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 Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF AMERICAN BEVERAGE LICENSEES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF AMERICAN BEVERAGE LICENSEES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae American Beverage Licensees (ABL) is an association representing licensed off-premises alcohol retailers (such as package liquor stores) and on-premises alcohol retailers (such as bars, taverns, and restaurants) across the nation. ABL was created in 2002 after the merger of the National Association of Beverage Retailers and the National Licensed Beverage

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

Association. ABL has about 15,000 members in 35 States. Many of ABL's members are independent, family-owned operations who ensure that beverage alcohol is sold and consumed responsibly by adults in conformity with the laws of the State in which each member does business.

ABL monitors federal legislation, judicial decisions, and trends of concern to beverage alcohol retailers. ABL is strongly committed to working with others under effective regulation toward the responsible sale of beverage alcohol products. ABL supports state laws concerning the structure of a State's beverage alcohol distribution system.

SUMMARY OF ARGUMENT

This Court has held multiple times that "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment." *Granholm* v. *Heald*, 544 U.S. 460, 466 (2005). For decades, many States have had such three-tier systems—requiring separate producers, wholesalers, and then retailers for alcohol distribution. And residency requirements for retailers and wholesalers have been essential and beneficial parts of this three-tier system. Requiring in-state alcohol retailers and wholesalers furthers legitimate state interests in "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality op.). States can ensure proper enforcement of their own alcohol regulations much more easily and effectively by requiring in-state residency for wholesalers or retailers.

With these benefits of the three-tier system in mind, this Court has recognized that the dormant Commerce Clause applies differently in the unique context of state alcohol regulation under the Twenty-first Amendment. This constitutional font of power stands as an exception to the typical operation of the dormant Commerce Clause. While the Court has held that the Commerce Clause overrides certain state alcohol regulations, precedent also clarifies that the Commerce Clause does not displace a State's use of core Twenty-first Amendment powers—such as direct regulation of the sale or use of alcohol within a State's borders.

Accordingly, *Granholm* v. *Heald*'s holding—about when state alcohol laws can treat in-state and out-of-state entities differently—was expressly limited to the first tier of alcohol *producers*. *Granholm* reaffirmed the three-tier system is "unquestionably legitimate." 544

U.S. at 489. And the Court acknowledged that "[t]he Twenty-first Amendment * * * empowers [a State] to require that all liquor sold for use in the State be purchased from a licensed *in-state* wholesaler." *Ibid.* (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)) (emphasis added). In contrast, what *Granholm* said a State cannot do is exempt in-state alcohol producers from the three-tier system's requirements (of using in-state wholesalers and retailers), while demanding that out-of-state producers adhere to the three-tier system (and use in-state wholesalers and retailers). *Granholm*'s express holdings referred multiple times to "producer" or "product," confirming that the case dealt with just that first tier of alcohol production—and not the subsequent wholesaler or retailer tiers. Moreover, the Court's historical analysis recognized this line between producers versus subsequent tiers in alcohol distribution systems, as *Granholm* held that the Twenty-first Amendment incorporated precedents dealing with just producers.

In all events, *Granholm* should not be expanded to invalidate laws requiring in-state alcohol retailers, as this would eviscerate the three-tier system that has existed for decades. Any expansion of *Granholm* to cover retailers would call into question the Court's repeated admonition—even in *Granholm* itself—that the three-tier system is constitutional. The Court should avoid setting its precedents on that collision course by upholding the state residency requirement here for alcohol retailers.

ARGUMENT

I. RESIDENCY REQUIREMENTS ARE AN ESSENTIAL AND BENEFICIAL PART OF A STATE'S THREE-TIER SYSTEM FOR ALCOHOL DISTRIBUTION.

Time and again, this Court has reaffirmed "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 (citing *North Dakota*, 495 U.S. at 432 (plurality op.); *id.* at 447 (Scalia, J., concurring in the judgment)). That is, States can "regulate the sale and importation of alcoholic beverages" by requiring "[s]eparate licenses" for "producers, wholesalers, and retailers"—all through "a complex set of overlapping state and federal regulations." *Ibid.* *Granholm* made clear "that the three-tier system itself is 'unquestionably legitimate.'" *Id.* at 489 (citing *North Dakota*, 495 U.S. at 432 (plurality op.); *id.* at 447 (Scalia, J., concurring in the judgment)). And it acknowledged that these valid forms of state-based alcohol regulation empower States "to require that all liquor sold for use in the State be purchased from a licensed *in-state* wholesaler." *Ibid.* (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)) (emphasis added).

