**No.**

# 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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In a long line of cases, this Court has repeatedly held that the states' Twenty-first Amendment authority to regulate the distribution of alcohol is limited by the nondiscrimination principle of the Commerce Clause. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2470 (2019); *Granholm v. Heald,* 544 U.S. 460, 487 (2005); *Healy v. Beer Inst.*, 491 U.S. 324, 342 (1989); *Bacchus Ltd. v. Dias*, 468 U.S. 263, 276 (1984). Departing from these precedents, the Eighth Circuit held that Missouri's law prohibiting out-of-state wine retailers from participating in its online market was protected by the Amendment and immune from Commerce Clause scrutiny because physical presence in a state is an inherent prerequisite to effective regulation. The question, upon which the lower courts disagree, is:

When considering both the Twenty-first Amendment and the Commerce Clause, may Missouri ban out-of-state wine retailers from participating in its online market when nondiscriminatory alternatives are available that would serve its regulatory interests?

## PARTIES TO THE PROCEEDINGS

**Petitioners** are Sarasota Wine Market, LLC, d/b/a Magnum Wine and Tastings, Heath Cordes, Michael Schlueter and Terrance French. They were Plaintiffs-Appellants below.

**Respondents** are Eric S. Schmitt, Attorney General of Missouri, Dorothy Taylor, Supervisor of the Division of Alcoholic Beverage Control, and Michael L. Parson, Governor of Missouri, in their official capacities. They were Defendants-Appellees below.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Sarasota Wine Market, LLC, has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

## RELATED PROCEEDINGS

*Sarasota Wine Market, LLC v. Parson,* No. 4:17-cv-02792, U. S. District Court for the Eastern District of Missouri. Judgment entered March 29, 2019.

*Sarasota Wine Market, LLC v. Schmitt,* No. 19-1948, U.S. Court of Appeals for the Sixth Circuit. Judgment entered February 16, 2021. Rehearing denied March 24, 2021.

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This petition seeks review of the decision of the United States Court of Appeals for the Eighth Circuit in *Sarasota Wine Market, LLC v. Schmitt,* (App., *infra*, 1a-25a), reported at 987 F.3d 1171. The opinion and order of the United States District Court for the Eastern District of Missouri (App., *infra*, 26a-42a), is reported at 381 F.Supp. 3d 1094.

### JURISDICTION

The opinion of the court of appeals was entered on February 16, 2021. A petition for rehearing was denied on March 24, 2021 (App., *infra*, 43a). This Court has jurisdiction under 28 U.S.C. § 1254(1) to hear this case by Writ of Certiorari.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**A. The Commerce Clause, U.S. CONST., Art. I, § 8, cl. 3**: The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

**B. The 21st Amendment, 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.

**C. MO. REV. STAT. §§ 311.050, 311060:** Reprinted in the Appendix, *infra*, 44a.

## STATEMENT OF THE CASE

This case challenges the constitutionality of Missouri's law that prohibits out-of-state wine retailers from participating in its online market. Only Missouri citizens can get retailer licenses, and only in-state retailers may take internet orders and ship wine to consumers. MO. REV. STAT. §§ 311.050, 311.060(1), (App. *infra* 44a). This difference in treatment violates the Commerce Clause because it discriminates against interstate commerce and protects local businesses from competition. It is not saved by the Twenty-first Amendment because the ban advances no state interest that could not be served by non-discriminatory alternatives.

In *Granholm v. Heald*, 544 U.S. 460 (2005), this Court declared unconstitutional two state laws that prohibited out-of-state wineries from shipping to consumers but allowed in-state wineries to do so. The Court said that the nondiscrimination principle of the Commerce Clause applies to state liquor laws, so that if a State chooses to allow the direct shipment of wine, it must do so on evenhanded terms. *Id.* at 492-93. In the sixteen years since then, forty-four states have modernized their beverage laws to allow both in-state and out-of-state wineries to sell and ship to consumers.

The states have been slower to modernize their laws to allow retailers other than wineries to sell wine online and ship it to consumers. Thirteen states now permit both in-state and out-of-state wine retailers to sell online, but many others have repeated the patterns that existed before *Granholm*. They have begun allowing in-state retailers to ship to consumers while

continuing to prohibit out-of-state retailers from doing so. Missouri is one of those states.

Petitioners brought this action in 2017 in the Eastern District of Missouri under 42 U.S.C. § 1983 to challenge Missouri's discriminatory retailer shipping laws. It is one of a dozen similar cases filed around the country asking the courts to declare unconstitutional state laws that allow in-state, but not out-of-state, retailers to sell online and ship to consumers. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 which confers original jurisdiction on federal district courts to hear suits arising under the Constitution and laws of the United States.

On March 29, 2019, the District Court dismissed the complaint. *Sarasota Wine Market, LLC v. Parson*, 381 F.Supp. 3d 1094, 1100-1102 (E.D. Mo., 2019) (App., *infra*, 26a-42a). It relied on an Eighth Circuit case, *Southern Wine & Spirits of Am., Inc. v. Div. of Alco. & Tobacco Control*, 731 F.3d 799 (8th Cir.2013), which had interpreted *Granholm v. Heald* narrowly as only requiring Commerce Clause scrutiny when laws regulated wine producers, not when they regulated retailers. The Plaintiffs appealed.

While the appeal was pending, and before any briefs were filed, this Court effectively overturned *Southern Wine*. It held that the nondiscrimination principle of the Commerce Clause also applied to laws regulating wine retailers. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct 2449, 2470-71 (2019). The Plaintiffs therefore asked the Eighth Circuit to reverse the lower court because *Southern Wine* was no longer good law.

The court of appeals acknowledged that *Southern Wine* was no longer good law but affirmed on alternate grounds. It held that requiring a retailer to have a physical presence in the state is an inherent prerequisite to effective regulation, so Missouri's law banning out-of-state wine retailers from its online market was protected by the Twenty-first Amendment and immune from Commerce Clause scrutiny. *Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171, 1182-83 (8th Cir. 2021) (App., *infra*, 12a-22a).

## REASON FOR GRANTING THE PETITION: The Eighth Circuit decision conflicts with cases from this Court and other circuits

This Court has repeatedly held that the states' Twenty-first Amendment authority to regulate the sale of alcohol is limited by the nondiscrimination principle of the Commerce Clause. The Amendment did not "empower States to favor local liquor industries by erecting barriers to competition." *Bacchus Ltd. v. Dias*, 468 U.S. 263, 276 (1984). The Court has struck down discriminatory liquor laws that imposed a residency requirement on liquor licenses, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2470 (2019); prohibited out-of-state wineries from shipping to consumers when in-state wineries were allowed to do so, *Granholm v. Heald,* 544 U.S. 460, 487 (2005); and placed restrictions on out-of-state liquor distributors that were not imposed on local ones. *Healy v. Beer Inst.*, 491 U.S. 324, 342 (1989) (price controls); *Bacchus Ltd. v. Dias*, 468 U.S. at 276 (taxes).

The Eighth Circuit departed from these precedents and held that Missouri's discriminatory wine-shipping

laws were valid under the Twenty-first Amendment. *Sarasota Wine Market*, 987 F.3d at 1182-83. It upheld the residency requirement for retailer licenses despite the holding in *Tenn. Wine,* that a "residency requirement for retail license applicants blatantly favors the State's residents [and] is unconstitutional." 139 S.Ct. at 2457. It upheld the requirement that an out-of-state retailer must establish physical presence in Missouri in order to sell wine online despite the holding in *Granholm v. Heald* that "[s]tates cannot require an out-of-state firm to become a resident in order to compete on equal terms." 544 U.S. at 475. It dismissed the complaint on the pleadings without an evidentiary record despite the holdings in both *Tenn. Wine,* 139 S.Ct at 2474, and *Granholm*, 544 U.S. at 490, that a discriminatory liquor law could be upheld only if concrete evidence shows that it advances a legitimate purpose which could not be served by nondiscriminatory alternatives. The Eighth Circuit felt that requiring a retailer to be physically present in the state and operated by a resident was so obviously fundamental to effective regulation that these laws were exempt from Commerce Clause scrutiny altogether, despite the holding in *Bacchus* that the two provisions are "parts of the same Constitution [and] each must be considered." 468 U.S. at 275.

This Court has not directly addressed the extent to which the dormant Commerce Clause constrains the states' authority to limit online wine sales to retailers physically located in the state. The issue should have been settled by the unambiguous statement in *Granholm v. Heald* that authority to regulate alcohol distribution "is limited by the nondiscrimination

principle of the Commerce Clause." 544 U.S. at 487, and "is not saved by the 21st Amendment." *Id.* at 489. Therefore, "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Id.* at 492-93.

