

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TENNESSEE WINE AND SPIRITS)
RETAILERS ASSOCIATION,)
 Petitioner,)
 v.) No. 18-96
ZACKARY W. BLAIR, INTERIM)
DIRECTOR OF THE TENNESSEE)
ALCOHOLIC BEVERAGE COMMISSION,)
ET AL.,)
 Respondents.)

Pages: 1 through 61

Place: Washington, D.C.

Date: January 16, 2019

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 Washington, D.C.
 Wednesday, January 16, 2019

 The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 11:08 a.m.

1 APPEARANCES:

2 SHAY DVORETZKY, ESQ., Washington, D.C.;

3 on behalf of the Petitioner.

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5 Illinois, Chicago, Illinois;

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7 in support of the Petitioner.

8 CARTER G. PHILLIPS, ESQ., Washington, D.C.;

9 on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 18-96, Tennessee Wine and
5 Spirits Retailers Association versus Blair.

6 Mr. Dvoretzky.

7 ORAL ARGUMENT OF SHAY DVORETZKY

8 ON BEHALF OF THE PETITIONER

9 MR. DVORETZKY: Mr. Chief Justice, and
10 may it please the Court:

11 In the wake of the nation's failed
12 experiment with prohibition, the Twenty-First
13 Amendment restored to the states the powers
14 that they previously had under the Wilson and
15 Webb-Kenyon Acts. In exercising those powers,
16 both before prohibition and in its immediate
17 aftermath, states enacted residency
18 requirements, like Tennessee's, to regulate the
19 sale of alcohol within their territory.

20 All along the way, this Court
21 recognized the states' power to do so as part
22 of their virtually complete control over how to
23 structure the liquor distribution system.

24 Under Granholm, that unbroken and
25 undisputed history is dispositive. Residency

1 requirements like Tennessee's are protected
2 from dormant Commerce Clause scrutiny because
3 they were authorized by the Wilson and
4 Webb-Kenyon Acts and uniformly considered
5 constitutional at the time of ratification.

6 Respondents offer --

7 JUSTICE SOTOMAYOR: Could I ask you to
8 clarify for me your position? Justice Sutton,
9 in his dissent, basically said, if your
10 legislature came and said we don't want
11 out-of-state wholesalers, distributors, or
12 retailers to be in our chain of distribution,
13 because they're going to take business away
14 from our local enterprises, period, end of
15 story -- are you saying that the state can do
16 that? Are you disagreeing with Justice -- with
17 Judge Sutton? Or do you think that there's an
18 economic protectionism -- protection against
19 what a state can do?

20 MR. DVORETZKY: So I don't think that
21 there is an economic protectionism exception to
22 the Twenty-First Amendment, but even if there
23 were one, as Judge Sutton recognized in
24 applying his test to the two-year residency
25 requirement in this case --

1 JUSTICE SOTOMAYOR: The problem is --

2 MR. DVORETZKY: -- we would still
3 prevail.

4 JUSTICE SOTOMAYOR: Well, except we
5 have a difficulty there, which is you can't
6 look at legislation piecemeal. You have to
7 look at it as a whole.

8 It was written as a whole. It's one
9 paragraph that says two years, plus 10. So
10 it's really 12 years because -- and he said
11 there's no economic justification for a 10-year
12 residency requirement. So what you have to
13 look at is not whether it's two years but
14 whether there's any reason for a 12-year
15 residency requirement. I mean, if he said no
16 to 10, then it's no to 12.

17 MR. DVORETZKY: So, Justice Sotomayor,
18 that -- that gets us into a severability
19 question. And --

20 JUSTICE SOTOMAYOR: But -- but let's
21 go back to my initial question. Yes, it does.
22 And -- and that's a separate question, and you
23 can argue that one back and forth.

24 But my fundamental question is the --
25 you believe the Twenty-First Amendment permits

1 states to discriminate against out-of-state
2 interests, then does that mean Bacchus,
3 Granholm, all our jurisprudence that has
4 invalidated certain state laws was wrong? Is
5 that -- are you suggesting we should just
6 disavow all those cases and forget them?

7 MR. DVORETZKY: No. No, we're not.
8 And let me address both Bacchus and -- and --

9 JUSTICE SOTOMAYOR: I know you want to
10 limit it to producers. But that's not the way
11 that Granholm talked about them, talked about
12 this issue, but --

13 MR. DVORETZKY: Well --

14 JUSTICE SOTOMAYOR: -- you can slice
15 and dice as much as you want, but is it your
16 position that the Twenty-First Amendment makes
17 all of our other jurisprudence wrong?

18 MR. DVORETZKY: No, it's not, and --
19 and let me explain how to harmonize it.
20 Granholm -- Granholm mandated a historical
21 test. The question in Granholm, which all nine
22 justices agreed upon, was what were the state's
23 pre-prohibition powers. Now the disagreement
24 in Granholm was about whether states could
25 discriminate against out-of-state products

1 pre-prohibition, but the framework was not an
2 economic protectionism framework; it was a
3 historical question.

4 JUSTICE SOTOMAYOR: But they could
5 have --

6 JUSTICE ALITO: Can I come back to the
7 -- what I -- where I thought Justice Sotomayor
8 started, and ask you just very simply, can a
9 state enact a 10-year residency requirement
10 and, if not, why not?

11 MR. DVORETZKY: There would not be a
12 dormant Commerce Clause problem with a 10-year
13 residency requirement. There might be some
14 other constitutional challenge to that, but it
15 would be immune from dormant Commerce Clause
16 scrutiny as long as it treated in-state and
17 out-of-state products the same.

18 JUSTICE ALITO: Okay. Suppose if it
19 was a -- a grandparents requirement. So you
20 can't -- you can't get a liquor license in
21 Tennessee unless your grandparents were
22 Tennessee residents. That would not create a
23 dormant Commerce Clause problem?

24 MR. DVORETZKY: It would not create a
25 dormant Commerce Clause problem because the

1 whole point of the Twenty-First Amendment was
2 to constitutionalize the pre-prohibition
3 powers, which included the power to
4 discriminate against out-of-state interests.

5 If you think about the -- the
6 three-tier system and the in-state wholesaler
7 requirement, for example, that this Court in
8 Granholm itself said was unquestionably
9 legitimate, that discriminates against
10 out-of-state interests.

11 JUSTICE ALITO: Okay. Just -- I mean,
12 just to understand the contours of your
13 argument, so the -- to pick up on -- on
14 something else Justice Sotomayor referred to,
15 suppose you have a state statute that says for
16 the exclusive purpose of protecting in-state
17 retailers, no -- you must be a resident of the
18 -- of the state for two years, five years, in
19 order to get a license.

20 Would that be -- would that be
21 constitutional?

22 MR. DVORETZKY: I still don't think
23 there would be a dormant Commerce Clause
24 problem with that.

25 Now, under Bacchus, if you're looking

1 at the language in Bacchus, Bacchus does talk
2 about economic protectionism, but it does so in
3 the context of a case that was discriminating
4 against out-of-state products.