These constitutional residency requirements—mandating in-state alcohol wholesalers and retailers—further essential and beneficial state interests. The three-tier system's multi-step, comprehensive regulatory system advances a State's interest in "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432 (plurality op.); see *Rice* v. *Rehner*, 463 U.S. 713, 724 (1983) ("The State has an unquestionable interest in the liquor traffic that occurs within its borders").

By requiring distribution to occur through entities with sufficient connections to a State, that State can best enforce its own alcohol regulations. For example, States can more easily inspect in-state wholesalers and retailers than entities outside their jurisdictions. See, *e.g.*, *Carter* v. *Virginia*, 321 U.S. 131, 135 (1944) ("The state of transit may compel the carrier to furnish information necessary for checking the shipment against unlawful diversion"). In upholding Missouri's wholesaler residency requirements, the Eighth Circuit explained "that in-state residency facilitates law enforcement against wholesalers, because it is easier to pursue in-state owners, directors, and officers than to enforce against their out-of-state counterparts." *S. Wine & Spirits of Am., Inc.* v. *Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013).

Retail, in particular, is the most inherently local tier of the three-tier system. The Tennessee law at issue here governs brick-and-mortar liquor and package stores that are the final connection between the State's alcohol distribution system and the general public. See Pet. App. 50a (Sutton, J., concurring in part and dissenting in part) ("Because they form the final link in the distribution chain, retailers are closest to the local risks that come with selling alcohol, such as 'drunk driving, domestic abuse, [and] underage drinking.'" (quoting *S. Wine & Spirits*, 731 F.3d at 810)).

Even within the same statutory section of the law challenged here, Tennessee specifies various other qualifications for the owners of liquor retail stores—and each one of these regulations is more easily enforced by requiring retailers to have sufficient connections to the State. See Tenn. Code § 57-3-204(b)(2)(A)-(L). For example, among other disqualifying factors, the license holder cannot have any felony convictions, hold any other alcohol distribution or food retail licenses, or hold any

elected office. *Ibid.* And the Tennessee Alcoholic Beverage 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." *Id.* § 57-3-204(b)(4). These various regulations control everything from a liquor store's physical premises to its hours of operation. See *id.* § 57-3-204. Like residency requirements, physical-presence requirements allow States to effectively enforce laws designed for orderly market conditions and public safety.

Given the localized nature of many alcohol regulations, a State would have limited avenues to enforce compliance without residency or physical-presence requirements ensuring a retailer has sufficient connections to the State. For example, States may validly require training in responsible alcohol sales and mandate that retail store managers obtain a "Manager's Permit" by completing annual training. *Id.* § 57-3-221. Similarly, the Tennessee Alcoholic Beverage Commission conducts routine compliance checks of brick-and-mortar retails stores. These inspections ensure that each retail location follows the statutory and regulatory guidelines—such as the requirement that each retailer post "in the most conspicuous place on the premises" its license and keep a "copy of the rules and regulations promulgated by the commission" on hand. *Id.* § 57-3-211. And each applicant for a retail license must "submit with the application to the commission a certificate signed by the county mayor" affirming that the applicant meets the license qualifications and that the proposed location complies with local ordinances. *Id.* § 57-3-208. Tennessee is far from alone in its comprehensive approach to regulating the retail sale of alcohol. Pet. Br. 33-36 (collecting state statutes). And enforcement of all alcohol regulations is

furthered by requiring retailers to have sufficient connections to the State.

Furthermore, residency requirements do much more than merely facilitate effective enforcement of retailers, as they also allow proper enforcement of the entire three-tier system. Without a residency requirement for retailers, the State would not be able to ensure that retailers are purchasing from in-state wholesalers, who in turn have purchased alcohol directly from producers (whether in-state or out-of-state). Each step in this chain is designed to "funnel" alcohol sales through the appropriate channels and, in turn, through various levels of state regulation. See *Granholm*, 544 U.S. at 489 ("States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system."). Removing the retailer residency requirement thus limits the State's ability to enforce regulations pertaining to the entire distribution chain of the three-tier system.

