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 IN OPPOSITION

ERIC S. SCHMITT
Missouri Attorney General
D. JOHN SAUER
Solicitor General
Counsel of Record
JESUS A. OSETE
Deputy Solicitor General
OFFICE OF THE MISSOURI ATTORNEY GENERAL
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870
John.Sauer@ago.mo.gov

Counsel for Respondents

QUESTION PRESENTED

Whether the Commerce Clause and § 2 of the Twenty-First Amendment to the United States Constitution authorize the States to require alcohol retailers to establish physical presence within the State before retailers directly ship alcohol products to in-state consumers.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

Petitioners Sarasota Wine Market, LLC, *et al.*, ("Petitioners") challenge provisions of Missouri's Liquor Control Law ("LCL"), *codified at* MO. REV. STAT. §§ 311.010 *et seq*., that require alcohol retailers to obtain a license before shipping alcohol products to in-state consumers. MO. REV. STAT. § 311.050. Under Missouri law, retailer licensees must identify a specific location within the State to be licensed and available for inspection as well as appoint an agent (known as "the managing officer") who is an employee "of good moral character" and a "citizen of the county, town, city or village." MO. REV. STAT. §§ 311.220.1, 311.240.1-.3, 311.060.1; CSR 70-2.030(7). Missouri imposes these conditions as part of its tiered-distribution system for regulating alcohol shipment and sale within the State—a system this Court has recognized as "unquestionably legitimate." *Granholm* v. *Heald*, 544 U.S. 460, 489 (2005). Petitioners argue that § 311.050—imposing a license requirement on all alcohol retailers—and § 311.060—establishing the in-state presence licensing condition—unlawfully discriminate against out-of-state alcohol retailers who wish to sell alcohol online to in-state consumers. *See* Pet., at 2. Petitioners' arguments lack merit. The in-state presence requirement is non-discriminatory because it applies equally to in-state and out-of-state retailers, and it serves unquestionably legitimate, nonprotectionist interests by enabling inspection of

retailers and enforcement of Missouri's liquor laws, among others.

SUMMARY OF ARGUMENT

This Court should deny the petition for writ of certiorari. Petitioners have not demonstrated that "compelling reasons" to grant review exist. First, there is no circuit split warranting this Court's intervention, as two federal circuit courts have upheld similar in-state presence laws. Second, this case does not present an important issue that needs resolution by this Court, because at least seven similar challenges remain pending in lower federal courts, warranting further percolation of the legal issues. Third, the Eighth Circuit both properly stated the applicable rule of law and correctly applied it in this case.

ARGUMENT

I. There is no circuit split over alcohol retailer presence requirements warranting this Court's review.

This case does not present a conflict of authority that warrants the Court's review. S. Ct. R. 10. Until recently, licensing provisions like those challenged in this case were "consistently upheld" as essential to the three-tiered alcohol distribution system that this Court deemed "unquestionably legitimate." App.17a-18a (collecting cases from the Second, Fourth, Fifth, and Sixth Circuits). In 2019, this Court decided *Tennessee Wine & Spirits Retailers*

Ass'n v. *Thomas* 139 S. Ct. 2449, 2471-72 (2019), which stated in dictum that, while *Granholm* approved the three-tiered model, it did not constitutionalize every element thereof.

Tennessee Wine addressed the relationship between the Commerce Clause and § 2 of the Twenty-First Amendment. First, it held that the anti-discrimination principle of the dormant Commerce Clause applied to wholesalers and retailers as well as producers. *Tenn. Wine*, 139 S. Ct. at 2470-71. Second, it provided a standard for analyzing state alcohol laws under both the Commerce Clause and § 2. *Tennessee Wine* provided that "[§ 2] allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests," but that § 2 does not sanction "protectionist measures with no demonstrable connection to those interests." *Id*. at 2474. Applying this test, this Court first found that Tennessee's two-year durational residency law facially discriminated against nonresident retailers. *See id*. Instead of moving to the second prong of the traditional dormant Commerce Clause analysis, this Court performed a "different inquiry," asking whether the "challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id*. The law was ultimately struck down, as Tennessee failed to show the law's connection to preserving health, safety, and other "legitimate interests." *Id*.

To be sure, this Court did not address the constitutionality of "pure" in-state presence laws. In *Tennessee Wine*, this Court only invalidated a *durational* residency law which discriminated against newcomers in the alcohol retail marketplace. 139 S. Ct. at 2474-75. As a result, non-durational presence statutes were not affected by *Tennessee Wine*'s holding. App.17a ("[T]hat conclusion [in *Tennessee Wine*] does not resolve the Commerce Clause issue in this case, because [Petitioners] are not applicants for an in-state Missouri liquor license challenging a durational residency requirement.").

