

No. 20-1767

**In the
Supreme Court of the United States**

SARASOTA WINE MARKET, LLC, ET AL.,
Petitioners,

v.

ERIC S. SCHMITT,
ATTORNEY GENERAL OF MISSOURI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the
Eighth Circuit

**BRIEF OF 22 WINE CONSUMERS AS *AMICI*
CURIAE IN SUPPORT OF PETITIONERS**

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INTERESTS OF *AMICI CURIAE*¹

Wine consumers nationwide² desire to have access to wines produced far beyond the borders of their own particular localities. However, some consumers are stymied in their search for rare and collectible wines because of discriminatory laws that prevent out-of-state retailers from shipping wine directly to them. Compounding this problem, states like Missouri prohibit out-of-state retailers from obtaining the necessary license required to serve Missouri customers. Such a license, readily available to in-state interests, would allow direct shipments of wine not otherwise available to Missouri consumers, effectively preventing out-of-state retailers from participating in the Missouri marketplace.

These wine consumers and millions of others just like them are practically prevented from purchasing wine selections that are not produced or available in Missouri in favor of protectionist laws that run afoul of the dormant element of the Commerce Clause. In Missouri, a retailer must establish a physical presence in the state in order to be afforded the benefit of shipping wine directly to consumers, including internet sales. This heavy

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for any party authored this brief in whole or in part or made any monetary contribution. Pursuant to Supreme Court Rule 37.2, written consent to file was obtained from counsel for all parties more than 10 days in advance of the filing deadline.

² The names of all *Amici* are listed in the Appendix.

burden effectively and impermissibly prevents out-of-state retailers from participating in the Missouri marketplace.

The *amici curiae* respectfully request this Court grant Petitioners' Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The negative, or dormant, Commerce Clause prohibits discrimination by any state in favor of intrastate commerce over interstate commerce. The Twenty-first Amendment provides the several states with the ability to regulate the "transportation or importation" of alcohol, but not in such a manner that the regulation becomes an effective bar to interstate commerce.

Wine, like many areas of commerce, has shifted toward online retail. The Missouri residency and in-state presence requirements represent a historical anachronism. Online retail portals have brought about a radical paradigm shift by providing almost unlimited consumer choices that were beyond comprehension when the states adopted the Twenty-first Amendment. To prevent out-of-state retailers from shipping directly to consumers by requiring in-state residency effectively bars those retailers from the Missouri marketplace. Such a bar is impermissible under the Court's present Commerce Clause jurisprudence.

Additionally, states rely on their claimed interests in promoting and protecting the public health and welfare of citizens when defending even onerous regulations that clearly divide access to a mar-

marketplace between intrastate and interstate commerce. Those claims are increasingly dubious and incongruent with this Court's jurisprudence especially considering that Missouri responded to the potential loss of by-the-drink alcohol sales during the Covid-19 pandemic by allowing to-go alcohol sales. In fact, Missouri very recently adopted legislation to permanently codify the allowance of to-go cocktails from restaurants. The state should, at minimum, be required to make an evidentiary showing that its discriminatory practice is necessary, and not a pretext for discrimination, and the purpose of the discriminatory practice cannot be achieved by nondiscriminatory legislation.

ARGUMENT

I. Certiorari is needed to bring certainty and finality to the question of whether discriminatory state alcoholic beverage control laws must be analyzed under both the Commerce Clause and the Twenty-first Amendment.

This Court has made it clear that the authority granted to states by the Twenty-first Amendment³ to regulate the sale of alcohol is limited by the principle of nondiscrimination contained within the Commerce Clause⁴. This Court crystalized the point in holding that a state may not compel an out-of-state entity to establish in-state residence simply in order to gain access to the marketplace. *Granholm v. Heald*, 544 U.S. 460, 475 (2005). To

³ U.S. CONST., amend. XXI.

⁴ U.S. CONST., art. I, § 8, cl. 3.

do so would create market inefficiencies, requiring retailers to establish residency within Missouri when all of the infrastructure necessary to sell wine online and deliver it directly to consumers already exists where the out-of-state retailer operates. The Court views state statutes requiring business operations to be moved in-state when the same operations already operate more efficiently elsewhere with suspicion. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

The challenged Missouri statutes find their origin in legislation adopted in the 1930s following the end of Prohibition. At that time, substantially all retail transactions occurred in face-to-face dealings. Granted, consumers could purchase goods from catalogs like Sears and Montgomery Ward but such sales represented a minority of annual transactions. Even then, shipping of mail-order goods could take days or weeks.