5 If the rule from Bacchus --

6 JUSTICE SOTOMAYOR: Wholesalers.

7 Bacchus -- Bacchus is --

8 MR. DVORETZKY: Well, it -- it
9 involved wholesalers, but it involved a tax --
10 it involved a tax exemption that applied only
11 for in-state products rather than out-of-state
12 products. And that --

13 JUSTICE SOTOMAYOR: Well, under
14 your theory --

15 MR. DVORETZKY: -- the tax was
16 collected through the wholesalers.

17 JUSTICE SOTOMAYOR: Yeah, that's the
18 problem. I don't know why, under your theory
19 of the dormant Commerce Clause, if the state
20 can do what it wants within its borders because
21 it's regulating liquor, I don't know why our
22 cases would be right under your theory that
23 they can't put a different tax on different
24 products?

25 MR. DVORETZKY: Because, under

1 Granholm and under the history pre-prohibition,
2 states could do virtually what they wanted
3 within their borders but not everything. And
4 -- and one important carveout -- and this is
5 reflected in the text of the Wilson Act itself
6 -- is that they had -- had to treat in-state
7 and out-of-state products the same.

8 The Wilson Act itself says -- this is
9 in the blue brief at page 26; it's 27 U.S.C.
10 121 -- that states have the power to ban the
11 importation of liquor as long as they treat --
12 in violation of laws in the exercise of its
13 police powers within the state, as long as they
14 are treating liquor to the same extent and in
15 the same manner as those such liquors had been
16 produced in the state or territory. So the
17 pre-prohibition powers --

18 JUSTICE SOTOMAYOR: Then Ziffrin --
19 then Ziffrin was wrong? One of the cases you
20 rely on. Because Ziffrin was really the
21 counter to Bacchus, wasn't it?

22 MR. DVORETZKY: Uh --

23 JUSTICE SOTOMAYOR: And -- and Ziffrin
24 basically said you can discriminate in terms of
25 taxes basically.

1 MR. DVORETZKY: But not based on
2 products. And the -- the key point from
3 Bacchus was that it was about discrimination
4 based on products.

5 If the rule that came out of Bacchus
6 were just a straight economic protectionism
7 test, Granholm would have been a much easier
8 case. Granholm could have been written by
9 saying the question is, do the Michigan and New
10 York laws at issue -- are they meant to protect
11 in-state producers or not?

12 That wasn't the analysis that Granholm
13 used. Instead, again, Granholm set forth this
14 historical test that required the court to look
15 back at the pre-prohibition powers.

16 And the -- the Wilson and Webb-Kenyon
17 Acts, first of all, empowered states to
18 regulate interstate shipment of alcohol so long
19 as they treated in-state and out-of-state
20 alcohol the same. And then, second, at that
21 time, pre-prohibition, states also had the
22 inherent authority to regulate in-state sales.

23 So, combined, that meant that states,
24 pre-prohibition, were free to structure the
25 in-state liquor distribution systems free from

1 Commerce Clause scrutiny, again, as long as
2 they treated in-state and out-of-state
3 products the same.

4 JUSTICE BREYER: Does it apply the
5 Commerce Clause? I mean, if you go back to
6 1920, maybe they said you can only be sold on
7 the basis of race or the basis of gender or
8 some -- I mean, it can't be 100 percent
9 whatever they did in 1920.

10 MR. DVORETZKY: Well, that's right,
11 but that's because the Twenty-First Amendment
12 and the pre-prohibition powers that we're
13 talking about are -- are powers related to
14 overriding the dormant Commerce Clause
15 specifically, not other constitutional
16 provisions like the First Amendment or -- or
17 partially these others.

18 JUSTICE BREYER: So now, in other
19 words, your position, your view is all the
20 other amendments apply, okay, the Commerce
21 Clause applies too as long as it wasn't part of
22 the distribution system in the Wilson Act.

23 MR. DVORETZKY: And -- and that --

24 JUSTICE BREYER: But, if it's part of
25 the distribution of the Wilson Act, then it's

1 free of Commerce Clause, but, otherwise, it's
2 subject to it, and it's also subject to
3 everything else.

4 MR. DVORETZKY: Well, I -- I wouldn't
5 quite --

6 JUSTICE BREYER: Is that -- is that
7 basically -- have I got it basically right?

8 MR. DVORETZKY: No. I -- I wouldn't
9 quite say we're looking at the distribution
10 system pre the Wilson Act. But the Wilson and
11 Webb-Kenyon Acts, which were constitutionalized
12 in the Twenty-First Amendment, were all about
13 permitting states to act in ways that did
14 restrain commerce, but they weren't about
15 permitting states to act in ways that violated
16 the First Amendment or other, you know,
17 individual rights, for example.

18 And so -- and --

19 JUSTICE SOTOMAYOR: So that's where
20 you're wrong because the law then did provide
21 for racial discrimination, and there's nothing
22 in the provision that limits itself to the
23 Commerce Clause.

24 It just says: The transportation or
25 importation into any state, territory, or

1 possession of the United States for delivery or
2 use therein of intoxicating liquors in
3 violation of the laws thereof is hereby
4 prohibited.

5 I don't actually see in that any
6 reference to the Commerce Clause or to any
7 other limiting principle. Yet we have cases
8 that have found limiting principles.

9 MR. DVORETZKY: Yes. But this Court's
10 cases, including the ones that have found
11 limiting principles, and Granholm itself, all
12 explain that the Twenty-First Amendment has to
13 be understood in light of what it was trying to
14 achieve, which was constitutionalizing these
15 statutes. And these statutes were dealing with
16 commerce, notwithstanding their broad language.

17 The problem that they were trying to
18 solve and the state powers that they were
19 trying to protect were related to powers
20 because --

21 JUSTICE SOTOMAYOR: All right. Let me
22 -- let me ask something about that. I do
23 understand that the Twenty-First Amendment was
24 geared towards giving states greater freedom in
25 controlling the distribution and sale of liquor

1 in their jurisdiction.

2 But I'm having a hard time
3 understanding how the residency requirement
4 does when it comes to a person's pre-existing
5 residency. So, yes, we understand that having
6 someone there who's responsible to the
7 community is necessary. That was inherent in
8 the three-tier system.

9 But why is it inherent in the
10 three-tier system that you have to have someone
11 who's only a local do it? There are many
12 states whose three-tier system doesn't require
13 that. They function fairly well.

14 I -- I don't understand the necessity
15 of that.

16 MR. DVORETZKY: So, first, I don't
17 think the question is whether it's necessary or
18 not. The point of the Twenty-First Amendment
19 is the courts aren't supposed to impose that
20 kind of scrutiny. States get to decide what
21 distribution system works within their state.

22 JUSTICE SOTOMAYOR: Well, we just --

23 MR. DVORETZKY: There's no one size
24 fits all solution.

25 JUSTICE SOTOMAYOR: I -- I agree. But

1 there are some parts of the discrimination part
2 of the -- of the Commerce Clause that we --
3 today still affect this.

4 You're saying they can't use it to
5 violate the First Amendment. We've said you
6 can't use it to discriminate against products,
7 although nothing in here says you can't do
8 that.