The lower courts, however, have been confused about how much meaning to attribute to the *dictum* in *Granholm* that "[w]e have previously recognized that the three-tier system itself is 'unquestionably legitimate.'" *Id.* at 489. They are divided on whether this *dictum* means that the Commerce Clause applies to a lesser extent and tolerates a greater degree of discrimination against out-of-state interests when the state is regulating retail liquor sales than when it is regulating other aspects of liquor distribution. The Seventh Circuit has noted:

> Some [courts] see *Granholm* as establishing a rule immunizing the three-tier system from constitutional attack so long as it does not discriminate between in-state and out-of-state producers or products. The idea is that the Twenty-first Amendment overrides the Commerce Clause and permits states to treat in-state retailers and wholesalers differently from their out-of-state equivalents. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190–91 (2d Cir.2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir.2006) (Niemeyer, J., writing only for himself); *So. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 809–10 (8th Cir.2013). More courts have read *Granholm* simply to reaffirm a general nondiscrimination principle, although the

> principle may carry greater or lesser weight at different tiers of a three-tier system. *Brooks,* 462 F.3d at 354; *Cooper v. Tex. Alcoholic Beverage Comm'n,* 820 F.3d 730, 743 (5th Cir.2016); *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d 608, 618 (6th Cir.2018); *Siesta Vill. Mkt., LLC v. Granholm*, 596 F.Supp.2d 1035, 1039 (E.D. Mich. 2008); *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F.Supp.2d 200, 221 (D. Mass. 2006). Finally, one judge understands *Granholm* to preclude any Twenty-first Amendment protection for state laws that otherwise violate the dormant Commerce Clause. *Brooks,* 462 F.3d at 361 (Goodwin, J., concurring in part and dissenting in part).

*Lebamoff Enterpr., Inc. v. Rauner*, 909 F.3d 847, 853-54 (7th Cir. 2018).

Part of the confusion concerns the level of scrutiny to give to the state's purported justification for discriminating against out-of-state interests. This Court has articulated a fairly exacting standard requiring the state to prove with "concrete evidence" that the discrimination is justified because nondiscriminatory alternatives would be unworkable. *Granholm*, 544 U.S. at 492-93; *Tenn. Wine*, 139 S.Ct at 2474-75. Some lower courts have applied this standard. *E.g.*, *Lebamoff Enterpr., Inc. v. Rauner*, 909 F.3d at 856; *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d at 624; *Siesta Vill. Mkt., LLC v. Granholm*, 596 F.Supp.2d at 1041. The Eighth Circuit and some other courts have not. *E.g., Sarasota Wine Market*, 987 F.3d at 1183-84; *Lebamoff Enterp., Inc. v. Whitmer*, 956 F.3d

863, 869 (6th Cir.2020), *cert. denied* 141 S.Ct. 1049) (2021). Some panels have disagreed among themselves. *E.g., Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d at 624-26 (applying standard); *id.* at 636 (Sutton, J., dissenting).

The question of whether a state may authorize online wine sales but ban out-of-state retailers from participating is an important one. Throughout the country, states are considering how best to balance the need to regulate wine as an alcoholic beverage against the growing demand from consumers for online ordering and home delivery.[1] There has been a surge in online purchases of all kinds of products during the pandemic,[2] and wine is no exception.[3] Challenges to state laws banning direct shipping by out-of-state wine retailers are pending in seven federal courts. *Lebamoff Enterpr., Inc. v. O'Connell*, No. 1:16-cv-08607 (N.D.

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[1] *See* Nat'l Ass'n of Wine Retailers, *Lessons from the New Hampshire wine shipping debacle*, https://nawr.org/lessons- from-the-new-hampshire-wine-shipping-debacle/ (last visited June 4, 2021); NY Assembly Bill A00895, https:// nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00895&term=2021&Summary=Y&Text=Y (last viewed June 4, 2021).

[2] Charles Riley, *Online shopping has been turbocharged by the pandemic. There's no going back,* CNN BUSINESS (October 13, 2020), https://www.cnn.com/2020/10/11/investing/stocks-week-ahead/index.html (last visited June 4, 2021).

[3] Dave McIntyre, *Buying wine online is another pandemic-era shift that's poised to stick around,* WASH. POST (MAY 14, 2021); https://www.washingtonpost.com/food/2021/05/14/online-wine-buying-trends/ (last visited June 27, 2020).

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 v. Canepa,* 2:20-cv-03686 (S.D. Ohio). The Uniform Law Commission is attempting create model legislation on retail wine shipping.[4] Retailers are trying to make decisions about adapting to an online future.[5] This issue needs to be resolved.

## CONCLUSION

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

Respectfully submitted,

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[4] *See* https://www.uniform laws.org/viewdocument/2019-june-report-to-scope-and-pro. (last viewed June 4, 2021).

[5] Lucas Roh, *How best to adapt your business when the world is moving online*, FORBES (June 1, 2020), https://www.forbes.com/sites/forbestechcouncil/2020/06/01/how-to-best-adapt-your-business-when-the-world-is-moving-online/?sh=3888672f7b9e (last visited June 7, 2021).

**APPENDIX A. Opinion of the Court of Appeals for the Eighth Circuit** [Filed Feb. 16, 2021]

Nos. 19-1948

Sarasota Wine Market, LLC, et al.
Plaintiffs-Appellants

v.

Eric S. Schmitt, Attorney General of Missouri, et. al.
Defendants-Appellees

Before Loken, Shepherd, and Erickson, Circuit Judges.

LOKEN, Circuit Judge.

An amendment to the Missouri Liquor Control Act permits licensed in-state retailers to deliver alcohol directly to Missouri consumers. This is an action by four plaintiffs -- Sarasota Wine Market LLC, a Florida-licensed wine retailer; Heath Cordes, its owner-operator; and Michael Schlueter and Terrence French, two Missouri residents who would like to have direct delivery of wines not sold in the State (collectively, "Sarasota") -- against three Missouri officials acting in their official capacities -- Attorney General Eric Schmitt; Dorothy Taylor, Supervisor of the Missouri Division of Alcohol and Tobacco Control;[1] and Governor Michael Parson (collectively, "the Officials"). Sarasota seeks prospective relief, alleging that Missouri's liquor control laws, by preventing out-of-state retailers from shipping directly to Missouri

[1] Dorothy Taylor, the current Supervisor, is substituted as an appellee pursuant to Federal Rule of Appellate Procedure 43(c).

consumers, discriminate against interstate commerce and citizens of other States in violation of the "dormant" Commerce Clause, art. I, § 8, cl. 3, and the Privileges and Immunities Clause, art. IV, § 2, cl. 1. The district court[2] dismissed Sarasota's Amended Complaint, concluding it failed to state viable claims under the Commerce Clause or the Privileges and Immunities Clause when construed together with Section 2 of the Twenty-first Amendment. Sarasota appeals. Concluding their claims are foreclosed by Supreme Court and circuit precedents that presently govern these issues, we affirm.

## I. Background

Regulation by the States and the federal government of the manufacture, sale, and transportation of alcoholic beverages has a long, turbulent, controversial history, a history that continues to provoke disagreement among Justices of the Supreme Court and others. See generally *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, — U.S. —, 139 S. Ct. 2449, 2462-70, 204 L.Ed.2d 801 (2019), and 2476-82 (Gorsuch, J., dissenting); *Granholm v. Heald*, 544 U.S. 460, 476-86, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005), and 498-514 (Thomas, J., dissenting). Our task of course is to apply the law as it exists today, not to take sides on these historical debates, but an understanding of this history is important in framing the issues we must decide. *Cf. Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 (2d Cir. 2009) (Calabresi, J., concurring); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d

[2] The Honorable Henry Edward Autrey, United States District Judge for the Eastern District of Missouri.

848, 853 (7th Cir. 2000).

The Eighteenth Amendment, ratified in 1919, was a rather brief experiment with a nationwide ban on the "manufacture, sale, or transportation" of alcohol. The Twenty-first Amendment, ratified in 1933, ended Prohibition. Section 1 of the Twenty-first repealed the Eighteenth Amendment. Section 2, which is central to the issues before us, provides: "The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited." (Emphasis added.) Acting in response to the Twenty-first Amendment, Missouri promptly enacted the Liquor Control Act. 1933-34 Mo. Laws, Extra Session, pp. 77-95, now codified at Mo. Rev. Stat. Ch. 311. The Act is "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,* 345 Mo. 637, 135 S.W.2d 345, 346 (1939).