Likewise, residency requirements encourage responsible ownership of alcohol distribution companies and public safety. Judge Sutton's dissent below observed that "Tennessee reasonably concluded that requiring retailers to reside in the communities that they serve would further 'health, safety and welfare.'" Pet. App. 50a (quoting Tenn. Code Ann. § 57-3-204(b)(4)). The Eighth Circuit credited a similar point behind Missouri's wholesaler residency requirements: "a wholesaler governed predominantly by Missouri residents is more apt to be socially responsible and to promote temperance, because the officers, directors, and owners are residents of the community and thus subject to negative externalities—drunk driving, domestic abuse, underage drinking—that liquor distribution may produce." *S. Wine & Spirits*, 731 F.3d at 811. The Eighth Circuit thus recognized that residents "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." *Ibid.* These interests are only heightened with respect to retailers, who "sell alcohol directly to the public." *Id.* at 810.

Notably, local ownership and presence play a particularly important role in preventing underage sales of alcohol. As the Eighth Circuit and Judge Sutton noted, owners who reside in the community and operate these brick-and-mortar retail stores are in the best position to check identification, assess credibility, and manage employees' day-to-day compliance with applicable regulations. See Pet. App. 50a (Sutton, J., concurring in part and dissenting in part); *S. Wine & Spirits*, 731 F.3d at 811. Out-of-state owners and retailers do not have the same capability to oversee the business's direct interactions with the public, including minors. Residency requirements thus support a State's public-health interest in preventing underage sales of alcohol.

Part of the justification for the three-tier system also is the State's interest in preventing "unlawful diversion of liquor into its domestic market." *North Dakota*, 495 U.S. at 450 (Scalia, J., concurring in the judgment); see *id.* at 433 (plurality op.) ("The risk of diversion into the retail market and disruption of the liquor distribution system is thus both substantial and real."). This Court therefore found "[i]t is necessary for the State to record the volume of liquor shipped into the State and to identify those products which have not been distributed through the State's liquor distribution system." *Id.* at 433 (plurality op.). Today, citizens take for granted that illicit or tainted alcohol is generally not sold throughout the nation. But this is largely because of the responsible and traceable chain of custody provided by a three-tier system with effective in-state enforcement mechanisms. For example, if tainted alcohol is somehow introduced

into the three-tier distribution chain, this system can quickly fix the problem: Labeling and reporting requirements create a built-in tracking system for each shipment, and in-state residency requirements ensure a State can adequately enforce these laws. All of this is possible based on a well-documented chain of custody, knowing where the product is, and easily determining who is selling the alcohol.

In sum, a three-tier system allows regulators to effectively and flexibly adapt to the local norms and laws of their communities. Tennessee required in-state alcohol retailers not for economic discrimination in favor of local interests, but for the State's unquestioned interest in "the health, safety and welfare of this state." Tenn. Code § 57-3-204(b)(4); see *id.* ("[I]t 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."). As Judge Sutton's dissent correctly summarized, "[r]equiring individual retailers to reside in one place for a sustained, two-year period ensures that they will be knowledgeable about the community's needs and committed to its welfare." Pet. App. 50a; accord, *e.g.*, *Norris* v. *Grimsley*, 585 P.2d 925, 927 (Colo. App. 1978) ("[R]esidents of the affected neighborhood, by virtue of that fact alone, have a strong interest in insuring that the liquor licensing procedure is fairly and property administered.").

II. THE DORMANT COMMERCE CLAUSE APPLIES DIFFERENTLY IN THE UNIQUE CONTEXT OF STATE ALCOHOL REGULATIONS UNDER THE TWENTY-FIRST AMENDMENT.

Whatever the dormant Commerce Clause may require in other contexts, this Court has recognized repeatedly that state alcohol regulation presents unique concerns.

See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 712 (1984) ("[t]his Court's decisions * * * have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause" (quoting *Craig* v. *Boren*, 429 U.S. 190, 206 (1976)); see also 42 U.S.C. § 290bb-25b ("It is the sense of Congress that . . . [a]lcohol is a unique product and should be regulated differently than other products by the States and Federal Government.").

