No. 20-1767

In The
Supreme Court of the United States

SARASOTA WINE MARKET, LLC, et al.,

Petitioners,

v.

ERIC S. SCHMITT,
ATTORNEY GENERAL OF MISSOURI, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF WINE RETAILERS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The National Association of Wine Retailers (NAWR) is an association that represents and promotes the unique interests of wine sellers nationwide. Through advocacy, education, and research, NAWR seeks to expand the opportunities for America's wine retailers, whether they serve the wine buying public via small brick-and-mortar establishments, large retail chains, Internet-based businesses, grocery stores, auction houses, or wine clubs. NAWR seeks to unite and serve wine retailing interests by providing essential services, strategic advocacy, and calls to action that will lead to a stable and modernized environment for wine retailing.

Unfortunately, arbitrary and archaic and often unconstitutional laws and regulations built for an era that decidedly no longer exists not only hamper wine retailers' abilities to access modern and growing marketplaces locally and nationally, but also hamper consumer choice and consumers' ability to access the robust retail market that NAWR's members seek to foster and serve. Too often, these measures serve only to protect local commercial interests from competition while hindering consumers' interests in a diverse and thriving retail market for wine. It is thus a core part of

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have provided written consented to this filing. All parties have been timely notified of the submission of this brief.

NAWR's mission to work to overcome arbitrary, archaic, and protectionist state-based market access and distribution laws and support laws that create a fair and level playing field where wine retailers can legally respond to consumer demand that is increasingly turning to online ordering and shipment.

NAWR submits this amicus brief in support of Sarasota Wine Market's petition for a writ of certiorari. NAWR believes it is necessary for the U.S. Supreme Court to grant the writ in this case, because allowing the *Sarasota Wine Market v. Schmitt* decision to stand, will create such chaos and uncertainty in the legal system and state regulatory system that wine retailers will be unable to make reasonable business plans.

The COVID-19 crisis has roiled the markets and devasted the economy, while at the same time motivating more people to buy online and receive shipments of goods so as to reduce their exposure to health risks. Many wine retailers want to invest in the infrastructure to serve wine shipping markets across the country and expand their businesses and enhance their revenue. However, due to protectionist state wine shipping laws supported by wholly unique legal doctrines such as those posited by the Eighth Circuit, they are unwilling and often unable to make the necessary investments. NAWR wants these legal uncertainties removed so that wine retailers across the country can grow their businesses during these uncertain times and beyond.

SUMMARY OF THE ARGUMENT

Justice Anthony Kennedy writing for this Court in *Granholm* clearly stated, "the Court has held that §2 does not abrogate Congress' Commerce Clause powers with regard to liquor."[2] Justice Kennedy cited a series of Supreme Court cases that underscored this principle.[3] These Supreme Court cases make clear that a discriminatory state liquor law is not shielded by §2 of the Twenty-First Amendment and must face Commerce Clause scrutiny.

Under the more recent *Tennessee Wine & Spirits Retailers Assn. v. Thomas* decision, the Court held that in order for a discriminatory state liquor statute to overcome a Commerce Clause challenge, the state would need to demonstrate with concrete evidence that the discriminatory law is necessary to promote a legitimate state interest, and there are no non-discriminatory alternatives available.[4]

The Eighth Circuit contravenes these long held Supreme Court legal doctrines, and replaces them with a new legal theory declaring a discriminatory state liquor law does not face Commerce Clause scrutiny when

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[2] *Granholm v. Heald*, 544 U.S. 460, 487 (2005).

[3] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324 (1964).

[4] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2474 (2019).

the law is protecting a core provision or "essential element" of the state's "three-tier system".

With this analysis, the Eighth Circuit has returned to a now overturned *Young's Market*[5]-era analysis that delivers near unlimited power to the state to pass and maintain protectionist and discriminatory alcohol laws.

The Eighth Circuit deems a retailer's physical presence and residency in the state and the requirement that retailers only purchase inventory from an in-state wholesaler as essential elements of the three-tier system. In creating this new legal theory, the Eighth Circuit challenges the Supreme Court to prove them wrong and indicates that its newly created legal doctrine will stand until the Supreme Court indicates otherwise.