Prior to Prohibition, some States enacted laws adopting a "three-tiered distribution model." A primary purpose of this model is to prevent a return to "the English 'tied-house' system" in which alcohol producers monopolized distribution from producer to consumer, a system widely perceived as causing or at least contributing to the social ills of excess alcohol consumption and consumption by minors. See Tenn. Wine, 139 S. Ct. at 2463 n.7. Under the three-tiered model,

> the producer sells to a licensed in-state wholesaler, who pays excise taxes and delivers

> the alcohol to a licensed in-state retailer. The retailer, in turn, sells the alcohol to consumers, collecting sales taxes where applicable.

*Arnold's Wines*, 571 F.3d at 187. A central feature of the separated tiers is to prohibit a member of one tier from having a financial interest in a member of a higher or lower tier. In the Liquor Control Act, Missouri -- like many States -- adopted a version of the three-tiered distribution model in implementing its authority under Section 2 of the Twenty-first Amendment. *See S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control,* 731 F.3d 799, 802 (8th Cir. 2013).[3]

Though there are no longer completely "dry" States, some States severely limit liquor sales and distribution by private individuals and companies. In Utah, for example, the State is the sole importer and main retailer of all alcoholic products other than light beer; in Michigan, the State is the only wholesaler for liquor but not for wine and beer.[4] Missouri, like most States, permits private retailers to sell alcohol to the public if they qualify for the appropriate license and comply with Missouri's three-tier restrictions. See MO. REV. STAT. §§ 311.050, 311.060.1. Among other

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[3] Unlike other States, Missouri's system includes a fourth tier, solicitors who act as brokers between producers and wholesalers. *See* MO. REV. STAT. § 311.275. This distinction does not affect the basic functioning of the tiered system and we do not address it further. *See S. Wine*, 731 F.3d at 805 n.3.

[4] *See* UTAH CODE ANN. §§ 32B-2-202, 204, 501, and 32B-7-202; MICH. COMP. LAWS § 436.1231.

qualifications, an individual licensee must be a "qualified legal voter and a taxpaying citizen of the county, town, city or village," while a corporate licensee's "managing officer" must be a "qualified legal voter and taxpaying citizen of the county, town, city or village." MO. REV. STAT. § 311.060.1. In addition, a licensed retailer must operate from physical premises in Missouri named in the license, see MO. REV. STAT. §§ 311.220.3, 311.240.3; and must purchase liquor exclusively from Missouri-licensed wholesalers, MO. REV. STAT. § 311.280.1.

In 2007, Missouri amended the Liquor Control Act to allow in-state and out-of-state wine producers to ship wine directly to Missouri consumers. See MO. REV. STAT. § 311.185. A later amendment -- a principal focus of Sarasota's broad challenge in this case -- allows licensed Missouri in-state retailers to ship wine and other alcoholic beverages directly to consumers, provided the sale is made in-person, online, or by phone at the retailer's licensed premises. See MO. REV. STAT. § 311.300.2; Mo. Div. of Alcohol & Tobacco Control, *Guidelines for Retailers Who Want to Deliver Alcohol* (2020), *citing* MO. REV. STAT. § 311.240.3 and MO. CODE REGS. ANN. tit. 11, § 70- 2.140(11).[5]

Sarasota Wine Market is a Florida-licensed wine retailer doing business as Magnum Wine and Tastings in Sarasota, Florida. Sarasota Wine has received orders on its website for direct shipments to Missouri residents. It declines these sales because it is an out-of-state retailer with no physical presence in

[5] https://atc.dps.mo.gov/IndustryCircular/guidelines-for-retailers-to-deliver-4-24-20.pdf (last visited Jan. 28, 2021).

Missouri, and Missouri only permits direct wine shipments by licensed in-state retailers. Missouri residents Schlueter and French have attempted to order wines that Missouri retailers do not carry directly from out-of-state retailers like Sarasota Wine, but these retailers refuse to fulfill these orders because Missouri law prohibits direct shipments to Missouri consumers. Sarasota Wine and Cordes have not applied for a Missouri retailer license because they are not willing to open a physical store in Missouri and purchase wines sold to Missouri consumers from licensed Missouri wholesalers.

Sarasota alleges the Chapter 311 restrictions on out-of-state retailers shipping wine directly to Missouri consumers, including the residency and physical presence license requirements, violate the Commerce Clause because they discriminate against interstate commerce and constitute protectionism of local businesses. In addition, Cordes individually alleges that Missouri's statutory scheme violates the Privileges and Immunities Clause because Cordes is a Florida resident being denied a retailer license needed to practice his trade as a wine merchant in Missouri. The Officials argue that these regulations are permissible components of a three-tiered system that the Supreme Court has blessed as "unquestionably legitimate" under Section 2 of the Twenty-first Amendment. *Granholm,* 544 U.S. at 488-89, 125 S.Ct. 1885. In addition, they argue, Cordes's claim must fail because selling alcohol is not a fundamental right protected by the Privileges and Immunities Clause, and, in any event, the restrictions further legitimate, non-protectionist public interests.

The district court rejected the Officials' contention that the Sarasota plaintiffs lack standing. However, relying on our interpretation of the Supreme Court's decision in *Granholm* in *Southern Wine*, the court concluded there is no Commerce Clause violation because the challenged laws do not impermissibly discriminate against out-of-state *producers*, and Section 2 of the Twenty-first Amendment permits Missouri's restrictions on out-of-state *retailers*. The court rejected Cordes's individual licensee claim because the Privileges and Immunities Clause does not apply to the occupation of selling alcohol. Sarasota appeals, arguing *inter alia* that the district court's reliance on our interpretation of *Granholm* in *Southern Wine* was rejected in the Supreme Court's supervening decision in *Tennessee Wine*. In light of *Tennessee Wine*, Sarasota argues, we should reconsider the holding in *Southern Wine*, "issue a new opinion consistent with" *Tennessee Wine*, and remand with directions "to determine whether the Missouri residency rule being contested is constitutional under the new standard."

## II. Standing

The Officials moved to dismiss Sarasota's Amended Complaint for lack of standing as well as on the merits. The district court concluded the Sarasota plaintiffs adequately pleaded standing but dismissed their claims for failure to state a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6). On appeal, the Officials challenge each plaintiff's standing to assert Commerce Clause and Privileges and Immunities Clause claims. Article III standing is a threshold jurisdictional inquiry that we review *de novo*. *See Jones v. Gale,* 470 F.3d 1261, 1265 (8th Cir. 2006), *cert.*

*denied,* 549 U.S. 1328, 127 S.Ct. 1912, 167 L.Ed.2d 577 (2007). To establish standing, plaintiffs must show that they: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 716 (8th Cir. 2017) (citation omitted). At the pleading stage, they can meet this burden with "general factual allegations" that satisfy these three elements. *Wieland v. U.S. Dep't of Health & Hum. Servs.*, 793 F.3d 949, 954 (8th Cir. 2015) (citation omitted). We accept as true all factual allegations in the Amended Complaint and draw all reasonable inferences in favor of the nonmoving party. *Id.* at 953.

Though the district court logically focused on the injury-in-fact element of standing, the Officials argue on appeal that plaintiffs also failed to satisfy the traceability and redressability elements. "An injury is fairly traceable to a challenged statute when there is a causal connection between the two." *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 779 (8th Cir. 2019) (quotation omitted). Redressability turns on whether a "favorable judicial decision" would remedy the alleged injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

To show injury in fact, plaintiffs must allege an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 560, 112 S.Ct. 2130. In our view, this element does not require extended analysis. Sarasota alleges that Sarasota Wine is prohibited from selling, delivering, or shipping wine from its out-of-state inventory to its Missouri customers because it is "not eligible for a

Missouri off-premises [retail] license." Cordes, a Florida resident, alleges that he is unable "to practice his profession as a wine merchant in Missouri" because Missouri law prevents him from delivering out-of-state wines to Missouri customers who reside in Florida part of the year. As the Supreme Court said in *Bacchus Imports, Ltd. v. Dias*, "the [plaintiff liquor] wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business." 468 U.S. 263, 267, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984); *see Alexis Bailly Vineyard*, 931 F.3d at 777-79.