This is primarily because the Twenty-first Amendment "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Capital Cities*, 467 U.S. at 712 (citing *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964)). Consequently, "'[t]he 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 *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

State-specific regulations concerning alcohol distribution necessarily involve treating alcohol within the State's wholesale and retail tiers differently from alcohol outside that system. As Judge Sutton's dissent below rightly explained, "in-state distribution regulations in one sense always discriminate against out-of-state interests." Pet. App. 52a. But the Court has recognized that States can permissibly require such distribution through in-state wholesale and retail as part of their valid three-tier systems for alcohol regulation. See *Granholm*, 544 U.S. at 489 ("The Twenty-first Amendment * * * empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state

wholesaler" (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)).

So, while the Court has held that the dormant Commerce Clause applies in some fashion to alcohol laws, *ibid.*, "the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 516 (1996). In particular, when a State has "attempted directly to regulate the sale or use of liquor within its borders—the core [Twenty-first Amendment,] § 2 power"—that law does not violate the dormant Commerce Clause. *Capital Cities*, 467 U.S. at 713.

More general pronouncements about the dormant Commerce Clause in other contexts do not control challenges to state alcohol regulation. For example, the Court has explained that the dormant Commerce Clause generally forbids a State from providing "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc.* v. *Dep't of Envtl. Quality of the State of Or.*, 511 U.S. 93, 99 (1994). But the "unquestionably legitimate" three-tier system requires in-state alcohol wholesalers and retailers, even if out-of-state entities would have wanted to distribute and sell alcohol in that State. *Granholm*, 544 U.S. at 489.

State alcohol regulation is therefore a unique context under this Court's precedents interpreting the Twenty-first Amendment in conjunction with the dormant Commerce Clause. See, *e.g.*, *Duckworth* v. *Arkansas*, 314 U.S. 390, 398-399 (1941) (Jackson, J., concurring in the judgment) (recognizing that the "people of the United States," by enacting the Twenty-first Amendment, determined that alcohol regulation "should be governed by a specific and particular Constitutional provision").

The Court can therefore uphold the residency requirement here, as within the State's "core" Twenty-first Amendment power, without otherwise implicating the dormant Commerce Clause's operation outside the context of alcohol regulation. *Capital Cities*, 467 U.S. at 713. In fact, this Court has previously upheld state alcohol residency requirements. See *Heublein, Inc.* v. *S.C. Tax Comm'n*, 409 U.S. 275, 283 (1972) (state "resident representative" requirement did not violate the Commerce Clause because "[t]he requirement that, before engaging in the liquor business in South Carolina, a manufacturer do more than merely solicit sales there, is an appropriate element in the State's system of regulating the sale of liquor").

III. *GRANHOLM* V. *HEALD*'S HOLDING IS LIMITED TO PROTECTIONIST LAWS THAT DISCRIMINATE AGAINST OUT-OF-STATE PRODUCERS AND PRODUCTS.

A. *Granholm* clarified numerous times that its holding was limited to state laws discriminating against out-of-state alcohol *producers* and *products* (the first tier in a three-tier system). But the Court distinguished, as valid, laws requiring in-state alcohol wholesalers and retailers (the second and third tiers). *Granholm* thus held that both in-state and out-of-state alcohol producers must be required to use in-state wholesalers or retailers—or neither in-state nor out-of-state producers can be compelled to use a State's three-tier system.

Granholm invalidated state laws that allowed certain in-state wine producers to sell directly to consumers without allowing out-of-state producers to do the same. The Court concluded that these direct-shipment laws were discriminatory exceptions to the otherwise valid operation of a three-tier system requiring in-state alcohol wholesalers and retailers. In other words, the laws invalidated in *Granholm* allowed certain in-state

producers to bypass the traditional three-tier system of alcohol regulation (in-state wholesale and retail tiers), while out-of-state producers had to adhere to the three-tier system. See 544 U.S. at 466 ("the three-tier system is * * * mandated by Michigan and New York only for sales from out-of-state wineries"). As noted above, the Court expressly reasoned "that States could mandate a three-tier distribution scheme." *Ibid.* But *Granholm* held that a State could not subject only out-of-state produced alcohol to the three-tier system if in-state produced alcohol could evade this system. See *ibid.* (invalidating the "differential treatment between in-state and out-of-state wineries").

Commensurate with the fact that those state direct-shipment laws applied to producers, *Granholm* tailored its holding exclusively to producers. The majority opinion referred to "producer" or "product" almost 30 times (and to "winery" dozens more). Many of these references establish that the Court's holding was limited to the differential treatment of producers and products:

- "Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state *producers*." *Id.* at 476 (emphasis added).
- "The Court held that States were not free to pass laws burdening only out-of-state *products*." *Id.* at 477 (emphasis added).
- "Our more recent cases, furthermore, confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own *producers*." *Id.* at 487 (emphasis added).
- "The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local *producers*." *Id.* at 489 (emphasis added).