9 I'm -- I'm having a hard time
10 understanding. Explain to me why it's
11 necessary.

12 MR. DVORETZKY: Let -- let -- let me
13 make two points. One, just quickly going back
14 to your earlier question about the text of the
15 Twenty-First Amendment, the text does refer to
16 the delivery or use of alcohol. So that --
17 that is invoking the sort of Commerce Clause
18 concern that the history confirms.

19 But, to get to your other question
20 about the purposes of a durational residency
21 requirement, everybody agrees that a residency
22 requirement of some sort is constitutional,
23 notwithstanding that it would otherwise raise
24 Commerce Clause concerns.

25 And the durational component of a

1 residency requirement serves very much the same
2 interests. For example, residency requirements
3 are important because they allow states to
4 conduct background checks. Having somebody be
5 a -- a resident for a longer period of time
6 allows the -- those who decide whether to issue
7 licenses to actually observe the person and to
8 observe the person's character and give the --
9 the state a better ability to decide whether to
10 issue a license and to conduct the background
11 check. Likewise --

12 JUSTICE ALITO: Well, now you're --
13 you're arguing that they serve a public health
14 and safety purpose, and -- but I thought you --
15 you answered my previous question by saying it
16 doesn't matter. If the only purpose of the --
17 of the regulation -- and this is spelled out
18 right in the statute itself -- is economic
19 protectionism, that does not create a dormant
20 Commerce Clause problem because the
21 Twenty-First Amendment gave the states that
22 authority.

23 MR. DVORETZKY: So -- so I think
24 that's right. I think there's no historical
25 pedigree for an economic protectionism sort of

1 exception. If the Court were to engage in
2 that, it would essentially be a standardless
3 inquiry that would --

4 JUSTICE ALITO: Well, I think you're
5 turning -- maybe you're turning it around, and
6 maybe my understanding of history is wrong, so
7 you'll correct me, but I thought that the
8 purpose of the Eighteenth Amendment was a
9 determination by those who adopted it and
10 ratified it that alcohol created a public
11 health and safety problem.

12 And I thought the purpose of the --
13 the -- the Twenty-First Amendment and Section 2
14 of the Twenty-First Amendment was to say this
15 is a determination, the public health and
16 safety determination is not going to be made on
17 the national level. It's going to be made by
18 the states. But none of that seems to me to
19 have anything to do with economic
20 protectionism.

21 But where am I wrong in that? What is
22 the -- what is the -- the basis for thinking
23 that the purpose of or a purpose of Section 2
24 of the Twenty-First Amendment was to authorize
25 the states in this one area, dealing with

1 alcohol, to engage in protectionist activities
2 that wouldn't be permitted with respect to any
3 other commodity?

4 MR. DVORETZKY: I -- I don't think the
5 purpose was specifically to allow protectionist
6 activity. But I do think that the purpose was
7 to shield state laws from scrutiny under the
8 dormant Commerce Clause.

9 And for sure, one way that states
10 might exercise that authority would be economic
11 protectionism. But there's no historical
12 pedigree for that kind of a carveout from what
13 is otherwise virtually complete authority for
14 states to legislate in this area free from
15 dormant Commerce Clause scrutiny.

16 JUSTICE KAVANAUGH: When you --

17 MR. DVORETZKY: If the court --

18 JUSTICE KAVANAUGH: When you say
19 virtually complete authority, and you've said
20 several times the point of the Twenty-First
21 Amendment, the purpose of the Twenty-First
22 Amendment, the problem that I'm having in
23 thinking about this is the text -- the text of
24 the Twenty-First Amendment does not support
25 that, as I read it.

1 You mentioned delivery or use, but it
2 doesn't just say the states have complete
3 authority over delivery or use. It's talking
4 about the transportation or importation into
5 any state.

6 And why isn't that most naturally read
7 to allow states to remain dry and, therefore,
8 ban transportation or importation, but not to
9 otherwise impose discriminatory or, as Justice
10 Alito says, protectionist regulations?

11 MR. DVORETZKY: Two points in response
12 to that, Justice Kavanaugh.

13 First, the Twenty-First Amendment has
14 to be read against the backdrop of the inherent
15 authority that states already had to regulate
16 the distribution systems within their system.

17 The Twenty-First Amendment didn't need
18 to say that expressly because it was understood
19 at the time.

20 Second, this Court in *Midcal* said --
21 and this is --

22 JUSTICE KAVANAUGH: Wait. I'm going
23 to stop you there. I'm sorry. Where -- where
24 do you get that -- that idea that it somehow --
25 the backdrop was to give the states authority

1 to enact protectionist legislation or
2 legislation that discriminated against
3 out-of-state producers, retailers, wholesalers?

4 MR. DVORETZKY: So -- so I direct you
5 to Judge Sutton's dissent in the Sixth Circuit,
6 which walks through the understanding of state
7 authority -- of state authority at that time.

8 JUSTICE KAVANAUGH: I -- I -- I've
9 gone through all that, and I -- and I don't see
10 that in the Webb-Kenyon Act, that the -- the
11 things that led up to that were not the -- the
12 Act was not, as I understood it, enacted to
13 enable states to enshrine protectionist
14 legislation into state law.

15 MR. DVORETZKY: Those -- those
16 statutes were enacted in order to avoid
17 circumvention of certain inherent state powers
18 by importing product into the --

19 JUSTICE KAVANAUGH: When they wanted
20 to -- when they wanted to remain dry states, as
21 I understood it.

22 MR. DVORETZKY: But, when the
23 Twenty-First Amendment was enacted, obviously,
24 that was the end of prohibition. But it also
25 restored to the states powers that they

1 previously had to regulate -- regulate
2 authority within their borders.

3 I'd also direct the Court to Midcal,
4 this is at 445 U.S. at 106, which said that
5 although the Twenty-First Amendment on its face
6 gives the states control over the
7 transportation or importation, such control
8 logically entails considerable regulatory power
9 not strictly limited to importing and
10 transporting alcohol.

11 That too is referring to the Court's
12 -- to the state's inherent power to regulate
13 the systems within their states.

14 If I may reserve the remainder of my
15 time.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 General Franklin.

19 ORAL ARGUMENT OF DAVID L. FRANKLIN FOR
20 ILLINOIS, ET AL., AS AMICI CURIAE, IN
21 SUPPORT OF THE PETITIONER

22 MR. FRANKLIN: Mr. Chief Justice, and
23 may it please the Court:

24 This Court has repeatedly stated, most
25 recently in Granholm itself, that Section 2 of

1 the Twenty-First Amendment gives states
2 virtually complete control over how to
3 structure their domestic liquor distribution
4 systems.

5 Now questions have obviously arisen
6 already this morning about whether residency
7 requirements were -- were part of that
8 structure. And they were.

9 We know that, for example, from the
10 Vance case in 1898. The -- the Court's
11 discussion there is very instructive. Vance
12 involved the South Carolina dispensary law, but
13 the Court there said the dispensary law was
14 comparable to a situation in which a state
15 required for a retail license that the retailer
16 be a resident of that state.

17 And the Court treated that situation
18 as so self-evidently valid that it used that as
19 the basis for upholding the South Carolina law
20 by saying any rule that would question that --

21 JUSTICE KAGAN: Mr. --

22 MR. FRANKLIN: -- just couldn't be the
23 law.

24 JUSTICE KAGAN: Mr. Franklin, you're
25 representing quite a number of states,

1 including Tennessee, I guess. Maybe?

