No. 19-1948

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SARASOTA WINE MARKET, LLC, ET AL.,

Plaintiffs-Appellants

v.

ERIC SCHMITT, ATTORNEY GENERAL, ET AL.,

Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District of Missouri, No. 4:17-cv-02792
Hon. Henry E. Autry

BRIEF OF WINE & SPIRITS WHOLESALERS OF AMERICA, INC. AND AMERICAN BEVERAGE LICENSEES AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici* state they do not have parent corporations, nor do they issue any stock.

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INTEREST OF *AMICI CURIAE*[1]

Wine & Spirits Wholesalers of America, Inc. ("WSWA") is a national trade organization and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents nearly 400 companies in all 50 States and the District of Columbia that hold state licenses to act as wine and/or spirits wholesalers and/or brokers. Wholesalers directly account for more than 88,000 jobs paying more than $7.5 billion in wages, and WSWA's members distribute more than 80% of all wine and spirits sold at wholesale in the United States.

American Beverage Licensees ("ABL") is an association representing licensed off-premises alcohol retailers (such as package liquor stores) and on-premises alcohol retailers (such as bars, taverns, and restaurants) across the nation. ABL was created in 2002 after the merger of the National Association of Beverage Retailers and the National Licensed Beverage Association. ABL has about 15,000 members in 35 States.

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[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person, other than WSWA and ABL, their members or their counsel, contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

Many of ABL's members are independent, family-owned operations who ensure that beverage alcohol is sold and consumed responsibly by adults in conformity with the laws of the State in which each member does business. ABL monitors federal legislation, judicial decisions, and trends of concern to beverage alcohol retailers. ABL is strongly committed to working with others under effective regulation toward the responsible sale of beverage alcohol products. ABL supports state laws concerning the structure of a State's beverage alcohol distribution system.

Alcohol wholesalers and retailers have an interest in stable regulatory environments. This case presents a challenge to, and potential further disruption of, Missouri's regulation of alcohol. And it concerns the proper application of the Supreme Court's framework for evaluating state alcohol regulation. Therefore, WSWA and ABL have an interest in its correct articulation and application here.

SUMMARY OF THE ARGUMENT

I. The States' authority to regulate alcohol is greater than their authority to regulate any other article of commerce, so Dormant Commerce Clause challenges to state alcohol regulations are evaluated under a different test. As the Supreme Court recently reiterated, "Section 2 [of the Twenty-first Amendment] gives the States regulatory authority that they would not otherwise enjoy," to "address alcohol-related public health and safety issues" and advance other legitimate state interests. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2474 (2019). The Court thus reaffirmed that the States' regulation of alcohol receives special, though not overwhelming, solicitude.

Consequently, the Supreme Court has recognized that the Dormant Commerce Clause test for evaluating state alcohol regulation is different from the typical Dormant Commerce Clause test. *See id.* Just last Term in *Tennessee Wine*, the Court again declined to subject state alcohol regulation to the Dormant Commerce Clause's usual "strict scrutiny" approach—a rule that imposes "virtually *per se*" invalidity. *See Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)).

Instead, "because of § 2" of the Twenty-first Amendment, the Court crafted a "different inquiry" than strict scrutiny. *Tennessee Wine*, 139 S. Ct. at 2474. The Court in *Tennessee Wine* wanted to ensure that States are actually "address[ing] alcohol-related" concerns when they enact alcohol regulations facially favoring in-state over out-of-state entities. *Id.*

So *Tennessee Wine* articulated a unique Dormant Commerce Clause test notably more accommodating than strict scrutiny: When "the *predominant effect* of a law" is "the protection of public health or safety"—or the promotion of other legitimate state interests—then the law does not violate the Dormant Commerce Clause. *See id.* (emphasis added). But when "the predominant effect of a law is protectionism," then the alcohol law violates the Dormant Commerce Clause. *Id.* To show that a law's predominant effect furthers a legitimate state interest, States may present "'concrete evidence'" that such regulations "actually promote[]" legitimate, "nonprotectionist" interests or that there are no "*obvious alternatives* that *better serve*" the States' goals. *Id.* at 2474, 2476 (emphases added) (quoting *Granholm v. Heald*, 544 U.S. 460, 490 (2005)).