Likewise, Schlueter and French have standing to challenge this aspect of the Missouri Liquor Control Act. Commerce Clause standing is not limited to the nonresident victims of discriminatory state laws. It extends to in-state customers who suffer economic injury, such as higher prices, caused by discriminatory laws. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 286-87, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (collecting cases); *Bacchus Imps.*, 468 U.S. at 267, 104 S.Ct. 3049. Schlueter and French allege that Missouri law prevents them from purchasing wines not available in Missouri retail stores; Sarasota Wine and other out-of-state retailers refuse to ship wine into Missouri because of Missouri's liquor laws, and Schlueter and French "cannot afford the time and expense of traveling to out-of-state retailers to purchase a few bottles of rare wine and personally transport them home." This is alleged economic injury, whatever one might think of the severity of the injury. *See Freeman v. Corzine*, 629 F.3d 146, 154-57 (3d Cir. 2010).

The Officials argue that Sarasota Wine and Cordes lack injury in fact because they never applied for Missouri retail liquor licenses they would be able to obtain.[6] But a Missouri retail liquor licensee must comply with conditions that Sarasota Wine and Cordes are unwilling to meet -- a licensee must operate a retail store in Missouri, MO. REV. STAT. §§ 311.220.3, 311.240.3, MO. CODE REGS. ANN. tit. 11, § 70-2.120; must be a resident individual licensee or have a resident corporate managing officer, MO. REV. STAT. § 311.060.1; and must purchase liquor exclusively from Missouri licensed wholesalers, MO. REV. STAT. § 311.280.1. Compliance with these conditions would frustrate the relief Sarasota seeks in this lawsuit -- the ability to ship wine purchased outside Missouri from their Florida inventories direct to Missouri consumers. Although the Officials argue this establishes lack of the redressability needed for Article III standing, we think it goes to the merits of Sarasota's broad-scale attack on the Missouri Liquor Control Act. *Cf. Sporhase v. Neb. ex rel. Douglas*, 458 U.S. 941, 944 n.2, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982). We reject the Officials' argument that Sarasota challenges only the restriction on obtaining direct retailer shipping permits issued under § 311.060.1. The Amended Complaint expressly seeks a judgment "declaring Missouri's statutory

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[6] In this regard, the Officials note that out-of-state corporations such as Walmart and Total Wine have obtained retailer liquor licenses because the residency requirement only requires that the "managing officer" be a Missouri resident. Missouri regulations define managing officer to be "either an officer or an employee with the general control and superintendence." MO. CODE REGS. ANN. tit. 11, § 70-2.030(7).

scheme that prohibits out-of-state retailers from selling, delivering and shipping wine directly to a Missouri consumer, *including* REV. STAT. MO. § 311.060, unconstitutional" under the Commerce Clause. Plaintiffs have standing to challenge these laws under the Commerce Clause.

Though a closer question, we also conclude the allegations in the Amended Complaint are sufficient at this stage of the proceedings to show that Cordes as an individual plaintiff has standing to challenge these Missouri Liquor Control Act provisions under the Privileges and Immunities Clause. Natural persons, but not corporations, may invoke the protections of this Article IV provision. *See W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 656, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981). The same basic elements of standing apply to claims under this Clause. *See Council of Ins. Agents & Brokers v. Molasky-Arman,* 522 F.3d 925, 931 (9th Cir. 2008).

The Officials argue that Cordes, who owns and operates Sarasota Wine, lacks standing to assert this claim because his alleged injury "flows directly and solely from the alleged injury to [Sarasota Wine], which is not constitutionally cognizable." *Chance Mgmt., Inc. v. South Dakota,* 97 F.3d 1107, 1116 (8th Cir. 1996) (quotation omitted). We disagree. The Amended Complaint alleges that Missouri's liquor laws, by preventing Cordes from completing wine sales to Missouri customers, damage his practice of a trade -- wine merchant and consultant. That distinguishes the Amended Complaint from the summary judgment record in *Chance Management,* where the corporate shareholder plaintiff did not allege denial of a personal

economic interest arguably protected by the Privileges and Immunities Clause. *See Molasky-Arman*, 522 F.3d at 929, 932.

III. Commerce Clause Claims

The Commerce Clause grants Congress the power to "regulate Commerce ... among the several States." The Supreme Court interprets this Clause as including a "dormant" limitation on the States' power to enact "laws that unduly restrict interstate commerce." *Tenn. Wine*, 139 S. Ct. at 2459 (collecting cases). "This negative aspect of the Commerce Clause prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Id.* (cleaned up).

Section 2 of the Twenty-first Amendment allows States to regulate the "transportation or importation ... for delivery or use therein of intoxicating liquors." The Supreme Court initially interpreted Section 2 as conferring broad powers on the States to regulate alcohol within their borders, including laws and regulations discriminating against out-of-state alcohol interests that the dormant Commerce Clause would normally forbid. *See Granholm*, 544 U.S. at 485-86, 125 S.Ct. 1885. But over time, the Court held in a series of cases that Section 2 does not authorize States to take actions that violate other constitutional provisions, such as the Free Speech Clause, Equal Protection Clause, and -- relevant to this appeal -- the Commerce Clause. *Id.* at 486-87, 125 S.Ct. 1885 (collecting cases).

In two recent decisions, the Court recognized "that the three-tiered distribution system itself is 'unquestionably legitimate.' " *Granholm*, 544 U.S. at

489, 125 S.Ct. 1885, *quoting North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990) (plurality opinion), *and citing id.* at 447, 110 S.Ct. 1986 (Scalia, J., concurring); *see Tenn. Wine,* 139 S. Ct. at 2471 ("At issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers, but the durational-residency requirement ... impose[d] on new applicants for liquor store licenses."). These cases also established that the ways in which a State implements its three-tiered system are not immune from dormant Commerce Clause scrutiny. The question in a particular case is "whether the principles underlying the Twenty-first Amendment are sufficiently implicated ... to outweigh the Commerce Clause principles that would be otherwise be offended." *Bacchus Imps.*, 468 U.S. at 275, 104 S.Ct. 3049; *see Granholm,* 544 U.S. at 488, 125 S.Ct. 1885. Courts must take into account a State's valid interests in regulating alcohol, such as promoting responsible consumption, preventing underage drinking, and collecting taxes. But economic protectionism "is not such an interest." *Tenn. Wine*, 139 S. Ct. at 2469.

In *Granholm*, the Court held that Michigan and New York laws allowing in-state wine producers to ship directly to consumers while prohibiting or making impractical direct sales by out-of-state wineries violated the Commerce Clause. Though the three-tiered system is "unquestionably legitimate," the Court concluded, this discrimination against out-of-state producers "is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment." 544 U.S. at 489, 125 S.Ct. 1885. The

States in *Granholm* failed to show that the discriminatory direct-shipping restrictions advanced a valid local purpose that could not be served by nondiscriminatory alternatives. In these circumstances, "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Id.* at 493, 125 S.Ct. 1885.

In *Southern Wine*, a Florida corporation challenged the Missouri law requiring officers and directors of a licensed liquor wholesaler to be bona fide Missouri residents for at least three years. 731 F.3d at 802-03; see MO. REV. STAT. § 311.060.3. Interpreting *Granholm*, the most recent and explicit Supreme Court precedent, we noted that the state laws at issue in that case "worked to exempt in-state wineries -- but not their out-of-state competitors -- from distributing their wines through wholesalers." *Id.* at 806. By contrast, Missouri's three-year residency requirement for in-state wholesalers "does not discriminate against out-of-state liquor products or producers." *Id.* at 810. We observed that *Granholm* confirmed that it is "beyond question that States may require wholesalers to be 'in-state' without running afoul of the Commerce Clause," because in *Granholm* "the Court cited the 'in-state wholesaler' in connection with the very sentence affirming that 'the three-tier system itself is unquestionably legitimate.' " *Id.* Thus, "[i]nsofar as *Granholm* imported a balancing approach to regulations of the three-tier system ... it drew a bright line between the producer tier and the rest of the system." *Id.* Moreover, we concluded, even if wholesaler restrictions do not enjoy "protected" status under *Granholm*, Missouri's three-year residency

requirement "passes muster" under the Twenty-first Amendment because the Legislature "legitimately could believe" that the requirement serves valid health, safety, and regulatory interests. *Id.* at 810-11.

In *Tennessee Wine*, a trade association of in-state liquor stores challenged a Sixth Circuit decision striking down a two-year residency requirement for individuals and corporate officers seeking an in-state retailer license. The Supreme Court granted certiorari to address "disagreement among the Courts of Appeals about how to reconcile our modern Twenty-first Amendment and dormant Commerce Clause precedents."139 S. Ct. at 2459. The Court first "reiterate[d] that the Commerce Clause by its own force restricts state protectionism," and that Section 2 of the Twenty-first Amendment "must be viewed as one part of a unified constitutional scheme." *Id.* at 2461-62. The Court then rejected the argument that the Commerce Clause nondiscrimination principle which it applied in *Granholm* to out-of-state alcohol products and producers does not apply to "state laws that regulate in-state alcohol distribution." *Id.* at 2470-71. Rather, "[a]lthough *Granholm* spoke approvingly of [the basic three-tiered] model, it did not suggest that § 2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme." *Id.* at 2471. Applying the Commerce Clause more broadly than some Courts of Appeals, the Court held that Section 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 it does not license the States to adopt protectionist measures with no demonstrable connection to those interests.