Consequently, the Courts of Appeals have remained free to pass upon the constitutionality of non-durational physical presence requirements imposed on alcohol retailers. At this time, only two circuit courts—the Sixth and Eighth Circuits—have considered Commerce Clause challenges to such laws after this Court decided *Tennessee Wine*. Both circuits have found such laws constitutional.

In this case, the Eighth Circuit explained that this Court's precedents confirmed the "three-tiered distribution system itself" as " 'unquestionably legitimate,' " App.12a-14a (quoting *Granholm*, 544 U.S. at 489 (quoting *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion))), while leaving the component elements of the three-tier distribution systems subject to dormant Commerce Clause scrutiny. *Id*. The Eighth Circuit articulated

the *Tennessee Wine* test, explaining that if Missouri's laws discriminate against out-of-state retailers, the inquiry turns to Missouri's interest in addressing "public health and safety" and "other legitimate interests" relating to alcohol consumption. App.15a-16a (citing *Tenn. Wine*, 139 S. Ct. at 2474). Applying this test, the Eighth Circuit resolved the matter on the discrimination prong, concluding that imposing the same licensing requirements on in-state and out-of-state retailers does not amount to discrimination against out-of-state retailers. App.21a (citing *Bridenbaugh* v. *Freeman-Wilson* 227 F.3d 848, 853 (7th Cir. 2000) ("*Every* use of § 2 could be called 'discriminatory' ... because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter.")).

The Sixth Circuit addressed a similar challenge to Michigan's retailer-presence statute and likewise concluded that the law was constitutional under *Tennessee Wine*. See *Lebamoff Enters.* v. *Whitmer*, 956 F.3d 863, 870 (6th Cir. 2020), *cert. denied*, 131 S. Ct. 1049 (2021). In *Whitmer*, the court addressed whether Michigan may permit only its in-state licensed retailers the option of offering at-home alcohol delivery. *Id.* at 868. The court correctly noted that even if the challenging Indiana retailer and in-state Michigan licensees were similarly situated so as to raise the specter of discrimination, "challenges to alcohol regulation face a 'different' test." *Id.* at 871

(citing *Tenn. Wine*, 139 S. Ct. at 2474). The Sixth Circuit held that, after *Tennessee Wine*, the relevant question was whether Michigan's law could be "justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* at 869. If the "predominant effect of the law is protectionism," rather than advancing legitimate state interests, the Twenty-First Amendment does not "shield" it. *Id* (citing *Tenn. Wine*, 139 S. Ct. at 2474).

Applying that test, the Sixth Circuit did not reach the discrimination inquiry, concluding that Michigan's law promoted "plenty of legitimate state interests," because the states have a legitimate interest in " 'promoting temperance, and controlling the distribution of [alcohol].' " *Id.* at 871 (citing *North Dakota*, 495 U.S. at 433). "To promote these interests, States have 'virtually complete control over whether to permit importation or sale of liquor and how to structure the[ir] liquor distribution system[s].' " *Id.* at 871 (quoting *Granholm*, 544 U.S. at 488). Had the Indiana retailers succeeded in their Commerce Clause challenge, the Sixth Circuit recognized that Michigan would see "direct deliveries from out-of-state retailers" that would open the State up to "alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all," leaving a "sizeable hole in the three-tier system." *Id.* at 872. This hole would allow out-of-state retailers to undercut local prices set by Michigan (which by law was the exclusive wholesaler and price-regulator of liquor products) and

thus "escape the State's interest in limiting consumption." *Id.*

Petitioners cite a lone Seventh Circuit decision as evidence of confusion among the lower courts about how to apply this Court's precedents. *See* Pet., at 6 (citing *Lebamoff Enters., Inc.* v. *Rauner*, 909 F.3d 847, 853-54 (7th Cir. 2018)). But the cited portion of *Rauner* merely acknowledges that lower courts were once divided over whether this Court's decision in *Granholm* limited the dormant Commerce Clause's antidiscrimination principle to laws regulating alcohol producers. *See id.* That issue was resolved in *Tennessee Wine*, and *Rauner* does not create a circuit split that warrants this Court's review.

Petitioners provide no other cases to establish a split of authority on the constitutionality of alcohol retailer presence statutes. Two circuits have passed on the issue after *Tennessee Wine*, and both have found such regulations lawful. *See* App.18a-23a; *Whitmer*, 956 F.3d at 873. Because there is no circuit split over the question presented, granting certiorari is unwarranted.