II. This unique "predominant effect" Dormant Commerce Clause test for state alcohol regulation allows courts to distinguish between laws

furthering legitimate interests—to which they owe "deference"—and laws for which the State's true goal is "mere economic protectionism." *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (preventing pure protectionism is the "central tenet" of the Dormant Commerce Clause).

Moreover, this "predominant effect" test does not impose a heavy burden on States. *Tennessee Wine* held that alcohol laws are valid where "concrete evidence" shows that the laws further legitimate state interests. 139 S. Ct. at 2474. Likewise, alcohol laws are valid where there are no "obvious" and feasible nondiscriminatory means of regulation that "better serve" a State's interests. *See id.* at 2476. States cannot rely on "'mere speculation' or 'unsupported assertions'" to justify their alcohol laws. *Id.* at 2474 (quoting *Granholm*, 544 U.S. at 490). But the "concrete evidence" merely has to show that the State is not engaging in "*arbitrary discrimination*." *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (emphasis added). So alcohol laws are valid where a State provides some competent evidence that its chosen regulation promotes legitimate interests.

Furthermore, States may permissibly draw from their shared history of alcohol regulation to craft and defend their policies. Specifically, they may rely on the historical underpinnings and the modern benefits

of independent alcohol distribution models. Additionally, as is true in other constitutional contexts, States may "rely on" the experiences and data of other States—though they are not bound by the decisions and failures of other States. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 51-52 (1986) ("The First Amendment does not require [the government] . . . to conduct new studies or produce evidence independent of that already generated by other [governments], so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.").

III. Here, even if the Court were to conclude that Appellants have standing and that Missouri's law discriminates between in-state and out-of-state alcohol retailers, the State's law is still valid as a straightforward extension of the State's licensure of in-state alcohol retailers. It affords Missouri all the regulatory benefits of its in-state presence requirement while allowing consumers to purchase from retailers in accordance with their preferences.

The Supreme Court has recognized that when retailers have an in-state physical presence, the State can "monitor [their] operations through on-site inspections, audits, and the like" to ensure regulatory compliance.

Tennessee Wine, 139 S. Ct. at 2475. Indeed, the Supreme Court has long recognized that States may insist that retailers be located "*in-state*." *Granholm*, 544 U.S. at 489 (emphasis added) (quoting *North Dakota v. United States*, 495 U.S. 423, 447 (1990) (Scalia, J., concurring in judgment)).

Moreover, only those retailers that adhere to the State's alcohol distribution model can sell (and ship) alcohol to Missouri residents. Thus, Missouri has also ensured that all wine delivered by retailers has traveled through the State's distribution model which itself generates recognized benefits.

Finally, there are no "obvious" nondiscriminatory alternatives—and certainly none that "better serve" Missouri's regulatory system. *Tennessee Wine*, 139 S. Ct. at 2476. Any putative "alternative" that works contrary to a State's legitimate interests is no alternative at all.

In all events, if this Court rules that the current record does not support affirmance, the Court should vacate and remand for further proceedings and record development in light of the Supreme Court's intervening *Tennessee Wine* opinion—which was decided after the district court's decision here.

ARGUMENT

I. The *Tennessee Wine* "predominant effect" test is a "different inquiry" from the strict scrutiny that normally applies in Dormant Commerce Clause challenges.

Tennessee Wine reiterated that the Twenty-first Amendment requires a different Dormant Commerce Clause test for state alcohol regulation that is less probing than the Clause's typical strict scrutiny test.

The Twenty-first Amendment accomplished two main goals. In Section 1, it repealed the Eighteenth Amendment, ending Prohibition and returning alcohol to lawful commerce. Alone, this was enough to restore the States' authority to regulate alcohol. But any regulatory efforts would have needed to conform fully with the limitations imposed by Congress and the Constitution.

