No. 18-___

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Tennessee Wine and Spirits Retailers Association. Petitioner is not the subsidiary or affiliate of any publicly owned corporation. No publicly owned corporation owns 10% or more of Petitioner's stock.

Respondents are Clayton Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission; Tennessee Fine Wines and Spirits, LLC, d/b/a Total Wine Spirits Beer & More; and Affluere Investments, Inc., d/b/a Kimbrough Fine Wine & Spirits.

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INTRODUCTION

The Twenty-first Amendment grants States "virtually complete control" over the intrastate distribution and sale of liquor. *Granholm v. Heald*, 544 U.S. 460, 488 (2005). Like nearly all States, Tennessee has exercised that authority to create a three-tier distribution system that separately regulates (1) producers of liquor, (2) wholesalers that act as middlemen, and (3) retailers that sell directly to consumers. As part of this regime, Tennessee imposes durational-residency requirements for retail liquor licenses. Tennessee law requires individuals to reside in Tennessee for two years before they are eligible for a license to sell liquor to consumers; the same requirements apply to the directors, officers, and capital stockholders of corporate applicants. *See* Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A). Tennessee is not alone: At least twenty-one States impose some form of durational-residency requirement for liquor retailers or wholesalers. And many States impose other residency-based requirements on those entities.

These laws make good sense. As Judge Sutton recognized below, States have a core Twenty-first Amendment interest in "[p]romoting responsible consumption and orderly liquor markets," through close regulation of liquor retailers and wholesalers. Pet.App. 50a (Sutton, J., dissenting). And retailers, in particular, "are closest to the local risks that come with selling alcohol, such as 'drunk driving, domestic abuse, [and] underage drinking.'" *Id.* (quoting *Southern Wine & Spirits v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013)). Requiring individuals (or corporate principals) to

reside in the communities they serve for a sustained period before becoming eligible for retail or wholesale licenses ensures that each seller "will be knowledgeable about the community's needs and committed to its welfare." *Id.*

In the decision below, however, the Sixth Circuit held, over Judge Sutton's dissent, that Tennessee's durational-residency requirements violate the dormant Commerce Clause. The court acknowledged and deepened a circuit split about the constitutionality of such laws. The Fifth and now Sixth Circuits have held that durational-residency requirements violate the dormant Commerce Clause. The Eighth Circuit, in contrast, has held that they are a valid exercise of States' Twenty-first Amendment authority. As the Eighth Circuit put it, "state policies that define the structure of the [three-tier] liquor distribution system" are "'protected under the Twenty-first Amendment'" "against constitutional challenges based on the Commerce Clause," as long as they "giv[e] equal treatment to in-state and out-of-state liquor *products* and *producers* . . . ." *S. Wines & Spirits*, 731 F.3d at 809 (quoting *Granholm*, 544 U.S. at 489) (emphasis added). In so holding, the Eighth Circuit agreed with the approach of the Second and Fourth Circuits, which, following *Granholm*, upheld other kinds of residency-related restrictions on retailers and wholesalers.

This issue is important. It determines the constitutionality of durational-residency laws in at least twenty-one States. And in resolving the question presented, the Court will provide much-needed guidance to courts that have struggled to understand *Granholm*'s implications for other

restrictions that states impose on retailers and wholesalers. This case is also a clean vehicle—a declaratory-judgment action filed solely to determine the constitutionality of the law at issue. Finally, the decision below—which leaves next to no continuing role for Section 2 of the Twenty-first Amendment's grant of authority to the States—is wrong. The Court should grant certiorari and reverse the decision below.

OPINIONS BELOW

The District Court's opinion granting summary judgment to Respondent Tennessee Fine Wines (Pet.App. 57a–81a) is published at 259 F. Supp. 3d 785 (M.D. Tenn. 2017). The Sixth Circuit's decision affirming that judgment (Pet.App. 1a–56a) is published at 883 F.3d 608 (6th Cir. 2018).

JURISDICTION

The Sixth Circuit entered judgment on February 21, 2018. On April 26, 2018, Justice Kagan extended the time to file a certiorari petition to and including July 21, 2018. No. 17A1186. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Twenty-first Amendment of the United States Constitution 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.

2. The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl.3.

3. Section 57-3-204(b) of the Tennessee Code Annotated, which addresses the issuance of licenses for the retail sale of alcoholic beverages, provides, in relevant part:

> (2) No retail license under this section may be issued or transferred to or held by, to any individual:
>
> > (A) Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years;
>
> [. . .]
>
> (3) The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to, transferred to, or maintained by any corporation unless such corporation meets the following requirements:
>
> > (A) No retail license shall be issued to, transferred to, or maintained by any corporation if any officer, director, or stockholder owning any capital stock in the corporation, would be ineligible to

> receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director, or stockholder in their individual capacity;
>
> (B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of the state for the two (2) years immediately preceding the date application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years;
>
> [. . .]
>
> (D) No stock of any corporation licensed under this section shall be transferred to any person who is not a resident of this state and either has not been a resident of the state for at least two (2) years next preceding or who at any time has not been a resident of this state for at least ten (10) consecutive years.