The Supreme Court has held in numerous cases that the essential elements or core provisions of the so-called "three-tier system" is limited to the separate licensing of the producer, wholesaler and retail tiers and preventing vertical integration between these tiers.[6] Despite the fact that the Court has defined the elements of a three tier system differently than Missouri and the Eighth Circuit and despite the fact the Court has never utilized this "essential element" test to preclude a Commerce Clause analysis, the Eighth Circuit in *Sarasota Wine* nonetheless takes the bold step to ignore the Court's holdings and advances a new legal

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[5] *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59 (1936).

[6] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449 (2019); *Granholm v. Heald*, 544 U.S. 460 (2005).

standard on what constitutes the essential element of the three-tier system, and declares a new approach to analyzing discriminatory state liquor laws that neuter the power of the Commerce Clause in Twenty-First Amendment cases.

The Eighth Circuit's decision does not go through the proper Commerce Clause analysis as required by *Tennessee Wine*. Had the Eighth Circuit applied the correct analysis, it would have required the state to demonstrate why it is necessary to discriminate in order to protect a core provision or essential element of the three-tier system, as well as demonstrate that there were no reasonable nondiscriminatory alternatives available. Finally, by not applying the correct analysis, the Eighth Circuit does not require Missouri to demonstrate through evidence, why a retailer maintaining an in-state physical presence is an essential element or core interest of the three-tier system.

If the Supreme Court remains silent on *Sarasota Wine Market*, it will create chaos in the legal system. The Supreme Court would permit a legal theory that ignores and misconstrues numerous Supreme Court Commerce Clause precedents to stand as legal authority. As there are seven[7] cases pending in the federal court system with near identical facts as in *Sarasota*

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[7] *Lebamoff Enterpr., Inc. v. O'Connell*, No. 1:16-cv-08607 (N.D. Ill.); *Chicago Wine Co. v. Holcomb*, 1:19-cv-02785 (S.D. Ind.); *Tannins of Indianapolis, LLC v. Taylor*, 3:19-cv-00504 (W.D. Ky.); *B-21 Wines, Inc. v. Guy*, 3:20-cv-00099 (W.D.N.C.); *Bernstein v. Graziano*, 2:19-cv-14716 (D.N.J.); *Anvar v. Tanner*, 1:19-cv-523 (D. R.I.); *Block et al. v. Canepa et al.,* 2:2020-cv-03686 (S.D. Ohio).

Wine Market, the need for Supreme Court guidance on this issue is at this moment paramount.

Further, if the Supreme Court does not address this issue, the Eighth Circuit will return Twenty-First Amendment/Commerce Clause analysis to the long discredited *Young's Market*[8]-era analysis, advancing unlimited state power in liquor laws, which will create confusion and chaos within the state alcohol regulatory systems that have attempted to embrace the more balanced approach to discriminatory liquor laws embedded in the Court's *Granholm* and *Tennessee Wine* decisions.

Silence on this matter by the Court is likely to encourage other federal courts[9] to adopt the Eighth Circuit's *Young's Market*-style analysis of discriminatory state alcohol statutes provide states with near unlimited power to enforce facially discriminatory and protectionist laws. This will sow uncertainty about the correct balance between the Commerce Clause and the Twenty-First Amendment.

Moreover, the Court ought to review *Sarasota Wine Market* in order to correct the discriminatory and protectionist state laws that currently hinder the important online wine sales and shipping marketplace, and to provide legal certainty to both retailers and consumers, particularly during the current health crisis

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[8] *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59 (1936).

[9] *B-21 Wines, Inc. v. Stein*, 3:20-cv-00099-FDW-DCK (W.D.N.C. July 9, 2021).

that has driven more and more consumers to turn online for access to goods. The online market is crucial to both consumers and wine retailers and with legal uncertainty about how the laws will be applied, it is impossible to develop a business plan going forward.

ARGUMENT

I. The Eighth Circuit's decision in *Sarasota Wine Market* replaces the Court's well established dormant Commerce Clause analysis with a vague and unsupported legal test

The Eighth Circuit replaces the traditional Commerce Clause analysis with a new and unsupported legal theory in which state power under §2 of the Twenty-First Amendment abrogates the Commerce Clause with regard to liquor matters.