So Section 2 of the Twenty-first Amendment went a step further, and it "grant[ed] the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980); *see* U.S. Const. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the

United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

Of course, this power is neither exclusive nor plenary. Congress retains its own role in regulating alcohol. *See Tennessee Wine*, 139 S. Ct. at 2469 ("[Section] 2 does not entirely supersede Congress's power to regulate commerce."). And Section 2 exists as part of a "unified constitutional scheme." *Id.* at 2462. "[N]o one now contends" that the Twenty-first Amendment requires, for example, "a state law prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex" to be "immunized from challenge under the Equal Protection Clause." *Id.*

One constitutional principle, however, has defied such a straightforward harmonization: the Dormant (or Negative) Commerce Clause. Article I grants Congress the power "To regulate Commerce . . . among the several States," which "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys.*, 511 U.S. at 98.

Under the normal operation of the Dormant Commerce Clause, States generally may not afford "differential treatment [to] in-state and

out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 99. To justify such a law outside the context of alcohol regulation, States must satisfy "strict scrutiny." *See New Energy Co. v. Limbach*, 486 U.S. 269, 279 (1988). Under Dormant Commerce Clause strict scrutiny, a government must demonstrate that its discriminatory law is "narrowly tailored" to further a legitimate governmental interest. *Tennessee Wine*, 139 S. Ct. at 2461.

But States have unique interests in the regulation of alcohol, and the Constitution grants them distinct authority to pursue diverse policies to further those interests. The Twenty-first Amendment grants States certain authority to regulate alcohol in a manner that may "burden the interstate flow" of alcohol. *Or. Waste Sys.*, 511 U.S. at 98. Thus, the Dormant Commerce Clause does not operate with equal force to alcohol regulations. *See, e.g.*, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000) ("[Section] 2 of the twenty-first amendment empowers [States] to control alcohol in ways that [they] cannot control cheese.").

The Supreme Court therefore has steadfastly refused to apply strict scrutiny—and its "narrow tailoring" requirement—to state alcohol regulations. Just last Term in *Tennessee Wine*, the Court considered

Tennessee's two-year durational-residency requirement for retail licenses. *See* 139 S. Ct. at 2462. The Court acknowledged that under the normal Dormant Commerce Clause test—if the State had chosen to regulate any other article of commerce in such a manner—the regulation "could not be sustained." *Id.* at 2474.

"But because of § 2, we engage in a *different inquiry*." *Id.* (emphasis added). The Court recognized that "§ 2 was adopted to give each State the authority to address alcohol-related public health and safety issues," and other legitimate interests, "in accordance with the preferences of its citizens." *Id.* So "Section 2 gives the States regulatory authority that they would not otherwise enjoy," namely power normally denied them under the Dormant Commerce Clause. *Id.*

The "different inquiry" articulated in *Tennessee Wine* requires States to show that "the *predominant effect* of a law" is "the protection of public health or safety" (or other legitimate state interests)—*not* "protectionism." *Id.* (emphasis added). "In conducting the inquiry, courts must look for [1] 'concrete evidence' that the statute 'actually promotes [the State's legitimate interests, including] public health or safety,' or [2] evidence that 'nondiscriminatory alternatives would be insufficient to

further those interests.'" *Wal-Mart Stores v. Tex. Alcoholic Beverage Comm'n*, 935 F.3d 362, 369-70 (5th Cir. 2019) (quoting *Tennessee Wine*, 139 S. Ct. at 2474).