(4) It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained

> in wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A)–(B), (3)(D), (4).

STATEMENT

1. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm*, 544 U.S. at 488 (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). Consistent with that broad grant of authority, States are free "to ban the sale and consumption of alcohol altogether." *Id.* at 488–89. Alternatively, "States may . . . assume direct control of liquor distribution through state-run outlets." *Id.* at 489. Or they can set up a regulatory scheme governing private manufacturers, distributors, and retailers. Such three-tier systems are

"unquestionably legitimate." *Id.* (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)).

To be sure, state alcohol laws may be limited in some respects by the dormant Commerce Clause, which generally prevents States from "discriminat[ing] against interstate commerce" or "favor[ing] in-state economic interests over out-of-state interests." *See id.* at 487 (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986)). For example, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court invalidated an excise tax that exempted some liquors produced in-State, where the sole, "undisputed . . . purpose of the exemption" was "mere economic protectionism" rather than "any clear concern of the Twenty-first Amendment." *Id.* at 271, 276. This Court later emphasized in *Granholm*, however, that "state policies" that define the structure of a three-tier distribution system "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. *Granholm* thus distinguished between discrimination against out-of-state products, which the dormant Commerce Clause prohibits, and a State's decisions about "how to structure the liquor distribution system" within its borders, over which "[t]he Twenty-first Amendment grants the States virtually complete control." *Id.* at 488. Indeed, all nine Justices agreed that States have virtually plenary authority over structuring a three-tier liquor distribution system, at least as long as they provide equal treatment to liquor produced in and out of state. *See id.*; *see also id.* at 518 (Thomas, J. dissenting).

2. Tennessee, like most States, has implemented a three-tier regulatory scheme for the distribution of alcohol. *See* Pet.App. 2a; *see also Jelovsek v. Bredesen*, 545 F.3d 431, 433 (6th Cir. 2008) (describing Tennessee's regulatory framework). Under that scheme, "[m]anufacturers are limited to selling to wholesalers; wholesalers may sell to retailers, or in some cases other wholesalers; [and] consumers are required to buy only from retailers." Pet. App 2a (quoting *Jelovsek*, 545 F.3d at 434); *see also* Tenn. Code Ann. § 57-3-404(b)–(d). The Tennessee Alcoholic Beverage Commission ("TABC" or the "Commission") oversees this system and issues licenses to individuals and entities that meet the statutory requirements. *See* Pet.App. 2a–3a; Tenn. Code Ann. § 57-3-201.

This case is about the statutory requirements for retail licenses. Tennessee law provides that, to obtain a retail license, an individual must have "been a bona fide resident of [Tennessee] during the two-year period immediately preceding the date upon which application is made." Tenn. Code Ann. § 57-3-204(b)(2)(A). Corporations, for their part, are ineligible for a retail license "if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2)." *Id.* § 57-3-204(b)(3)(A).[1]

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[1] Two other aspects of Tennessee's regulatory scheme were also at issue in the lower courts: "its application of the residency requirement to 100% of a retailer's stockholders, Tenn. Code Ann. § 57-3-204(b)(3)(A), (B), (D), and its imposition

The Tennessee legislature codified its explanation of the health and safety benefits of these durational-residency requirements:

> Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, . . . it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein . . . .

Tenn. Code Ann. § 57-3-204(b)(4).

3. Respondents Tennessee Fine Wines and Spirits, LLC ("Fine Wines") and Affluere Investments, Inc. ("Affluere") applied for Tennessee retail licenses in November 2016. *See* Pet.App. 3a. It is undisputed that neither entity satisfies the durational-residency requirements for these licenses. *See id.*; D.Ct. Dkt. 1-1, Compl. ¶¶ 12–13. Both entities have principal addresses outside Tennessee. *See* Pet.App. 3a; D.Ct. Dkt. 1-1, Compl. ¶¶ 3–4. And although Fine Wines is a Tennessee limited liability company, none of its members are Tennessee

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(continued…)

of a ten-year residency requirement for renewal of a license, *id.* § 57-3-204(b)(2)(A)." Pet.App. 54a (Sutton, J., dissenting).

residents. *See* Pet.App. 3a; D.Ct. Dkt. 1-1, Compl. ¶ 4.

Petitioner Tennessee Wine and Spirits Retailers Association (the "Association") represents the interests of licensed Tennessee retailers. *See* Pet.App. 4a. The Association learned that the TABC was considering granting Fine Wines's and Affluere's retail-license applications despite their failure to satisfy the durational-residency requirements. *See id.* The Association then told the TABC that it would immediately sue over licenses issued in violation of state law. *See* D.Ct. Dkt. 1-1, Compl. ¶ 17. Fine Wines and Affluere, for their part, told the TABC that they would sue to challenge the constitutionality of the durational-residency requirements if the TABC denied their applications. *See id.* ¶ 18.