*Id.* at 2474. Applying that standard, the Court concluded the two-year residency requirement "violates the Commerce Clause and is not saved by the Twenty-first Amendment" because its "predominant effect ... is simply to protect the Association's members from out-of-state competition." *Id.* at 2476.

Without question, *Tennessee Wine* overruled one of the alternative grounds on which we upheld the three-year wholesaler residency requirement in *Southern Wine* when it held that the Commerce Clause prohibition of protectionist measures applies to all three tiers of a three-tiered system. *Tennessee Wine* did not explicitly overrule *Southern Wine*'s alternative ground -- that Missouri's three-year residency requirement "passes muster" because it "serves valid health, safety, and regulatory interests." But the Court invalidated Tennessee's two-year durational residency requirement for individuals seeking initial *retail* licenses, concluding -- on a summary judgment record -- that it was an invalid "protectionist measure" because "the 2-year residency requirement [is] ill suited to promote responsible sales and consumption practices" and "there are obvious alternatives that better serve that goal without discriminating against nonresidents." 139 S. Ct. at 2474, 2476. In affirming the Sixth Circuit, *see Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 622-23 (6th Cir. 2018), the Supreme Court cited favorably a prior Fifth Circuit decision invalidating durational residency requirements, *Cooper v. McBeath*, 11 F.3d 547 (5th Cir.

1994) (one and three year residency requirements to acquire a nightclub's "mixed beverage permit"). *Tenn. Wine,* 139 S. Ct. at 2475. In *Southern Wine*, we noted the nonresident applicant "did not raise this protectionist-intent argument in the district court." 731 F.3d at 807. Presumably, if a future out-of-state applicant for a Missouri in-state wholesaler license does make a properly supported claim of protectionism, *Tennessee Wine* will require a fresh look at the Twenty-first Amendment issue.

However, that conclusion does not resolve the Commerce Clause issue in this case, because Sarasota Wine and Cordes are not applicants for an in-state Missouri liquor license challenging a durational residency requirement. Rather, they challenge Missouri's requirements that licensed liquor retailers be residents of Missouri, have a physical presence in the State, and purchase liquor sold in the State from licensed in-state wholesalers. Under Sarasota's interpretation of the Commerce Clause, if Florida allowed Sarasota Wine to be acquired or controlled by one or more wine producers, Missouri would be compelled to permit alcohol sales and deliveries into Missouri by a twenty-first century version of the tied house.

The licensing requirements and 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." *See Byrd,* 883 F.3d at 623 ("requiring wholesaler or retailer businesses to be physically located within Tennessee may be an inherent aspect of a three-tier system"); *Cooper v. Tex. Alcoholic Beverage*

*Comm'n*, 820 F.3d 730, 743 (5th Cir.) (distinctions between in-state and out-of-state retailers and wholesalers are permissible "if they are an inherent aspect of the three-tier system."), *cert. denied sub nom., Tex. Package Stores Ass'n v. Fine Wine & Spirits of N. Tex.*, — U.S.—, 137 S. Ct. 494, 196 L.Ed.2d 404 (2016); *Wine Country Gift Baskets.com v. Steen,* 612 F.3d 809, 818-20 (5th Cir. 2010) ("Because of *Granholm* and its approval of three-tier systems, we know that Texas may authorize its in-state, permit-holding retailers to make sales and may prohibit out-of-state retailers from doing the same.... [D]iscrimination that would be questionable, then, is that which is not inherent in the three-tier system itself.... [A] beginning premise is that wholesalers and retailers may be required to be within the State."), *cert. denied,* 562 U.S. 1270, 131 S.Ct. 1602, 179 L.Ed.2d 499 (2011); *Arnold's Wines,* 571 F.3d at 191 ("Requiring out-of-state liquor to pass through a licensed in-state wholesaler and retailer ... mandates that both in-state and out-of-state liquor pass through the same three-tier system before ultimate delivery to the consumer."); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (challenging the requirement that out-of-state retailers sell through Virginia's three-tier system "is nothing different than an argument challenging the three tier system itself," which *Granholm* upheld as "unquestionably legitimate.").

In *Lebamoff Ents. Inc. v. Whitmer,* 956 F.3d 863 (6th Cir. 2020), cert. denied, – U.S. –, – S.Ct. –, – L.Ed.2d –, 2021 WL 78088, 2021 U.S. LEXIS 414 (2021), the Sixth Circuit again took up these issues after the decision in *Tennessee Wine* affirming its durational residency decision in *Byrd*. This time, the

court rejected a Commerce Clause challenge by an Indiana wine retailer and several Michigan wine consumers to an amendment of the Michigan Liquor Control Code allowing in-state retailers to deliver direct to consumers using licensed "facilitators" or common carriers. The court noted the Supreme Court in *Granholm* said that nothing stops the States from "funnel[ing] sales through the three-tier system" that is "unquestionably legitimate." Courts also have permitted States "to regulate wholesalers (the second tier) ... to control the volume of alcohol sold in a State and the terms on which it is sold," and have "require[d] retailers to be physically based in the State." *Id.* at 869-70, citing *Southern Wine* and other cases. The court then framed the issue that is also presented in this case:

> All of this leaves a narrow question. If Michigan may have a three-tier system that requires all alcohol sales to run through its in-state wholesalers, and if it may require retailers to locate within the State, may it limit the delivery options created by the new law to in-state retailers? The answer is yes.

*Id.* at 870. After reviewing prior decisions such as *Bridenbaugh, Arnold's Wines*, and *Steen*, the court observed:

> there is nothing unusual about the three-tier system, about prohibiting direct deliveries from out of state to avoid it, or about allowing in-state retailers to deliver alcohol within the State. Opening up the State to direct deliveries from out-of-state retailers necessarily means opening it

> up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all. That ... create[s] a sizeable hole in the three-tier system .... leav[ing] too much room for out-of-state retailers to undercut local prices and to escape the State's interests in limiting consumption.... That Michigan permits direct deliveries by in-state retailers .... is nothing new.... Anyone who wishes to join them can get a Michigan license and face the regulations that come with it.

*Id.* at 872-73. The court concluded that "[t]he purpose of the [three-tiered] system, for better or worse, is to make it harder to sell alcohol by requiring it to pass through regulated in-state wholesalers.... [This] seems far afield from the tied-saloon system that the three-tier system was designed to replace.... But the Twenty-first Amendment leaves these considerations to the people of Michigan, not to federal judges." *Id.* at 875.

We agree with the Sixth Circuit that *Tennessee Wine* does not require us to reverse and remand in this case. In *Tennessee Wine*, the Court invalidated a durational residency requirement that "is not an essential feature of a three-tiered scheme." 139 S. Ct. at 2471. The Court expressly distinguished between the two-year residency requirement at issue and a State's requirement that retail liquor stores be physically located within the State. See 139 S. Ct. at 2475. By contrast, Sarasota without question attacks core provisions of Missouri's three-tiered system that the Court again described as "unquestionably legitimate."

There are passages in the *Tennessee Wine* opinion that may forecast a future decision that retailer or wholesaler residency or physical presence requirements, or the mandate to purchase only from in-state wholesalers, are subject to an evidentiary weighing to determine "[h]ow much public health and safety benefit must there be to overcome this Court's worries about protectionism 'predominating.' " 139 S. Ct. at 2484 (Gorsuch, J., dissenting). These requirements are likely to impose greater costs than would otherwise be incurred by an out-of-state retailer selling to Missouri consumers. But Missouri imposes the same licensing requirements on in-state and out-of-state retailers. Viewed from this perspective, laws establishing a three-tiered distribution system may be economically and socially anachronistic, but they do not discriminate against out-of-state retailers and wholesalers. *See Bridenbaugh*, 227 F.3d at 853 ("*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 Missouri laws at issue in this case are an essential feature of its three-tiered scheme, and the rules governing direct shipments of wine to Missouri consumers apply evenhandedly to all who qualify for a Missouri retailers license. "States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 223, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984). Given that Section 2 of the Twenty-first Amendment is

a *constitutional* command, the Supreme Court may ultimately decide that it "is ill suited to the judicial function" to conduct a rigorous Commerce Clause inquiry into whether a state law that comprises an *essential* element of its three-tiered distribution system is a protectionist measure with no demonstrable connection to valid Section 2 interests. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987) (Scalia, J., concurring). We conclude we should be no more invasive of the "unquestionably legitimate" three-tiered system than the Supreme Court has mandated. Accordingly, we agree with the district court that Sarasota's Amended Complaint failed to state viable dormant Commerce Clause claims.