This test is distinct from normal Dormant Commerce Clause strict scrutiny, which requires that laws be "*narrowly tailored*." *Tennessee Wine*, 139 S. Ct. at 2461 (emphasis added) (quoting *Dep't of Revenue*, 553 U.S. at 338). First, the Supreme Court has recognized that the States' nonprotectionist interests in, for example, "address[ing] *alcohol-related* public health and safety issues" are undeniably legitimate. *Id.* at 2474 (emphasis added). Second, under this modified test, States do not have to demonstrate that their chosen regulations are "narrowly tailored" to serve their interests. Under strict scrutiny, the narrow-tailoring requirement would penalize States for ignoring *any* nondiscriminatory alternative means of regulation. But *Tennessee Wine* requires only that States demonstrate they are not ignoring "*obvious* alternatives that *better serve*" their interests—a much lighter burden. *Id.* at 2476 (emphases added).

II. Unlike strict scrutiny, the *Tennessee Wine* "predominant effect" test does not impose an onerous burden on States, and States satisfy this test when they provide some competent evidence that their alcohol law furthers legitimate interests or no obvious nondiscriminatory alternatives exist.

Tennessee Wine's "predominant effect" test does not impose an onerous burden on States. Strict scrutiny penalizes the mere fact of discrimination. In stark contrast, the *Tennessee Wine* test has a different goal: to ensure that a State is not engaging in the "*arbitrary* discrimination against interstate commerce" left unprotected by the Twenty-first Amendment. *Taylor*, 477 U.S. at 151 (emphasis added). The test is designed to reveal when "the *predominant effect* of a law is protectionism, not the protection of public health or safety," or other legitimate state interests. *Tennessee Wine*, 139 S. Ct. at 2474 (emphasis added). When States engage in blatant protectionism, they lose the "deference" generally afforded to "laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Bacchus*, 468 U.S. at 276.

Conversely, when States act in furtherance of legitimate interests, they have broad discretion to craft policy—even policy that has some protectionist effects. The *Tennessee Wine* test has play in the joints that the strict scrutiny approach lacks. As explained further below, it tolerates an

imperfect fit between a State's asserted interest and its chosen means of regulation. And it forestalls a more probing adversarial inquiry into the State's regulation. So once States come forward with some "concrete evidence" supporting their policies, they fully meet their burden under *Tennessee Wine*, ending the inquiry. *See* 139 S. Ct. at 2474. Nothing in the Supreme Court's decisions suggests that a State's successful justification of its law should later devolve into a mini-trial or a battle of the experts, which would allow courts "to second-guess the empirical judgments of lawmakers concerning the utility of legislation." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987) (quoting *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring in judgment)).

At a minimum, of course States must assert a legitimate interest. *Cf. Bacchus*, 468 U.S. at 273 (quoting Hawaii's brief that the purpose of its discriminatory tax was "to promote a local industry"). The "protection of public health or safety" is one of many legitimate state interests. *Tennessee Wine*, 139 S. Ct. at 2474. Once States assert a legitimate interest, they must then simply provide "concrete evidence" that their chosen means of regulation "actually promotes" their interest, or that they are

not eschewing "obvious" and feasible nondiscriminatory alternatives that "better serve" their interest. *Id.* at 2474, 2476.

Nor does *Tennessee Wine*'s "predominant effect" test impose a heightened evidentiary standard. To the contrary, the Supreme Court uses the term "concrete evidence" across multiple areas of law in juxtaposition with phrases like "mere speculation," "unsupported assertions," *Granholm*, 544 U.S. at 490, 492; "mere conjecture," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013); and "generalized pleas," *United States v. Kimbell Foods*, 440 U.S. 715, 730 (1979). The requirement for concrete evidence is thus a requirement for *some* competent evidence. *See, e.g.*, *Anderson v. Liberty Lobby*, 477 U.S. 242, 251, 256 (1986) (using "concrete evidence" as "some evidence").