II. Further percolation is warranted, as seven challenges to similar laws are pending in the lower federal courts.

Even if the Court views the issue as important enough to support review, further percolation is warranted. Petitioners cite seven pending challenges against "state laws banning direct shipping by out-of-

state wine retailers[.]" Pet., at 8 (collecting cases). Petitioners assert that these cases present similar legal issues to those in this case. Pet., at 8. As mentioned, only the Sixth and Eighth Circuits have squarely addressed the legality of in-state retailer presence laws under *Tennessee Wine*. Permitting the issues to percolate in these courts and be addressed on appeal will likely generate additional reasoned decisions on the issues here, and it may also generate a circuit split.

III. The Eighth Circuit properly applied *Tennessee Wine* in this case.

"A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. The Eighth Circuit properly stated the applicable rule of law distilled from *Tennessee Wine*, and it made no error when applying the law to this case. This Court's precedents make clear that states are permitted to engage in non-discriminatory funneling of alcohol products through state three-tiered schemes. And deciding this case in favor of the Petitioners would greatly undermine the regulatory authority provided to the states by § 2 of the Twenty-First Amendment.

A. The Eighth Circuit properly stated the rule of law provided in this Court's precedents.

Petitioners claim that *Tennessee Wine* made clear that the nondiscrimination principle of the Commerce Clause applies to laws regulating alcohol retailers and wholesalers. Pet., at 3. In their brief before the Eighth Circuit, Respondents argued that under *Tennessee Wine*, Missouri's laws are not discriminatory and have the primary purpose of promoting public health and safety. *See* Mo. C.A. Br. 28. As discussed above, the Eighth Circuit properly explained the rule this Court issued in *Tennessee Wine*. This alone provides an adequate basis to deny certiorari. *See* S. Ct. R. 10.

At its core, Petitioners disagree with the Eighth Circuit's application of the rule in *Tennessee Wine*. In their petition, they state that the Eighth Circuit erroneously affirmed dismissal of the complaint on the pleadings "without an evidentiary record despite the holdings in both *Tenn. Wine* … , and *Granholm* … , that a discriminatory liquor law could be upheld only if concrete evidence shows [the requirement] advances a legitimate purpose which could not be served by nondiscriminatory alternatives." Pet., at 5.

This is not the test this Court established in *Tennessee Wine* and *Granholm*. This reading reduces § 2 of the Twenty-First Amendment to a nullity.

Indeed, the Commerce Clause, by its own force, requires discriminatory state laws to be supported by a "legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Or. Waste Sys., Inc.* v. *Dept. of Envir. Quality of State of Or.*, 511 U.S. 93, 101 (1994) (quotation marks omitted). To suggest that § 2 of the Twenty-First Amendment protects discriminatory laws in a manner coterminous with the Commerce Clause reduces § 2 to a dead letter. It is for this reason that *Tennessee Wine* prescribes "a different inquiry." 139 S. Ct. at 2475. If the law discriminates against out-of-state commerce in the context of alcohol production or sale, this Court asks "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist grounds." *Id.* at 2474.

Petitioners also suggest that the Eighth Circuit departed from *Tennessee Wine*'s requirement that in order to avoid invalidation, there must be "concrete evidence" that the discriminatory law supports public health or safety or some other "legitimate purpose." Pet., at 7. Petitioners are, again, mistaken. The requirement to provide "concrete evidence" supporting the law's public health or safety purpose followed only after the preliminary finding that the law was discriminatory. *Tenn. Wine*, 139 S. Ct. at 2474-75 (noting that after finding the law discriminatory, the inquiry turned to public health and safety justifications). Because the Eighth Circuit

found that Missouri's residency laws were nondiscriminatory, no "concrete evidence" was required. App.21a-23a.

Petitioners also argue that the Eighth Circuit "upheld the residency requirement for retailers despite the holding in *Tenn. Wine*, that a 'residency requirement for retail license applicants blatantly favors the State's residents [and] is unconstitutional.' " Pet., at 5 (citing *Tenn. Wine*, 139 S. Ct. at 2457). But Petitioners omit key words immediately preceding the citation: "Tennessee's 2-year." *Tenn. Wine*, 139 S. Ct. at 2457 ("Because *Tennessee's 2-year residency* requirement for retail license applicants blatantly favors the State's residents and has little relationship to public health and safety, it is unconstitutional.") (emphasis added). *Tennessee Wine* did not use broad strokes to strike down all retailer residency requirements; the case was limited to durational residency laws that deprived out-of-state retailers from market access.

B. States are authorized to funnel alcohol sales in a non-discriminatory manner through their three-tier systems under § 2 of the Twenty-First Amendment.