"[F]ace[d] [with] imminent litigation" over this dispositive issue, *id.* ¶ 25, the TABC's Executive Director, Clayton Byrd, filed a declaratory-judgment action in Tennessee state court. *See* Pet.App. 4a. Byrd named Fine Wines, Affluere, and the Association as Defendants. *See generally* D.Ct. Dkt. 1-1, Compl. The Complaint explained that the TABC's staff "f[ound] no other grounds for denying [Fine Wines' and Affluere's] license applications" besides the "statutory residency requirement." *Id.* ¶ 14. Byrd therefore sought a declaratory judgment about the constitutionality of those requirements, so that the TABC could "lawfully fulfill its duties . . . and correctly determine whether nonresident Defendants [Fine Wines and Affluere] may be issued a retail liquor license." *Id.* ¶ 27.

The Association removed the case on federal-question grounds. *See* Pet.App. 4a. The District

Court then realigned the parties to reflect their interests in the litigation, denominating Fine Wines and Affluere as Plaintiffs and the Association as Defendant. *See id.* at 4a n.1.[2]

Fine Wines moved for summary judgment, arguing that Tennessee's durational-residency requirements violate the dormant Commerce Clause. *See id.* at 57a–58a. Affluere sought a preliminary injunction on the same basis. *See* D.Ct. Dkt. 63.

4. The District Court granted Fine Wines' motion for summary judgment. Despite *Granholm*'s limitation of dormant Commerce Clause scrutiny to laws that "discriminate in favor of local *producers*," 544 U.S. at 489 (emphasis added), the court held that such scrutiny also extends to state laws governing local *retailers*. *See* Pet.App. 65a–72a. Next, the court found that Tennessee's durational-residency requirements in fact discriminate in favor of in-state retailers, even though they apply to in-state and out-of-state retailers alike. *Id.* at 73a–76a. Finally, the District Court found that those requirements do not "advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 80a. The District Court therefore held that Tennessee's durational-residency requirements violate the dormant Commerce Clause, and enjoined their enforcement. *Id.* at 80a–801a.

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[2] Although Byrd remained denominated as a Plaintiff, he defended the constitutionality of the state law in response to Fine Wines' summary judgment motion in the District Court, and on appeal in the Sixth Circuit. *See* Pet.App. 4a n.1.

6. A divided panel of the Sixth Circuit affirmed. The majority observed that this Court's precedents "ha[ve] created some uncertainty" about whether "the dormant Commerce Clause appl[ies] only when an alcoholic-beverages law regulates producers or products," or whether it also applies to regulations of retailers and wholesalers. *Id.* at 11a. And it acknowledged a circuit split on that fundamental question. *See id.* at 11a–12a. The Second, Fourth, and Eighth Circuits have interpreted *Granholm* to mean that the dormant Commerce Clause applies only to state laws that regulate alcohol *producers* or *products*. *See id.* at 12a–13a; *see also Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006); *S. Wine & Spirits*, 731 F.3d at 809–10. According to these circuits, the Twenty-first Amendment protects laws regulating alcohol *retailers* and *wholesalers* from dormant Commerce Clause scrutiny. The Fifth Circuit, on the other hand, has extended *Granholm* to retail regulation, and has held that durational-residency requirements fail dormant Commerce Clause scrutiny. *See* Pet.App. 13a–14a; *see also Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016) (*Cooper II*).

The panel majority followed the Fifth Circuit. *See* Pet.App. 15a. Like the Fifth Circuit, the panel wrote off the producer-specific language in *Granholm*, asserting that *Granholm* had "discussed the relationship between the dormant Commerce Clause and the Twenty-first Amendment in the context of 'producers' simply because *Granholm* involved statutes addressing that step in the three-tier system." *Id.* at 23a. And it relied on this Court's

earlier decision in *Bacchus* in holding that the dormant Commerce Clause extends to the regulation of retailers. *See id.* at 22a–23a.

The majority again followed the Fifth Circuit's reasoning in finding that Tennessee's interest in the durational-residency requirements did not implicate the core purposes of the Twenty-first Amendment. *See id.* at 24a–27a. These requirements, the court reasoned, "regulate the flow of individuals" rather than "the flow of alcoholic beverages within the state." *Id.* at 27a. Accordingly, the Twenty-first Amendment does not "immunize" them from "scrutiny under the dormant Commerce Clause." *Id.*

Finally, the majority concluded that Tennessee's law failed that scrutiny. The court acknowledged that the State had asserted two legitimate purposes for the durational-residency requirements—"(1) protecting 'the health, safety and welfare' of its citizens and (2) using a higher level of oversight and control over liquor retailers." *Id.* at 32a (quoting Tenn. Code Ann. § 57-3-204(b)(4)). But the court hypothesized that the State could achieve those purposes through nondiscriminatory means (for example, by "creating an electronic database to monitor liquor retailers"). *Id.* at 33a. Accordingly, the court held that the durational-residency requirements violated the dormant Commerce Clause, severed them from the Tennessee statute, and enjoined their enforcement. *See id.* at 33a–39a.

