesalers' officers, directors, and shareholders would have any impact on those objectives. The relationship of the State's discriminatory classification to its asserted goals "is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 447.

2. That conclusion is underscored once again by a fact the State tries to sweep under the rug: Its own witness agreed that the Residency Requirements had no bearing on the State's supposed goals. *See supra* at 24-25. The State argues that that record evidence is irrelevant because on rational-basis review it does not matter whether the asserted reasons for the law actually motivated the legislature. Resp. Br. 68-69 n.13. The State misses the point. Schler's testimony refuting any connection between the State's discrimination and the State's goals is not relevant because it reflects the legislature's intent. It is relevant—and dispositive—because it demonstrates that the relationship between that discrimination and those goals is "so attenuated" as to be arbitrary. *City of Cleburne*, 473 U.S. at 447.

3. Finally, the Residency Requirements cannot survive rational-basis review for a separate reason: From all that appears, they were motivated purely by protectionist intent. *See supra* at 5-9. That is fatal for equal-protection purposes just as it is under the Commerce Clause and Twenty-first Amendment. *See*

Metropolitan Life Ins. Co. v. *Ward*, 470 U.S. 869, 880 (1985) ("promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose"); *Merrifield* v. *Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("mere economic protectionism for the sake of economic protectionism is irrational" on rational-basis review); *Craigmiles* v. *Giles*, 312 F.3d 220, 225 (6th Cir. 2002) (same). Faced with flimsy policy rationales that do not withstand scrutiny on the one hand, and indications of protectionist intent on the other, courts have concluded that laws were enacted merely "to prevent economic competition" and have struck them down. *Id.* This is such a case.

CONCLUSION

For the foregoing reasons, and those in the opening brief, the judgment below should be reversed.

Respectfully submitted,

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December 20, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the attached Brief is proportionally spaced, has a 14-point typeface, and contains 6,999 words.

/s/ Dominic F. Perella
Dominic F. Perella

CERTIFICATE OF SERVICE

I certify that the foregoing Brief was filed with the Clerk using the appellate CM/ECF system on December 20, 2012. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Dominic F. Perella
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RULE 28A(h)(2) CERTIFICATION

I certify that the PDF copy of this Brief submitted to the Court has been scanned for viruses and is virus-free.

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