The growth of internet and online retail portals have resulted in many of the policies underlying post-Prohibition era laws to become an anachronism. Online retail portals have become a pervasive outlet for interstate commerce which brings consumers and marketplaces closer than ever before, even when they are physically distant. *S. Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080, 2095 (2018). This technology allows consumers to purchase any number and variety of goods without ever stepping foot into a retail store. This same technology also allows, in many cases, for something unheard of in the 1930s: same-day delivery. Yet, despite the many changes to the commercial

marketplace, states like Missouri still apply a 1930s regulatory model to 21st century commerce.

The dormant Commerce Clause requires that interstate commerce not be unfairly burdened or cut out of a market in favor of intrastate commerce. The simple fact that a state wishes to regulate alcohol sales in a particular manner under the Twenty-first Amendment does not exempt those regulations from scrutiny under the Commerce Clause. *Heald*, 544 U.S. at 466.

If a retailer chooses not to engage in online sales, Missouri's discriminatory laws will not make any difference to that retailer because it cannot lose business by being shut out of a market from which it volitionally abstained. However, for the many retailers who are already selling wine online, the Missouri residence requirement serves only to force those retailers to establish a brick-and-mortar presence in Missouri, secure a managing officer who resides in Missouri, and then sell from that location if they wish to participate in the marketplace. Such requirements lead to market redundancies which are both duplicative and inefficient.

In order to determine whether a discriminatory regime passes muster under the Commerce Clause, courts are instructed to both consider "concrete evidence" that is established on the record, and then only allow discriminatory requirements for which there is no sufficient nondiscriminatory alternative. *Heald*, 544 U.S. at 492-93; *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. ___, 139 S.Ct. 2449, 2474 (2019).

Such consideration recently led this Court to hold that Tennessee's two-year residency requirement for a retail alcohol license application was unconstitutional, in part because the state failed to provide any evidence that the requirement, which is facially discriminatory to any out-of-state retailer, is both sufficiently connected to the protection of public health and safety and that no non-discriminatory alternative would sufficiently protect those interests. *Thomas*, 139 S.Ct. at 2474.

It is unclear as to how the Eighth Circuit concluded that Missouri's residency licensure requirement is either adequately connected to the advancement of public health or that no nondiscriminatory alternative would adequately protect that interest, as there was no concrete evidence in the district court record. The Eighth Circuit asserts, without supporting evidence, that Missouri's ability to regulate in-state retailers is sufficient to meet the "exacting standard" required to allow a discriminatory practice to stand under Commerce Clause jurisprudence. *Heald*, 544 U.S. at 492.

At the very least, Missouri should be required to demonstrate how its discriminatory law requiring retailers to have established in-state residence in order to ship wine to consumers benefits the public health and that no nondiscriminatory alternative would serve a similar purpose. In essence, Missouri should be required to demonstrate that no reasonable means would allow it to effectively regulate out-of-state retail establishments.

II. The market changes resulting from the Covid-19 pandemic and Missouri's responses thereto highlight the discriminatory effects of the challenged statutes.

Finally, in a recent development that occurred after the Petition for Writ of Certiorari was filed by Petitioners, Missouri made the to-go retail sale of cocktails permanently available to retail customers⁵. Prior to rule changes enacted during the COVID-19 pandemic, such an arrangement was illegal and largely unthinkable. Missouri's initial reaction to by-the-drink establishments selling to-go cocktails was to require any establishment wishing to do so to sell mix-at-home kits in order to prove that the liquor sold had not been opened prior to sale. In the wake of such massive changes to the alcohol sales landscape in Missouri, as ratified by the state legislature and signed into law by the governor, heightened skepticism should be turned toward any claim that Missouri has a reasonable claim that its in-state residence requirement is sufficiently connected to the public health, or that the state does or should promote temperance.

⁵ Dori Olmos, AP, Missouri Gov. Parson signs bill making to-go cocktails permanent, KSDK.com, (July 7, 2021), <https://www.ksdk.com/article/news/local/missouri-parson-bill-making-to-go-cocktails-permanent/63-1f54a8d5-2aff-4a63-98e8-20aad0faf14c> (last visited July 14, 2021).

CONCLUSION

For the foregoing reasons, this Court should grant the Petitioners' Petition for Writ of Certiorari in this matter.

Respectfully submitted,

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