

No. 19-1948

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

Sarasota Wine Market, LLC d/b/a Magnum Wine and Tastings; Heath Cordes;
Michael Schlueter; Terrence French

Plaintiffs-Appellants,

vs.

Eric Schmitt, Attorney General of Missouri; Dorothy Taylor¹, State Supervisor of
the Missouri Div. of Alcohol and Tobacco Control; Michael L. Parson, Governor
of Missouri

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri
Case No. 4:17-cv-02792 HEA
The Honorable Henry Edward Autrey, 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**

¹ Substituted for Keith Hendrickson pursuant to Fed. R. Civ. P. 25 (d)

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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.

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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 wholesalers, including hundreds of beer wholesalers who live, work, and operate in the Eighth Circuit. Its members reside in all fifty states. According to the most recent economic census survey, U.S. beer distributor direct sales reached \$68.6 Billion Dollars.² Beer wholesalers employed 141,588 individuals and paid \$9.5 Billion Dollars in wages. In its entirety, the beer industry pays over \$58.6 Billion Dollars in taxes.³

The Missouri Beer Wholesalers Association (“MBWA”) represents the interests of its 33 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, alcohol that is greater than 5% by weight under appropriate licenses.

This case implicates the interests of NBWA, MBWA, and their respective members who have heavily invested in Missouri’s current regulatory structure. If successful, Appellants’ challenge to Missouri law would undermine Missouri’s right under the Twenty-first Amendment to structure the liquor distribution system within

² U.S. Census Bureau, 2017 Economic Census of Wholesale Trade. <https://www.census.gov/programs-surveys/economic-census.html>.

³ <https://beerservesamerica.org/>

the state and, specifically, to create a three-tier 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 serving a wide variety of fundamental interests including but not limited to preventing illegal sales to minors, limiting the number and density of retail outlets, preventing counterfeit alcohol from being sold, preventing monopolies within the industry, inhibiting overly aggressive marketing, moderating consumption, and collecting various taxes.

The District Court below acknowledged the relationship between the challenged statute and Missouri’s public health and safety or other legitimate state interests. It upheld the law as a valid exercise of Missouri’s authority under the Twenty-first Amendment. NBWA and MBWA (collectively hereafter referred to as “*Amici*”) respectfully submit that the District Court appropriately dismissed the dormant Commerce Clause and Privilege and Immunity challenges to Missouri law and urge this Court to affirm that decision.

ARGUMENT

I. Introduction.

This appeal arises out of a legal challenge by Plaintiffs-Appellants (hereinafter collectively referred to as “Sarasota Wine”) to a Missouri Statute which requires that any applicant for a Missouri retail license must demonstrate “good

moral character” and establish that he/she is a “qualified legal voter and taxpaying citizen of the country, town, city or village.” Mo. Rev. Stat. § 311.060.1. As interpreted by the Missouri Supreme Court, if the applicant is a citizen of the state of Missouri, the latter statutory requirement is satisfied. *State ex rel. Klein v. Hughes*, 173 S.W.2d 877 (Mo. 1943). If the applicant is a corporation or limited liability company, its managing officer must satisfy those requirements. *Id.*

Missouri has established a tiered system of licensed alcohol distribution involving producers, solicitors, wholesalers and retailers. *See* Mo. Rev. Stat. §§ 311.180.1, 311.190.1; 11 CSR 70-2.060(1). Each tier is restricted to its own service function. As discussed in detail below, this regulatory system serves many legitimate state interests, including most relevantly here that all alcohol being sold in the state is subject to effective regulatory oversight and control. Only retailers with a brick and mortar retail establishment in the state may obtain a retail license. Those retailers may only purchase their alcohol from licensed wholesalers. Those licensed wholesalers may only purchase their alcohol from producers or solicitors. Out-of-state, unlicensed retailers with no brick and mortar establishment, like Sarasota Wine, are prohibited from importing alcohol into the state without a license and shipping that alcohol to Missouri consumers. However, any out-of-state individual or entity can purchase or lease a physical premise in the state, employ a

manager residing in Missouri, obtain a retail license, and sell and deliver to Missouri consumers from that physical premise.

Amici submit this Brief in support of Defendant-Appellee (hereinafter referred to as “Missouri”). In the interest of avoiding the repetition of arguments made persuasively by Missouri, this Brief will focus on the policies underlying the challenged statute, the reasons why it does not run afoul of the dormant Commerce Clause doctrine, and, finally, the reasons why the Twenty-first Amendment shields that statute from challenge.

