No. 19-1948

IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

SARASOTA WINE MARKET, LLC,
d/b/a Magnum Wine and Tastings, et al.
Plaintiffs/Appellants

v.

ERIC SCHMITT, Attorney General, et al.
Defendants/Appellees

Appeal from the United States District Court,
Eastern District of Missouri, Hon. Henry Edward Autry

BRIEF OF APPELLEES

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SUMMARY OF THE CASE

A Florida wine retailer, its owner, and two Missouri consumers brought this civil-rights action challenging Missouri's three-tier system for alcohol distribution—a framework in place since the end of Prohibition. Plaintiffs claim this scheme discriminates against interstate commerce and violates the Privileges and Immunities Clause by prohibiting unlicensed out-of-state retailers from shipping wine to local consumers. On the State's motion, the district court dismissed both claims in light of applicable precedent and because invalidating the shipping restriction would allow out-of-state retailers to "circumvent the Missouri regulatory system entirely."

Plaintiffs argue on appeal that *Tennessee Wine & Spirits v. Thomas*, 139 S. Ct. 2449 (2019), renders the district court's order "clearly erroneous." But dismissal remains valid for two reasons. First, Plaintiffs lack standing to bring this action. Second, the three-tier system does not discriminate against out-of-state retailers—a necessary element of both claims. Far from mere protectionism, the framework advances vital state interests.

The State does not believe argument is necessary, as these issues have been fully briefed and involve pure questions of law. However, if the Court would find argument helpful, the State requests equal time as Plaintiffs.

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a. Most Apposite Cases:

Bernbeck v. Gale, 829 F.3d 643, 646 (8th Cir. 2016)

Pucket v. Hot Springs Sch. Dist., 526 F.3d 1151 (8th Cir. 2008)

Chance Mgmt., Inc. v. South Dakota, 97 F.3d 1107 (8th Cir. 1996)

Doe v. Va. Dep't of State Police, 713 F.3d 745 (4th Cir. 2013)

b. Applicable Constitutional Provision:

U.S. CONST. art. III

II. Whether the district court erred in finding that Plaintiffs failed to state a claim under the dormant Commerce Clause in their challenge against Missouri's Liquor Control Law, which does not facially discriminate against interstate commerce or treat similarly situated out-of-state retailers differently than in-state retailers and which promotes vital state interests like public health and safety.

a. Most Apposite Cases:

Tennessee Wine & Spirits v. Thomas, 139 S. Ct. 2449 (2019)

Granholm v. Heald, 544 U.S. 460, 489 (2005)

General Motors v. Tracy, 519 U.S. 278 (1997)

Wal-Mart Stores, Inc. v. Tex. Alc. Beverage Comm'n, 935 F.3d 362 (5th Cir. 2019)

b. Most Apposite Constitutional Provision:

U.S. CONST. art. I, § 8, cl. 3

U.S. CONST. amend. XXI, § 2

c. Most Apposite Statutory Provision:

Mo. Rev. Stat. § 311.060.1

III. Whether the district court erred in finding that Plaintiffs failed to state a claim under the Privileges and Immunities Clause in their challenge against Missouri's Liquor Control Law, where the privilege asserted—selling alcohol—is not "fundamental" and there is no indication that the law was passed for protectionist purposes.

a. Most Apposite Cases:

McBurney v. Young, 569 U.S. 221 (2013)

Minnesota ex rel. Hatch v. Hoeven, 456 F.3d 826 (8th Cir. 2006)

United Bldg. & Const. Trades Council v. Mayor & Council of the City of Camden, 465 U.S. 208 (1984)

b. Most Apposite Constitutional Provision:

U.S. CONST. art. IV, § 2, cl. 1

c. Most Apposite Statutory Provision:

Mo. Rev. Stat. § 311.060.1

STATEMENT OF THE CASE

I. State Alcohol Regulations and the Rise of the Three-tier System

The regulation of liquor in America is older than the Nation itself. *Tenn. Wine*, 139 S. Ct. at 2476–78 (Gorsuch, J., dissenting). "The country's early years were a time of notoriously hard drinking," with per capita consumption double modern levels. *Id.* at 2463 & n.6 (majority opinion). The resulting social ills led to a "wave of state regulation," including licensing and residency requirements. *Id.* at 2463; *id.* at 2478 (Gorsuch, J., dissenting).

After the Civil War, the introduction of the "tied house" system ushered in a host of new problems. *Id.* at 2463 (majority opinion). "Tied houses" were liquor retailers that were financially "tied" and beholden to manufacturers or wholesalers. *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 843 (9th Cir. 2017) (en banc). Beyond their monopolistic sales schemes, these upmarket actors drove retailers to push product in ways that led to widespread alcohol abuse. *Tenn. Wine*, 139 S. Ct. at 2463 & n.7; *Prieto*, 861 F.3d at 843. In fact, the "myriad social problems" that flowed from vertical integration were a major impetus for Prohibition. *Tenn. Wine*, 139 S. Ct. at 2463 & n.7; *see also Prieto*, 861 F.3d at 843 (discussing anticompetitive dangers of tied-house systems); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 187 (2d Cir. 2009) (tying the system to organized crime).

The Nation's experiment with Prohibition came to an end in 1933 with the ratification of the Twenty-First Amendment. But the Amendment also sought to avoid the return of tied-house abuses by granting States "virtually complete control" in structuring liquor distribution within their borders. U.S. CONST. amend. XXI, § 2; *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980). Heeding this call, the "vast majority of states enacted alcohol beverage control laws . . . designed to forestall the . . . disorderly marketing conditions [that] plagued the public and the alcoholic beverage industry prior to prohibition." *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 959 n.1 (9th Cir. 1986).

The hallmark of these laws was a segmentation of the alcohol industry into a "three tier" system, in which (1) producers supply wholesalers, (2) wholesalers distribute to retailers, and (3) retailers sell to consumers. *Boyle*, 571 F.3d at 187. To prevent vertical integration, each tier is separately licensed and forbidden from overlapping with the other layers. *Id.* As a testament to its effectiveness, this model endures in many States,[1] including Missouri. *See* Mo. Rev. Stat. Ch. 311.[2]

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[1] For examples of modern three-tier structures, see, e.g., *Wine Country Gift Basekts.com v. Steen*, 612 F.3d 809, 811–12 (5th Cir. 2010) (Texas); *Boyle*, 571 F.3d at 187–89 (New York); *Stroh*, 830 F.2d at 960 (California); *Manuel v. State*, 982 So. 2d 316, 330 (La. Ct. App. 2008) (Louisiana).