2 These states have very varying
3 residency requirements. And I want to take you
4 back to Justice Alito's question. Tennessee
5 appears to be on one end of the spectrum. And
6 is there anything in your argument that would
7 give us a way to say, you know, when there's a
8 12-year residency requirement, when there's a
9 100 percent shareholder requirement, these have
10 stopped being public health and safety
11 measures; these are clearly protectionist and
12 we should not allow those to occur?

13 MR. FRANKLIN: Well, I agree with my
14 co-counsel that there wouldn't be a dormant
15 Commerce Clause claim there because the
16 Twenty-First Amendment, as he stated, was
17 designed to supplant or displace dormant
18 Commerce Clause analysis.

19 Now there may come a point where the
20 residency requirement is so extreme or so
21 excessive as to be truly arbitrary, and then it
22 could fail the Fourteenth Amendment's
23 background presumption all --

24 JUSTICE KAGAN: Well, it's not
25 arbitrary if you are intending to promote

1 economic protectionism. And as I understand
2 your position, it's that that's part of the
3 states' prerogatives too.

4 And then, you know, the sky is the
5 limit. Every -- the more you do, the more
6 protectionist it gets.

7 MR. FRANKLIN: Well, for example, it's
8 our position in this case that the interplay
9 between the initial two-year residency
10 requirement for a license under Tennessee law
11 and the 10-year renewal requirement, it's hard
12 to see a rational basis for that. It seems
13 like a trap for the unwary.

14 That -- that's not a dormant Commerce
15 Clause problem, but it could be a violation of
16 the background rationality --

17 JUSTICE KAVANAUGH: Why --

18 MR. FRANKLIN: -- minimal rationality
19 requirement under the Fourteenth amendment.

20 JUSTICE KAVANAUGH: Why is that? To
21 pick up on Justice Kagan's question, economic
22 protectionism is rational. It's -- and in
23 certain circumstances, it's disputed, but it's
24 rational, and maybe a dormant Commerce Clause
25 problem. And you're saying no, it's no dormant

1 Commerce Clause problem.

2 Then it would seem -- I'm repeating
3 Justice Kagan now -- the sky is the limit.

4 MR. FRANKLIN: My comment went simply
5 to the interplay between --

6 JUSTICE KAVANAUGH: I know.

7 MR. FRANKLIN: -- the initial
8 requirement and the subsequent requirement.

9 JUSTICE KAVANAUGH: Yeah, but the 12
10 years, no dormant Commerce Clause problem, you
11 said, and the rationality argument would be
12 that it's designed to favor in-state retailers.
13 That's rational.

14 MR. FRANKLIN: Our position would
15 simply be that, at some point down the line,
16 there -- there could be a failure of minimal
17 rationality.

18 JUSTICE GORSUCH: I guess --

19 MR. FRANKLIN: But that's certainly
20 not the case with respect to the two-year
21 requirement that the --

22 JUSTICE GORSUCH: Well, General, I
23 guess the question is, if -- if -- if you're
24 conceding that much, what's the delta? What's
25 the difference between what the dormant

1 Commerce Clause would otherwise disallow and
2 what I -- I take it to -- to be your position
3 the Equal Protection Clause would -- would
4 permit?

5 If it's -- if it's irrational under
6 one, why is it rational under the other? And
7 are we just going to re-create our dormant
8 Commerce Clause jurisprudence elsewhere?

9 MR. FRANKLIN: Well, I do think it
10 would be a mistake to re-create the dormant
11 Commerce Clause elsewhere because --

12 JUSTICE GORSUCH: Presumably.

13 MR. FRANKLIN: Right.

14 JUSTICE GORSUCH: But why? Isn't that
15 exactly the invitation you're issuing us
16 through this concession?

17 MR. FRANKLIN: I -- I don't think so.
18 All -- all legislation is subject to the
19 Fourteenth Amendment's background requirement
20 of minimal rationality. We don't think we're
21 close to that here.

22 And the protectionism lens is just the
23 wrong lens through which to look at this issue.

24 JUSTICE BREYER: Suppose you -- law:
25 Any liquor store has to use paint made in

1 Tennessee, asphalt made in Tennessee for the
2 parking lot, neon -- you know, I can go on.

3 (Laughter.)

4 MR. FRANKLIN: I -- I -- I suppose at
5 some point, if we're talking about the use of
6 paint, then we're really getting pretty far
7 afield from the state's structuring the
8 in-state distribution and sale.

9 JUSTICE BREYER: And so there's just
10 as good a reason for saying the out-of-state
11 owner has to be -- live here for 12 years, as
12 there is to say paint. In fact, a better
13 reason because Tennessee paint's really good.

14 (Laughter.)

15 MR. FRANKLIN: But this -- the statute
16 here, Your Honor, goes to the question of who
17 can sell to whom and on what terms. That's
18 always been at the heartland of what the
19 Twenty-First Amendment was meant to protect,
20 the state's ability to structure the intrastate
21 sale of its product.

22 JUSTICE KAGAN: I -- I guess,
23 Mr. Franklin, the -- that a question that
24 followed from my last is wouldn't it be a
25 better idea if we said the dormant Commerce

1 Clause does apply, and then let the state come
2 back and say we can meet that test; we have
3 real health and safety concerns here, and our
4 law is well tailored to address those concerns.

5 And so it's not a dormant Commerce
6 Clause violation.

7 MR. FRANKLIN: I -- I think that
8 approach, which is essentially Judge Sutton's
9 approach, would still embroil the courts in the
10 kind of line drawing that the Twenty-First
11 Amendment was designed to relieve them of by --
12 by creating what this Court has called an
13 exception to the normal operation of the
14 dormant Commerce Clause. It would be at odds
15 with the broad regulatory discretion that's --
16 that's conferred by the Twenty-First Amendment.

17 But -- but it's -- I think it's
18 important to note also that the Respondents'
19 approach -- which is not that approach, right?
20 Their approach says no discrimination of any
21 kind under the Twenty-First Amendment.

22 And that approach really would leave
23 the Twenty-First Amendment with no meaningful
24 role to play in our modern constitutional
25 order.

1 Think about the three-tier system for
2 a moment. This Court described it in Granholm
3 not only as unquestionably legitimate but also
4 as involving sales to and purchases from an
5 in-state wholesaler.

6 Now that arrangement disadvantages
7 out-of-state business interests. It wouldn't
8 fly if we were talking about milk or trash.
9 But this Court has treated it as unquestionably
10 legitimate because it's part of the state's
11 choice about how to structure the in-state sale
12 of this particularly dangerous product that has
13 distinctive constitutional treatment under the
14 Twenty-First Amendment.

15 In the end, Respondents are asking
16 this Court to treat alcohol like any other
17 article of commerce. But it's not. It was
18 actually 100 years ago today that the
19 Eighteenth Amendment was -- was finally
20 ratified. And 14 years after that failed
21 experiment, the Twenty-First Amendment restored
22 to the individual states their broad police
23 powers over delivery and sale of this product
24 within their borders so long as they treated
25 out-of-state and in-state products the same.

