No. 18-96

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner Tennessee Wine and Spirits Retailers Association (the "Association") showed in its Petition what the decision below acknowledges: This case presents a square circuit split about whether durational-residency requirements violate the dormant Commerce Clause. The answer to that question, which cuts to the core of States' authority to regulate alcohol, is important. And the decision below is wrong—not least because it renders Section 2 of the Twenty-first Amendment an effective dead letter.

Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More ("Total Wine," as it calls itself in its Opposition) makes two principal arguments in response.

First, Total Wine confuses matters by lumping together distinct provisions of Tennessee law. As both the majority and the dissent below agreed, however, the different provisions of Tennessee's liquor law are severable. And Total Wine has done nothing to undermine the clear split as to the *only* statutory provision at issue in the Petition: the two-year durational-residency requirement for new license applicants.

Second, Total Wine complains that Tennessee has been insufficiently enthusiastic in defending its law. But, as Total Wine does not dispute, the Association has both the legal standing and the practical ability to litigate the Question Presented no matter what the State's role. In any event, Tennessee law obligates the State's Attorney General to defend Tennessee law, as he has steadfastly done at every stage of this litigation.

Total Wine's remaining arguments merely try to muddy clear waters. This petition checks all the certworthiness boxes: a square split, on an important issue, with an erroneous decision below. The Court should grant certiorari.

ARGUMENT

I. THE COURTS OF APPEALS ARE SPLIT ON THE QUESTION PRESENTED.

Faced with a circuit split, Total Wine attempts a sleight of hand by repeatedly invoking two provisions of Tennessee law that are severable from the two-year residency requirement for initial license applicants: a ten-year residency requirement for license renewals and a 100%-residency requirement for corporate stockholders. Tenn. Code Ann. § 57-3-204(b)(2)(A), (b)(3)(A), (B), & (D). These other provisions—which were never even properly at issue below, let alone raised in the Petition as a basis for certiorari—have nothing to do with the clear, acknowledged division of authority on the constitutionality of the two-year durational-residency requirement.

A. The License-Renewal and 100%-Stockholder Requirements Are Not At Issue.

The Petition seeks certiorari about the constitutionality of the two-year durational-residency requirement for the initial issuance of a retail liquor license in Tennessee. As the complaint makes clear, this case is, and has always been, about that provision. The State filed this lawsuit seeking a "declaratory order that construes the constitutionality *of the two-year residency requirement*." D.Ct. Dkt. 1-1, Compl. at 1 (emphasis added). Because

Respondents were not pre-existing license holders, the ten-year requirement for renewals has nothing to do with them. Nor does the 100%-stockholder requirement have any bearing on Total Wine's license because, as a Tennessee LLC, it does not purport to issue stock. And it concedes that *none* of its members are Tennessee residents. *See* Opp'n Br. at 10.

To be sure, the majority and dissent below both opined that the renewal and 100%-stockholder requirements would fail constitutional scrutiny. *See* Pet. App. 2a, 54a–55a. But there was no need for the court to address those provisions. And all panelists agreed—and Total Wine nowhere disputes—that the various requirements of Tennessee's liquor laws are severable from each other under Tennessee law. *See id.* at 33a–37a, 54a–55a; Tenn. Code Ann. § 1-3-110 (providing that "the sections, clauses, sentences and parts of the Tennessee Code are severable"). So Judge Sutton teed up the issue exactly right: Regardless of the constitutionality of the license-renewal or 100%-stockholder requirements, this case—like Respondents' entitlement to licenses—turns exclusively on the constitutionality of Tennessee's two-year durational-residency requirement for the initial issuance of retail liquor licenses. Pet. App. 54a.

There is nothing anomalous about that. Cases often turn on one aspect of a statutory scheme, without calling an entire legislative framework into question. That is the point of severability.

B. Total Wine Cannot Deny the Clear Division of Authority on the Constitutionality of the Two-Year Durational-Residency Requirement.

As explained in the Petition and acknowledged by all three members of the panel below, Tennessee's durational-residency requirement implicates a clear split: the Fifth and Sixth Circuits have held that such requirements violate the dormant Commerce Clause; the Eighth Circuit has held that they fall within States' Twenty-first Amendment authority; and the Second and Fourth Circuits have adopted the same approach as the Eighth Circuit in cases involving different kinds of residency requirements. Stripped of its reliance on the inapposite renewal and 100%-stockholder requirements, Total Wine's Opposition does not seriously contend otherwise.