[2] All statutory references are to the current version of the Revised Statutes of Missouri unless otherwise indicated.

II. Missouri's Liquor Control Law and Retail Licenses

Anticipating the repeal of Prohibition, the Missouri General Assembly convened a special session in October 1933 to devise "a comprehensive scheme for the regulation and control of the manufacture, sale, possession, transportation and distribution of intoxicating liquor." *John Bardenheier Wine & Liquor Co. v. City of St. Louis*, 135 S.W.2d 345, 346 (Mo. banc 1939). The resulting "Liquor Control Law" (as amended) is codified through a number of interconnected provisions in Chapter 311 of the state code. *See* Mo. Rev. Stat. § 311.010. This statute is premised on the recognition that alcohol, by necessity, is "regulated differently than other products." § 311.015. As such, the General Assembly crafted this "vital state regulation . . . to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals such as maintaining an orderly marketplace" for alcohol. *Id.*

To advance these ends, Missouri "funnels liquor sales through a tier system, separating the distribution market into discrete levels." *S. Wine & Spirits of Am. v. Div. of Alc. & Tobacco Control*, 731 F.3d 799, 802 (8th Cir. 2013). This system has four categories: (1) producers, (2) solicitors,

(3) wholesalers, and (4) retailers.[3] *S. Wine*, 731 F.3d at 802. Producers include manufacturers, brewers, distillers, and winemakers. *See* §§ 311.180.1, 311.190.1; 11 CSR 70–2.060(1). Solicitors are brokers who acquire liquor from producers for resale. *See* §§ 311.180.1, 311.275; 11 CSR 70–2.010(12). Producers and solicitors sell directly to wholesalers, *see* § 311.180; 11 CSR 70–2.050(1), who then distribute to retailers for sale to consumers, *see* §§ 311.200.1; 311.280; 11 CSR 70–2.010(10). As a check on vertical integration, the upper tiers cannot have any "financial interest" in a retailer, and various business practices are prohibited. § 311.070.1, .4; *Brown-Forman Distillers Corp. v. Stewart*, 520 S.W.2d 1, 7 (Mo. banc 1975) ("[These provisions] indicate a legislative intent to preclude a licensee in one phase of the liquor traffic from controlling other separate and distinct phases of the liquor traffic . . . ."). Each tier must also obtain a license to "manufacture, sell, or expose for sale" intoxicating liquor based on distinct criteria. §§ 311.050, 311.060.

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[3] Although Missouri's system contains a fourth tier of solicitors, it is functionally the same as a three-tier system. *S. Wine*, 731 F.3d at 805 n.3. Another distinction of Missouri's alcohol regime is that it is consistently rated "one of the least restrictive in the United States." WILLIAM P. RUGER & JASON SORENS, FREEDOM IN THE 50 STATES 159 (3d ed. 2013). In fact, since 2000, Missouri has ranked either first or second in terms of "alcohol freedom," a category that includes the distribution regulations challenged in this case. *Ranking: Alcohol Freedom – Missouri*, FREEDOM IN THE 50 STATES, https://www.freedominthe50states.org/alcohol/missouri.

At issue here are the licensing criteria for package-liquor retailers.[4] Br. at 2–4. Missouri has three main requirements for such licenses. *First*, retailers cannot sell only liquor; they must operate a business outside the alcohol industry, like a pharmacy or grocery store, and maintain a set value of regular merchandise. § 311.200.1; *State ex rel. Hewlett v. Womach*, 196 S.W.2d 809, 813 (Mo. banc 1946) (interpreting provision as a mandatory condition). *Second*, retailers must identify a specific location to be licensed, and the premises must be available for inspection by state regulators. § 311.240.3; 11 CSR 70–2.120, 2.140(2). *Third*, retail businesses must designate an agent ("the managing officer"), which can be any employee "of good moral character" who is a "citizen of the county, town, city or village." § 311.060.1; 11 CSR 70–2.030(7). Critically, there is no residency requirement for retailers themselves, and indeed, many out-of-state companies like Walmart and Total Wine have package-liquor licenses.

While these requirements impose a minimal burden on retailers, they advance vital state interests by undergirding the three-tier system, protecting health and safety, and promoting responsible consumption.

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[4] In the retail tier, Missouri offers separate licenses for liquor sold "in the original package" versus "by the drink." § 311.200. For reference, a blank retail license application is included in the addendum. State's Add. 1–7.

A. Retail Licensing Undergirds the Three-Tier System

Because retailers are the foundation of Missouri's three-tier system, oversight at this level is critical. *See* § 311.015; *Tom Boy, Inc. v. Quinn*, 431 S.W.2d 221, 226 (Mo. banc 1968) ("The purpose of [separating retailers] is to prevent the so-called tied-house."). On-site inspections are key in this regard, which is a major reason why retailers are required to identify fixed premises and an in-state agent. This enables state officials to audit retailers' books for signs of financial entanglement with other tiers. *See* 11 CSR 70–2.140. The State also inspects records of liquor transactions and physical inventory to confirm that retailers have purchased only from licensed Missouri wholesalers.[5] *See id.*; *see also* § 311.280.1 (unlawful for retailer to purchase liquor except from other sources); 11 CSR 70–2.130(10) (same). Thus, Missouri's licensing requirements help ensure that the separation among the tiers is more just than a paper barrier. *See Boyle*, 571 F.3d at 188 (explaining how a similar licensing scheme allows regulators to scrutinize financial relationships among the tiers).

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[5] A related regulatory interest is the collection of taxes and fees. If out-of-state retailers were allowed to purchase from wholesalers outside Missouri's three-tier system, there would be no way for the State to collect excise taxes. *See* §§ 311.275, 311.550; 11 CSR 70–2.070, 2.080. And even if out-of-state retailers purchased from Missouri wholesalers, it would require a new process for collecting sales tax and ensuring that licensing fees are paid. *See* §§ 311.665 (sales tax); 311.200 (licensing fee).