II. Policy Underlying the Challenged Missouri Statutes.

Since the dawn of recorded history, alcohol has enriched our culinary experiences, social gatherings, and lives. When abused, however, it has also occasioned great harm. According to the federal government’s Centers for Disease Control and Prevention, alcohol contributes to over 88,000 deaths each year in this country, and excessive drinking costs our economy over \$249 billion annually.⁴

All state alcohol regulatory systems strive to achieve moderation in both the consumption and sale of intoxicating liquor. The goal is to create an “orderly” market that balances competition with appropriate control. Three-tier and tied-house laws are the keystones of American alcohol regulation. Pursuant to their authority

⁴ CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/features/costsofdrinking/index.html> (last visited Nov. 4, 2019).

under the Twenty-first Amendment,⁵ states regulate alcohol within their respective borders through three-tier systems with licensed and structurally separate producers, wholesalers, and retailers. The Supreme Court has expressly recognized that the three-tier system is “unquestionably legitimate.” *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005). “Tied-house” laws support a three-tier system by prohibiting producers and wholesalers, with narrow exceptions, from providing items of value to, exercising control over, or having an ownership in retailers. The purpose of these regulatory controls is to ensure that all alcohol being imported into a state is funneled through licensed entities, is safe for human consumption, and is in full compliance with all state regulatory requirements. In addition, the system is designed to avoid the harmful effects of vertical integration in the industry by restricting these market participants to their respective service functions.

The American historical 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.⁶

⁵ U.S. CONST. amend XXI.

⁶ In *Toward Liquor Control*, Fosdick and Scott noted that “tied-houses” lead to a “multiplicity of outlets.” Raymond B. Fosdick and Albert Scott, *Toward Liquor Control*, Harper & Brothers, at 43 (1933) (Republished by Center for Alcohol Policy 2011). Federal public health officials have noted a correlation between the number and density of retail outlets, on the one hand, and consumption patterns and abuse, on the other. See *Preventing Excessive Alcohol Consumption: Regulation of Alcohol Outlet Density*, COMMUNITY GUIDE,

It is widely recognized that prior to prohibition, “tied houses” were a root cause of alcohol abuse and related problems because retailers were pressured to sell products by any means including selling to minors, selling after hours, and overselling to intoxicated customers.

The underlying policy of the three-tier system was succinctly articulated 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.

(emphasis added).

The three-tier system has been likened to an hourglass. With very limited exceptions, all alcohol sold within a state, regardless of its origin, must be funneled through a wholesaler with a physical presence in the state who is subject to audit,

<https://www.thecommunityguide.org/findings/alcohol-excessive-consumption-regulation-alcohol-outlet-density> (last visited Nov. 4, 2019).

oversight and enforcement action by the state alcohol regulator.⁷ In addition, nearly every state, either expressly or impliedly, requires a retailer to maintain a physical premise in the state.⁸ If Sarasota Wine's argument prevailed, all of these state laws would be invalidated and the ability of alcohol control authorities to effectively monitor and regulate the industry would be severely undermined if not destroyed.

Like the rest of the country, Missouri regulates the sale and distribution of alcohol within its borders through a system of licensed and structurally separate producers, wholesalers, and retailers. *See* Mo. Rev. Stat., Chap. 311. The Missouri Supreme Court has recognized the importance of effectively regulating alcohol, in particular, the importation of alcohol into the state through the distribution 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

⁷ *See e.g.*, Ark. Code Ann. § 3-5-216; Minn. Stat. Ann. § 340A.305; Mo. Ann. Stat. § 311.373; 237 Neb. Admin. Code Ch. 6, Sec. 010; N.D. Admin. Code § 81-12-01-04; S.D. Codified Laws § 35-4-60.1.

⁸ *See, e.g.* Ark. Code Ann. § 3-5-302; Minn. Stat. §340A.410 (7); Mo. Ann. Stat. § 311.060(1); Neb. Rev. Stat. Ann. § 53-131.01(1)(d); ND Stat. § 5-02-02(4); SD Stat. § 35-2-1.2.

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 recognized that the effective regulation of alcohol requires that 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 order to insure that all alcohol being imported into the state complies with Missouri law, it is "unlawful for any person in [Missouri] holding a retail liquor license to purchase any intoxicating liquor except from, by or through a duly licensed wholesale liquor dealer in this state." Mo. Rev. Stat. § 311.280. In addition, by interposing independent wholesalers between producers and retailers, Missouri prevents producers from exercising undue influence over retailers and pressuring them to overmarket and overpromote the sale of alcohol. Finally, Missouri licensed wholesalers with warehouses in the state are more amenable to effective enforcement measures in the event of a violation of Missouri law. *See* Mo. Rev. Stat. § 311.060.