1 And that proviso comes directly from
2 the text of the Wilson Act, which was
3 Congress's instruction as to how and to what
4 extent to overturn this Court's original
5 package doctrine case law from the late 19th
6 Century. That was the line Congress drew and
7 no further.

8 Granholm drew the same line. It said
9 we're not going to import all of the dormant
10 Commerce Clause's non-discrimination principles
11 into the Twenty-First Amendment, but we are
12 going to import so much of it as the historical
13 analysis and the Wilson Act require.

14 JUSTICE ALITO: As Justice Kavanaugh
15 pointed out in an earlier question, the
16 Twenty-First Amendment is about the
17 transportation or importation of alcohol into a
18 state.

19 How do you get from there to a
20 durational residency requirement that is
21 imposed on the owner of a retail outlet in the
22 state? Suppose I am not a resident of
23 Tennessee and I want a license to operate an
24 entity that will sell only Tennessee whiskey.
25 How would that fall within the terms of the

1 Twenty-First Amendment?

2 MR. FRANKLIN: Well, if I can quote
3 from Midcal in the way that my colleague was
4 beginning to do, what the Court said there is
5 very instructive. It said yes, in terms, the
6 amendment gives states control over
7 transportation and importation. But, of
8 course, such control -- I'm quoting still --
9 logically entails considerable regulatory power
10 not strictly limited to importing and
11 transporting alcohol.

12 It's true, in other words, that the
13 Twenty-First Amendment speaks of importation,
14 though it also speaks of delivery and use, but
15 it does so --

16 JUSTICE ALITO: It speaks of
17 transportation for the purpose of delivery or
18 use.

19 MR. FRANKLIN: For the purpose of
20 protecting the state's ability to control the
21 terms on which delivery or use will take place
22 within its borders. And that's exactly what's
23 at issue here.

24 The Twenty-First Amendment, in other
25 words, presupposes and safeguards the state's

1 broad control over intrastate distribution and
2 sale. And this Court has said that repeatedly.

3 Granholm and -- and Bacchus are not to
4 the contrary. What they do is undertake a
5 historical analysis and recognize a proviso to
6 that. But the broad rule still stands: States
7 have virtually complete control over intrastate
8 distribution and sale.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 General Franklin.

11 Mr. Phillips.

12 ORAL ARGUMENT OF CARTER G. PHILLIPS
13 ON BEHALF OF THE RESPONDENTS

14 MR. PHILLIPS: Thank you, Mr. Chief
15 Justice, and may it please the Court:

16 I think I'd like to start with the
17 history because it seems to me that there's a
18 fundamental difference here, and this Court
19 actually has answered the question of what the
20 history of the Wilson Act and the Webb-Kenyon
21 Act and the Twenty-First Amendment was designed
22 to get at.

23 And the language of the Twenty-First
24 Amendment speaks directly to exactly what the
25 purpose of this entire exercise was.

1 The problem that the two federal
2 statutes were designed to deal with was the
3 fact that states had complete authority to say
4 we're not going to allow any use or sale of
5 alcohol within our states and had absolutely
6 no authority to stop the import from other
7 states of -- of alcohol.

8 In the first instance, in the
9 original package doctrine, they could sell it
10 to retailers, and then, ultimately, beyond that,
11 they could sell it directly to consumers. And
12 the statutes were passed to stop that specific
13 practice.

14 And -- and then we go to the
15 prohibition, which, as somebody already noted, is
16 exactly 100 years ago today. And then we come
17 back and we repeal the prohibition. And the
18 language in Section 2 tracks very closely the
19 language and the intention. It's not designed
20 -- it's not a grant of authority. It's a
21 protection against allowing out-of-state
22 operators to come in and sell directly liquor
23 under certain circumstances.

24 That was the entire purpose of it.
25 that's what the Court held in Bacchus, and

1 that's what the Court held in -- in Granholm.
2 Bacchus said it was not the -- I'll quote it
3 -- "doubts about the scope of the amendment's
4 authorization, Section 2, notwithstanding, one
5 thing is certain, the central purpose of the
6 provision was not to empower states to favor
7 local liquor industries by erecting barriers to
8 competition."

9 Candidly, I don't know that the
10 Court had to go past Bacchus when it decided
11 Granholm because those statutes were clearly
12 just as economically protectionist as this one
13 is, but the principle from Bacchus is, if a
14 statute has no purpose, and this statute has no
15 purpose except to be protectionist of the local
16 industries, it's unconstitutional.

17 JUSTICE KAGAN: Is that your standard?
18 Because you seem to slide back and forth a
19 little bit between standards in your brief --
20 or -- or I thought that you did maybe.

21 If -- if a state can come forward with
22 any purpose other than protectionism, the state
23 wins?

24 MR. PHILLIPS: No, no. It's when the
25 state doesn't come forward with anything except

1 protectionism, the state loses.

2 JUSTICE KAGAN: Well, suppose a state
3 comes forward and says: We like this because
4 it's protectionist. We were trying to do --

5 MR. PHILLIPS: Right.

6 JUSTICE KAGAN: -- some protectionist
7 things. And we also, coincidentally, we found
8 a way that our protectionist interests matched
9 up completely with our health and safety
10 interests.

11 MR. PHILLIPS: Right.

12 JUSTICE KAGAN: What happens then?

13 MR. PHILLIPS: Then you're in
14 Granholm. And that's -- that's where -- I
15 mean, Granholm, I think, could have concluded
16 anyway that the statutes involved there were
17 really just economic protectionism and not gone
18 beyond it, but it did go beyond that.

19 And what it said is, if, in fact, the
20 state is engaged in discrimination under the --
21 under normal Commerce Clause standards, it's
22 presumptively unconstitutional, and the state
23 must come forward and justify the
24 discrimination on the basis of
25 non-discriminatory, less restrictive means of

1 achieving the same objective.

2 And under that standard -- and that's
3 -- I'm perfectly comfortable with the standard,
4 because there's no doubt that what we're
5 talking about here is rank discrimination on
6 the basis of commerce.

7 JUSTICE BREYER: The -- the argument
8 -- look, it also says in Granholm that the
9 Twenty-First Amendment grants the states
10 virtually complete control as to how to
11 structure the liquor distribution system.

12 MR. PHILLIPS: Right.

13 JUSTICE BREYER: We have previously
14 recognized that the three-tier structure is
15 unquestionably legitimate. And then we go back
16 into the history. And it's just history, but
17 it is history. And -- and we discover that the
18 states, the vast majority, always have had
19 rules like the Tennessee rule. And, today, 34
20 states, apparently, according to my -- our
21 count, have rules just like this, except maybe
22 not the same number of years.

23 MR. PHILLIPS: Oh, I --

24 JUSTICE BREYER: And so -- so this
25 amendment was enacted against a history. This

1 Court has several times say we honor that
2 history. And the history favors the other
3 side. So -- so what do we do about that?

4 MR. PHILLIPS: Well, I don't think the
5 history does favor the other side, first of
6 all.

7 JUSTICE BREYER: Why not?

8 MR. PHILLIPS: I -- it's pretty clear
9 to me there's nowhere near 34 states that have
10 durational residency requirements.