B. Retail Licensing Protects Health and Safety

These same "physical presence" requirements also serve important public health and safety interests. "A primary purpose of Missouri's licensing requirements for those who sell alcoholic beverages is to provide the [State] with a concrete method for inspecting, testing and approving" liquor before it is offered for sale. *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 838 (Mo. App. 2000). The ability of regulators to check the provenance, labeling, and safety of liquor is critical, as "bootleg" or tainted alcohol can be deadly. *Id.* These periodic inspections could not occur if out-of-state retailers shipped directly to consumers. *See Gen. Sales & Liquor Co. v. Becker*, 14 F. Supp. 348, 351 (E.D. Mo. 1936) ("It would be an impossible task for the state to inspect premises and product, and enforce regulations beyond its borders."). The State also "spends a substantial amount of time and effort in deterring the sale of alcoholic beverages to persons under the age of 21 years." *Beer Nuts*, 29 S.W.3d at 838. Retailers with no operations or agent in Missouri pose unique challenges in terms of monitoring, and it is far more difficult to bring enforcement actions against them. *See id.* at 831–32 (describing a North Carolina brewery that was caught shipping beer to underage Missouri residents).

C. Retail Licensing Promotes Moderation

Retail licensing also promotes responsible alcohol consumption in several ways. The three-tier system was designed to counteract systemic drivers of alcohol abuse, and as discussed above, the regulation of retailers is an essential part of that framework. Further, the mandate for retailers to sell liquor through the auspices of another type of business deemphasizes alcohol. By proscribing pure liquor stores, the Liquor Control Law diffuses the sale of alcohol into the general stream of commerce and diminishes its role in retail enterprises. Likewise, the requirement that a managing officer possess "good moral character" not only averts actual illicit conduct in the industry, but it also guards against the ruinous but legal practices of the tied-house era. Lastly, having an in-state presence gives retailers a stake in the well-being of the community, encouraging them to promote moderation and address the social ills of excess consumption.

In sum, Missouri's licensing requirements advance each of the stated aims of the Liquor Control Law—"promot[ing] responsible consumption, combat[ting] illegal underage drinking, and . . . maintaining an orderly marketplace"—while also safeguarding public health and safety. § 311.015.

III. Procedural History

A Florida company and three individuals brought this action under 42 U.S.C. § 1983, challenging the constitutionality of Missouri's licensing criteria for liquor retailers. J.A. 15–17. Specifically, they assert that section 311.060.1, as applied to out-of-state retailers, discriminates against interstate commerce and violates the Privileges and Immunities Clause. J.A. 16; *see also* Br. at 2–4 ("The statute being challenged is Mo. Rev. Stat. § 311.060(1)."). This provision requires retailers to designate an employee as a "managing officer" to serve as an in-state agent for the business. § 311.060.1; 11 CSR 70–2.030(7). Plaintiffs incorrectly suggest this requirement bars out-of-state retailers from obtaining a Missouri package-liquor license, thereby causing them harm. J.A. 16–17, 19.

The lead plaintiff, Sarasota Wine Market, is a Florida retailer that wants to ship wine directly to Missouri consumers. J.A. 17, 20. Heath Cordes, the owner of Sarasota, is also a named plaintiff. J.A. 17. While Sarasota and Cordes claim economic harm as a result of not being able to ship wine into Missouri, neither has attempted to apply for a Missouri retail license. J.A. 20, 22. But both aver they would obtain a license if one were available and would comply with applicable rules. J.A. 20, 22. The

other two plaintiffs, Michael Schlueter and Terrence French, are Missouri residents who want to purchase wine from out-of-state retailers like Sarasota and have it shipped directly to their homes. J.A. 16–17.

In November 2017, Plaintiffs filed their original complaint against three Missouri officials (collectively, "the State") who are responsible for enforcing the Liquor Control Law. J.A. 18; *see also* Br. at 6. Shortly thereafter, the State moved to dismiss the case due to Plaintiffs' lack of standing and failure to state a claim. J.A. 4, Doc. 17. The district court granted dismissal on both grounds but gave Plaintiffs leave to amend their pleading. J.A. 5, Doc. 30. After they filed their Amended Complaint, the State again moved for dismissal. J.A. 25. On March 29, 2019, following a hearing, the district court issued its final order and opinion, dismissing the case for failure to state a claim. J.A. 43, 45.

The district court first concluded that Plaintiffs had "adequately plead[ed] standing." J.A. 37. Although the Amended Complaint included only a few additional lines, the court found that it cured the defect in standing by identifying an injury-in-fact: wine sales that would have occurred but for the Liquor Control Law. J.A. 37–38. Nevertheless, dismissal was still required as Sarasota failed to state a claim. J.A. 38.

In rejecting Plaintiffs' claims, the opinion relied on the Supreme Court's instruction in *Granholm v. Heald* that the three-tier systems are "unquestionably legitimate." J.A. 40, 42 (quoting 544 U.S. 460, 489 (2005)). Likewise, here, Missouri's three-tier system "is a legitimate exercise of Missouri's power under the Twenty-first Amendment." J.A. 42. As to the dormant Commerce Clause claim, the court held that the Liquor Control Law does not discriminate against interstate commerce because it requires *all* alcohol to pass through the three-tier system. J.A. 42–43. In fact, invalidating the restriction on direct shipping by unlicensed out-of-state retailers would allow them to "circumvent the Missouri regulatory system entirely" and thereby undermine this legitimate system. J.A. 42. Unwilling to reach this result, the court rejected the first count. J.A. 43. As to the Privileges and Immunities claim, the district court once again emphasized state authority to regulate alcohol distribution systems under the Twenty-First Amendment. J.A. 44. As a result, it concluded, "the privilege of engaging in the occupation of selling alcohol is not protected by the Privileges and Immunities Clause." J.A. 44. Thus, because both claims failed on their face, the court granted dismissal. Sarasota timely appealed, J.A. 47, and this appeal now follows.

STANDARD OF REVIEW

This Court may affirm a district court's grant of dismissal "on any basis supported by the record." *Friends of Lake View Sch. v. Beebe*, 578 F.3d 753, 758 (8th Cir. 2009) (citations omitted).

Standing is a "jurisdictional prerequisite and thus a threshold issue that [appellate courts] are obligated to scrutinize." *Bernbeck v. Gale*, 829 F.3d 643, 646 (8th Cir. 2016) (quotation omitted). "[I]f a plaintiff lacks standing, the district court has no subject matter jurisdiction." *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002). "And if the record discloses that the lower court was without jurisdiction, this court will notice the defect . . . [and] correct[]the error of the lower court in entertaining the suit." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (quotation omitted). Accordingly, this Court reviews "*de novo* a district court's conclusion that the plaintiffs had standing." *Gerlich v. Leath*, 861 F.3d 697, 703 (8th Cir. 2017) (quotation omitted). Likewise, dismissal for failure to state a claim is reviewed *de novo*. *Rush v. Ark. DWS*, 876 F.3d 1123, 1125 (8th Cir. 2017) (per curiam) (citation omitted).