Accordingly, wholesalers serve as an essential regulatory gateway through which alcoholic beverages imported into the state must pass. As one of the two licensed in-state tiers subject to effective audit and enforcement, wholesalers are required to ensure that the producers from whom they buy product and the retailers to whom they sell product are licensed and fully compliant with all applicable

regulatory requirements. Furthermore, wholesalers are obligated to report their purchases from producers to the state so the State can ensure that producers are paying the correct amount of excise taxes to the State and retain records of their purchases from producers and their sales to retailers, thereby creating a transparent and accountable distribution system.

The existence of the wholesale tier produces significant efficiencies for producers, retailers and the economy by reducing the costs of transporting beer, servicing retailers and providing consumers with a wider range of choices than they would otherwise enjoy.⁹ In addition, small producers and new market entrants, lacking substantial resources, leverage the wholesalers' distribution infrastructure to create and grow a market for their products. Without this infrastructure, the barriers to vertical integration erected by the three-tier system, and the prohibitions embodied in the related tied-house laws, small suppliers, producers would be unable to compete with multinational producers. Furthermore, American consumers would

⁹ See Dr. Bill Latham & Dr. Ken Lewis of the Center for Applied Business & Economic Research at the University of Delaware, *America's Beer Distributors: Fueling Jobs, Generating Economic Growth & Delivering Value to Local Communities* (2015). <https://www.nbwa.org/resources/economic-impact>, at 8-13 (2015); see also Boston Consulting Group, <http://www.bcg.com/publications/2014/consumer-products-for-small-large-brewers-us-market-open.aspx>.

not enjoy the unprecedented choice and variety offered by the current regulatory system.

Similarly, and necessarily, Missouri's liquor regulatory system extends the "physical presence" requirement to retailers as well as wholesalers. Every Missouri retailer must have a brick and mortar retail premise in the state and is responsible to ensure that all sales and conduct on those licensed premises are in full compliance with Missouri law. Mo. Rev. Stat. § 311.060.1. Finally, retailers may only purchase their alcohol from licensed, Missouri wholesalers. These requirements serve several critically important state interests.

First, and perhaps most importantly, physical presence requirements are essential to Missouri's efforts to enforce alcohol regulations for the health and safety of its residents. State liquor regulators, like all law enforcement, have been overburdened by budget and staffing cuts. The requirement that both wholesalers and retailers maintain an in-state physical presence facilitates compliance and enforcement in several ways.

There are approximately 12,500 licensed retailers in Missouri, in contrast to over 640,000 national retailers. *See* pg. 14 *infra*. Missouri liquor regulators are required to inspect the premises, records, and products of liquor vendors within the state. Mo. Rev. Stat. §§ 311.490-311.540. They must conduct background investigations and license suitability checks. Inspections of licensed premises are of

paramount importance to the effectiveness of alcohol control policies which depend heavily on the “intensity of implementation and enforcement and on the degree to which the intended targets are aware of both the policy and its enforcement.” Nat’l Highway Traffic Safety Admin., *The Role of Alcohol Beverage Control Agencies*, (citation omitted), <https://www.nllea.org/documents/RoleofABCsNHTSA.pdf>. The Missouri Alcohol & Tobacco Control Division (hereinafter referred to as the “Division”) actively monitors retail sales within the state and routinely brings enforcement actions against violators.¹⁰

It would be virtually impossible for the Division to discharge that statutory duty if the number of wholesalers and retailers were expanded exponentially because they were located in another state or country, not to mention the impossibility of inspecting those remote premises. Furthermore, those out-of-state retailers would not be purchasing their alcohol from Missouri wholesalers. As a result, there would be no effective or practical means for the Division to verify that the alcohol being imported into the state was manufactured by the supplier referenced on the label, that the product was legal for sale in the state, that the product was safe for human consumption, that tied-house laws were being complied with, and that the appropriate excise tax had been paid.

¹⁰ For example, in 2019 to date, the Division has brought well over 60 enforcement actions in Jefferson City, Kansas City, Springfield and St. Louis alone. See <https://atc.dps.mo.gov/enforcement/suspensions.php>.