11 JUSTICE BREYER: Well, that may be,
12 but they say you have to be a resident on some
13 form or other.

14 MR. PHILLIPS: Right.

15 JUSTICE BREYER: But there are a lot.

16 MR. PHILLIPS: And my -- and my client
17 is here, as I -- as we say in our brief --
18 actually, both of our clients are here to say
19 we -- we -- we are not challenging the
20 three-tier system. All we are seeking is the
21 opportunity to compete into this market.

22 JUSTICE SOTOMAYOR: See, I -- I -- the
23 problem I have is it seems -- I don't think
24 that you would challenge a state -- the state's
25 residency requirement moving forward, meaning

1 that almost all of the states require their
2 wholesalers, distributors, and retailers to be
3 resident in the state.

4 MR. PHILLIPS: Or present. Some say
5 present; some say resident.

6 JUSTICE SOTOMAYOR: Present. But
7 pretty much you're not challenging that.

8 MR. PHILLIPS: I do not challenge that
9 whatsoever.

10 JUSTICE SOTOMAYOR: So now the
11 challenge seems to me why is a pre-registration
12 or pre-licensing residency requirement of the
13 normal length, one or two years, because I
14 think even the dissent below thought the 14 was
15 too -- the 12 was too long, all right, but
16 let's concentrate on the two. Let's do the
17 severability your adversary wants.

18 MR. PHILLIPS: Right. Sure.

19 JUSTICE SOTOMAYOR: Why is that two
20 years not reasonable --

21 MR. PHILLIPS: Okay.

22 JUSTICE SOTOMAYOR: -- given the
23 history of what other states have done, et
24 cetera, et cetera?

25 MR. PHILLIPS: Okay. So the -- the

1 core principle that's embedded in here, right,
2 is the -- is that there's a non-discrimination
3 principle. And so adopting a durational
4 residency requirement is, by definition,
5 discriminating against out-of-state interests.

6 And unless you're going to limit it
7 just to producers, which is an irrational
8 limitation this Court's never adopted with
9 respect to any Commerce Clause analysis, we are
10 being discriminated against. And, therefore,
11 it's the state's burden to come forward and to
12 justify that discrimination.

13 There is no rational basis for the
14 two-year ban that they've put in place here.
15 The Tennessee attorney general himself has
16 twice looked at this ban and said it doesn't
17 remotely serve any purpose that's designed
18 under the Twenty-First Amendment when we're
19 dealing with alcohol or public safety or public
20 health or anything else. It's only designed to
21 exclude us.

22 JUSTICE SOTOMAYOR: Except for the
23 attorney general may -- may represent the
24 government, but the legislature gave a reason.

25 MR. PHILLIPS: And -- and the reason

1 it gave was, because this is alcohol, we're
2 protecting the public interest. That's fine.
3 But that doesn't remotely explain the two-year
4 durational residency requirement.

5 That just explains all of the other
6 regulations that were adopted at the same time,
7 including the 12-year residency requirement.

8 So that -- it's their burden, and they
9 should come forward not just in making
10 statements to the legislature, they can come
11 into court -- and that's what Granholm says.
12 Look, you discriminate against out-of-state
13 interests. That triggers a burden on the state
14 to justify the limitation -- the discrimination
15 that it's imposed. And what does it say? In
16 this case, it said absolutely nothing.

17 It didn't -- it didn't file a single
18 affidavit. It didn't put forward any kind of a
19 witness. It didn't put on any defense
20 whatsoever. And the reason is pretty clear.

21 The sole purpose of this statute was,
22 as my friend here who -- who represents the
23 retailers association proves beyond any
24 question, what this is designed to do is be
25 exclusively protectionist, which is why in some

1 places we say that's a basis for the Court to
2 reach the decision, because this is exclusively
3 protectionist, but, if you don't accept that,
4 our fall-back position is Granholm requires
5 them to come forward with more than they have
6 come forward with.

7 JUSTICE SOTOMAYOR: Let's have --

8 JUSTICE BREYER: The same question.

9 MR. PHILLIPS: I'm sorry.

10 JUSTICE BREYER: That is, yes, of
11 course, but to have -- to be able to have what
12 is called the three-tier system is
13 unquestionably legitimate.

14 MR. PHILLIPS: Right.

15 JUSTICE BREYER: Virtually complete
16 control over how to structure liquor
17 distribution. A liquor distribution system
18 employs people.

19 And how can you structure -- you can,
20 but you could structure a liquor system
21 involving the people who are to work there.
22 The people who are to work there are an
23 integral part of such a system.

24 MR. PHILLIPS: Right.

25 JUSTICE BREYER: And, therefore, given

1 the case law and the history and the absence of
2 any discrimination forbidden by others, this
3 has been the law for 100 years. Don't change
4 it. Not all law makes that much sense.

5 (Laughter.)

6 JUSTICE BREYER: And there we are.

7 MR. PHILLIPS: But this law does make
8 sense because everything you're talk --

9 JUSTICE BREYER: I mean, you want to
10 say their -- their law -- you want to say their
11 law does make sense?

12 MR. PHILLIPS: No. What I'm saying is
13 that if they can apply the other kinds of -- of
14 restrictions equally to both in-state operators
15 and out-of-state operators, we don't have any
16 problem with that.

17 So, if your question to go back to
18 your hypothetical about paint is if they say:
19 If you're an in-state operator, you've got to
20 -- you have to have green walls, and you're an
21 out-of-state operator you have to have green
22 walls, we have no quarrel with that.

23 Our concern is that this is a
24 blatantly discriminatory statute. And --

25 JUSTICE GORSUCH: Well, Mr. Phillips,

1 I -- I -- I -- if we were here on a dormant
2 Commerce Clause case --

3 JUSTICE BREYER: It would be easy.

4 JUSTICE GORSUCH: -- it would be easy,
5 right?

6 MR. PHILLIPS: We'd be done.

7 JUSTICE GORSUCH: Right. But I -- I'm
8 stuck where Justice Breyer is, and I just want
9 to give you another opportunity --

10 MR. PHILLIPS: Okay.

11 JUSTICE GORSUCH: -- to discuss the
12 history here. Alcohol has been treated
13 differently --

14 MR. PHILLIPS: Right.

15 JUSTICE GORSUCH: -- than other
16 commodities in our nation's experience for
17 better or worse. And -- and we have the
18 Twenty-First Amendment. We have the Heublein
19 decision, for example, in 1972 that required
20 the use of a resident representative to sell
21 alcohol.

22 MR. PHILLIPS: A presence.

23 JUSTICE GORSUCH: Yeah. And I didn't
24 see you address that case anywhere in your
25 brief. And I -- I just want to give you one

1 more shot --

2 MR. PHILLIPS: Sure.

3 JUSTICE GORSUCH: -- at the -- at the
4 history --

5 MR. PHILLIPS: Yeah.

6 JUSTICE GORSUCH: -- and dealing with
7 the Wilson Act and Webb Act and --

8 MR. PHILLIPS: Thank you, Justice
9 Gorsuch.

10 JUSTICE GORSUCH: -- those sorts of
11 things.

12 MR. PHILLIPS: Appreciate the
13 opportunity.

14 The case that, it seems to me, speaks
15 directly to this really is Walling versus
16 Michigan. It predates the Wilson Act. It
17 predates Webb-Kenyon. It specifically says
18 categorically that you cannot -- states cannot
19 discriminate against out-of-state sellers by
20 imposing a tax on them.