1. For starters, Total Wine does not try to distinguish *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016) (*Cooper II*). For good reason: The Sixth Circuit majority expressly adopted *Cooper II*'s reasoning. Pet.App. 15a. And Judge Sutton acknowledged his and the Eighth Circuit's disagreement with it. *Id.* at 53a.

2. Total Wine tries unsuccessfully to distinguish *Southern Wine & Spirits v. Div. of Alcohol & Tobacco*, 731 F.3d 799 (8th Cir. 2013). It notes that the applicant there had waived the argument that the statute was motivated exclusively by economic protectionism. *See* Opp'n Br. 18–19. But the Eighth Circuit addressed that argument anyway. *See id.* at 807–09. In rejecting it, the court relied on a statutory "purpose clause," which, like Tennessee's, provides that the legislature intended the residency

requirement "to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals." 731 F.3d at 808 (quoting Mo. Rev. Stat. § 311.015). The court also dismissed the plaintiffs' reliance on reported statements of a single legislator. For one thing, "a single legislator's views about the purpose of the residency requirement" cannot be imputed to the entire legislature. *Id.* For another, an "inten[tion] to prevent a few big national distillers from monopolizing the wholesale liquor business in Missouri" accords with a legitimate purpose to limit and responsibly regulate in-state liquor sales. *Id.*; *cf.* Opp'n App. 9a (statements about limiting "interstate whiskey" explained as Tennessee's effort to "cut down on the sale of liquor" and "prevent more people from getting drunk").

Total Wine thus offers no viable distinction between *Southern Wine* and this case—which is unsurprising, because Judges Moore and Sutton saw no distinction, either. *See* Pet. App. 11a, 15a, 51a. Indeed, Missouri's three-year durational-residency requirement, which applies to each corporate director and officer, is "nearly identical to Tennessee's" in every relevant respect. *Id.* at 51a (Sutton, J., dissenting); *see Southern Wine*, 731 F.3d at 802 (citing Mo. Rev. Stat. § 311.060.3).

3. Total Wine objects that the Second and Fourth Circuits' decisions involved different kinds of residency-related restrictions. *See* Opp'n Br. 19–21. But the Petition acknowledged that. Pet. 23. The point is that both decisions "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?'" *Id.* (quoting Pet.App. 11a). Indeed, both the majority and the dissent below recognized that the Second and Fourth Circuits confronted the same basic question about "reconcil[ing] [this Court's] cases." Pet. App. 11a–12a; *see also id.* at 67a–68a.[1]

II. THE QUESTION PRESENTED IS IMPORTANT.

Total Wine does not dispute the importance of granting certiorari when lower courts diverge about the constitutionality of state laws. *See* Pet. 25. Nor does it dispute that prominent jurists are "at a loss in seeking to figure out what the Twenty-First Amendment means" after *Granholm*. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 (2d Cir. 2009) (Calabresi, J., concurring); *see* Pet. App. 25a–26a (citing cases).

Instead, Total Wine quibbles with the Association's tally of 21 States' durational-residency requirements. *See* Opp'n Br. 21–24. But regardless of any minor differences among those laws, or how they apply to various entities, they all implicate the same fundamental question about the interaction of

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[1] Total Wine suggests that Judge Traxler took no position on the dormant Commerce Clause issue in *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006). *See* Opp'n Br. 20–21 & n.5. But Judge Traxler fully concurred in the judgment—including the decision upholding Virginia's Personal Import Exception. Moreover, Judge Traxler joined Judge Niemeyer's explication of the governing principles from *Granholm*, as well as his conclusion that, consistent with those principles, Virginia's law was a valid exercise of the State's Twenty-first Amendment authority. *See Brooks*, 462 F.3d at 349–52, 354.

the Twenty-first Amendment and the dormant Commerce Clause post-*Granholm*.