SUMMARY OF THE ARGUMENT

I. Standing: To show Article III standing, a plaintiff has the burden of establishing: (1) an injury-in-fact, (2) causation, and (3) redressability. *See Pucket v. Hot Springs Sch. Dist.*, 526 F.3d 1151, 1157 (8th Cir. 2008). Plaintiffs lack standing to bring this action for three reasons. *First*, Sarasota and Cordes never applied for a Missouri retail license, so they have not identified an injury-in-fact, and Cordes's futility argument fails because it was possible for him to obtain a license. *Second*, Plaintiffs failed to establish causation and redressability, as the unchallenged requirement to purchase from Missouri wholesalers independently precludes their desired transactions. And *third*, Cordes lacks standing to bring the Privileges and Immunities Claim because companies cannot raise such claims and his interests are identical to Sarasota's.

II. Commerce Clause: The dormant Commerce Clause applies to state alcohol regulations only if they facially discriminate against interstate commerce and, even then, such regulations will be upheld if the "predominant effect" is a legitimate interest versus mere protectionism. *See Tenn. Wine*, 139 S. Ct. at 2474–76. Plaintiffs failed to state a claim under this Clause for three reasons. *First,* the Liquor Control Law does not facially discriminate based on residency, rendering *Tennessee Wine*

inapplicable. *Second*, the dormant Commerce Clause prohibits discrimination against only "similarly situated" parties, and unlicensed retailers like Sarasota are distinct from licensed retailers. And *third*, the Liquor Control Law has the "primary effect" of promoting public health, safety, and other vital interests, not of advancing protectionism.

III. Privileges and Immunities Clause: The Privileges and Immunities Clause prohibits States from discriminating against out-of-state residents with respect to fundamental privileges or rights. *Minnesota ex rel. Hatch v. Hoeven*, 456 F.3d 826, 834 (8th Cir. 2006). Plaintiffs failed to state a claim under this Clause for two reasons. *First,* the privilege of selling alcohol is not fundamental, as the district court correctly concluded. And *second*, Plaintiffs have not alleged or shown that the Liquor Control Law was passed for a protectionist purpose.

ARGUMENT

I. Plaintiffs lack standing to bring this action for at least three independent reasons.

The district court found that Plaintiffs adequately pleaded standing by identifying potential sales that unlicensed out-of-state retailers are not allowed to make under the Liquor Control Law. J.A. 37–38. But more is required to meet the "irreducible constitutional minimum" of Article III standing. *Constitution Party v. Nelson*, 639 F.3d 417, 420 (8th Cir. 2011). Because "[s]tanding is a jurisdictional prerequisite that must be resolved before reaching the merits," *Gerlich*, 861 F.3d at 703 (quotation omitted), the Court's inquiry begins with this issue, and it should affirm dismissal on the alternative basis that Plaintiffs lack standing.

"Under Article III of the United States Constitution, federal courts may only adjudicate actual cases and controversies." *Pucket v. Hot Springs Sch. Dist.*, 526 F.3d 1151, 1157 (8th Cir. 2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, (1992)). Standing is the means by which courts enforce this case-or-controversy requirement. *Id.* "To show Article III standing, a plaintiff has the burden of proving: (1) that he or she suffered an 'injury-in-fact,' (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision." *Id.* Here, Plaintiffs lack standing for three reasons.

A. Plaintiffs failed to plead a cognizable injury because Sarasota and Cordes never applied for a Missouri retail license, and it was not futile for them to do so.

Injury-in-fact is the only component of standing that the district court analyzed. J.A. 37–38. Plaintiffs claim that out-of-state wine retailers cannot obtain a package-liquor license, and thus make deliveries to Missouri consumers, because such licenses are "reserved for Missouri citizens" under section 311.060.1. Br. at 4–5; J.A. 20, 22. While Plaintiffs allege "interrupted sales and lost profits" as a result, they fail to plead a cognizable injury because Sarasota and Cordes are capable of obtaining a Missouri liquor license but never attempted to do so. Br. at 11.

To support standing, an injury-in-fact must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Nelson*, 639 F.3d at 420. That is, a party "must demonstrate more than simply a generalized grievance." *Pucket*, 526 F.3d at 1157 (quotation omitted). A plaintiff lacks standing if he or she "is required to meet a precondition or follow a certain procedure to engage in an activity or enjoy a benefit and fails to attempt to do so." *Bernbeck*, 829 F.3d at 649 (citations omitted); *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220–21 (9th Cir. 1992) ("There is a long line of cases . . . hold[ing] that a plaintiff

lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit.") (collecting cases).

Here, Plaintiffs are frank in acknowledging that Sarasota and Cordes have never applied for a Missouri liquor license. Br. at 5; J.A. 20, 22. Instead, they claim it would be "futile" to attempt to obtain a license because they are Florida residents.[6] Br. at 12; J.A. 17, 20–22. But, as explained above, Missouri has no residency requirement for package-liquor licenses. *See supra* at 6. All that is required is a physical store and a single employee to serve as an agent for the business. Thus, this matter does not "fall[] within that small class of cases where a formal application is unnecessary on the ground of futility." *See Madsen*, 976 F.2d at 1222.

Plaintiffs cite two cases to bolster their claim of futility, but neither advances their argument. Br. at 12. In *Constitution Party v. Nelson*, a district court found that an Arizona citizen could challenge a South Dakota

[6] Significantly, Plaintiffs do not challenge the requirement in section 311.200.1 that a retailer operate one of six enumerated businesses outside of the alcohol industry. Br. at 2, 4 (identifying section 311.060.1 as the only challenged statute); J.A. 18 (pledging "to comply with all . . . non-discriminatory state regulations."). While Sarasota might qualify as a "general merchandise store," *see* § 311.200.1; State's Add. 1, Cordes's job as a "wine consultant" plainly falls short of this bar, to the extent he claims it is a separate business. Thus, based on the Amended Complaint, Cordes must qualify for a retail license by means of owning Sarasota, if at all.

law on the basis of futility. 730 F. Supp. 2d 992, 1001–02 (D.S.D. 2010). However, unlike here, that case involved a residency requirement, and it was undisputed that the Arizonan did not qualify. *Id.* Even then, the court explained that a finding of futility is appropriate only if is "inevitable" or "automatic" that an application will be denied. *Id.* Moreover, the Eighth Circuit later reversed on standing, as the Arizonan had not adequately shown futility. Plaintiffs' reliance on *Pucket v. Hot Springs School District* is also misplaced. While recognizing the doctrine of futility in the abstract, the Court made clear that a plaintiff bears the burden of demonstrating that a precondition is truly impossible and declined to recognize standing based on futility as a result. 526 F.3d. at 1162; *see also Davis v. Tarrant Cty.*, 565 F.3d 214, 220 (5th Cir. 2009) ("[S]peculation is not sufficient to show that applying under the [policy] would have been futile.").