21 And I guarantee you that under the --
22 under the approach offered by my friends on the
23 other side, they read the Twenty-First
24 Amendment to say: Of course, you can impose a
25 tax on them because you're regulating the sale

1 of alcohol, and if you regulate the sale of
2 alcohol on a wholesaler, under those
3 circumstances, you can put a billion-dollar tax
4 on him as long as it's within the Twenty-First
5 Amendment, and that's constitutional.

6 And that predates all of these things.
7 And nothing in the Wilson Act, nothing in the
8 Webb-Kenyon Act, and certainly nothing in the
9 Second Amendment -- Second -- or the
10 Twenty-First Amendment was designed to overrule
11 Walling.

12 And, indeed, this Court said in
13 Granholm, Granholm specifically, that that case
14 and Scott -- and the third case whose name is
15 going to escape me -- Tiernan, all three
16 survived Section 2 of the Fourteenth Amendment.

17 So while it is true that they can --
18 they can -- they have virtual control --
19 virtually control -- virtual control is
20 something else -- they have the ability to
21 control the structure, that's simply a
22 recognition of the three-tiered system.

23 And just to go back to the history,
24 what's the -- what's the purpose of the
25 three-tiered system? It's to avoid the tied

1 sales arrangement that gave rise to the
2 prohibition in the first place.

3 You want to have three distinct
4 levels, you know, the -- the producers, the
5 wholesalers, and the retailers.

6 JUSTICE KAVANAUGH: So that the
7 three --

8 MR. PHILLIPS: They're not
9 interrelated -- interrelated.

10 JUSTICE KAVANAUGH: -- the three-tier
11 system does not necessarily, in your view,
12 entail favoritism of in-state interests?

13 MR. PHILLIPS: It probably has some --

14 JUSTICE KAVANAUGH: Doesn't it do
15 that?

16 MR. PHILLIPS: -- some advantages but
17 not -- not that is inherent to it.

18 JUSTICE KAVANAUGH: Because when we're
19 talking --

20 JUSTICE GORSUCH: Isn't -- isn't --
21 isn't that the next case --

22 JUSTICE KAVANAUGH: -- the paragraph
23 that Justice --

24 MR. PHILLIPS: I'm sorry?

25 JUSTICE GORSUCH: No, I'm sorry.

1 JUSTICE KAVANAUGH: The paragraph that
2 Justice Breyer's referred to multiple times
3 also has a quote from a Justice Scalia
4 concurrence which that says the Twenty-First
5 Amendment empowers the state to require that
6 all liquor be sold by an in-state wholesaler.

7 In other words, that is interpreting
8 the three-tiered system, I think, to entail
9 favoritism of in-state interests.

10 MR. PHILLIPS: Right. But -- but,
11 see, we -- we would regard ourselves as an
12 in-state retailer within the meaning of that.
13 We have satisfied every condition necessary to
14 -- to operate in state, with a presence in
15 state of a very large facility that can be
16 examined, can be determined to be in
17 compliance, can satisfy every single one of the
18 state's vast requirements.

19 JUSTICE GORSUCH: But, Mr. Phillips,
20 I'd agree with you on that, but I would think
21 that the next case would be -- much as we've
22 reexamined Quill, for example, and the
23 requirement of physical presence in state, that
24 the next lawsuit would be that, yes, this
25 three-tier system is, in fact, discriminatory

1 by requiring some sort of physical presence in
2 state.

3 And under the dormant Commerce Clause
4 jurisprudence, you have a point. You have a
5 good point. So I -- why isn't this just the
6 camel's nose under the tent?

7 MR. PHILLIPS: Well, if only because,
8 under these circumstances, as the camel at
9 least, or I guess I'm the nose of the camel,
10 that's not what I'm looking for.

11 JUSTICE GORSUCH: I think you may be,
12 yes.

13 (Laughter.)

14 MR. PHILLIPS: I am not -- that's --
15 that's -- you know, it is fundamentally at odds
16 with my client's business model to be looking
17 to undo the three-tier principle.

18 JUSTICE GORSUCH: But isn't the next
19 business model just to -- to try and operate as
20 the Amazon of -- of liquor?

21 MR. PHILLIPS: No, Amazon wants to
22 operate --

23 JUSTICE GORSUCH: Or --

24 MR. PHILLIPS: -- as the Amazon of
25 liquor or may at some point. No, my client

1 operates on a -- on a more -- on a
2 brick-and-mortar business model that says we're
3 perfectly comfortable operating within the
4 sphere of regulation that the state imposes on
5 every in-state operator. And all we are
6 seeking to have is not to be discriminated
7 against.

8 JUSTICE BREYER: All right. That's
9 totally rational to me.

10 MR. PHILLIPS: I appreciate that.

11 JUSTICE BREYER: I look at the
12 Webb-Kenyon Act, 1913, and it says you can't
13 send liquor into a state if it's going to be
14 possessed or sold in a -- in any manner used in
15 violation of any law of the state.

16 Now "any," well, maybe we can work
17 with that, but we know at the time that these
18 states did all, or 30 or 20 or 50, have laws
19 that said when you, in fact, structure your
20 distribution system in our state, you have to
21 have local residents. That's one of our
22 employee requirements.

23 So, when they passed Webb-Kenyon, did
24 they mean all of them except that one? And
25 there could have been a lot that were, in fact,

1 violation of dormant Commerce Clause. That --
2 that's where I'm -- I -- I -- I get all the
3 arguments, but I'm worried about that history.

4 MR. PHILLIPS: Well, Justice Breyer,
5 you know, I don't know how you can just limit
6 it to that history, though. My guess is, if
7 you go back to the point in time of the -- of
8 Webb-Kenyon, the Court didn't have in mind
9 every state law that happened to be involved
10 with the -- with the distribution of alcohol.

11 JUSTICE BREYER: No, but there were a
12 lot that said you have to be a resident.

13 MR. PHILLIPS: Yeah, but there were
14 probably a lot, as you said earlier, that also
15 probably discriminated on the basis of race,
16 discriminated on the basis of ethnicity --

17 JUSTICE BREYER: Those other
18 amendments say they took care of that. They --
19 they -- they -- all the -- the race, the women
20 and all these different things, they said, no,
21 no, of course, they trump the --

22 MR. PHILLIPS: But -- but the reason
23 why they trump is because --

24 JUSTICE BREYER: -- they -- they trump
25 it. But why should -- but this --

1 MR. PHILLIPS: -- you can't read under
2 the laws of the state so broadly as to mean any
3 law. They have to be valid laws. And so you
4 just go back, that just brings you back to the
5 same fundamental question, Justice Breyer.

6 Is it permissible for the state to
7 discriminate with a durational residency
8 requirement, not just a presence, but with a
9 durational requirement --

10 JUSTICE KAGAN: But, to go back to
11 Justice Gorsuch's question, I mean, I'm trying
12 to figure out what kind of opinion we could
13 write, Mr. Phillips, that says you win, but
14 then, when the next case comes along and the
15 next case is somebody that says we don't like
16 this brick-and-mortar stuff, we don't want to
17 have any physical presence at all, and the
18 state is preventing that, and in doing so, the
19 state is discriminating against out-of-state
20 companies.