IV. The Privileges and Immunities Clause Claim

Cordes argues that these Missouri liquor laws violate the Privileges and Immunities Clause, which provides: "The 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. This Clause "protects the right of citizens to ply their trade, practice their occupation, or pursue a common calling," *McBurney v. Young*, 569 U.S. 221, 226, 133 S.Ct. 1709, 185 L.Ed.2d 758 (2013), in another State "on terms of substantial equality with the citizens of that State." *Sup. Ct. of N.H. v. Piper,* 470 U.S. 274, 280, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985). "There is scant precedent considering the interaction of the Privileges and Immunities Clause and the Twenty-first Amendment." *Lebamoff Ents., Inc. v. Rauner*, 909 F.3d 847, 857 (7th Cir. 2018). "[N]o prior case in this or any other circuit has found a state regulation of alcohol violated the

Privileges and Immunities Clause." *Whitmer,* 956 F.3d at 876.

Like the Commerce Clause, the Privileges and Immunities Clause "was intended to create a national union." *Piper,* 470 U.S. at 280, 105 S.Ct. 1272. "[T]he Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen." *McBurney,* 569 U.S. at 229, 133 S.Ct. 1709. Nor does the Clause "preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objectives." *Piper*, 470 U.S. at 284, 105 S.Ct. 1272. "[T]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 entities." *McBurney*, 569 U.S. at 227, 133 S.Ct. 1709.

Viewed from this perspective, we think it apparent the district court properly dismissed Cordes's Privileges and Immunities Clause claim, regardless whether the trade or occupation of selling alcohol is a "fundamental" privilege. Selling alcohol to consumers is a lawful occupation in Missouri, provided the retailer obtains a license and complies with the applicable regulations. See MO. REV. STAT. § 311.060.1. Section 311.060.1 requires all licensees, residents and nonresidents alike, to become a Missouri voter and taxpayer, in other words reside in Missouri, to engage in the privilege of practicing that calling. Is that "discrimination" against nonresidents, or simply an "incidental effect" of regulatory requirements? As the

Sixth Circuit noted in *Whitmer*, "[t]o sell alcohol in Michigan, [Indiana retailers] simply have to play by the Michigan rules -- just as they have to do in Indiana." 956 F.3d at 876. It is not impossible for Cordes to obtain an individual Missouri retailer license, but to be eligible, he must move to Missouri, which he will not do. Nor is he willing to form a personal LLC, establish a physical presence in Missouri with a resident "managing officer," and obtain a retailers license in the name of that company.

Even if Missouri does "discriminate" against nonresidents by requiring liquor licensees to reside in Missouri, such discrimination is permissible if it is not protectionist, that is, if there is a substantial reason for the economic burden the license requirements place on nonresidents, and the burden bears a substantial relationship to the State's legitimate objectives. Here, as we explained in Part III, the licensing restrictions that Cordes is unwilling to meet 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. Until the Supreme Court concludes that essential elements of the three-tiered system are not protected from dormant Commerce Clause challenge, an individual nonresident's challenge under the Privileges and Immunities Clause likewise fails to state a claim.

## V. Conclusion

As our Seventh Circuit colleague David Hamilton has observed, "the three-tier distribution system [is] a

model that may seem to have less and less value as the internet and e-commerce flatten the global marketplace. Yet the extraordinary constitutional status given to state alcoholic beverage laws in the Twenty-first Amendment was the compromise that allowed the repeal of Prohibition." *Lebamoff Ents., Inc. v. Huskey*, 666 F.3d 455, 472 (7th Cir. 2012) (Hamilton, J., concurring). We agree with the Sixth Circuit that the Supreme Court in *Granholm* and *Tennessee Wine* did not decide that essential elements of the three-tiered system are subject to frontal attack under the dormant Commerce Clause or the Privileges and Immunities Clause. Therefore, those seeking a more consumer-oriented organization of alcohol industries must "turn to state-by-state political action on behalf of consumers who are hurt by these laws." *Id.*

The judgment of the district court is affirmed.

**APPENDIX B. Opinion of the U. S. District Court for the Eastern District of Missouri** [Filed March 29, 2019].

No. 4:17-cv-02792

Sarasota Wine Market, LLC, et al.
Plaintiffs,

v.

Michael L. Parson, et al.
Defendants

**OPINION, MEMORANDUM AND ORDER**

Henry Edward Autrey, United States District Judge

This matter is before the Court on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint [Doc. No. 37] under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiffs oppose the Motion. The Motion has been fully briefed. For the reasons set forth below, Defendants' Motion is GRANTED.

Facts and Background

Plaintiffs brought this case pursuant to 42 U.S.C. § 1983, challenging the constitutionality of Missouri's Liquor Control Law, Chapter 311 RSMo ("Liquor Control Law").

Like many states, Missouri "funnels liquor sales through a tier system, separating the distribution market into discrete levels." *Southern Wine and Spirits of Am., Inc. v. Division of Alc. & Tobacco Control*, 731 F.3d 799, 802 (8th Cir. 2013). The first tier "consists of producers, such as brewers, distillers, and winemakers." *Id.* The second tier "is comprised of

solicitors, who acquire alcohol from producers and sell it 'to, by or through' wholesalers." *Id.* The third tier "is made up of wholesalers, who purchase alcohol from producers and solicitors and sell it to retailers." *Id.* The fourth tier – and the tier at issue in this case – "consists of retailers, who sell alcohol to consumers." *Id.* This multi-tiered system for controlling the distribution and sale of alcohol to Missouri residents is permitted by the Twenty-First Amendment to the United States Constitution, which grants states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* (*quoting Cal.Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S.97, 110, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)).

Missouri implements its multi-tier system through its Liquor Control Law. The Liquor Control Law prohibits "any person, firm, partnership, or corporation" from selling alcoholic beverages in Missouri "without taking a license." § 311.050 RSMo. To obtain a license, an applicant must demonstrate "good moral character" and establish that he/she is "a qualified legal voter and taxpaying citizen of the county, town, city or village" to be served. § 311.060.1 RSMo. These requirements apply to the managing officer of any corporation seeking a license. *Id.*

Defendants previously filed a Motion to Dismiss Plaintiffs' Complaint, which was granted for lack of standing under Rule 12(b)(1). Plaintiffs filed their Amended Complaint, followed by Defendants' filing of the instant Motion to Dismiss.

Plaintiffs' Amended Complaint alleges the following:[1]

Plaintiff Michael Schlueter is a Missouri resident who would purchase wine from out-of-state retailers and have it shipped to his Missouri home, if Missouri law permitted him to do so. Plaintiff Terrence French us a Missouri Resident who has been refused sales of wine by out-of-state retailers due to Missouri's Liquor Control Law that bans out-of-state sales, shipments, and delivery of wine from out-of-state sources.

Plaintiff Sarasota Wine Market, LLC d/b/a Magnum Wine and Tastings ("Magnum Wine") is a Florida Limited Liability Company that operates a retail wine store in Sarasota, Florida. Magnum Wine has received requests that it sell and ship wine to Missouri, but is unable to do so legally. It intends to sell and ship wines directly to consumers in Missouri if the laws prohibiting such sales and shipments are removed or declared unconstitutional. Plaintiff Heath Cordes is a citizen of Florida who works as a professional wine consultant, advisor, and merchant. Cordes owns and operates Magnum Wine. Plaintiffs intend to pay all taxes due on interstate wine sales and shipments, and comply with all other non-discriminatory state regulations, including obtaining licenses.

[1] The recitation of facts is taken from Plaintiffs' Amended Complaint and is set forth for the purposes of the pending motion to dismiss.

Defendants Missouri Governor Michael L. Parson, Missouri Attorney General Eric Schmitt[2], and Acting Supervisor of the Missouri Department of Public Safety, Division of Alcohol & Tobacco Control Keith Hendrickson are all sued in their official capacities.