Unregulated and illicit alcohol sales are a significant issue in other parts of the world.¹¹ The World Health Organization has recommended that governments establish monitoring and surveillance systems to track alcohol sales and mitigate the illicit market. *See* WHO Global Status Report on Alcohol and Health, 2018, at xii, Section 2.3. https://www.who.int/substance_abuse/publications/global_alcohol_report/gsr_2018/en/. The American three-tier system establishes cradle to grave regulatory oversight of alcohol sales and has prevented the scourge of illicit alcohol that has plagued other countries. *See The Fake Alcohol Situation in the United States*, https://www.centerforalcoholpolicy.org/wp-content/uploads/2015/04/The_Fake_Alcohol_Situation_in_the_United-States_compressed.pdf.

In the event of a violation of an alcohol law, it would be prohibitively expensive and impractical for prosecutors to bring suit in another state or a foreign

¹¹ For instance, earlier this year, 30,000 bottles of contaminated alcohol were confiscated by Costa Rica authorities. 19 deaths resulted from consumption of that alcohol. <https://www.usatoday.com/story/travel/news/2019/07/22/costa-rica-blames-deaths-tainted-alcohol-methanol-what-to-know/1793061001/>. In 2017, the State Department issued a travel warning to Americans travelling to Mexico about tainted alcohol. <https://www.jsonline.com/story/news/investigations/2017/07/26/u-s-state-department-issues-travel-warning-tainted-alcohol-mexico-resorts-after-tourists-blackouts/513563001/>. In 2012, the Czech Republic banned the sale of liquor containing 20 percent or higher alcohol content after at least 20 people were killed and dozens of others were seriously injured from consuming methanol-tainted spirits. <https://www.nytimes.com/2012/09/18/world/europe/czechs-ban-hard-liquor-sales-after-methanol-poisonings.html>.

jurisdiction. Adjudication of violations is critically important to deter future transgressions. See Nat'l Highway Traffic Safety Admin., *The Role of Alcohol Beverage Control Agencies*, at 7. The remedies for such violations are typically the imposition of fines, payment of outstanding taxes, disgorgement of illicit profits, or suspension or revocation of the license. A physical presence requirement ensures that the vendor has assets in the state which are subject to forfeiture. The requirement also eliminates the troublesome question of jurisdiction.

Second, the Center for Disease Control (CDC) has noted that “[b]ased on a systematic review of scientific evidence on the effectiveness of regulating alcohol outlet density that was done for The Guide to Community Preventive Services (Community Guide), as well as other scientific studies, there is strong scientific evidence that regulating alcohol outlet density is one of the most effective strategies for reducing excessive alcohol consumption and related harms.” <https://www.cdc.gov/alcohol/pdfs/CDC-Guide-for-Measuring-Alcohol-Outlet-Density.pdf>. As documented by the CDC and many other studies, there is an undisputed correlation between the number and density of retail outlets, on the one hand, and consumption patterns and abuse, on the other. See, e.g., Toben F. Nelson, et al, *Patterns of change in implementation of state alcohol control policies in the United States, 1999–2011*. <https://www.ncbi.nlm.nih.gov/pubmed/25138287>.

In order to effectively control the number of retail outlets and allocate those licenses fairly among applicants, Missouri has provided local municipalities with the authority to limit the number of retail outlets in their community. *See, e.g.* Kansas City Ordinance, Section 10-211 (Number of Retail Alcoholic Beverage Licenses) https://library.municode.com/mo/kansas_city/codes/code_of_ordinances?nodeId=PTIICOOR_CH10ALBE_ARTVQU_DIV2DELO_S10-211NUREALBELI. For instance, many wards in St. Louis have established a moratorium on the issuance of any additional retail liquor licenses. <https://www.stlouis-mo.gov/government/departments/public-safety/excise/Helpful-Information.cfm>.

Unlicensed out-of-state retailers are prohibited from soliciting orders, importing unregulated alcohol into the state, and shipping that alcohol to Missouri consumers. Without such a prohibition, the Division and local municipalities lack the ability to limit retail outlets and lack the means to ensure that liquor sales to their residents conform to their regulations. There are over 640,000 retail outlets existing outside of Missouri who would effectively escape regulatory control and yet would be accessible to Missouri residents with a click of a button. *See* <https://www.nbwa.org/resources/2017-beer-industry-review>. If *Sarasota Wine* were to prevail and physical presence requirements were declared unconstitutional, unlicensed out-of-state retailers and wholesalers would actually be provided with a significant competitive advantage over duly licensed, compliant in-state retailers and

wholesalers. Furthermore, there would be no practical and effective means to regulate these sales. Certainly, the dormant Commerce Clause does not compel this absurd result.