Likewise, this Court has used the phrase "concrete evidence" similarly. *See, e.g.*, *Dean v. Searcey*, 893 F.3d 504, 521 (8th Cir. 2018) ("The record here is replete with concrete historical evidence—affidavits, memos, interview transcripts—supporting the Appellees' claims and supplementing the credible testimony in this case."); *Shur-Value Stamps, Inc. v. Phillips Petroleum Co.*, 50 F.3d 592, 597 n.5 (8th Cir. 1995) ("In attacking the movant party's witness' credibility, however, the

nonmovant must show concrete evidence."); *Kimbrough v. Wilson*, 578 F.2d 215, 216 (8th Cir. 1978) ("The evidence put forward by the employees was characterized by ambiguity and vagueness. By contrast, the City defendants introduced concrete evidence refuting the allegations . . . .").

A State fails to offer concrete evidence if it declines to provide *any* evidence. For instance, the Supreme Court determined that the State in *Tennessee Wine* presented no concrete evidence at all. *See* 139 S. Ct. at 2474 ("During the course of this litigation, the [intervenor-defendant] relied almost entirely on the argument that Tennessee's residency requirements are simply 'not subject to Commerce Clause challenge,' and the State itself mounted no independent defense. *As a result, the record is devoid of any 'concrete evidence'* . . . .") (emphasis added) (internal citation omitted) (quoting *Granholm*, 544 U.S. at 490); Tr. of Oral Argument at 42, *Tennessee Wine*, 139 S. Ct. 2449 (No. 18-96) ("[The State] didn't -- it didn't file a single affidavit. It didn't put forward any kind of a witness. It didn't put on any defense whatsoever.").

Similarly, in *Granholm*, the Court concluded that "the States provide[d] *little concrete evidence* for the sweeping assertion that they cannot police direct shipments by out-of-state wineries." 544 U.S. at 492

(emphasis added). In fact, the State of New York "explicitly concede[d]" in the district court that its disparate treatment of out-of-state wineries was "intended to be protectionist." *Swedenburg v. Kelly*, 232 F. Supp. 2d 135, 146 (S.D.N.Y. 2002) (citing State Liquor Authority Divisional Order No. 714, ¶ 4 (Aug. 31, 1976)); *id.* at 148 ("There is evidence in the record that the direct shipping ban was designed to protect New York State businesses from out-of-state competition.").

The lesson from *Granholm* and *Tennessee Wine* is that a State may offer any evidence that tends to show that the "predominant effect" of a challenged regulation is the promotion of the State's legitimate interests. Although the Supreme Court's decisions have provided some guidance about its *substantive* expectations for the evidence that States submit, it has never dictated the *form* the evidence must take. So, for example, the Court has not limited States to expert reports alone. Accordingly, this evidence can include affidavits from state officials, state-sponsored or academic studies, and reports from state agencies—including those the State generally makes available to the public.

The States' respective and shared histories in regulating alcohol also create a significant basis for States to both craft and defend their

policies. As Missouri recounts in its brief, the longstanding practice of separating alcohol producers from retailers arose out of deleterious tied-house arrangements, whereby alcohol producers supplied retailers with premises and equipment in exchange for retailers exclusively (and excessively) selling the producer's alcohol. *See* Br. of Missouri at 4-5; *see also Tennessee Wine*, 139 S. Ct. at 2463 n.7. In response, States created "comprehensive system[s]" of alcohol regulation that separated producers and retailers. *North Dakota*, 495 U.S. at 432 (plurality op.). In the experience of the States, as recounted by the Supreme Court, this separation "promot[es] temperance, ensur[es] orderly market conditions, and rais[es] revenue." *Id.*

And, as they are "entitled" to do in other constitutional contexts, States can "rely on the experiences" of other States. *See Renton*, 475 U.S. at 51.[2] In practice, this means that States would not need "to conduct new studies or produce evidence independent of that already generated by

[2] Courts have not limited *Renton* to the First Amendment context. *See, e.g.*, *Hutchins v. D.C.*, 188 F.3d 531, 544 (D.C. Cir. 1999) (en banc) ("Of course no city is exactly comparable to any other, but it would be folly for any city not to look at experiences of other cities. And in drawing conclusions from those experiences, legislatures are not obliged to insist on scientific methodology.").