Total Wine insists that it is possible for some out-of-state retailers to operate in 7 of those States through appropriate registration or designation. *See* Opp'n Br. 22. Even on Total Wine's terms, that says nothing about the 14 other laws the Association cited. And by Total Wine's own lights, courts have already prevented 5 States (including Tennessee) from enforcing durational-residency requirements. *See id.* at 23–24. A question with such wide-ranging consequences is more than important enough to warrant certiorari.

III. THE SUPPOSED VEHICLE PROBLEMS TOTAL WINE IDENTIFIES ARE ILLUSORY.

This case presents a clean vehicle. It is a declaratory-judgment action raising a single, dispositive question that was preserved and decided at each stage of this litigation. The three purported vehicle problems that Total Wine gins up are irrelevant distractions.

1. Total Wine argues that Tennessee has not defended its law consistently or persuasively. *See* Opp'n Br. 24–27. Even if that were true, it would be irrelevant. The Association has both the standing and the practical ability to litigate the Question Presented in its own right. Total Wine doesn't contend otherwise. Indeed, Tennessee named the Association as a party to the original Complaint, apparently recognizing the interests of the Association's members and expecting that the Association would carry the laboring oar in this litigation. And the Association has a concrete interest in challenging an injunction

invalidating a law that affects its members. The Fifth Circuit in *Cooper II* held exactly that. *See* 820 F.3d at 737–40. Many decisions of this Court compel the same conclusion. *See, e.g.*, *Investment Co. Inst. v. Camp*, 401 U.S. 617, 620 (1971) (holding that investment companies have "standing to question whether national banks may legally enter a field in competition with them"); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125, 138 (2014) (explaining that plaintiff suffering competitive injury had Article III standing, and that "diversion of sales to a direct competitor may be the paradigmatic direct injury").

In any event, Tennessee's steady defense of its law in this litigation belies Total Wine's characterization of the State's position. *See* Opp'n Br. 24–27. The current Attorney General—unlike the former Attorney General who authored the opinions to which Total Wine refers, *id.* at 7–8—has never wavered in defense of Tennessee's liquor laws. He filed this lawsuit to obtain a declaratory judgment about the constitutionality of the State's two-year residency requirement. *See* D.Ct. Dkt. 1-1, Compl. 1 & ¶ 27. He then defended the law in both the District Court and the Sixth Circuit. *See* D.Ct. Dkt. 73, at 1 (arguing that "Tennessee's residency requirement . . . does not violate the dormant Commerce Clause"); Ct. App. Dkt. 32, at 3 ("Tennessee's residency requirement for retail liquor licenses is constitutional"). It is unremarkable that the State did not seek divided argument in the Sixth Circuit, given that its "position on the constitutionality of the residency requirements is the same as that of the Association." Ct. App. Dkt. 50, ¶¶ 6–7 (motion regarding oral argument). Nor is the

State's decision to conserve its limited resources and initially waive response to the Petition of any moment. Tennessee law *obligates* the Attorney General to "defend the constitutionality and validity of all legislation of statewide applicability"—or else notify the state legislature, so that it may employ outside counsel. *See* Tenn. Code Ann. § 8-6-109(b)(9), (c). In the absence of any such notification, there is every reason to believe that, if certiorari is granted, the Attorney General will continue to defend Tennessee law.

Finally, Total Wines gestures at *Hollingsworth v. Perry*, 570 U.S. 693 (2013), which it meekly characterizes as "somewhat similar." Opp'n Br. 25. Quite the opposite. There, private plaintiffs sued state "officials [who] refused to defend" the challenged law at any stage of the litigation. 570 U.S. at 702. Here, the State itself sued and, at every turn, has defended its law, as it remains obligated to do. Moreover, in *Hollingsworth*, the only parties defending the law were private proponents of California's marriage restrictions who suffered no cognizable injury from a decision invalidating those restrictions. *See id.* at 707. Here, the Association represents the particularized interests of "market participant[s] seeking the enforcement of a law that, if not enjoined, would apply to both [them] and [their] competitors." *Cooper II*, 820 F.3d at 737–38; *see also* Opp'n Br. 25 (recognizing that the Association's "business interests" are at stake).

In short: The Association has standing in its own right. And the State's defense of its law in this case has been steadfast. The State's litigation strategy therefore does not affect the certworthiness of this

case, which presents a clean vehicle to resolve a square split.