Third, numerous studies have documented the ease with which minors can successfully purchase alcohol online and the ineffectiveness of age verification procedures at the points of order and delivery. *See, e.g., Williams, Rebecca S, Internet Alcohol Sales to Minors, Arch Pediatric Adolescent Med, Vol. 166, at 808 (September;2012);*<https://jamanetwork.com/journals/jamapediatrics/fullarticle/1149402>. The Williams study documented that internet sales resulted in 42% of wine orders, 53% of liquor orders, and 57% of beer orders being successfully received by minors.¹² To address this problem, Missouri prohibits unlicensed out-of-state retailers from soliciting orders and shipping products to any Missouri consumer.

¹² *See Sober Truth on Preventing (STOP) Underage Drinking Act (Pub. L. 109-422), which was enacted by Congress in 2006 and reauthorized in December 2016 as part of the 21st Century Cures Act (Pub. L. 114-255). The STOP Act requires an annual report “on each State's performance in enacting, enforcing, and creating laws, regulations, and programs to prevent or reduce underage drinking.” As directed by the STOP Act, the State Reports were prepared by the Interagency Coordinating Committee on Preventing Underage Drinking (ICCPUD), which is chaired by the Assistant Secretary for Mental Health and Substance Use, U.S. Department of Health and Human Services.*

III. The Challenged Statutes Do Not Run Afoul of the Dormant Commerce Clause Doctrine And Were Properly Enacted Pursuant to Missouri's Authority Under the Twenty-first Amendment.

A. Appellants Fail to Meet the Requisite Threshold Implicating Commerce Clause Scrutiny.

Pursuant to the dormant Commerce Clause doctrine, a state is prohibited from enacting laws that unduly restrict interstate commerce by discriminating against out-of-state entities in favor of in-state entities.¹³ As repeatedly acknowledged by the Supreme Court, however, not every exercise of state authority conferring some benefit to in-state entities and some burden on out-of-state entities is invalid. E. g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Hunt v. State Apple Advertising Comm'n*, 432 U.S. 333, 349-50 (1977) (citing *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976)).

As noted just a few months ago by the Fifth Circuit Court of Appeals, “a statute impermissibly discriminates only when it discriminates between two

¹³ An ardent critic of the doctrine, Justice Scalia noted: that “[o]ne glaring defect of the negative Commerce Clause is its lack of governing principle. Neither the Constitution nor our legal traditions offer guidance about how to separate improper state interference with commerce from permissible state taxation or regulation of commerce. . . . A final defect of our Synthetic Commerce Clause cases is their incompatibility with the judicial role. The doctrine does not call upon us to perform a conventional judicial function, like interpreting a legal text, discerning a legal tradition, or even applying a stable body of precedents. It instead requires us to balance the needs of commerce against the needs of state governments. That is a task for legislators, not judges.” *Comptroller of Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1808, 1810 (2015) (J. Scalia, dissenting).

similarly situated in-state and out-of-state interests.” *Walmart Stores, Inc. v. Texas Alcoholic Beverage Comm.*, 935 F.3d 362, 376 (5th Cir. 2019) (quoting *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007)); see *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978); *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1977). Unlicensed, out-of-state retailers who have no physical presence in Missouri and who are purchasing alcohol from outside of the state are not “similarly situated” to licensed Missouri retailers purchasing their alcohol within Missouri’s three-tier system from licensed Missouri wholesalers who are subject to the state’s regulatory safeguards.

Under the Twenty-first Amendment, Missouri unquestionably has authority to control the “importation or sale of liquor and how to structure the liquor distribution system.” *Granholm*, 544 U.S. at 488-89 (quoting *California Retail Liquor Dealers Assn’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 (1980)). Pursuant to this authority, with very limited exceptions, Missouri law provides that no alcohol may be sold to a Missouri consumer except by a duly licensed retailer who purchased from a duly licensed wholesaler who, in turn, purchased from a producer or “solicitor”, who has duly registered the pertinent brand labels with the Division.¹⁴ Having ignored these critically important regulatory requirements,

¹⁴ Mo. Rev. Stat. § 311.275 & 311.280. This “chain of custody” requirement ensures that the alcohol was produced by a licensed manufacturer, is fit for human consumption, is compliant with Missouri liquor laws, and that all applicable taxes

Sarasota Wine is not similarly situated to duly licensed, compliant Missouri retailers.¹⁵ As such, the dormant Commerce Clause does not even apply.¹⁶