Here, the absence of futility is even clearer because Missouri has no residency requirement for package-liquor licenses. Like scores of other out-of-state retailers, Sarasota and Cordes are free to obtain a license under section 311.060.1. They simply prefer not to comply with Missouri's three-tier system. This lack of diligence is in stark contrast to the alcohol retailers in *Tennessee Wine*, who could not possibly qualify under a durational

residency requirement but opted to apply for licenses anyway to ensure than an actual case or controversy existed. *See* 139 S. Ct. at 2458; *see also S. Wine*, 731 F.3d at 802 (same). By failing to undertake even minimal efforts in an attempt to secure a Missouri retail license, Plaintiffs cannot show a cognizable injury and thus lack standing on this basis alone.[7]

B. Plaintiffs failed to establish causation and redressability because there are unchallenged, independent, and valid grounds that prohibit the desired wine transactions.

Plaintiffs will not be able to complete their desired wine transactions even if the district court were to grant their requested relief of invalidating section 311.060.1 as applied to them. This is true because out-of-state retailers still would be required to buy any alcohol for sale to Missouri consumers from Missouri wholesalers—a foundational element of the three-tier system. § 311.280.1. As such, defects in traceability and redressability independently destroy Plaintiffs' standing.

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[7] If the Court finds that Sarasota lacks standing, Schlueter and French necessarily do, as well. These Missouri consumers have identified no other out-of-state retailer (including Cordes, to the extent he operates independently of Sarasota) who is "willing and able" to apply for a Missouri package-retail license, much less one who possesses the rare wines they desire. *See Nelson*, 639 F.3d at 421. Thus, without Sarasota, it would be "merely speculative that the injury will be redressed by a favorable decision." *Id.* at 420 (citation omitted).

"Traceability," or causation, refers to the requirement that a plaintiff show that an alleged injury is "fairly traceable to the challenged conduct of the defendants." *Liddell v. Special Admin. Bd. of Transitional Sch. Dist.*, 894 F.3d 959, 966 (8th Cir. 2018). "For an injury to be redressable, judicial action must be likely to remedy the harm and cannot be merely speculative." *Steger v. Franco, Inc.*, 228 F.3d 889,893 (8th Cir. 2000). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 107 (1998).

A fatal "obstacle to establishing traceability and redressability" arises "when there exists an unchallenged, independent rule, policy, or decision that would prevent relief even if the court were to render a favorable decision." *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 756 (4th Cir. 2013). In such cases, an injury is not traceable to the challenged conduct, and "even in victory [the prevailing party] would be 'no closer' to [their desired outcome] than when the litigation began. *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 802 (8th Cir. 2006). Therefore, when two distinct regulations prohibit a party from engaging in particular conduct, that party must assert a valid challenge to both regulations to satisfy causation and redressability. *Doe*, 713 F.3d at 756

("[W]here an unchallenged regulation would prevent a plaintiff from [exercising her asserted rights] even if we struck down the challenged regulation, we have found redressability lacking."); *see also Midwest Media Prop., L.L.C. v. Symmes Twp.*, 503 F.3d 456, 462 (6th Cir. 2007) (collecting cases); 13A CHARLES ALAN WRIGHT, ET. AL, FEDERAL PRACTICE & PROCEDURE § 3531.5 (3d ed. 2019) ("One law alone does not cause the injury if the other law validly outlaws all the same activity.").

Here, Schlueter and French want to buy "rare and unusual wine" they claim is unavailable in Missouri, while Sarasota and Cordes hope to consummate these and other sales. J.A. 16–18, 20, 22. To these ends, they seek to invalidate the managing-officer requirement in section 311.060.1, which they claim will allow out-of-state retailers to begin shipping and delivering wine to Missouri consumers. Br. 2–4. But even if the court were to order the State to grant licenses to retailers like Sarasota with no in-state agent or location, they still would be required to purchase any inventory sold here from licensed Missouri wholesalers as part of the three-tier system. *See* § 311.280.1; State's Add. 8. This requirement, in turn, would be impossible for a Florida "vendor" like Sarasota, which can purchase from only Florida licensees. *See* Fla. Stat. § 561.14. Thus, if they prevail in this suit, Schlueter and French would not gain access to any wine

that is not available in Missouri, and Sarasota and Cordes would not be able to complete their "interrupted sales." *See Boyle*, 571 F.3d at 192 n.3 (describing it as "demonstrably impossible for out-of-state retailers . . . to comply with [a] three-tier scheme" if they have no in-state locations).

Even in the wake of *Tennessee Wine*, Plaintiffs are not so bold as to attack Missouri's three-tier system directly, and for good reason. The *Granholm* Court left no room for doubt in reaffirming that "the three tier system itself is unquestionably legitimate," 544 U.S. at 489 (quotation omitted); *S. Wine*, 731 F.3d at 802 (same), and *Tennessee Wine* does nothing to disturb that principle. As such, Plaintiffs not only fail to challenge an independent bar on the restriction of out-of-state shipping, but they also could not do so with any prospect of success. Accordingly, their claims must be dismissed for lack of causation and redressability.

C. Plaintiffs lack standing as to the Privileges and Immunities claim because the Clause does not apply to companies, and Cordes did not plead a distinct injury.

Even if the Court were to conclude that Plaintiffs could overcome these defects, they lack standing to bring a claim under the Privileges and Immunities Clause. It is black-letter law that this provision affords no protection to companies, which do not qualify as "citizens." *See, e.g.*, *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656 (1981).

As such, corporations and LLCs lack standing under the Clause. *See, e.g.*, *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1115 (8th Cir. 1996); *Orion Wine Imps., LLC v. Applesmith*, No. 2:18-cv-01721-KJM-DB, 2019 WL 3860218, at *8 (E.D. Cal. Aug. 16, 2019). Likewise, citizens of a regulating State cannot bring a challenge on this basis. *Swedenburg v. Kelly*, 358 F.3d 223, 240 n.14 (2d Cir. 2004) (citation omitted).