7. Judge Sutton dissented in relevant part. He began with the Constitution's text. Judge Sutton explained that the Commerce Clause's "dormant" aspect impliedly prohibits States from interfering with Congress's prerogative to "regulate Commerce

with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* at 40a (quoting U.S. Const. art. I, § 8, cl. 3). And "[w]hatever else this Tennessee requirement does," Judge Sutton observed, "it does not purport to displace or contradict congressional regulation of commerce among the States." *Id.* at 41a. As to the Twenty-first Amendment, Judge Sutton stressed that the text "prohibit[s] the 'delivery or use' of alcohol 'in violation of the laws' of each State," which "empowers States to regulate sales of alcohol within their borders." *Id.* (quoting U.S. Const. amend. XXI, § 2).

Judge Sutton also looked to history. In the beginning, he explained, federal and state government powers were "[l]argely exclusive." *Id.* at 42a. But that changed over time. As the federal commerce power expanded, the line between the two regulatory spheres blurred, until most business activities became subject to both state and federal regulation. *See id.* at 42a–43a. Accordingly, the scope of the dormant Commerce Clause—which was once crucial for keeping States from interfering in the federal sphere—became, in Judge Sutton's view, "more difficult to articulate and police." *Id.* at 46a.

Against that historical backdrop, Judge Sutton addressed this Court's Twenty-first Amendment precedents. Those precedents make clear that "the Commerce Clause still limits state efforts to regulate activity outside of a State's territorial domain." *Id.* at 48a. But "exceptions to the normal operation of the Commerce Clause remain alive and well in some areas—in particular the in-state nature of alcohol distribution." *Id.* at 49a. Indeed, *Granholm*

expressly said that, because in-state distribution "implicates the States' core interests after the repeal of Prohibition, such regulations are generally 'protected under [the Twenty-first Amendment] when they treat liquor produced out of state the same as its domestic equivalent.'" *Id.* (quoting *Granholm*, 544 U.S. at 488). Put differently, "[s]tate regulations of *in-state distribution*, even if facially discriminatory, are constitutional unless a challenger can show that they serve *no purpose* besides 'economic protectionism.'" *Id.* (quoting *Bacchus*, 468 U.S. at 276) (emphases added).

"Measured by these standards and cases," Judge Sutton concluded, "Tennessee's two-year residency requirement should survive." *Id.* Some requirement that retailers reside in-state is an inherent part of the three-tier system that this Court has repeatedly and unequivocally endorsed. *See id.* at 50a. Moreover, "retailers are closest to the local risks that come with selling alcohol, such as 'drunk driving, domestic abuse, [and] underage drinking.'" *Id.* (quoting *S. Wine & Spirits*, 731 F.3d at 811). And durational-residency requirements for retailers ensure that individuals responsible for the sale of alcohol to Tennessee citizens will develop an understanding of and commitment to the needs of the local community before becoming licensed to sell alcohol directly to the members of that community. *See id.* The same logic applies "to a residency requirement for officers and directors of the retailer." *Id.* at 51a. Accordingly, Judge Sutton would have followed the Eighth Circuit, which "approved [durational-residency] requirements nearly identical to Tennessee's." *Id.* In contrast, Judge Sutton

explained, the panel majority and the Fifth Circuit in *Cooper II* "misread *Granholm*" and contravened the Twenty-first Amendment by allowing "a court [to] unnecessarily substitute its own judgment for that of a state legislature about the best policies for regulating liquor." *Id.* at 53a.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are squarely divided about whether a state may exercise its Twenty-first Amendment authority by requiring individuals or entities to reside in-state for a certain period before they may obtain a retail or wholesale liquor license. The Fifth and Sixth Circuits have held that such laws violate the dormant Commerce Clause; the Eighth Circuit has held that they are valid under the Twenty-first Amendment. This divide reflects a fundamental disagreement—one that the Second and Fourth Circuits have also addressed—about whether and how, in light of *Granholm*, the dormant Commerce Clause limits state authority to regulate alcohol retailers and wholesalers (as opposed to producers). This issue is important, particularly given the prevalence of durational-residency requirements and other residency-related regulations of wholesalers and retailers. And the decision below is wrong because it misunderstands the text of the relevant constitutional provisions and misconstrues this Court's precedents. This Court should grant the petition for a writ of certiorari and reverse the judgment of the Sixth Circuit.

I. THE COURTS OF APPEALS ARE DIVIDED.

A. The Fifth and Sixth Circuits Have Struck Down Durational-Residency Requirements.

1. In *Cooper II*, the Fifth Circuit held that Texas's one-year residency requirement for liquor retailers violated the dormant Commerce Clause. *See* 820 F.3d 730 (upholding injunction against enforcement of Tex. Alco. Bev. Code Ann. § 109.53).

The case involved a decades-old injunction issued in a suit brought by two individuals who did not reside in Texas but wanted to buy a Texas nightclub licensed to sell liquor. *See Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994) (*Cooper I*). In *Cooper I*, which predated this Court's decision in *Granholm*, the Fifth Circuit relied mainly on *Bacchus* in concluding that Texas's durational-residency requirement violated the dormant Commerce Clause. *See id.* at 555. The Fifth Circuit therefore enjoined Texas from enforcing its law. *See id.* at 555–56.