Under the Eighth Circuit's newly minted legal theory, if a discriminatory state liquor law protects an "essential element" of the" three-tier system", then a Commerce Clause analysis is precluded.[10] Problematically, this new legal theory does not require the state provide evidence to determine how or why or to what extent a particular provision of the state alcohol regulatory system constitutes an essential element of the three-tier system.

[10] *Sarasota Wine Mkt. v. Schmitt*, 987 F.3d 1171, 1184, 1185 (8th Cir. 2021).

The Eighth Circuit deemed requiring a retailer maintain residency and physical presence, and purchasing product from an in-state wholesaler as essential elements of a three-tier system.[11] Further, the Eighth Circuit accepted the State's assertion that these regulatory provisions were an "essential element" of the three-tier system without requiring any concrete evidence that the State's law served a regulatory purpose that could not be served by nondiscriminatory alternatives.

The *Sarasota Wine Market* decision sets forth that Missouri's discriminatory licensing restrictions on out-of-state entities "are essential to Missouri's implementation of its authority under Section 2 of the Twenty-First Amendment – a three-tiered system for regulating the "transportation or importation" of intoxicating liquors "for delivery or use" in the State."[12]

The Eighth Circuit dictated that this newly created test is a bedrock legal principle, unless the Supreme Court determines the legal fate of the test.

Specifically, the Eighth Circuit states, "Until the Supreme Court concludes that essential elements of the three-tiered system are not protected from dormant Commerce Clause challenge", the nonresident

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[11] *Id.* at 1182.

[12] *Sarasota Wine Mkt. v. Schmitt*, 987 F.3d 1171, 1185 (8th Cir. 2021).

retailer's challenge fails under both the Commerce Clause and the Privileges and Immunities Clause.[13]

The Eighth Circuit throws down a legal challenge to the Supreme Court to prove them wrong or otherwise the Eighth Circuit's legal theory will stick.

The Eighth Circuit makes an unconvincing attempt to show how its decision comports with the Court's decision in *Tennessee Wine.* The Eighth Circuit distinguishes the facts in *Sarasota Wine Market* from *Tennessee Wine* by stating that *Tennessee Wine* does not require it overturn the lower court's decision because *Tennessee Wine* invalidated a residency requirement that "is not an essential feature of a three-tiered scheme."[14] Whereas *Sarasota Wine Market* attacks a core provision of the three-tier system that the Supreme Court deemed as "unquestionably legitimate".[15]

Although the Eighth Circuit attempts to demonstrate how its decision in *Sarasota Wine Market* fits within Supreme Court precedent, history and legal doctrine show otherwise.

First, the Eighth Circuit's claims that §2 abrogates Congress' Commerce Clause powers with regard to liquor has been rejected by the Supreme Court. In *Granholm* the Court directly stated that "the Court

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[13] *Sarasota Wine Mkt. v. Schmitt*, 987 F.3d 1171, 1185 (8th Cir. 2021).

[14] *Sarasota Wine Mkt. v. Schmitt*, 987 F.3d 1171, 1183 (8th Cir. 2021).

[15] *Id.*

has held that §2 does not abrogate Congress' Commerce Clause powers with regard to liquor."[16] Further, the Court in *Granholm* held that "The argument that the Twenty-First Amendment has somehow operated to 'repeal' the Commerce Clause for alcoholic beverages has been rejected."[17]

In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Court held the proposition that §2 abrogates the Commerce Clause is "patently bizarre" and "demonstrably incorrect."[18]

Even in light of settled Supreme Court precedent, the Eighth Circuit seems to believe that if a discriminatory law protects its near boundless definition of "essential elements" of the three-tier system, then the dormant Commerce Clause has no role to play in limiting the powers of the state.

Problematically for the Eighth Circuit, even if its legal theory is correct, the Eighth Circuit does not understand what the Supreme Court considers an essential element of the three-tier system. In numerous cases the Supreme Court has never gone beyond citing a separate licensing scheme for producers, wholesalers and retailers and prohibiting vertical integration of the three tiers as the essential elements of

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[16] *Granholm v. Heald*, 544 U.S. 460, 487 (2005); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *California Retail Liquor Dealers Assn. v. Midcal Aluminum*.