Furthermore, any out-of-state individual or entity, like Sarasota Wine, can employ a manager residing in the state, establish a brick and mortar retail premise,

have been paid. As an example, in order to register a brand, a “solicitor” must provide the following: (1) the approved Tax and Trade Bureau (TTB) Certificate of Label Approval (COLA); (2) the valid appointment letter from the owner of product or certification of ownership of product (i.e. "primary American source of supply, the basic requirement being that the solicitor be the first source closest to the manufacturer in the channel of commerce from whom the product can be secured by the wholesalers); (3) an actual sample of the label corresponding with the TTB COLA; (4) the wholesaler appointment and/or geographical agreement designating the specific area within such wholesaler applicant is authorized to sell such brand; and (5) the notarized Lab Analysis if the alcohol content is not verified on the TTB COLA. https://atc.dps.mo.gov/licensing/brand_label.php

¹⁵ See *Exxon v. Maryland*, 437 U.S. 117, 125 (1978). In *Exxon*, oil companies brought a dormant Commerce Clause challenge to invalidate a Maryland statute prohibiting producers and refiners of petroleum products from operating retail service stations in the state. The oil companies argued that the statute had the effect of protecting in-state independent dealers from out-of-state competition. *Exxon*, 437 U.S. at 125. The plaintiffs relied on the fact that the burden of the prohibition fell solely on interstate companies. *Id.* The Supreme Court rejected the argument and explained that because “the burden of [a] state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.” *Id.* at 126. The Court’s reasoning was based on the following factors: (1) The prohibition did not restrict interstate dealers in the retail market; (2) did not restrict the flow of interstate goods; (3) did not place added costs on interstate goods; and (4) did not distinguish between in-state and out-of-state retailers in the market. *Id.* The Court declared that the absence of those factors “distinguishe[d] th[e] case from those in which a State has been found to have discriminated against interstate commerce.” *Id.* A burden on some interstate companies is not a violation if “in-state [retailers] will have no competitive advantage over out-of-state [retailers].” *Id.*

¹⁶ Congress itself has also legislated in this area. See Federal Alcohol Administration Act, 27 U.S.C §201 et seq.

obtain a retail license, and sell and deliver alcohol to Missouri consumers. The ability of licensed in-state retailers to occasionally deliver alcohol to consumers is not constitutionally significant.¹⁷ As such, Sarasota Wine fails to meet the requisite threshold implicating the Commerce Clause. *See Wine Country Gift Baskets.Com v. Steen*, 612 F. 3d 809, 820 (5th Cir. 2010) (“We view local deliveries as a constitutionally benign incident of an acceptable three-tier system”).

B. Assuming Arguendo that the Missouri Law Triggers Scrutiny Under the Dormant Commerce Clause Doctrine, It Constitutes a Valid, Constitutional Exercise of the State’s Authority Under the 21st Amendment.

1. The Challenged Missouri Statute is not “Protectionist.”

Appellants rely almost exclusively upon and mischaracterize the holding of the recent Supreme Court case of *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019) to support their contention that the challenged law is invalid under the dormant Commerce Clause. Opening Brief of Plaintiffs-Appellants, at 14 – 22. In addition, they entirely ignore the application of the Twenty-first Amendment and its interpretation by the Supreme Court and this Court.

For several reasons, the *Tennessee* case is clearly distinguishable from the case at bar. *Tennessee* involved a two-year durational residency requirement that not only applied to the retail applicant but, if the applicant was a corporation, applied

¹⁷ There is no express or regulatory authority for duly licensed Missouri retailers to deliver alcohol to consumers via Alcohol Carrier licensees (UPS, FedEx, DHL).

to *all* of its shareholders and officers. Furthermore, if such a license was issued, Tennessee law imposed a ten-year durational residency requirement for renewal and, if the license holder was a corporation, on *all* of its shareholders and officers. Twice the Tennessee Attorney General opined that the law was unconstitutional. The State of Tennessee declined to even defend the law when it was challenged. The Tennessee law created nearly insurmountable barriers to an out-of-state business obtaining a Tennessee retail license. Not surprisingly, the Supreme Court struck down the law.

The *Tennessee* holding is best summarized by the following language:

For these reasons, we reject the Association’s overly broad understanding of §2 [of the Twenty-first Amendment]. That provision allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests.