In *Granholm*, this Court stated that "[s]tates may also assume direct control of liquor distribution through state-run outlets *or funnel sales through the three-tier system*." 544 U.S. at 489 (emphasis added). Of course, laws causing the funneling effect would presumably be subject to the Commerce Clause's

antidiscrimination provision. App.14a-16a (noting that *Tennessee Wine* said the antidiscrimination rule applies to all three tiers of the three-tiered system). However, *Tennessee Wine* left this rule from *Granholm* undisturbed.[1]

Missouri's retailer licensing provisions do not discriminate against out-of-state retailers. Like out-of-state retailers, domestic retailers must meet the same three requirements: (1) they must operate a qualifying business outside the alcohol industry, MO. REV. STAT. § 311.200.1; (2) they must identify a specific location to be licensed that is open for inspection, *id.* § 311.240.3; 11 CSR 70-2.120, 2130(2); and (3) they must designate an in-state managing officer as a business agent, MO. REV. STAT. § 311.060.1; 11 CSR-2.030(7). All retail liquor sold in-state by licensees must be purchased from licensed Missouri wholesalers. MO. REV. STAT. § 311.280.1. Only then can a retailer make direct delivery to customers, provided the sale is completed on the retail premises and the delivery is not made to persons either intoxicated or under 21 years old. *Id.* § 311.300.

The collective effect of the above provisions, taken together with MO. REV. STAT. § 311.050, which

---

[1] The law invalidated in *Tennessee Wine* was unrelated to funneling alcohol sales, as Tennessee's residency law imposed a competition moratorium as a precondition for in-state licensing. 139 S. Ct. at 2457.

requires all alcohol retailers to hold a license, ensures no package-liquor alcohol products are sold outside Missouri's three-tiered regulatory scheme. By requiring physical presence in the state, Missouri ensures that alcohol directed into Missouri is brought within the scope of Missouri's regulatory authority. Inspection and enforcement of retailers would be impracticable if retailers lacked a physical presence in Missouri. Such authority would be absent if Missouri, instead, attempted to regulate retailers operating wholly outside the State. *Whitmer*, 956 F.3d at 872 ("The extraterritoriality doctrine, also rooted in the dormant Commerce Clause, bars state laws that have the 'practical effect' of controlling commerce outside their borders") (citing *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989)). Among other interests, Missouri advances this legitimate, nonprotectionist interest through its retailer-presence requirement. Because Missouri's licensing laws are both non-discriminatory and a reasonable means of assuring that all alcohol sold to consumers within the State is subject to Missouri's three-tiered regulatory scheme, the presence provisions are constitutional.

C. Holding in-state retailer presence laws unconstitutional would undermine state regulatory control over alcohol sales as guaranteed by § 2 of the Twenty-First Amendment.

Finally, denying States the power to require alcohol retailers doing business within the state to

maintain an in-state presence would greatly undermine state regulatory authority under § 2 of the Twenty-First Amendment.

At the close of Prohibition, thirty-eight state conventions passed the Twenty-First Amendment, which both repealed the Eighteenth Amendment and gave the states the power to regulate the "transportation and importation" of alcohol. U.S. CONST. amend. XXI, §§ 1 & 2. Section 2 of the Twenty-First Amendment mirrored the Webb-Kenyon Act, the language of which § 2 closely tracks. *Tenn. Wine*, 139 S. Ct. at 2467. "Like the Webb-Kenyon Act, § 2 incorporates [the] state prohibitions into a federal rule" by "clos[ing] the loophole left by the dormant commerce clause[.]" *Bridenbaugh*, 227 F.3d at 853. That loophole provided that "direct shipments from out-of-state sellers to consumers" were categorically beyond the states' regulatory power. *Id*. And while this Court has held that such pre-Prohibition state regulation did not include interstate discrimination, *see Tenn. Wine*, 139 S. Ct. at 2467-68, the suggestion that states were precluded from *any* discrimination flips the plain meaning of § 2 upon its head. As Judge Easterbrook has acknowledged, "all 'importation' involves shipments from another state or nation" and so "*[e]very* use of § 2 could be called 'discriminatory' ... because every statute limiting importation leaves intrastate commerce unaffected." *Bridenbaugh*, 227 F.3d at 853. If any state law limiting the channels of entry for alcohol products into a state, no matter how

evenhanded, was considered "discriminatory" and thereby unlawful under the Commerce Clause and unprotected by § 2 of the Twenty-First Amendment, § 2 would be a "dead letter." *Id.* Because the plain language of § 2 anticipates that form of "discrimination" and both the Commerce Clause and the Twenty-First Amendment are to be read together, *see Tenn. Wine*, 139 S. Ct. at 2463 (noting § 2 must be read as part of a "unified constitutional scheme"), § 2 must, at the very least, allow states to require alcohol retailers maintain an in-state presence before transacting with in-state consumers.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

ERIC S. SCHMITT
Missouri Attorney General
D. JOHN SAUER
Solicitor General
Counsel of Record
JESUS A. OSETE
Deputy Solicitor General
OFFICE OF THE MISSOURI ATTORNEY GENERAL
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870
John.Sauer@ago.mo.gov

Counsel for Respondents