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TEXAS JUDGE CALLS BANS ON WINE RETAILER SHIPPING UNCONSTITUTIONAL

—Consumers and Free Trade Win Out Against Protectionism in Sweeping Repudiation of Anti-Consumer Laws—

In a sweeping repudiation of anti-consumer and protectionist restrictions on the shipment of wine, Judge Sidney Fitzwater of the U.S. District Court of Northern Texas ruled yesterday that the state of Texas may not prohibit consumers from having wine shipped to them from out-of-state wine merchants if the state allows the shipment of wine from in-state Texas wine merchants.

This critically important decision provides wine retailers with the same protection against economic discrimination that wineries obtained in the 2005 Supreme Court Case *Granholm v. Heald*. That seminal case held that no state may discriminate against out-of-state wine shippers for the purpose of protecting in-state competitors. Yesterday's ruling completely rejected the claims by the State of Texas, Texas wine wholesalers, as well as lawmakers and wholesalers in other states that *Granholm v. Heald* did not apply to retailers.

“We know wine lovers and lovers of free trade will rejoice upon reading this decision,” said Tom Wark, executive director of the Specialty Wine Retailers Association—the consumer and retailer advocates who helped file the lawsuit. “This decision puts to rest the plainly protectionist notion that retailers may be blatantly discriminated against only for the sake of protecting wholesalers.”

Kirkland & Ellis, LLP, recently named the top litigation firm in America by *American Lawyer* magazine, served as retailers' counsel in the Texas litigation, styled *Siesta Village Market v. Perry*. Kirkland & Ellis Partner Tracy Genesen and Ken Starr, Of Counsel to the Firm, oversaw the litigation that led to the far-reaching decision. Genesen and Starr were also instrumental in the successful *Granholm* case.

The *Siesta Village* decision is set to have an important impact on two important and nearly identical cases in New York and Michigan, as well as in states considering wine shipping legislation this year. Those states include Maine, Tennessee and Virginia.

“SWRA has plans to present this important decision to lawmakers and alcohol regulators in a number of states where consumers have been banned from having wine shipped to them from out-of-state retailers,” said Wark. “Illinois is one state, for example, that recently banned its residents from having wine shipped to them from out-of-state retailers after wholesalers lobbied very hard to impose the restriction—even though lawmakers were told that such a law would be unconstitutional, which this decision confirms.”

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In an unexpected part of the opinion, Chief Judge Fitzwater gave impetus to what could be a radical reformulation of the three-tier system when he gave the state of Texas the authority to force out of state retailers to purchase their wine from Texas wholesalers. This surprising part of the decision suggests the creation of a national wholesale market whereby wine retailers are allowed to purchase wines from wholesalers in a variety of states and not just their own, as is the current law in most states. This of course is not the only option for states that will have to re-evaluate their retailer shipping laws and is not the solution that SWRA believes is constitutional. States concerned with consumer choice and access to wines should create a permit system that allows out-of-state retailers to ship into the state and have the shippers contribute to the local tax base through remittance of state taxes—just like wineries are allowed to do in 36 states.

“This is an important ruling for those who favor free trade, consumers rights, and those who want to see the American wine trade flourish,” Wark said. “Wine lovers should be very pleased that the Court specifically prohibited a ban on consumers importing wine from out-of-state retailers.”

Contact:

Tom Wark, Executive Director
Specialty Wine Retailers Association
707-935-4424 • twark@specialtywineretailers.org