139 S. Ct. 2449, 2474 (2019).

In determining whether the Twenty-first Amendment shielded the challenged Tennessee durational residency law from invalidation under the dormant Commerce Clause, the Court examined whether “the predominant effect of a law is protectionism, not the protection of public health or safety.” *Id.* The Court stated that “mere speculation” of a connection to legitimate state interests is not sufficient. *Id.* The onerous Tennessee durational residency requirement ran afoul of even this deferential standard.

The challenged Missouri law, however, does not. It does not require durational residency for a retail license, does not require all owners and officers of a corporate applicant to be Missouri residents, does not erect any significant barrier for an out-of-state person or entity to obtain a retail license, and does not impose a renewal requirement that is more stringent than the threshold requirements for the license. Many interstate retailers, like Walmart and Total Wine (the principal Plaintiff in the *Tennessee* case) have obtained Missouri retail licenses. The *Tennessee* decision expressly distinguished laws, like the one at issue here, requiring *physical presence* from those requiring *durational residency*. *Id.* at 2475. The Court specifically and favorably noted that if retailers are physically located within the state, “the State can monitor the stores’ operations through on-site inspections, audits and the like [and] [s]hould the State conclude that a retailer has ‘fail[ed] to comply with state law,’ it may revoke its operating license.” *Id.*

More to the point, the challenged Missouri law does not have a “protectionist” purpose or a predominant protectionist effect. The physical presence requirement insures that all alcohol being imported into the state is funneled through a licensed entity, is subject to effective audit and control by the Division, is purchased from a licensed Missouri wholesaler, is sold to consumers by a licensed Missouri retailer, and complies with all applicable Missouri liquor laws. In this way, the Division can ensure that criminal elements do not own or control the retail outlet, inhibit illegal

sales to minors, limit the number and density of retail outlets selling alcohol to Missouri consumers, prevent counterfeit alcohol from being sold in the state, prevent the vertical integration of this socially sensitive industry, inhibit overly aggressive marketing, moderate consumption, efficiently collect taxes, and maintain an orderly, accountable, and transparent distribution and importation system. *See* pages 4 - 15 *supra*. The “connection” between the law and these legitimate interests is readily apparent and by no means tenuous or speculative.

Sarasota Wine bears the burden of proving that the law is “protectionist” and that it bears no correlation to the state’s public health and safety or other legitimate interests. It must overcome a presumption of validity and a “presumption of legislative good faith.” *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)); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Walmart Stores, Inc.*, 935 F.3d at 376 (quoting *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007)). Sarasota Wine has not and cannot meet its burden in this regard.

C. The Challenged Missouri Statute Was Enacted as a Valid Exercise of the State’s Authority Under the Twenty-first Amendment to Address the “Public Health and Safety Effects of Alcohol Use” as Well as Other Legitimate State Interests.

Relying on *Tennessee*, Sarasota Wine contends that the challenged law is not “narrowly tailored to advance” a public health or safety or other legitimate interest that cannot be served by a “nondiscriminatory alternative. *See* Opening Brief of

Plaintiffs-Appellants, at 21. By framing the inquiry in this way, it erroneously applies traditional dormant Commerce Clause analysis and completely ignores the state's primary authority under the Twenty-first Amendment, a constitutional provision of equal stature to the Commerce Clause.

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.” *Granholm*, 544 U.S. at 488-89 (quoting *California Retail Liquor Dealers Assn'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 (1980)). The Court has also repeatedly held that states may “funnel sales through the three-tier system” which, it has recognized, is “unquestionably legitimate.” *Id.* at 488-489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)); see *Tennessee Wine & Spirits Ass'n*, 139 S. Ct. at 2474 (Section 2 of the Twenty-first Amendment “allows each state leeway to enact measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests.”)¹⁸

¹⁸ The ability of regulators to strictly control importation is not an esoteric concern. See <https://eu-ocs.com/tax-fraud-operation-involving-shipments-of-illegal-alcohol-broken-up-in-italy/>. See also, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/273880/Alcohol_Fraud_Next_Steps_Summary_of_responses_FINAL.pdf

When appropriately invoked, the Twenty-first Amendment alters traditional dormant Commerce Clause analysis of state law governing the importation of alcohol and the establishment of a liquor regulatory system within the state. *Id.* at 460. If the Twenty-first Amendment means anything, and as the only constitutional amendment passed by state convention it certainly must, Missouri is entitled to require a license to import alcohol into the state, require a license to sell alcohol to its residents, require that a retailer must purchase its alcohol from licensed, in-state wholesalers so that sales are “funneled” through its three-tier system, and require physical presence as a condition to issuing a retail license. All of those requirements are fundamental to the “structure” of Missouri’s “liquor distribution system” and to effective regulatory oversight of alcohol sales. As such, these requirements fall squarely within the “leeway” granted to the state to address public health and safety effects attendant to alcohol use and sale. *Tennessee Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2474.