Later, in *Granholm*, this Court explained that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. So a trade association, the Texas Package Stores Association, intervened and moved for relief from the outdated injunction, because Texas's law—which regulated retailers and wholesalers, and had nothing to do with disparate treatment of in-state and out-of-state liquor producers—passed *Granholm*'s test. *See Cooper II*, 820 F.3d at 734–36.

The Fifth Circuit adhered to its holding that Texas's durational-residency requirement was

unconstitutional. The court dismissed as dicta *Granholm*'s statements that three-tier systems are "unquestionably legitimate" and that policies that do not discriminate against liquor produced out of state are "protected under the Twenty-first Amendment." *Id.* at 742–43 (quoting *Granholm*, 544 U.S. at 489). Indeed, it held precisely the opposite—that "state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor." *Id.* at 743. "Distinctions between in-state and out-of-state retailers and wholesalers are permissible," the Fifth Circuit concluded, "only if they are an inherent aspect of the three-tier system." *Id.* And in the Fifth Circuit's view, a "durational-residency requirement on the *owners* of alcoholic beverage retailers and wholesalers" is not an inherent requirement of such a system. *Id.*

2. As described above, *see supra* 12–13, the Sixth Circuit majority below followed *Cooper II*. The court below summarized, at length, the varying attempts of the "Second, Fourth, Fifth, and Eighth Circuits . . . to reconcile [this Court's] cases" involving the Twenty-first Amendment. Pet.App. 11a. Rejecting the approach of most of these circuits, the Sixth Circuit "f[ou]nd the Fifth Circuit's reconciliation of *Bacchus* and *Granholm* persuasive." *Id.* at 15a. In particular, the court emphasized that "the Supreme Court explicitly declined to overrule *Bacchus* in *Granholm*." *Id.* And it afforded little weight to *Granholm*'s statements about liquor production because "*Granholm* involved statutes addressing that step in the three-tier system." *Id.* at 23a. Moreover, because "Tennessee's durational-

residency requirements are nearly identical to" Texas's, the court found that the analysis in *Cooper II* was on all fours with this case. *Id.* at 26a. It therefore held that the dormant Commerce Clause bars Tennessee from requiring that a liquor retailer reside in-state for a set time to be eligible for a license.

B. The Eighth Circuit Has Upheld Durational-Residency Requirements.

Judge Sutton would have followed the Eighth Circuit's "thoughtful opinion" in *Southern Wine & Spirits v. Div. of Alcohol & Tobacco*, 731 F.3d 799 (8th Cir. 2013), which upheld "requirements nearly identical to Tennessee's." Pet. App. at 51a. That case involved a Missouri law providing that a license to engage in the wholesale distribution of "intoxicating liquor containing alcohol in excess of five percent by weight" could be granted only to a "resident corporation"—*i.e.*, one whose corporate officers and directors had been "bona fide residents" of Missouri for at least three years. Mo. Rev. Stat. §§ 311.060.2(3), 311.060.3. The plaintiff, an entity ineligible for a license because of that requirement, alleged that Missouri's law violated the dormant Commerce Clause.

Writing for a unanimous panel, Judge Colloton acknowledged that "the Supreme Court has sent conflicting signals about the relationship between these two constitutional provisions." 731 F.3d at 804. *Granholm* itself, however, had reconciled this Court's earlier precedents. On the one hand, "the Twenty-first Amendment granted the States 'virtually complete control over whether to permit importation or sale of liquor and how to structure the

liquor distribution system.'" *Id.* at 805 (quoting *Cal. Retail*, 445 U.S. at at 110). On the other hand, state regulations of production, rather than distribution, do not implicate core Twenty-first Amendment authority and thus must comply with the dormant Commerce Clause. *See id.* (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984)). Consistent with these principles, *Granholm* concluded that "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment," *Granholm*, 544 U.S. at 466, so long as "they treat liquor produced out of state the same as its domestic equivalent," *id.* at 489.

Applying these standards, the Eighth Circuit upheld Missouri's durational-residency requirement. The court first rejected the argument that the law was unconstitutional in light of *Bacchus*. Even "[a]ssuming that *Bacchus*'s analysis of economic protectionism should apply to a regulation of the wholesale tier," the court reasoned, a durational-residency requirement has a non-protectionist rationale: "to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals." *S. Wine & Spirits*, 731 F.3d at 807–09 (citing Mo. Rev. Stat. § 311.015). In any event, the court held, consistent with *Granholm*, that "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 under the Twenty-first Amendment.'" *Id.* (quoting *Granholm*, 544 U.S. at 489). Because durational-residency requirements fit that bill, the court upheld Missouri's law as a

permissible exercise of Twenty-first Amendment authority—regardless of whether it would otherwise offend the dormant Commerce Clause. *See id.* at 810. The court added, finally, that durational-residency requirements would pass muster even if some Commerce Clause scrutiny applied: "Missouri residents, the legislature sensibly could suppose, are more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-to-day in ballparks, churches, and service clubs." *Id.* at 811.