other [States], so long as whatever evidence the [State] relies upon is reasonably believed to be relevant to the problem that the [State] addresses." *Id.* at 51-52; *see Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 393 & n.6 (2000) (suggesting that States could rely on "evidence and findings accepted in" *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), to support state campaign-finance laws). Importantly, although States may rely on the experiences of other States, they are not limited by other States' policy choices—especially other States' policy failures. *See Renton*, 475 U.S. at 52 (holding that one city's "choice of a different remedy . . . does not call into question either [the city's] identification of" the problems "or the relevance" of one city's experience to the other). Rather, the Twenty-first Amendment provides States with power to craft alcohol laws to best address the particular concerns of each State.

Furthermore, the *Tennessee Wine* "predominant effect" test recognizes that state alcohol laws are valid unless they eschew "*obvious* alternatives that *better serve* [the State's interest] without discriminating against nonresidents." 139 S. Ct. at 2476 (emphases added). Importantly, this is a very different inquiry than strict scrutiny. The *Tennessee Wine* test does not require States to demonstrate that every "abstract

possibility" of a nondiscriminatory alternative is unworkable. *Taylor*, 477 U.S. at 147. *Tennessee Wine*'s "predominant effect" test is thus aimed at uncovering purely protectionist regulations while otherwise permitting States to exercise discretion. And it focuses only on "obvious" alternatives that "better serve" the States' interests. *Tennessee Wine*, 139 S. Ct. at 2476. These qualifiers serve to give States necessary breathing room to retain broad authority for regulating alcohol "in accordance with the preferences of [their] citizens." *Id.* at 2474.

III. Missouri's law here furthers Missouri's legitimate interest in licensing retailers with an in-state physical presence, for which there are no obvious reasonable alternatives.

Missouri's law here ensures that all wine delivered by retailers is subject to the State's full regulatory authority, which necessarily balances the need for an innovative, consumer-responsive marketplace with the important public goals of safety and responsible alcohol consumption. For such regulation to be effective, States can require that a retailer must have a physical presence in the State. This is not the kind of "arbitrary discrimination against interstate commerce" that *Tennessee Wine* prohibits. *Taylor*, 477 U.S. at 151.

Like other States, Missouri requires a tiered system for alcohol distribution, under which the State separately licenses and regulates alcohol producers, wholesalers, and retailers.[3] *See* Mo. Ann. Stat. §§ 311.180.1(1), 311.200. Subject to certain limited exceptions, alcohol travels from licensed producers to licensed wholesalers to licensed retailers and finally to consumers. *See id.* § 311.050 (requiring all alcohol sales to take place between licensed entities).[4] This system is specifically designed to create retailer independence from producers and wholesalers. *See Tennessee Wine*, 139 S. Ct. at 2463 n.7. This separation ensures, among other things, regulatory accountability at each tier of the

[3] Missouri also licenses "solicitors" who can act as intermediaries between producers and wholesalers. Mo. Ann. Stat. § 311.180.1(6). Although solicitors may be considered a "fourth tier," their inclusion "does not alter the basic features of the three-tier system" that the Supreme Court has endorsed—including in-state presence requirements. *S. Wine & Spirits of Am. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 805 n.3 (8th Cir. 2013).

[4] Not every drop of alcohol goes through this system. For example, Missouri allows out-of-state wineries to ship wine directly to consumers. *See* Mo. Ann. Stat. § 311.185.1. Allowing producers to directly ship to consumers is unlike allowing retailers to do so. The former is already an *exception* to the general rule that all alcohol must pass through licensed wholesalers and retailers before getting to consumers. When licensed retailers ship alcohol purchased from licensed wholesalers, on the other hand, both of those transactions take place wholly within a State's general distribution system.

distribution process. By properly isolating the distinct features in each tier of the distribution process, a State can better provide for public safety while holding each entity responsible for adhering to regulations tailored to its tier.