In summary, the predominate effect of the challenged law is to address the public health and safety effects of alcohol use and sale in Missouri and serve other legitimate state interests. By limiting the issuance of retail licenses to those with a physical presence in the state, Missouri and its local communities have a means of controlling the number of retail outlets. This not only positively impacts consumption patterns and abuse but also enables the Division to effectively marshal

and deploy their scarce resources and personnel to effectively audit, monitor and engage wholesalers and retailers within the state and police their trade and sales practices.

It would be virtually impossible for the Division to conduct due diligence regarding criminal or cross-tier ownership of retail outlets or conduct effective oversight of alcohol sales within the state if the hundreds of thousands of unlicensed retailers scattered across the country and world were able to market and ship alcohol directly to Missouri consumers. Similarly, it would be impossible to verify that the alcohol being imported into the state was not counterfeit and safe for human consumption. There would be no effective means for Missouri to verify that the alcohol being imported into the state was manufactured by the supplier referenced on the label, that the product was legal for sale in the state, and that the appropriate excise tax had been paid. *See* note 14 *supra* and accompanying text.

In the event of a violation, it would be prohibitively expensive and impractical for prosecutors to bring suit in another state or a foreign jurisdiction. Adjudication of violations is critically important to deter future transgressions. *See* Nat'l Highway Traffic Safety Admin., *The Role of Alcohol Beverage Control Agencies*, at 7. The remedies for such violations are typically the imposition of fines, payment of outstanding taxes, disgorgement of illicit profits, or suspension or revocation of the license. A physical presence requirement ensures that the vendor has assets in the

state which are subject to forfeiture. The requirement also eliminates the troublesome question of jurisdiction. Finally, an in-state presence is likely to promote a greater sensitivity to local norms and standards, greater compliance with existing regulations, and more effective enforcement.

Amici assert that the District Court correctly dismissed Sarasota Wine's Complaint. In the event, however, that the Court requires a more developed factual record in order to resolve these issues, Amici suggests that the case be remanded to the District Court requiring Sarasota Wine to demonstrate that the challenged law is "blatantly protectionist" and to establish the absence of any correlation between the law and any legitimate state interest.¹⁹

¹⁹ Assuming arguendo that the court were to conclude that the challenged Missouri law violates the dormant Commerce Clause, the court would be required to adopt the remedy of either nullification or extension to address the constitutional infirmity. When faced with an identical issue, other courts have wisely chosen to tighten, rather than relax, state liquor regulations. For instance, in *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), the Fourth Circuit concluded that North Carolina laws that permitted in-state wineries to ship direct to consumers but prohibited out-of-state wineries from doing so violated the dormant Commerce Clause. The *Beskind* court remedied the constitutional defect by prohibiting all wineries from selling directly to North Carolina consumers noting:

Finally, we can accept a presumption that North Carolina would want to uphold and preserve all of its ABC laws against constitutional challenges. Accordingly, when presented with the need to strike down one or more of those laws as unconstitutional, we can assume that North Carolina would wish us to take the course that least destroys the regulatory scheme that it has put into place pursuant to its powers under the Twenty-first Amendment. *See North Dakota*, 495 U.S. at 433, 100 S.Ct. 1986 (plurality opinion) And as a matter of comity and harmony, we are duly bound to give effect to such a policy, disturbing

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,

November 19, 2019

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only as much of the State regulatory scheme as is necessary to enforce the U.S. Constitution. When applying this “minimum-damage” approach, we have little difficulty in concluding that it causes less disruption to North Carolina’s ABS laws to strike the single provision-added in 1981 and creating the local preference-as unconstitutional and thereby leave in place the three-tiered regulatory scheme that North Carolina has employed since 1937 and has given every indication that it wants to continue to employ.

Id. at 519; *See, e.g., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-40 (1990) (discussing remedy options for an unconstitutional tax law); *Costco v. Hoen*, 407 F. Supp. 2d 1247 (W.D. Wash. 2005) (prohibiting in-state wineries from shipping direct to Washington consumers but staying entry of judgment until close of legislative session).

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 6,450 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 in 14-point Times New Roman.

Date: November 19, 2019

/s/ Michael D. Madigan

Michael D. Madigan

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s Michael D. Madigan _____
Michael D. Madigan