Plaintiffs are apparently aware of these limitations, as only Cordes asserts a Privileges and Immunities claim. J.A. 21–22. But owners and majority shareholders also lack standing to bring such claims where an alleged injury is derivative of or directly related to the business's losses. *See Chance Mgmt.,* 97 F.3d at 1115 (corporation and majority shareholder lacked standing); *Orion Wine*, 2019 WL 3860218, at *7–8 (same for LLC and its owner, even after *Tennessee Wine*). While a party does not forfeit their rights under the Privileges and Immunities Clause due to their stake in a company, they must show an independent injury to have standing.

Here, the Amended Complaint directly links Cordes's alleged injury to his ownership status. *See* J.A. 22 ("Mr. Cordes is the owner of [Sarasota] and has suffered economic harm by not being able to complete sales to Missouri customers."). As such, the pleading itself confirms any harm to Cordes is not distinct from the harm to Sarasota. *See Orion*, 2019 WL

3860218, at *8. Moreover, as explained above, Cordes could not qualify for a Missouri retail license independently of Sarasota, further tying him to the company for purposes of this claim. *Supra* at 20 n.6. Thus, none of the Plaintiffs have standing to challenge section 311.060.1 under the Privileges and Immunities Clause.[8]

D. For these three reasons, Plaintiffs lack standing.

"Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element [of standing]. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546 (2016). Plaintiffs have failed to meet all three elements of standing, in addition to falling short on their Privileges and Immunities claim. Thus, this Court need not reach the question of whether Plaintiffs failed to state a claim and should instead affirm the district court's grant of dismissal for lack of standing.

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[8] Plaintiffs inaccurately paraphrase the standing rule for multiple plaintiffs, suggesting that "jurisdiction is established if any one has standing." Br. at 10. This is true only to the extent that the parties are making "similar arguments" and raising the same claims. *See S. D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003) (citations omitted). Because Cordes is the only plaintiff to raise a claim under the Privileges and Immunities Clause and because he does not appear to be part of the dormant Commerce Clause claim, *see* Br. 11–13; J.A. 18–22, the Court must confirm that at least one plaintiff has standing to bring each claim. Moreover, it is questionable whether this general rule applies with equal force when dismissal is granted at the pleading stage.

II. The district court did not err in finding that Plaintiffs failed to state a claim under the dormant Commerce Clause.

Plaintiffs first challenge the district court's determination that they failed to state a valid dormant Commerce Clause claim under Rule 12(b)(6). The only argument they advance for reversal is that the district court's reliance on *Southern Wine* is "clearly erroneous" in the wake of *Tennessee Wine*. Br. at i, 13–14. As an initial matter, Plaintiffs mischaracterize the court's opinion by suggesting that it "relied on a single controlling opinion," *Southern Wine*, for its analysis. Br. at 14. The court also leaned heavily on the Supreme Court's still-binding endorsement of the three-tier system in *Granholm*, *supra* at 12, thereby undercutting their implication that summary reversal is appropriate.

In any event, Plaintiffs' challenge fails on the merits for three reasons: (1) section 311.060.1 does not discriminate based on residency, rendering *Tennessee Wine* inapplicable; (2) the dormant Commerce Clause prohibits discrimination against only "similarly situated" parties, and unlicensed retailers like Sarasota are distinct from retailers operating under the three-tier system; and (3) the Liquor Control Law has the "primary effect" of promoting public health, safety, and other vital interests, not of advancing protectionism.

A. State alcohol regulations are subject to Commerce Clause scrutiny only if they facially discriminate against interstate commerce and, even then, will be upheld if the "predominant effect" advances a legitimate interest.

While the Commerce Clause "is framed as a positive grant of power to Congress," the Supreme Court has long held it implicitly "prohibits state laws that unduly restrict interstate commerce." *Tennessee Wine*, 139 S. Ct. at 2459. This "dormant" or "negative" aspect of the Clause typically applies when States attempt to regulate economic conduct wholly outside their borders for protectionist purposes. *See New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). With limited exceptions, "state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm*, 544 U.S. at 472 (quotation omitted).

However, dormant Commerce Claus challenges are more complicated in the context of liquor regulations due to the Twenty-First Amendment. Section 2 of the Amendment provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As noted above, this provision was designed to enable States to head off a resurgence of the abuses that gave rise to Prohibition. *Supra* at 3.

"Over time, the Supreme Court has sent conflicting signals about the relationship between these two constitutional provisions." *S. Wine*, 731 F.3d at 804. Its early decisions indicated that section 2 immunized state regulations from Commerce Clause scrutiny. *Id.* More recently, the Court has attempted to harmonize these provisions by extending the Commerce Clause's nondiscrimination principle to state alcohol regulations, *Granholm*, 544 U.S. at 487, while otherwise permitting States "leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable," *Tennessee Wine*, 139 S. Ct. 2457. Significantly, in doing so, the Court has confined its analysis to "facial discrimination."

Granholm exemplifies this trend. The *Granholm* Court reaffirmed 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." 544 U.S. at 488. States are thus free "to ban the sale and consumption of alcohol altogether [and] bar its importation," to "assume direct control of liquor distribution through state-run outlets," or less intrusively, "to funnel sales through the three-tier system." *Id.* at 488–89. What they cannot do, however, is favor local industry by regulating only out-of-state competitors.

At issue in *Granholm* were two regulatory systems that exempted in-state wineries from distributing through wholesalers, while not granting the same flexibility to their out-of-state counterparts. *Id.* at 468–70. As this "differential treatment between in-state and out-of-state wineries constitute[d] explicit discrimination," the regulations exceeded the authority granted by the Twenty-First Amendment and were subject to Commerce Clause scrutiny. *Id.* at 467, 489–93. At the same time, *Granholm* was careful to emphasize that the three-tier system itself is "unquestionably legitimate" when it applies to all market participants. *Id.* at 489; *see also S. Wine*, 731 F.3d at 805 (reading *Granholm* to mean that "a State may, at a minimum, require separation among the various levels of the distribution chain to control the importation and sale of liquor within its borders.")