- "State policies are protected under the Twenty-first Amendment when they treat liquor *produced* out of state the same as its domestic equivalent." *Ibid.* (emphasis added).
- "This [Twenty-first Amendment] power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state *producers*." *Id.* at 493 (emphasis added).

Not only did *Granholm*'s language emphasize "producer" and "product," its reasoning relied on the distinction between this first production tier versus the latter two tiers (wholesale and retail). Recognizing that States can "funnel sales through the three-tier system," the Court clarified that a State may "require that all liquor sold for use in the State be purchased from a licensed *in-state* wholesaler." *Id.* at 489 (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)) (emphasis added). So States can require in-state alcohol wholesalers and retailers under *Granholm*, but they must "treat liquor *produced* out of state the same as its domestic equivalent" if States are going to implement a three-tier system. *Ibid.* (emphasis added).

Granholm's historical analysis also shows that its holding was limited to the differential treatment of producers—not wholesalers or retailers. The Court explained that ratification of the Twenty-first Amendment "constitutionaliz[ed] the Commerce Clause framework established under [the Wilson and Webb-Kenyon Acts]." *Id.* at 484 (quoting *Craig*, 429 U.S. at 205-206). *Granholm* then reasoned that these Acts had reaffirmed "the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor *produced* out of state." 544 U.S. at 483 (emphasis added). This line of cases, which *Granholm* held were

incorporated into the Twenty-first Amendment, implicated only producers—and not the remaining wholesaler and retailer tiers of the three-tier system:

- *Scott* v. *Donald*, 165 U.S. 58, 101 (1897) ("[W]hen a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other states; that such legislation is void as a hindrance to interstate commerce, and an unjust preference of the *products* of the enacting state as against similar *products* of the other states.") (emphases added).
- *Walling* v. *Michigan*, 116 U.S. 446, 455 (1886) (invalidating a "discriminating tax * * * operating to the disadvantage of the *products* of other states") (emphasis added).
- *Tiernan* v. *Rinker*, 102 U.S. 123, 127 (1880) ("A tax cannot be exacted for the sale of beer and wines when a foreign *manufacture*, if not exacted from their sale when of home *manufacture*.") (emphasis added).

This explains why *Granholm* invalidated state laws treating in-state and out-of-state alcohol producers differently, while reaffirming the unquestionable legitimacy of a three-tier system requiring in-state wholesalers and retailers.

B. While reaffirming the validity of three-tier systems, *Granholm* further limited the scope of its holding to state laws designed to discriminate in favor of local economic protectionism. See, *e.g.*, 544 U.S. at 472 ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.").

Granholm relied on cases dealing with state laws that discriminated against out-of-of state producers, thereby protecting local producers from competition. See *id.* at

487-488. For example, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984), invalidated a state law that was admittedly designed with "simple economic protectionism" in mind. The law in *Bacchus* created an exception to the State's otherwise broadly applicable alcohol regulations by excepting certain local alcohol producers from excise taxes. See *ibid.* The holding in *Bacchus* turned on that law's economic protectionism in favor of local alcohol producers, as *Granholm* noted. See *Granholm*, 544 U.S. at 487 ("'The central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.'") (quoting *Bacchus*, 468 U.S. at 276).

Similarly, *Granholm* relied on two additional cases involving economic protectionism where the practical effect of state laws would have been to regulate alcohol outside a State's boundaries. See *id.* at 488. *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Authority* invalidated a state law requiring out-of-state producers to affirm that their posted prices for alcohol sold to in-state wholesalers were no greater than prices charged to wholesalers in neighboring States. 476 U.S. 573, 575-576 (1986). Once the producer posted its monthly price in New York, it was required to seek approval from New York regulators before offering discounts in other States. *Ibid.* The Court held that this law violated the Commerce Clause because "the 'practical effect' of the law is to control liquor prices in other States." *Id.* at 583. And the Court rejected the State's reliance on the Twenty-first Amendment because "[t]he Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country or another State." *Id.* at 585 (citation omitted).