2. Total Wine also suggests that the Court should deny certiorari because Respondents pressed an alternative Privileges and Immunities theory that the courts below never addressed. *See* Opp'n Br. 27–29. But this Court grants certiorari all the time to decide issues that the lower courts resolved below, even when a respondent raised alternative arguments that the lower courts never reached. *See, e.g.*, *Manuel v. City of Joliet, Ill.,* 137 S. Ct. 911, 922 (2017) (remanding for consideration of an argument "never confronted" below, as well as "any other still-live issues"); *Sturgeon v. Frost*, 136 S. Ct. 1061, 1072 (2016) (similar). At most, Total Wine's Privileges and Immunities argument is a question for remand.

3. Finally, Total Wine is wrong to suggest that the Court should deny certiorari because Total Wine has already obtained a license. *See* Opp'n Br. 2–3 & n.1, 13–14, 26. The absence of a stay pending appeal—which is appropriate only in rare circumstances—has no bearing on the certworthiness of a petition. Moreover, it was Total Wine's choice to set up shop while appeals were still pending. Indeed, when Total Wine opened its doors on June 27th, it did so knowing that the Association had already received an extension of time to petition for a writ of certiorari. Total Wine thus accepted the risk that the decision below could be reversed and its license revoked.

IV. THE SIXTH CIRCUIT'S DECISION IS WRONG.

Judge Sutton's dissent below and Judge Colloton's majority opinion in *Southern Wine* cogently explain why Total Wine's understanding of the Twenty-first

Amendment is wrong. Contrary to Total Wine's suggestion, *see* Opp'n Br. 29–30, those opinions—like the Association's position—are based not on a single line from *Granholm*, but on the text, history, and purpose of the Twenty-first Amendment and the dormant Commerce Clause. Nor do those opinions argue that the Twenty-first Amendment "immunize[s] all [liquor] laws from Commerce Clause challenge." *Id.* at 31 (quoting *Granholm v. Heald*, 544 U.S. 460, 488 (2005)). Instead, they simply apply *Granholm*'s holding 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.

It is Total Wine's position, not the Association's, that cannot be squared with this Court's precedents. This Court has consistently held that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause," *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984)—an exception that gives States "virtually complete control" over "how to structure the[ir] liquor distribution system[s]," *Granholm*, 544 U.S. at 488. As Total Wine would have it, however, the dormant Commerce Clause would trump the Twenty-first Amendment every time, leaving Section 2 of that Amendment with no substantive role to play.

Total Wine faults the State and the Association for "offer[ing] no evidence" about the purpose of the durational-residency requirement. Opp'n Br. 5, 25. But Total Wine neither explains what sort of "evidence" it believes was required nor identifies the source of that purported requirement. Tennessee's legislature enacted a statement of legislative purpose

specifically about the durational-residency requirement. *See* Tenn. Code Ann. § 57-3-204(b)(4). Total Wine complains that the legislature adopted this statement after the durational-residency requirement itself. *See* Opp'n Br. 6, 8–9. But, as the Eighth Circuit explained in rejecting the same argument, there is no reason "a later legislature—considering a preexisting law useful but perhaps for different reasons than its predecessor—cannot supplant an earlier legislature's intended purpose by enacting an express statutory purpose provision." 731 F.3d at 809.

In the end, Total Wine's position boils down to two points. *First*, invoking cases like *Bacchus Imports, Ltd. v. Dias*, 460 U.S. 263 (1984), and a concurring opinion in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), it argues that durational-residency requirements fall outside the Twenty-first Amendment because they serve no possible legitimate purpose. But that just goes to the crux of the dispute between the Eighth Circuit (and Judge Sutton) and the Fifth and Sixth Circuits. *Second*, Total Wine argues that, because the State could have accomplished its goals in some other manner, it had to do so. But that is the very point of the Twenty-first Amendment: to give States the power to choose how to achieve their goals concerning the sale of liquor. Tennessee's reasonable judgment that "[p]romoting responsible consumption and orderly liquor markets" is best accomplished by requiring that retailers be members of the communities they serve is entitled to respect. Pet.App. 50a (Sutton, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

September 4, 2018

Respectfully submitted,

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