[17] *Granholm v. Heald*, 544 U.S. 460, 487 (2005).

[18] *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1964).

the three-tier system.[19] In *Tennessee Wine*, the Court, in noting that a durational residency requirement was not an essential element of the three-tier system, specifically stated, "At issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers, but the durational-residency requirement that Tennessee has chosen to impose on new applicants for liquor store licenses."[20]

The Supreme Court was clear in *Tennessee Wine* and *Granholm* that the separate licensing of the tiers is the essential element of the three-tier system.

The Supreme Court in its most recent deliberations on the intersection of the Twenty-First Amendment and the Commerce Clause has not indicated an in-state physical presence for retailers was an essential element to running a well-regulated three-tier system. If residency or physical presence was necessary and essential to a three-tier system, the Court would have never ruled as it did in *Granholm.* Justice Alito agreed in *Tennessee Wine* when he stated "It is telling that an argument similar to the one now made by the Association would have dictated a contrary result in *Granholm*."[21]

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[19] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449 (2019); *Granholm v. Heald*, 544 U.S. 460 (2005).

[20] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2471 (2019).

[21] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2472 (2019).

Even though the Court identified the essential elements of the three-tier system in numerous cases, the Court never precluded Commerce Clause scrutiny based on protecting an essential element of the three-tier system. The Supreme Court in every Commerce Clause case required that a full Commerce Clause analysis be performed. Further, the Court never endorsed the analysis of any Circuit court case[22] which deemed a Commerce Clause analysis precluded. The Eighth Circuit, lacking evidence from any Supreme Court case that could bolster its position, draws on a new legal theory and new rules on what constitutes an essential element of the three-tier system and dictates that its new position becomes law unless the Supreme Court says otherwise.

But even if the Eighth Circuit were correct in its theory as it applies to its essential element test, it still would not pass Constitutional muster under *Tennessee Wine*. The Eighth Circuit badly misreads how *Tennessee Wine* addresses the question of essential elements of a state regulatory system.

The Eighth Circuit believes that a durational residency requirement is not an essential element under *Tennessee Wine*, but that a residency/physical presence is an essential element under *Tennessee Wine.*

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[22] *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010); *Southern Wine & Spirits v. Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013).

Tennessee Wine mentions the phrase "essential feature" one time in its opinion.[23] The Court held that a durational residency was not an essential feature, since other states' regulatory schemes operate without a durational residency requirement.[24]

Applying this reasoning in *Tennessee Wine* to the case hand, we discover that the Eighth Circuit's analysis of the "essential element" test is badly misplaced.

There are presently fifteen[25] states and the District of Columbia that allow out-of-state retailers to ship to their residents.[26] Just as it was demonstrated in *Tennessee Wine* that numerous states are able to maintain a three tier regulatory scheme without durational residency requirements, it is perfectly clear that states are able to maintain their three tier regulatory schemes while allowing wine shipments from

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[23] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2471 (2019).

[24] *Id.*

[25] The states and jurisdiction that allow wine retailer shipping includes: Alaska, California, Connecticut, District of Columbia, Florida, Idaho, Louisiana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Virginia, West Virginia and Wyoming.

[26] Cal. Business & Professions Code §23661.2; Conn. Gen. Stat. §30-18a(2); D.C. Code Ann. §25-772; Florida Declaratory Statement 2018-038; Idaho Code §23-1309A(7); La. Rev. Stat. Ann. §26:359; Neb. Rev. Stat. 53-123.15(5); Nev. Rev. Stat. §369.490; N.H. Rev. Stat. Ann. §178:27; N.M. Stat. Ann. §60-7A-3; N.D. Cent. Code §5-01-16(5); Or. Rev. Stat. §471.282(c); Va. Code §4.1-209.1(a); W. Va. Code §60-8-1(a), Legislative Rule CSR 175-4-9; Wyoming Wyo. Stat. §12-2-204.

out-of-state retailers without requiring residency, an in-state presence or that these out-of-state retailers purchase product from in-state wholesalers.

Under *Tennessee Wine*, if a state can operate a well-regulated three-tier licensing system without an additional discriminatory component, then that additional component does not constitute an "essential element" of the three-tier system.