At issue in this case, Missouri requires its licensed retailers have a physical presence in the State. *See* Mo. Ann. Stat. § 311.060(1). And because they are subject to various state regulations, Missouri only allows those in-state retailers to ship or deliver alcohol to consumers. Appellants contend that this in-state physical presence requirement offends the Dormant Commerce Clause because unlicensed retailers located outside of the State do not have the same shipping privileges.[5] Their focus on *shipping*, however, is a red herring. Appellants' challenge really amounts to an attack on baseline in-state physical presence requirements for retailers—and an attempt to radically undermine the State's entire alcohol distribution model.

[5] *See* Br. of Appellants at 19 ("Retailers *located in* the state can take orders by phone, email or Internet from customers who never set foot on the premises and ship that wine to their homes. *Retailers located outside Missouri are prohibited from doing so*.") (emphases added).

So even assuming *arguendo* both that Appellants have Article III standing *and* that Missouri's law does discriminate between in-state and out-of-state retailers, it is the kind of law that nevertheless satisfies *Tennessee Wine*. *See* Br. of Missouri at 18-25 (arguing Appellants lack standing under the Dormant Commerce Clause); 35-37 (arguing in-state retailers and out-of-state retailers are not "similarly situated" for purposes of Dormant Commerce Clause discrimination). The "predominant effect" of the law here is "the protection of public health [and] safety," as well as the promotion of other legitimate state interests like maintaining an effective and efficiently run state alcohol regulatory system. *Tennessee Wine*, 139 S. Ct. at 2474.

Under *Tennessee Wine*'s first prong, Missouri has a legitimate interest in an "orderly marketplace composed of state-licensed alcohol producers, importers, distributors, and retailers," which it finds necessary to effectively and efficiently regulate the alcohol marketplace. Mo. Ann. Stat. § 311.015. This system "promote[s] responsible consumption, combat[s] illegal underage drinking," and advances other legitimate state interests. *Id.* As an important part of that system, the State has ensured that retailer shipments are (1) only made by retailers with an in-state

presence subject to the State's full regulatory authority and (2) limited to wine that has flowed through the State's distribution system, which has various safeguards.

The Supreme Court has recognized that when retailers are "physically located within the State . . . the State can monitor the stores' operations through on-site inspections, audits, and the like." *Tennessee Wine*, 139 S. Ct. at 2475. The Court's endorsement of in-state presence requirements applies regardless of whether the licensed retailer is shipping or delivering alcohol to consumers or transferring it to consumers at brick-and-mortar locations. Moreover, the Supreme Court has similarly recognized that States may insist that retailers be located "*in-state*." *Granholm*, 544 U.S. at 489 (emphasis added) (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)). Otherwise, as here, States could not ensure compliance with their laws.

Here, Missouri can only "monitor the [] operations," *Tennessee Wine*, 139 S. Ct. at 2475, of retailers with a "particularly describe[d]" physical premises in the State. Mo. Ann. Stat. § 311.240.3 (requiring retailers to designate a physical location to secure a license). Out-of-state retailers cannot "cooperate fully" with on-premises inspections for

regulatory compliance, as Missouri requires. *See* Mo. Code Regs. tit. 11, § 70-2.140(2). Accordingly, among other things, the State would not be able to inspect for counterfeit or adulterated products before they are sold to consumers. *See* Br. of Missouri at 10; *see also* Mo. Code Regs. tit. 11, § 70-2.140(3) (requiring retailers to keep "complete and accurate records" at the premises for inspection); *id.* § 70-2.140(6) (imposing minimum and maximum container sizes that alcohol retailers can sell); *id.* § 70-2.140(9) (prohibiting certain sales promotions).[6]

Without the ability to inspect out-of-state retailers, Missouri's interest in ensuring regulatory compliance—which itself has numerous consumer benefits, *see* Br. of Missouri at 6-11—is severely undermined.