C. Applying the Same Approach as the Eighth Circuit, the Second and Fourth Circuits Have Upheld Other Residency-Related Restrictions on Retailers and Wholesalers.

Two other courts of appeals—the Second and Fourth Circuits—have rejected constitutional challenges to other kinds of residency-related restrictions on wholesalers and retailers. Both circuits adopted the same approach as the Eighth Circuit. They upheld these state laws because, under *Granholm*, "the dormant Commerce Clause only prevents a State from enacting regulation that favors in-state *producers*." *Brooks*, 462 F.3d at 354 (emphasis added).

1. In *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, the Second Circuit upheld a New York law prohibiting "out-of-state wine retailers from selling and delivering wine directly to New York consumers." *Id.* at 187; *see* N.Y. Alco. Bev. Cont. Law §§ 100(1), 102(1)(a)–(b). That ruling followed directly from *Granholm*, which "set forth the test for determining the constitutionality of state liquor

regulations." *Arnold's Wines*, 571 F.3d at 189. "While the Twenty-first Amendment grants the states broad powers to regulate the transportation, sale, and use of alcohol within their borders, it simply does not immunize attempts to discriminate in favor of local products and producers." *Id.* at 191. Those principles, the court held, foreclosed the plaintiffs' claim. "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*," the court found no need to "analyze the regulation further under Commerce Clause principles." *Id.*

Judge Calabresi concurred, writing separately to say that this Court has, "[r]egrettably," "le[ft] lower courts at a loss in seeking to figure out what the Twenty-First Amendment means and what if any governing principles may be derived from [its] Twenty-First Amendment decisions." *Id.* at 192. Judge Calabresi also noted that the Twenty-first Amendment, in a departure from its original meaning, "has been defined and redefined to accommodate changing social needs and norms," making it a case study of the "important theoretical questions about the role of courts" in constitutional interpretation. *Id.*

2. The Fourth Circuit similarly upheld a Virginia law that, among other things, established an "exception to the three-tier import restriction for consumers who personally carry into Virginia no more than one gallon (or four liters) of alcoholic beverages for personal consumption." *Brooks*, 462 F.3d at 345; *see* Va. Code § 4.1–310(E). The plaintiffs argued that this exception violated the dormant

Commerce Clause by favoring in-state retailers, who could sell unlimited amounts of liquor to Virginia residents, over their out-of-state counterparts, who could sell only a single gallon. 462 F.3d at 352.

The Fourth Circuit recognized that *Granholm* foreclosed that argument. Under *Granholm*, "the dormant Commerce Clause only prevents a State from enacting regulation that favors in-state producers." *Id.* at 354. "[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." *Id.* at 352. And *Granholm*, the court held, precludes any such challenge. *See id.*

3. These Second and Fourth Circuit decisions involved residency-related regulations other than durational requirements. But both turned on the same core question as the decision below, and the Fifth and Eighth Circuit durational-residency cases: In the wake of *Granholm*, "[d]oes scrutiny under the dormant Commerce Clause apply only when an alcoholic-beverages law regulates producers or products?" Pet.App. 11a. The circuits are intractably divided about how to analyze the constitutionality of state laws regulating retailers and wholesalers of alcohol.

II. THE QUESTION PRESENTED MERITS THE COURT'S ATTENTION.

1. At least twenty-one states impose durational-residency requirements on alcohol retailers or

wholesalers.[3] These requirements vary in some ways. *Compare, e.g.,* S.C. Code Ann. § 61-6-110 (30-day residency requirement), *with* Okla. Stat. tit. 37, § 527 (10-year residency requirement); *compare, e.g.,* Ky. Rev. Stat. Ann. § 243.100(1)(f) (requirement applicable to individuals only), *with* Ind. Code § 7.1-3-21-5 (requirement applicable to both individuals and corporations); *see also, e.g.,* Ga. Code Ann. § 3-4-23(a) (requirement specific to the county or municipality). But this variation merely reflects the States' use of their Twenty-first Amendment authority and expertise to craft liquor laws that suit the needs of their residents. Under the Sixth Circuit's reasoning, all of these laws are likely unconstitutional.