21 And, you know, you've said that that's
22 not valid, so we're entitled to do what we want
23 to do too.

24 MR. PHILLIPS: I think there are two
25 ways you can go about this. The first one

1 would be -- I mean, you can write an opinion
2 that just says Bacchus again. This is -- this
3 is really protectionist and ought to be
4 declared unconstitutional. Leave for another
5 day the rest of those kinds of issues.

6 The second one is, if you want to take
7 up the question and say, you know, what -- why
8 is -- why is brick-and-mortar more important,
9 well, brick-and-mortar is fully consistent with
10 the three-tier system. And we'll leave for
11 another day whether the three-tier system, if
12 it, in fact, operates --

13 JUSTICE KAGAN: Well, we're leaving a
14 lot of things for another day, but they all
15 seem to be demanded by the principles that
16 you're asking us to adopt.

17 MR. PHILLIPS: Well, I don't think so.
18 All I'm asking -- the principle I'm asking you
19 to adopt is to not discriminate against us
20 under these circumstances where we are clearly
21 exactly identically situated and where the
22 state's interests in -- in protecting against
23 alcohol can be fully protected.

24 And leave it for another day if there
25 are other rules that are challenged to see what

1 those rules are --

2 JUSTICE KAGAN: I guess what I'm
3 asking --

4 MR. PHILLIPS: -- how they operate,
5 and what's the state's justification for them.

6 JUSTICE KAGAN: Because the
7 hypothetical I was attempting to pose is a
8 hypothetical where the state is acting in a
9 discriminatory manner. And I guess I'm -- what
10 I'm asking you for is, why would some kinds of
11 discrimination be permissible and other kinds
12 of discrimination not be permissible?

13 MR. PHILLIPS: Because, under certain
14 circumstances, there may not be any less
15 discriminatory way of achieving the state's
16 objective.

17 CHIEF JUSTICE ROBERTS: Well, but, I
18 mean, are you incorporate --

19 MR. PHILLIPS: Granholm says that.

20 CHIEF JUSTICE ROBERTS: -- are you
21 incorporating the dormant Commerce Clause
22 jurisprudence completely?

23 MR. PHILLIPS: Well, it's a little
24 tricky because Granholm's a little unclear to
25 me on that because the -- I mean, the normal

1 Commerce Clause says if you discriminate, it's
2 -- it's almost per se unconstitutional.
3 Granholm didn't seem to go that far and just
4 talked about narrow tailoring and
5 non-discriminatory means of achieving its
6 objective.

7 And I can imagine in a close case it
8 would make a difference how you deal with that.

9 JUSTICE GORSUCH: But isn't that
10 exactly --

11 MR. PHILLIPS: This is not a close
12 case. I'm sorry, Your Honor.

13 JUSTICE GORSUCH: Isn't that exactly
14 where you want us to go? Not today, of course,
15 but tomorrow or next year.

16 MR. PHILLIPS: Or maybe not ever.

17 (Laughter.)

18 JUSTICE GORSUCH: And all --

19 MR. PHILLIPS: Only if I'm standing
20 here, Your Honor.

21 JUSTICE GORSUCH: And we'll see you
22 again. And -- and, surely, you know, the state
23 can achieve all the regulatory interests it
24 wants to achieve through virtually -- dealing
25 with virtual sellers from out of state, just as

1 easily as it can with the physical presence
2 sellers in state. I mean, surely that's
3 tomorrow's argument, isn't it?

4 MR. PHILLIPS: I -- I -- I'm --
5 perhaps, but at least the state --

6 JUSTICE GORSUCH: This is just like --

7 MR. PHILLIPS: -- at least the state
8 will have the opportunity --

9 JUSTICE GORSUCH: -- just like milk,
10 just like books.

11 MR. PHILLIPS: But, Justice Gorsuch,
12 somebody is going to -- at that point,
13 presumably, the state will say: This is why we
14 can't regulate effectively. This is why we
15 won't have the orderly market. This is why we
16 need this restriction.

17 But what Tennessee has never done here
18 is ever tried to explain why a durational
19 residency requirement of 10, 12, and why you
20 need all stockholders to be in -- in the town,
21 all the -- all the directors, et cetera.
22 That's the issue before this Court.

23 That seems to me so clearly beyond
24 what the Twenty-First Amendment was designed to
25 achieve that the Court simply should declare it

1 unconstitutional.

2 If there are no further questions,
3 Your Honors.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Two minutes, Mr. Dvoretzky.

7 REBUTTAL ARGUMENT OF SHAY DVORETZKY

8 ON BEHALF OF THE PETITIONER

9 MR. DVORETZKY: Thank you, Mr. Chief
10 Justice.

11 Respondents offer no administrable
12 rule that would support even the basic presence
13 requirement that this Court recognized in
14 Granholm was unquestionably legitimate, and no
15 account of the history.

16 First, Respondents concede a residency
17 requirement.

18 A durational residency requirement
19 follows from that: first, because states get
20 to define what residency is, and, second,
21 because the same interests that serve a
22 presence requirement also serve a durational --
23 durational residency requirement.

24 Duration facilitates background
25 checks. It facilitates investigation and

1 enforcement of the law because somebody who's
2 been there for a while is more likely to have
3 substantial assets that can be enforced -- that
4 can be seized, and is less likely to flee at
5 the first sign of trouble.

6 Once you concede that residency
7 requirements are okay, courts shouldn't be
8 second-guessing the extent to which those very
9 same interests are served by durational
10 residency requirements. The whole point of the
11 Twenty-First Amendment was to take that out of
12 the hands of courts.

13 With respect to the history, Mr.
14 Phillips referred to Walling and to Scott.
15 Both of those were cases like Granholm and
16 Bacchus that involved taxing out-of-state
17 product more heavily than in-state product.
18 That is the exception that Granholm recognized
19 to the state's virtually complete authority.

20 But, when we're talking about purely
21 in-state regulation, like a durational
22 residency requirement for a liquor license,
23 that is what the Twenty-First Amendment is
24 concerned with.

25 There's no economic protectionism test

1 that is either consistent with the history or
2 is administrable. If the Court were to go down
3 that road, there would be challenges to dozens
4 of state laws.

5 And how do we draw a line about
6 whether 30 days is protectionist, a year is
7 protectionist, two years is protectionist? At
8 that point, the inquiry just becomes the same
9 as any other dormant Commerce Clause challenge.

10 And the one thing we know from the
11 Twenty-First Amendment is that alcohol was to
12 be treated differently for dormant Commerce
13 Clause purposes. Respondents' rule allow no
14 room for that.

15 Lastly, even if there were an economic
16 protectionism test, for the reasons given by
17 Judge Sutton in his dissent below, and for the
18 reasons I said earlier, Tennessee's law
19 satisfies the necessary level of scrutiny,
20 which is not a searching sort of strict
21 scrutiny but just is there a plausible reason
22 for the law that makes it survive.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 11:59 a.m., the case
2 was submitted.)
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