In the State of Missouri, a resident wine retailer can obtain a license from Defendants which allows it to sell, deliver, and ship by common carrier directly to Missouri consumers any wine that it has in its inventory. A Missouri wine retailer may obtain wine for resale from distributors, auction houses and private collections. The Defendants will issue such an off-premises retail license only to wine retailers located in the State of Missouri. Magnum Wine is not located in Missouri, is not eligible for a Missouri off-premises license, and is prohibited by law from selling, delivering or shipping wine from its inventory directly to consumers in Missouri. No other Missouri license is available to Magnum Wine and Tastings that would allow it to sell, deliver, and ship wine from its inventory to consumers in Missouri. It would obtain such a license if one were available.

Plaintiff Schlueter has contacted several out-of-state retailers either on the Internet or by phone in order to buy wines he cannot find in Missouri. These retailers include Magnum Wine, The Wine Library in New Jersey, and Federal Wine & Spirits in Boston,

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[2] Effective January 3, 2019, Eric Schmitt is the Attorney General of Missouri. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Eric Schmitt is substituted for former Attorney General Joshua D. Hawley as defendant in this suit.

Massachusetts. All of these retailers refused to sell and ship their wines to Schlueter because of Missouri law. Some wines that Schlueter wants to buy are not available in retail stores in Missouri but are available from retail stores in other states. Plaintiff French has also attempted to purchase wine from out-of-state wine retailers which claims he cannot obtain either in his hometown or in Missouri and has been denied these purchases.

Mangum Wine has been contacted by Schlueter who has attempted to buy wine and have it shipped to him in Missouri. Mangum has refused to complete this order due to Missouri's ban on out-of-state retail sales, shipments, and deliveries. Magnum Wine has lost profit of its sale of wine to Schlueter and other Missouri customers. Magnum Wine would obtain a license to sell, ship and deliver its wine directly to consumers in the State of Missouri if one were available.

In the course of his business, Plaintiff Cordes develops personal relationships with many of his customers, makes special wine purchases for them, consults with them about wine in person, by telephone and by Internet, and sells and delivers wine to them. Some of these customers live part of the year in Florida and part of the year in Missouri. Cordes has received requests from his customers to send wine to residents of Missouri as gifts but was unable to ship the specifically requested wines because the laws of Missouri prevent him from doing so. Cordes wants to practice his profession as a wine merchant in Missouri by consulting with, obtaining wines for, and delivering wines to Missouri residents, but is prevented from

doing so by Missouri law. He has suffered economic harm as a result. Mr. Cordes has not applied to Missouri officials for a retail license because it would be futile to do so since he is not a resident of Missouri and residency is required for a retail wine dealer permit. If a license were available to Cordes on terms equivalent to those for Missouri citizens, he would obtain it.

Plaintiffs' Complaint alleges that the portions of Missouri's Liquor Control Law that allow in-state retailers to ship wine to Missouri consumers while prohibiting out-of-state retailers from doing the same is unconstitutional for two reasons:

First, Plaintiffs contend that the disparate treatment between in-state and out-of-state retailers violates the Commerce Clause because it discriminates against interstate commerce and protecting the economic interest of local businesses by shielding them from competition.

Second, Plaintiffs claim that the disparate treatment between residents and nonresidents violates the Privileges and Immunities Clause of Article IV of the United States Constitution because Missouri bans wine sales and deliveries by out-of-state merchants and prohibits the issuance of licenses to nonresidents, thereby denying Cordes the privilege to engage in his occupation in the state upon the same terms as Missouri citizens.

Plaintiffs seek declaratory and injunctive relief in this matter.

Defendants move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing and Rule (12)(b)(6) for failure to state a claim upon which relief may be granted. For their 12(b)(6) motion, Defendants contend that the constitutional validity of Missouri's multi-tiered approach to regulating liquor distribution and sale has been upheld by the Eighth Circuit Court of Appeals in *Southern Wine*, 731 F.3d 799.

Standard

"[I]f a plaintiff lacks standing, the district court has no subject matter jurisdiction." *Faibisch v. University of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002). Therefore, motions to dismiss for lack of standing fall under the purview of Rule 12(b)(1), which permits a party to move to dismiss a complaint for lack of subject matter jurisdiction. *Id.* "Motions to dismiss for lack of subject-matter jurisdiction can be decided in three ways: at the pleading stage, like a Rule 12(b)(6) motion; on undisputed facts, like a summary judgment motion; and on disputed facts." *Jessie v. Potter*, 516 F.3d 709, 712 (8th Cir. 2008). The parties do not rely on matters outside the pleadings, therefore the Court reviews Defendant's motion as a "facial attack" on jurisdiction. In a facial attack, "the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion under Rule 12(b)(6)." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016).

Under FED.R.CIV.P. 12(b)(6), a party may move to dismiss a claim for "failure to state a claim upon which relief can be granted." To survive a Rule 12(b)(6)

motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A pleading that merely pleads labels and conclusions or a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement will not suffice. *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

A complaint must be liberally construed in the light most favorable to the plaintiff. Eckert v. Titan Tire Corp., 514 F.3d 801, 806 (8th Cir. 2006). Under Rule 12(b)(6), the Court must accept plaintiff's factual allegations as true and grant all reasonable inferences in the plaintiff's favor. *Phipps v. FDIC*, 417 F.3d 1006, 1010 (8th Cir. 2005). Where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate. *Benton v. Merrill Lynch & Co.*, 524 F.3d 866, 870 (8th Cir. 2008).

Discussion

A. Standing

"Article III standing is a threshold question in every federal court case." *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003). The "irreducible constitutional minimum" of standing consists of three elements. *Spokeo, Inc. v. Robins*, — U.S. —, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ). "The plaintiff must have (1) suffered an injury in fact, (2)

that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* The Supreme Court has explained that the injury in fact requirement means showing "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (citations and quotation omitted).

In their Amended Complaint, Plaintiffs adequately plead standing. Schlueter and French each pled that they have tried to order wine for delivery from out-of-state retailers and been denied. They have also pled that they can only obtain their desired wines from out-of-state retailers. "[C]ognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates, and customers of that class may also be injured ..." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997). As they have pled that the wines they seek are unavailable for purchase in Missouri, the only way for Schlueter and French to engage in the interstate commerce they seek includes added costs, or imminent economic injury. Schlueter and French have standing to bring their Commerce Clause claim. Magnum Wine has alleged lost profits that resulted from their legal duty to decline orders where the buyer requested wine be shipped to Missouri residents. Magnum Wine has standing to bring this action. Likewise, Cordes has adequately pled that he has lost sales a result of their inability to ship wine directly to Missouri residents. Plaintiffs' Amended

Complaint establishes requisite standing to bring the instant case.

B. Failure to State a Claim

Next, Defendants argue that Plaintiffs fail to state a claim upon which relief can be granted. Plaintiffs defend their positions, arguing that, at the very least, the constitutionality of the Liquor Control Law as applied to out-of-state retailers cannot be decided on a Rule 12(b)(6) motion. The Court disagrees, and finds that precedents set by the Supreme Court in *Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) and by the Eighth Circuit in *Southern Wine*, 731 F.3d 799 bar Plaintiffs' claims for relief.

1. Commerce Clause

Defendants argue that the Eighth Circuit "affirmed the validity of Missouri's multi-tier approach to regulating the distribution and sale of alcoholic beverages" in *Southern Wine*, foreclosing Plaintiff's claims. In *Southern Wine*, an out-of-state wholesaler claimed that Missouri's statute requiring Missouri residency for wholesaler corporations violated the commerce clause and equal protection clause.[3] The issue before the Eighth Circuit, then, involved the relationship between the Commerce Clause and the Twenty-first Amendment. The Commerce Clause

[3] The district court also rejected the plaintiffs' arguments that the Missouri statute violated the Privileges and Immunities Clause. In doing so, the district court relied on the same legal conclusions reached in its analysis of the Commerce Clause claim. The Privileges and Immunities claim was not addressed on appeal.

generally prohibits state laws that "mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) ). The Twenty-first Amendment, however, provides that "[t]he 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," U.S. Const. amend. XXI § 2, affording states some "prerogatives particular to the regulation of alcohol," *Southern Wine*, 731 F.3d at 804. In determining the appropriate relationship between the Twenty-first Amendment and the Commerce Clause in *Southern Wine*, the Eighth Circuit relied on the Supreme Court's decision in *Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005).