Moreover, whether Missouri consumers walk into a retail establishment or have the retailer send them wine, all wine sold by a retailer to a consumer travels through Missouri's distribution system. *See* Mo. Ann. Stat. § 311.280.1 ("It shall be unlawful for any person in this state

[6] The State regularly publishes notices detailing the results of its inspections. *See, e.g.*, Division of Alcohol and Tobacco Control, Springfield Informal Conferences (Sept. 17, 2019; revised Oct. 24, 2019), https://atc.dps.mo.gov/SuspensionFiles/Sep17Suspensions2019.pdf (noting fines for failures to purchase from licensed wholesalers, failures to maintain records, and possessing untaxed liquor).

holding a retail liquor license to purchase any intoxicating liquor except from, by or through a duly licensed wholesale liquor dealer in this state."). Missouri is therefore acting in accordance with the lessons learned from the States' shared history. *See* Br. of Missouri at 6-11 (describing the history of the State's alcohol distribution system and its benefits). As detailed above in Part II, the Supreme Court has held that structuring a distribution system to ensure effective regulatory oversight is a legitimate means to achieve identifiable benefits to public health and safety. *See Granholm*, 544 U.S. at 489 (citing *North Dakota*, 495 U.S. at 432 (plurality op.)); *id.* ("States may . . . funnel sales through the three-tier system.").

Under *Tennessee Wine*'s second prong, any putative alternatives to Missouri's policy would be "insufficient to further [Missouri's] interests." *Tennessee Wine*, 139 S. Ct. at 2474.

The "alternatives" for Missouri are: (1) allow unlicensed, out-of-state retailers to ship to consumers, completely unraveling the State's twin requirements that retailers purchase from state-licensed wholesalers and maintain a physical presence in the State, *see* Br. of Missouri at

6-11 (describing the State's regulatory structure and its benefits);[7] (2) license out-of-state retailers, requiring them to comply with *two* States' laws simultaneously and impeding Missouri's ability to effectively regulate what amounts to a nationwide marketplace of thousands of retailers—forgoing the product-safety benefits of retailer physical presence as a result, *see id.* at 22-25 (describing the impossibility of out-of-state retailers complying fully with Missouri's alcohol distribution system); or (3) forbid all retailers from shipping wine to consumers, contrary to "the preferences of [Missouri's] citizens," *Tennessee Wine*, 139 S. Ct. at 2474.

None of these alternatives "serve [the State's] goal[s]," *id.* at 2476, because they all require Missouri to compromise either on its legitimate interests or the preferences of its citizens—a choice that the Dormant Commerce Clause does not require here. Indeed, under the *Tennessee Wine* test, these potential "alternatives" are no alternatives at all.

[7] The State further notes that this would also require the State to adopt a new tax-collection method for out-of-state retailers. See Br. of Missouri at 9 n.5.

* * *

In all events, if this Court concludes that the existing record does not support affirmance, the Court should vacate and remand for further proceedings and record development.

The district court decided the merits of this case before the Supreme Court issued its *Tennessee Wine* opinion. Accordingly, should this Court reach the Dormant Commerce Clause issue and conclude that the current state of the record does not support affirmance, the Court should vacate and remand for further proceedings allowing the parties to develop the record in light of the intervening *Tennessee Wine* decision.

CONCLUSION

The district court's judgment should be affirmed.

November 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was filed and served on November 19, 2019, via ECF upon counsel of record for the parties.

/s/ Scott A. Keller
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 5364 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in 14-point Century Schoolbook font.

3. This brief complies with the requirements of Local Rule 28A(h)(2) because it has been scanned for viruses and is free of viruses.

Dated: November 19, 2019

/s/ Scott A. Keller
Scott A. Keller

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RE: 19-1948 Sarasota Wine Market, LLC, et al v. Eric Schmitt, et al

Dear Counsel:

The amicus curiae brief of Wine & Spirits Wholesalers of America, Inc. and American Beverage Licensees has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

HAG

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District Court/Agency Case Number(s): 4:17-cv-02792-HEA