There are many more state laws that—like those at issue in the Second and Fourth Circuit decisions—impose other forms of residency-related restrictions on retailers or wholesalers. *See, e.g.*, 235 Ill. Comp. Stat. 5/6-29.1(b) (prohibiting out-of-state retailers, but not in-state retailers, from shipping wine directly

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[3] *See* Ark. Code Ann. § 3-4-606(a)(1)–(3); Ga. Code Ann. § 3-4-23(a)–(b); Ind. Code Ann. § 7.1-3-21-5(5)(a)–(b); Kan. Stat. Ann. § 41-311(b); Ky. Rev. Stat. Ann. § 243.100(1)(f); La. Stat. Ann. § 26:80(A)(2); Me. Rev. Stat. tit. 28-A, § 1401(5)(A)–(B); Md. Code, Alcoholic Beverages, § 3-102; Mich. Comp. Laws Ann. §436.1601; Miss. Code. Ann. § 67-3-21; Mo. Rev. Stat. § 311.060.2(3); N.H. Rev. Stat. Ann. § 178:1; Okla. Stat. Ann. tit. 37, § 527; 47 Pa. Stat. Ann. §§ 4-403, 4-410, 4-431, 4-432; S.C. Code Ann. § 61-6-110(2); Tenn. Code Ann. § 57-3-203; Tex. Alco. Bev. Code Ann. § 6.03(a); Va. Code Ann. § 4.1-222; Wash. Rev. Code Ann. § 66.24.010(2)(a); W. Va. Code Ann. § 11-16-8(a)(1); Wis. Stat. Ann. § 125.04(5); *see also* Idaho Code Ann. § 23-304 (durational-residency requirement for "special distributors").

to Illinois consumers); N.Y. Alco. Bev. Cont. Law §§ 100(1), 102(1)(a)–(b) (prohibiting out-of-state retailers, but not in-state retailers, from shipping wine directly to New York consumers); Va. Code § 4.1–310(E) (creating an exception to personal-import ban that favors in-state retailers); Cal. Bus. & Prof. Code § 23366.2 (prohibiting out-of-state wholesalers, but not in-state wholesalers, from selling liquor directly to in-state retailers). The constitutionality of these laws, too, turns on the interplay between the Twenty-first Amendment and the dormant Commerce Clause when it comes to state regulation of alcohol retailers and wholesalers.

2. The constitutionality of dozens of state laws is more than important enough to merit this Court's intervention. *See, e.g.*, *Sveen v. Melin*, 138 S. Ct. 1815 (2018) (considering the constitutionality of retroactive application of state revocation-on-divorce statutes); *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (considering the constitutionality of state statutes limiting sex offenders' internet access); *cf. Cty. of Maricopa v. Lopez-Valenzuela*, 135 S. Ct. 2046, 2046 (2015) (Thomas, J., dissenting from denial of certiorari) ("States deserve our careful consideration when lower courts invalidate their constitutional provisions.").

This Court has also often granted certiorari to resolve conflicts among the courts of appeals about the meaning of the Twenty-first Amendment. *See, e.g., Granholm*, 544 U.S. 460; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *North Dakota*, 495 U.S. 423; *Bacchus Imports*, 468 U.S. 263. But it has been thirteen years since the Court has addressed this constitutional provision. And in that

time, perceived contradictions within this Court's Twenty-first Amendment jurisprudence have "le[ft] lower courts at a loss in seeking to figure out what the Twenty-First Amendment means and what if any governing principles may be derived from [this Court's] Twenty-First Amendment decisions." *Arnold's Wines*, 571 F.3d at 192 (Calabresi, J., concurring). Indeed, courts have consistently acknowledged the pervasive confusion about the interaction of the Twenty-first Amendment and the dormant Commerce Clause post-*Granholm*. *See id.* at 200 (observing that lower courts have been left "in a difficult situation"); *S. Wine & Spirits*, 731 F.3d at 804 ("[T]he Supreme Court has sent conflicting signals about the relationship between these two constitutional provisions."); Pet.App. 11a ("The interaction between *Bacchus* and *Granholm* has created some uncertainty."). Only this Court can alleviate that confusion—and resolve the resulting division of authority.

4. This petition presents a clean vehicle for this Court to do so. This case is a declaratory-judgment action raising a single question: whether Tennessee's durational-residency requirements are a constitutional exercise of the State's authority under the Twenty-first Amendment, or are instead prohibited by the dormant Commerce Clause. Pet.App. 4a. The Complaint alleges that this question determines the entitlement of the Respondent applicants to liquor licenses. D.Ct. Dkt. 1-1, Compl. ¶¶ 14, 27. And the parties preserved, and the lower courts decided, that question at each stage of the proceedings below. This Court should take this opportunity to decide this important issue,

which affects the constitutionality of dozens of state laws and has prompted numerous court of appeals judges to lament the confusion flowing from this Court's existing precedents.

III. THE SIXTH CIRCUIT'S DECISION IS WRONG.

The decision below is wrong as a matter of constitutional text, history, and this Court's precedents. Indeed, the Sixth Circuit majority effectively neuters Section 2 of the Twenty-first Amendment and *Granholm*'s promise that States have broad leeway to structure three-tier distribution systems.

1. The Twenty-first Amendment gives States broad authority to regulate "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors." U.S. Const. amend. XXI, § 2. "Unlike any other provision in the U.S. Constitution," the Amendment thereby "sets up what is largely a regulatory regime of one." Pet.App. at 41a (Sutton, J., dissenting). And its text does not limit State authority in this arena.