The Supreme Court's recent decision in *Tennessee Wine* does nothing to unsettle this balance. Rather, it merely confirms the nondiscrimination principle applies to all levels of a three-tier system. 139 S. Ct. at 2474. Like in *Granholm*, the Court applied a two-step analysis in reviewing a challenge to a two-year residency requirement Tennessee imposed on alcohol retailers. *Id.* at 2457. As with any dormant Commerce Clause case, the first step was whether the challenged law

discriminated against out-of-state interests. *Id.* at 2461–62. After concluding that the "residency requirement discriminates on its face against nonresidents," the Court proceeded to step two. *Id.* at 2474. But at this stage, the Court conducted a "different inquiry" than in other cases, as the Twenty-First Amendment "gives the States regulatory authority that they would not otherwise enjoy." *Id.* at 2474. Accordingly, the Court asked whether the statute was a valid exercise of State power that "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* Only after concluding that the "predominant effect" of the restriction was protectionism rather than a valid state interest did the Court invalidate the law. *Id.* at 2476. Yet, once again, the Court clarified that it was not casting doubt on the validity of the three-tier system. *See id.* 2471. ("At issue in the present case is not the basic three-tiered model . . . but the durational-residency requirement that Tennessee has chosen to impose.").

B. The Liquor Control Law does not facially discriminate against out-of-state actors, as it imposes the exact same requirements on all package-liquor license applicants.

Unlike the regulations at issue in *Granholm* and *Tennessee Wine*, Missouri's Liquor Control Law imposes the exact same requirements on

in-state and out-of-state retailers. Plaintiffs' entire challenge rests on a misunderstanding of this critical point. They conclude that Missouri's package-liquor "license is available to Missouri citizens only" by interpreting section 311.060.1 as a "residency restriction." Br. at 20. But because this provision does not facially discriminate against out-of-state retailers like Sarasota, it is not subject to Commerce Clause scrutiny.

Plaintiff's brief boldly claims, "There is no dispute that Missouri discriminates against out-of-state wine retailers." Br. at 20. But this is simply not true. Like their "foreign" counterparts, domestic alcohol retailers must meet the same three requirements to qualify for a package-liquor license: (1) they must operate a qualifying business outside the alcohol industry, § 311.200.1; (2) they must identify a specific location to be licensed that is open for inspection, § 311.240.3; 11 CSR 70–2.120, 2.140(2); and (3) they must designate an in-state managing officer as an agent for the business, § 311.060.1; 11 CSR 70–2.030(7). All retailers are required purchase inventory from licensed Missouri wholesalers. § 311.280.1. From this inventory, they are permitted to make deliveries to customers, so long as the transactions are consummated on retail premises,

and provided retailers ensure deliveries are not made to anyone who is intoxicated or under 21 years old. § 311.300; State's Add. 8–9.

Of these regulations, Plaintiffs challenge only section 311.060.1, which requires that retailers have an in-state agent, or "managing officer." Critically, while this employee must reside in Missouri, the licensees themselves are not required to do so. Thus, despite Plaintiffs' repeated suggestion to the contrary, out-of-state interests like Sarasota are just as eligible for a retail liquor license as Missouri citizens. Because it applies equally to domestic and foreign retailers, the managing-officer requirement is, by definition, not facially discriminatory.

Moreover, this minimal requirement is far less burdensome than the "onerous durational residency requirements" the Supreme Court invalidated in *Tennessee Wine*, 139 S. Ct. at 2457. To obtain a retail license under Tennessee's system, applicants had to prove at least two years of residency. *Id.* at (citing Tenn. Code Ann. § 57–3–204(b)(2)(A)). But the real barrier was renewal: "to renew such a license—which Tennessee law require[d] after only one year of operation—an individual [had to] show continuous residency in the State for a period of 10 consecutive years." For corporations, all officers, directors, and

shareholders had to meet this same requirement, which effectively meant that no publicly traded company could operate a liquor store in Tennessee. And unlike Missouri's Liquor Control Law, Tennessee actually *prohibited* a licensee from using an agent. Tenn. Code. Ann. § 57-3-204(b)(2)(G). In practice, this meant that an individual retailer would have to wait nine years after establishing residency to start a retail business and that most companies could never do so.

Thus, while Plaintiffs claim that *Tennessee Wine* undercuts the district court's opinion, that case is inapposite. Significantly, while it was statutorily impossible for the out-of-state retailers to obtain a license in Tennessee, Missouri readily grants licenses to both foreign and domestic retailers, so long as they comply with the three-tier system. Because the Liquor Control Law does not facially discriminate against out-of-state retailers, it is not subject to Commerce Clause scrutiny.

C. To the extent the Liquor Control Law creates distinctions, unlicensed retailers are not similarly situated to licensed retailers, so the Commerce Clause does not apply.

Even if it the Court were to find the Liquor Control Law discriminatory, the dormant Commerce Clause applies only if a regulation creates distinctions between groups that are similarly

situated. Here, Missouri retailers—both domestic and foreign—who have obtained a retail license and adhere to the three-tier system, are not similarly situated to unlicensed out-of-state retailers like Sarasota. Thus, to the extent section 311.060.1 or any other provision creates distinctions between these two groups, it would not trigger Commerce Clause scrutiny.

In this context, "[a] statute impermissibly discriminates only when it discriminates between two similarly situated in-state and out-of-state interests." *Wal-Mart Stores, Inc. v. Tex. Alc. Beverage Comm'n*, 935 F.3d 362, 376 (5th Cir. 2019) (citing *Exxon Corp. v. Governor*, 437 U.S. 117 (1978)). As the Supreme Court stated in *General Motors v. Tracy*, "[A]ny notion of discrimination assumes a comparison of substantially similar entities." 519 U.S. 278, 298–300 (1997). To be similarly situated for purposes of the Commerce Clause, the "supposedly favored and disfavored entities" generally must compete "in a single market." *Id.* at 300; *see also id.* at 299 (describing this as "a threshold question").

The multi-tier system by its very nature creates markets that are unique to each State. Thus, to be in competition with a Missouri licensed retailer, a retailer must (1) be physically located in Missouri; (2) have a retailer license; and (3) obtain its alcohol from a licensed wholesaler.

Sarasota fulfills none of these requirements. This Court should follow the Fifth Circuit and reject the idea that licensed in-state retailers are "competitors" with unlicensed out-of-state retailers. *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010) ("Wine Country is not similarly situated to Texas retailers and cannot make a logical argument of discrimination.").

D. The Liquor Control Law has the predominant effect of promoting public health, safety, other vital interests rather than advancing base economic protectionism.