Soon thereafter, the Court also "rejected an identical argument" that Connecticut's analogous price-

affirmation statute was protected by the Twenty-first Amendment. *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 327 (1989). *Healy* relied on *Brown-Forman*'s holding that "the Twenty-first Amendment does not immunize state laws from invalidation under the Commerce Clause when those laws have the practical effect of regulating liquor sales in other States." *Id.* at 342. Notably, however, *Healy* did not question Connecticut's three-tier system and the geographic restrictions requiring in-state wholesalers without questioning their legitimacy. *See id.* at 326 n.2.

In relying on these precedents, *Granholm* limited its scope to state laws designed for local economic protectionism—as opposed to laws implementing the well-established three-tier system for alcohol distribution. And none of these authorities implicate or tarnish the evenhanded three-tier system that *Granholm* emphatically reaffirmed.

IV. THE SIXTH CIRCUIT'S EXPANSION OF *GRANHOLM* TO IN-STATE RETAILERS WOULD EVISCERATE THE THREE-TIER SYSTEM THAT THIS COURT HAS ALREADY HELD "UNQUESTIONABLY LEGITIMATE."

As explained above, *Granholm* provided comfort that the three-tier system was still "unquestionably legitimate" by holding that "State 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. Under that express holding, a State's residency requirement for alcohol retailers should also be unquestionably legitimate, as that treats alcohol produced both in-state and out-of-state the same by requiring both to be sold by in-state retailers.

But if States cannot require alcohol wholesalers or retailers to have a sufficient connection to the State, then it is unclear how any meaningful version of state-based

alcohol regulation under a three-tier system can survive. See, *e.g.*, *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185, 190 (2d Cir. 2009) ("[B]ecause in-state retailers make up the third tier in New York's three-tier regulatory system, Appellants' challenge to the ABC Law's provisions requiring all wholesalers and retailers be present in and licensed by the state is a frontal attack on the constitutionality of the three-tier system itself." (citation omitted)); *Brooks* v. *Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) ("an 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").

If the Court were to expand *Granholm*'s holding beyond producers—by ruling that States cannot treat in-state and out-of-state wholesalers or retailers differently—this would call into question whether *North Dakota*'s reaffirmation of the three-tier system would have to be overruled. *North Dakota* upheld a State's labeling and reporting regulations for "liquor destined for federal enclaves" within the State. 495 U.S. at 430 (plurality op.). The Court concluded that "[t]he two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment" because the laws served a "valid state interest" as part of North Dakota's "comprehensive system for the distribution of liquor within its borders." *Id.* at 432. This "comprehensive system" for controlling alcohol distribution included in-state wholesalers and retailers. *Id.* at 447-448 (Scalia, J., concurring in the judgment).

There is thus no need to reconsider the three-tier system, particularly given that such systems for alcohol distribution have existed for decades. See Pet. Br. 33-34 (collecting state statutes); *North Dakota*, 495 U.S. at 432

(plurality op.). In surveying precedents, *North Dakota* noted that "[t]he Court has made clear that the States have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets." *Id.* at 431. And against the backdrop of this long history of State control over alcohol distribution, Congress has enacted various alcohol statutes throughout the years without enacting any comprehensive scheme for regulating local retailers. See, *e.g.*, 42 U.S.C. § 290bb-25b (the Sober Truth on Preventing Underage Drinking Act of 2006); 27 U.S.C. § 122a (the Twenty-first Amendment Enforcement Act of 2000); 27 U.S.C. § 201-212 (Federal Alcohol Administration Act of 1935); 27 U.S.C. § 122 (Webb-Kenyon Act of 1913, Pub. L. 62-398, 37 Stat. 699 (1913); re-enacted, 49 Stat. 877 (1935)); 27 U.S.C. § 121 (Wilson Act of 1890). Cf. *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 173 (1939) (affirming Congress's ability to regulate liquor in certain circumstances, notwithstanding the Twenty-first Amendment).

Granholm did not mean to question a three-tier system requiring in-state alcohol retailers, as it expressly said this system was "unquestionably legitimate." 544 U.S. at 489. And this Court now should not expand *Granholm*'s holding beyond producers, as doing so would set this Court's precedents on a collision course by threatening the continued viability of *Granholm*'s and *North Dakota*'s unequivocal reaffirmation of the three-tier system.

CONCLUSION

The Court should reverse the judgment of the Sixth Circuit.

Respectfully submitted.

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