The Commerce Clause, in turn, grants Congress exclusive authority "[t]o regulate Commerce . . . among the several States." U.S. Const. art. 1, § 8, cl.3. The dormant aspect of that Clause reinforces that exclusivity, impliedly prohibiting states from exercising authority in that exclusively federal arena. *See* Pet.App. at 42a–44a.

2. The history of these provisions shows how the drafters of the Twenty-first Amendment expected them to operate in tandem. At the time that Amendment was adopted in 1933, the state and

federal "spheres of authority" were "[l]argely exclusive." *Id.* at 42a. So if the States had authority in a particular area, the federal government generally did not—and vice versa. *See id.* Accordingly, "[f]rom the vista of 1933, a lawyer (and judge) would have presumed that the regulation of sales of alcohol within the State (such as a residency requirement for ownership of a retail liquor store) would be an exclusive state power given the existing paradigm of largely separate and exclusive spheres of regulatory power." *Id.* at 44a.

It is unsurprising, therefore, that this Court at first understood the Twenty-first Amendment to give States essentially plenary authority to regulate intrastate alcohol distribution, "including in ways that the Commerce Clause would not otherwise allow." *Id.* at 46a:

> The words used [in § 2] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936).

But things changed. The scope of federal power to regulate commerce expanded, injecting federal authority into what were once exclusively state arenas. And the understanding of the dormant Commerce Clause changed, too: "[I]n a post-1930s world, in which the National Government and States largely have overlapping power over most sectors of commerce, the implementation of an implied restriction on state authority is much more difficult to articulate and police." *See* Pet.App. 45a–46a. Still, however, "[a]n exclusive delegation of power to one sovereign"—whether that be the grant of alcohol-regulatory authority to the states or the grant of commerce power to the federal government—"implies a ban on assertions of power by another sovereign over the same matter." *Id.*

3. This Court's more recent Twenty-first Amendment cases confirm that States retain special authority in regulating alcohol. *See Capital Cities*, 467 U.S. at 712 (explaining that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause"). States maintain "virtually complete control" over "how to structure the[ir] liquor distribution system[s]." *Granholm*, 544 U.S. at 488.

Granholm, this Court's most recent case about the Twenty-first Amendment, involved regulations that permitted in-state wineries, but not out-of-state ones, to ship directly to in-state consumers. 544 U.S. at 468–70. This "differential treatment between in-state and out-of-state wineries," the Court explained, "constitute[d] explicit discrimination" against the flow of goods across state lines in a way that—were it

not for the Twenty-first Amendment—would violate the dormant Commerce Clause. *Id.* at 467.

The Twenty-first Amendment, the Court also determined, did not "sav[e]" these laws. *Id.* at 489. In particular, that provision "does not displace the rule that States may not give a discriminatory preference to their own *producers*." *Id.* at 486 (emphasis added). And it does "not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Id.* at 484–85. Accordingly, because the laws at issue were "straightforward attempts to discriminate in favor of local producers" (and thus against out-of-state goods) the Court held that they violated the dormant Commerce Clause. *Id.* at 489.

The *Granholm* Court, however, was careful to cabin its ruling—and preserve the force of the Twenty-first Amendment. The Court emphasized that it did not "call into question the constitutionality of the three-tier system"—a system both the majority and dissent recognized as "unquestionably legitimate." *Id.* at 488–89; *see also id.* at 518 (Thomas, J., dissenting). And the Court made clear that the Twenty-first Amendment still provided absolute protection for regulation of in-state sales, rather than products. "State policies," the Court stated, "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489.

4. That principle resolves this case. Tennessee's durational-residency requirements, like other such laws, "treat liquor produced out of state the same as its domestic equivalent." *Id.* As a

result, *Granholm* compels the conclusion that they are "protected under the Twenty-first Amendment." *Id.* Were it otherwise—if, as the Sixth Circuit majority suggested, the Twenty-first Amendment conferred no special protections for laws regulating wholesalers and retailers of alcohol—Section 2 of the Twenty-first Amendment would have little or no role to play. A dormant Commerce Clause challenge to a regulation concerning alcohol, in other words, would be no different than such a challenge to any other kind of regulation. Neither constitutional history nor this Court's precedents support that result. *See Capital Cities*, 467 U.S. at 712 (observing that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause").

In any event, even if laws exclusively applicable to retailers or wholesalers were subject to some limited form of dormant Commerce Clause scrutiny, durational-residency requirements should survive. These requirements serve important State interests in protecting the "health, safety and welfare" of citizens. Tenn. Code Ann. § 57-3-204(b)(4). The consequences of excessive alcohol consumption—such as drunk driving, loss of employment, and homelessness—do not fall on one individual alone; they affect the community as a whole. Durational-residency requirements ensure that alcohol retailers know their community and are invested in its welfare. In other words, "[t]he only way to know a community is to live there." Pet.App. 50a. Indeed, that is presumably "why Congress requires federal court of appeals judges to live within their circuits, and district court judges to live within their districts." *Id.* at 50a–51a (citing 28 U.S.C. §§ 44(c),

134(b)). Durational-residency requirements like Tennessee's serve the same interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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