Based on the Eighth Circuit's badly misplaced legal theories and the misapplication of precedent, the Supreme Court needs to speak on this issue. Especially since this Court let stand *Lebamoff v. Whitmer*, in which a Sixth Circuit panel also flouted *Granholm* and *Tennessee Wine*, and stated that the federal courts, including this Court, had no business invalidating discriminatory state liquor laws.[27] If this decision is allowed to stand without correction, the Eighth Circuit's misinterpretation of the Court's precedent and holdings in this area of the law is libel to encourage more states to discriminate, motivate other courts to uphold facially discriminatory state alcohol laws and significantly hamper the ability of wine retailers to answer the marketplace as well as plan for the future.

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[27] *Lebamoff Enters. v. Whitmer*, 956 F.3d 863, 875 (6th Cir. 2020).

II. The Eighth Circuit misapplies the "unquestionably legitimate" dicta to justify Missouri's discriminatory liquor law

The Eighth Circuit determined that Missouri's discriminatory laws are protected because "restrictions at issue have been consistently upheld, before and after *Granholm* and *Tennessee Wine*, as essential to a three-tiered system that is 'unquestionably legitimate.'"[28]

According to the Eighth Circuit, under the "unquestionably legitimate"[29] doctrine, a state can require that product be funneled through a three-tier system and mandate that the product go through an in-state wholesaler. Further, the Eighth Circuit cites a series of cases that stand for the proposition that a state can require retailers and wholesalers are physical located in the state.[30]

While it may be true that Missouri, under its Twenty-First Amendment powers, may require an in-state presence as a condition for receiving a Missouri retailer's license and require that a licensed retailer to purchase inventory from a licensed in-state wholesaler, its legitimate Twenty-First Amendment powers do not allow Missouri to apply its three-tier regulatory structure to out-of-state retailers licensed in other states.

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[28] *Sarasota Wine Mkt. v. Schmitt*, 987 F.3d 1171, 1182 (8th Cir. 2021).

[29] The unquestionably legitimate doctrine originated in *North Dakota v. U.S.*, 495 U.S. 423 (1990), and was considered legal dicta in *Granholm v. Heald*, 544 U.S. 460 (2005).

[30] *Id.*

The Eighth Circuit and Missouri mistakenly allege that out-of-state retailer shipping implicates the state's three-tier system. It does not. Sarasota Wine Market is licensed under Florida law and is not a Missouri retailer. Moreover, Sarasota need not be licensed in any way by Missouri in order to sell wine to a Missouri's resident. No Federal, Missouri, Florida or local law prohibits Sarasota from selling wine to a Missouri resident. The question is whether Missouri's discriminatory law that allows Missouri's retailers to deliver wine to Missouri's residents using a common carrier rather than strictly on premises and face-to-face, while barring those same Missouri residents from having wine shipped to them from an out-of-state retailer is unconstitutional in light of *Granholm* and *Tennessee Wine*?

Sarasota Wine Market desires to ship wine to Missouri residents. It does not desire to become a Missouri retailer. It seeks a Missouri retailer license, as it's the only method currently available to ship wine to Missouri residents.

Sarasota Wine Market is similar to Domaine Alfred, the California winery in *Granholm*, which did not seek a Michigan winery license, but rather the right to ship product to Michigan residents – a right afforded Michigan wineries but not out-of-state wineries.

As Sarasota Wine Market desires only to ship product and not become a retailer, Missouri can rectify this situation and still maintain its modified form of a three-tier system, if it issues a license similar to its wine direct shipper license for which out-of-state wineries may currently apply.

Under Missouri's law a wine manufacturer in another state may apply for and be issued a wine direct shipper license.[31] Once issued this license, the out-of-state winery is permitted to ship wine to Missouri residents. However, this license does not make the out-of-state wine manufacturer a licensed Missouri winery, subject to Missouri's regulatory scheme for in-state wineries.

Unfortunately, the Eighth Circuit fails to note this important distinction and wrongly applies the "unquestionably legitimate" doctrine as means to justify discrimination.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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[31] Mo. Rev. Stat. §311.185.1.