Granholm addressed two state laws that essentially allowed in-state wineries to ship wine directly to in-state residents, but prohibited out-of-state wineries from doing the same. In holding that the state laws were unconstitutional, the Supreme Court emphasized that the Twenty-first Amendment does not supersede the Commerce Clause. *Id.* at 486, 125 S.Ct. 1885. However, Granholm also upheld the constitutionality of the states' tiered liquor distribution systems under the Twenty-first Amendment. *Id.* at 488, 125 S.Ct. 1885. Therefore, the Supreme Court limited the prohibition on interstate discrimination to

the first tier of the liquor distribution system: producers and products. As noted by the Eighth Circuit, the second, narrower tier of wholesalers was specifically mentioned as exempt from Granholm's holding:

> The three-tier system is "unquestionably legitimate," Granholm, 544 U.S. at 489, 125 S.Ct. 1885 (internal quotation omitted), and that system includes the "licensed in-state wholesaler." *Id.* (*quoting North Dakota [v. Unites States*], 495 U.S. [423] at 447, 110 S.Ct. 1986 [109 L.Ed.2d 420 (1990) ] (Scalia, J., concurring in the judgment) ).

*Southern Wine*, 731 F.3d at 809.

Moreover, the Supreme Court held that "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (emphasis added). Accordingly, *Southern Wine* mandates "state policies that define the structure of the liquor distribution system while giving equal treatment to in-state and out-of-state liquor products and producers ... are 'protected' against constitutional challenges based on the Commerce Clause." 731 F.3d at 809.

Plaintiffs argue that *Southern Wine* is inapposite, and that dismissal on the pleadings in this case is improper because the Eighth Circuit would have to decide on the facts whether to extend its holding in *Southern Wine* to retailers. However, the Eighth Circuit expressly rejected that argument in *Southern Wine*:

*Southern Wine* contends that even after Granholm, the constitutionality of residency requirements in the wholesale tier depends on a case-specific balancing of interests under the Commerce Clause and the Twenty-first Amendment. Insofar as Granholm imported a balancing approach to regulations of the three-tier system, however, it drew a bright line between the producer tier and the rest of the system. The more natural reading of Granholm is the Second Circuit's: "Because New York's three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers, we need not analyze the regulation further under Commerce Clause principles." *Arnold's Wines*, 571 F.3d at 191.

731 F.3d at 810. Plaintiffs do not allege and cannot show that the challenged portions of Missouri's Liquor Control Law provide differential treatment to in-state and out-of-state products and producers. Because Plaintiffs' claim concerns only the retailer tier of Missouri's liquor control system, it is foreclosed by the "bright line" between the producer tier and the rest of the system described in *Southern Wine*.

Plaintiffs argue that the Eighth Circuit's statement in *Southern Wine* that "[Granholm] drew a bright line between the producer tier and the rest of the system" is merely dictum that was unnecessary to the result in *Southern Wine* and thus should not be treated as binding authority. This argument is not well taken. In *Southern Wine*, the Eighth Circuit provided a wealth of reasoning that distinguishes discrimination against products and producers from discrimination in the other tiers of the liquor distribution system. See *Id.* at

809-10.

The four-tier system is a legitimate exercise of Missouri's power under the Twenty-first Amendment to "maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use," including the ability to "funnel sales through the [multi]-tier system." *Granholm*, 544 U.S. at 484, 125 S.Ct. 1885. While the state laws in *Granholm* failed to pass constitutional muster because they discriminatorily allowed only in-state producers to sidestep the tiered regulatory systems, the Missouri statutes in question require that all alcohol sold directly to consumers in Missouri by retailers pass through Missouri's four-tier regulatory system "funnel." To allow out-of-state retailers to ship directly to Missouri residents would not only burden in-state retailers, who would have to operate within the four-tier system while out-of-state retailers could circumvent the Missouri regulatory system entirely, it would also violate the Twenty-first Amendment by undermining Missouri's "unquestionably legitimate" system. *Cf. Brooks v. Vassar,* 462 F.3d 341, 352 (4th Cir. 2006) (opinion of Niemeyer, J.) ("[A]n argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself.... [T]his argument is foreclosed by the Twenty-first Amendment and the Supreme Court's decision in Granholm[.]").

The challenged statutes do not result in discrimination between in-state and out-of-state

producers or products, and they are legitimate exercises of Missouri's authority under the Twenty-first Amendment. Relying on the law of this Circuit, therefore, the Amended Complaint fails to state a Commerce Clause claim upon which relief can be granted.

2. Privileges and Immunities Clause

Plaintiff Cordes is a "professional wine consultant, advisor and merchant" who resides in and is a citizen of Florida. Cordes states that because he is unable to obtain a Missouri retail wine dealer license as a non-Missouri resident, he is prevented from practicing his profession of "consulting with, obtaining wines for, and deliver[ing] wines to Missouri residents." Cordes claims that the Liquor Control Law thereby violates the United States Constitution's Article IV Privileges and Immunities Clause by "den[ying] Mr. Cordes the privilege to engage in his occupation in the state upon the same terms as Missouri citizens."

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. The Supreme Court has stated that:

> The object of the Privileges and Immunities 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 advantages 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, 133 S.Ct. 1709, 185 L.Ed.2d 758 (2013) (internal citations and quotations omitted). Whether differential treatment of out-of-state residents violates the Privileges and Immunities Clause involves a two-part inquiry: (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) (*citing United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor & Council of the City of Camden*, 465 U.S. 208, 218, 221–23, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984) ). Generally, the privilege of engaging in a trade, business or occupation is protected by the Privileges and Immunities Clause. *McBurney*, 569 U.S. at 227, 133 S.Ct. 1709. However, the privilege of engaging in the occupation of selling alcohol is not protected by the Privileges and Immunities Clause, due to the Twenty-first Amendment's "broad grant of power to the states ... to implement [multi]-tier liquor distribution systems which disparately affect non-resident wholesalers and retailers." *Southern Wine*, 2012 WL 1934408, slip op. at *5 (W.D.Mo. May 29, 2012), aff'd, 731 F.3d 799 (8th Cir. 2013) *(citing Steamers Service Co. v. Wright*, 505 S.W.2d 65, 68 (Mo.1974) ("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.") ).

Because Cordes' specific occupation is subject to limitations imposed by the Twenty-first Amendment, his right to pursue it across state lines is not protected by the Privileges and Immunities Clause. Therefore, the court does not reach the "sufficient justification" prong of the two-part inquiry. Minnesota ex rel. Hatch, 456 F.3d at 834. Accordingly, the Amended Complaint fails to state a Privileges and Immunities Clause claim.

Conclusion

For the reasons stated above, Plaintiffs' Amended Complaint fails to state a claim upon which relief could be granted.

Accordingly,

IT IS HERBY ORDERED that the Defendant's Motion to Dismiss Plaintiff's Amended Complaint [Doc. No. 37] is GRANTED.

**APPENDIX C**. U. S. Court of Appeals for the Eighth Circuit, Order Denying Rehearing [Filed March 24, 2021].

No. 19-1948

Sarasota Wine Market, LLC, et al.
Appellants

v.

Eric S. Schmitt, Attorney General of Missouri, et. al.
Appellees

**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Gruender did not participate in the consideration or decision of this matter.

March 24, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit
/s/ Michael E. Gans

**APPENDIX D.** Missouri Rev. Stat., ch. 311.

§ 311.050. It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose for sale in this state intoxicating liquor, as defined in section 311.020, in any quantity, without taking out a license.

§ 311.060.1. No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village; and, except as otherwise provided under subsection 7 of this section, no person shall be granted a license or permit hereunder whose license as such dealer has been revoked, or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, or who employs in his or her business as such dealer any person whose license has been revoked unless five years have passed since the revocation as provided under subsection 6 of this section, or who has been convicted of violating such law since the date aforesaid; provided, that nothing in this section contained shall prevent the issuance of licenses to nonresidents of Missouri or foreign corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors to, by or through a duly licensed wholesaler, within this state.

§ 311.220.1. In addition to the permit fees and license fees and inspection fees by this law required to be paid into the state treasury, every holder of a permit or license authorized by this law shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located, or in case such premises are located in the City of St. Louis, to the collector of revenue of said city, a fee in such sum not in excess of the amount by this law required to be paid into the state treasury for such state permit or license, as the county commission, or the corresponding authority in the City of St. Louis, as the case may be, shall by order of record determine, and shall pay into the treasury of the municipal corporation, wherein said premises are located, a license fee in such sum, not exceeding one and one-half times the amount by this law required to be paid into the state treasury for such state permit or license, as the lawmaking body of such municipality, including the City of St. Louis may by ordinance determine.

§ 311 240.1. On approval of the application and payment of the license tax provided in this chapter, the supervisor of liquor control shall grant the applicant a license to conduct business in the state for a term to expire with the thirtieth day of June next succeeding the date of such license. A separate license shall be required for each place of business. Of the license tax to be paid for any such license, the applicant shall pay as many twelfths as there are months (part of a month counted as a month) remaining from the date of the license to the next succeeding July first.