The Court should reach step two of the *Tennessee Wine* analysis only if it concludes that that section 311.060.1 facially discriminates against unlicensed, out-of-state retailers *and* that such retailers are similarly situated to the foreign and domestic retailers that have obtained a license. In this event, the Court would consider "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Tenn. Wine*, 139 S. Ct. at 2474. Only if the "predominant effect of a law is protectionism" can the Court find "it not shielded by § 2" of the Twenty-First Amendment. *Id.*

Here, the Liquor Control Law is a "vital state regulation [that] promote[s] responsible consumption, combat[s] illegal underage drinking,

and achieve[s] other important state policy goals such as maintaining an orderly marketplace [for] alcohol." § 311.015. These important and legitimate goals would be imperiled if an unlicensed, out-of-state retailer like Sarasota were able to circumvent the three-tier system. In fact, *Tennessee Wine* itself endorsed the very regulatory measures Missouri employs, including "on-site inspections, audits, and the like" and "requiring a nonresident to designate an agent." 139 S. Ct. at 2475. The Amended Complaint does not allege that these measures have a protectionist effect, and Plaintiffs' brief does nothing to suggest that this is the case. Thus, the Court should remand for fact finding on this limited issue only if it concludes that Plaintiffs have meaningfully put this issue in dispute.

III. The district court did not err in finding that Plaintiffs failed to state a claim under the Privileges and Immunities Clause.

Plaintiffs also argue that the district court erred in concluding that they failed to state a claim under the Privileges and Immunities Clause of the Fourth Amendment. Tellingly, Plaintiffs are unable to cite a single case in which this Clause has been applied to invalidate a liquor regulations. More importantly, like their dormant Commerce Clause claim, they have not shown that the privilege of selling alcohol is "fundamental" or that the Liquor Control Law was adopted for protectionist purposes—both of which

are required under applicable precedent. Thus, the Court should affirm the district court's dismissal of this claim as well.

Under the Privileges and Immunities Clause, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. As the Supreme Court has explained,

> The object of th[is] Clause is to strongly constitute the citizens of the United States as one people, by placing the citizens of each State upon the same footing with citizens of other States, so far as the advantage resulting from citizenship in those States are concerned. This does not mean, we have cautioned, that state citizenship or residency may never be used by a State to distinguish among persons.

McBurney v. Young, 569 U.S. 221, 226 (2013) (citation omitted). Rather, the Court has "long held that the Privileges and Immunities Clause protects only the privileges and immunities that are 'fundamental.'" *Id.*

Cordes, the owner of Sarasota Wine, is the only Plaintiff who brought a Privileges and Immunities claim. J.A. 21–22. As explained above, there is no dispute that Sarasota, Schlueter, and French lack standing to bring a challenge under this Clause. *See supra* at 22–23. The Amended Complaint claims that because Cordes is not able to obtain a Missouri "retail wine dealer license" he is prevented from practicing his

profession of "consulting with obtaining wines for, and deliver[ing] wines to Missouri residents." J.A. 22. But because this alleged harm is directly tied to Sarasota's injury, he too lacks standing. *See supra* at 23.

A. The privilege of selling alcohol is not "fundamental" and thus is not subject to scrutiny under the Privileges and Immunities Clause.

In the event that the Court reaches the merits of this claim, the application of the Privileges and Immunities Clause requires a two-part inquiry, which considers: "(1) whether the state's law discriminates against out-of-state residents with regard to a privilege or immunity protected by the Clause, and (2) if so, whether sufficient justification exists for the discrimination." *Minnesota ex rel. Hatch v. Hoeven*, 456 F.3d 826, 834 (8th Cir. 2006) (citation omitted). The district court correctly found that "the privilege of engaging in the occupation of selling alcohol is not protected by the Privileges and Immunities Clause." J.A. 44.

Appellants argue that "the opportunity to earn a livelihood" is fundamental. Br. at 23. But the Supreme Court has scoped asserted privileges much more narrowly. For example, in another "common calling" case, the Court considered an out-of-state resident's interest in "employment on public works contracts in another State." *See United*

Bldg. & Const. Trades Council v. Mayor & Council of the City of Camden, 465 U.S. 208, 218 (1984). Thus, the district court appropriately confined its inquiry to whether "the occupation of selling alcohol" qualifies for protection under the Clause. J.A. 44

The opening brief also takes aim at the district court for "holding that the selling of alcoholic beverages was not the kind of occupation protected by the Clause because there was no 'natural right' to engage in the liquor business." Br. at 24. But this mischaracterizes the opinion. Instead, the court looked to a Missouri Supreme Court decision, which explains that, due to licensing regulations dating back to 1847, "the liquor business does not stand upon the same plane, in the eyes of the law, with other commercial occupations . . . and is thereby separated or removed from the natural rights, *privileges and immunities* of the citizen." J.A. 45 (quoting *Steamers Service Co. v. Wright*, 505 S.W.2d 65, 68 (Mo. banc 1974) (emphasis added)). In other words, due to the pedigree of these types of alcohol licensing regulations, the privilege of selling alcohol "does not constitute a fundamental right basic to the maintenance or well-being of the Union." *See Hatch*, 456 F.3d at 834.

B. Plaintiffs have failed to show a protectionist purpose, which is required when raising a Privileges and Immunities challenge related to a common calling.

Even if the Court determines that the privilege of selling alcohol is fundamental, and thus is protected by the Clause, Cordes's claim still fails because Plaintiffs have not demonstrated a protectionist purpose behind section 311.060.1. In *McBurney v. Young*, Justice Alito explained that "the Court has struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens." 569 U.S. at 227. *McBurney* then makes clear that the burden is on the challenger to show a statute "was enacted in order to provide a competitive economic advantage for [the State's] citizens." *Id.* at 228. After considering the purpose and mechanics of the state FOIA law at issue there, the Court rejected the Privileges and Immunities claim because "the Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen." *Id.*

Here, the Liquor Control Law "promote[s] responsible consumption, combat[s] illegal underage drinking, and achieve[s] other important state policy goals such as maintaining an orderly marketplace" for alcohol.

§ 311.015. Plaintiffs have done nothing to show that section 311.060.1 or any other provision of the law was "enacted in order to provide a competitive economic advantage for Missouri citizens." *McBurney*, 569 U.S. at 228. Rather Missouri's retail licensing criteria support a host of valid regulatory interests, including the very existence of its "unquestionably legitimate" three-tier system. Thus, the Court should affirm the district court's dismissal of this claim.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's grant of dismissal for lack standing or, alternatively, for failure to state a claim upon which relief can be granted.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the typeface and formatting requirements of Federal Rules of Appellate Procedure 27 and 32 and that it contains 9,752 words as determined by the word-count feature of Microsoft Word. The brief has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2019, the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, which serve all counsel of record.

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