No. 18-96

In the
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,
v.

ZACKARY W. BLAIR, *ET AL*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF 81 WINE CONSUMERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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I. INTEREST OF *AMICI CURIAE* [1]

A woman in Troy, Michigan, asks her local wine shop if they have a 1998 Chateau Margaux to celebrate a twentieth anniversary, but is told they do not carry anything that old. A man in Moline, Illinois, who loves chardonnay, tries to order some highly rated Kistler Chardonnay directly from the winery, but is told it has all been allocated and he should try again next year. Members of a wine tasting club in Bloomington, Indiana, want to taste recent red wines from Argentina, but can find only four examples in town. The wines these consumers are searching for are readily available from out-of-state sources and sold over the internet, but each lives in one of the 36 states that imposes a residency requirement on wine retailer licenses that prevents consumers from buying from retailers in other states.[2]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part or made a monetary contribution. Every individual who made a contribution toward the preparation and submission of the brief is listed in the Appendix. Pursuant to Supreme Court Rule 37.2, counsel for *amici curiae* state that Petitioner and Respondents have all entered blanket consents on the docket to the filing of *amicus curiae* briefs.

[2] Fourteen states allow some kinds of internet sales. Eric Asimov, *Wines are No Longer Free to Travel Across State Lines*, N.Y. Times (Oct. 23, 2017) (https://www.nytimes.com/2017/10/23/dining/drinks/interstate-wine-sales

This *Amicus Curiae* Brief is written on behalf of 81 wine consumers like these.[3] They live in twenty-five different states. They share a common frustration that they cannot find the wines they want locally and are prevented from buying them from out-of-state sellers because of laws like Tennessee's residency rule that protect local retailers from out-of-state competition. The problem is especially serious in smaller cities and less populous states where local wine stores and grocery stores may stock only a few hundred out of the hundreds of thousands of wines carried by out-of-state retailers and sold online.[4]

The case before the Court does not directly concern the ability of consumers to buy wine from out-

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-shipping-laws.html?_r=0). However, because of regulatory complexity, not all internet retailers will ship to all fourteen. E.g., K&L Wine Merchants, one of the biggest, will ship only to ten states. See https://www.klwines.com/Shipping/StateLegality. (all web sites last visited Nov. 29, 2018).

[3] The names of all amici are listed in the Appendix and include Eleanor and Ray Heald, lead plaintiffs in *Granholm v. Heald,* 544 U.S. 460 (2005). Another Amicus brief has been filed by an organization called Consumer Action that purports to represent the interests of consumers. It argues that consumers favor restrictive state laws that ban interstate competition, reduce supply and raise prices. Its claim cannot be taken seriously..

[4] A consumer can go to wine-searcher.com and quickly find internet retailers with a wine in stock, ready to ship.

of-state and internet retailers; it concerns Tennessee's residency requirement for operating a bricks-and-mortar wine store. However, the implications for internet sales are obvious and profound. If the Court were to rule, as the Petitioner has suggested, that the Twenty-first Amendment overrides the Commerce Clause and permits states to enforce protectionist and discriminatory residency rules when regulating bricks-and-mortar retailers, it would follow that states may also enforce discriminatory residency rules when regulating internet retailers. They could expand the right of their own retailers to sell wine via web sites and ship to consumers' homes, while prohibiting out-of-state retailers from doing so. Consumers would remain limited to the wine stocked by in-state sellers, no matter how limited or expensive their selection, and would be cut off from the more robust online wine market. The promise of the Commerce Clause that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any" would become a hollow one. *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949).

Despite the fact that this case concerns retail sales of consumer goods, no consumers are parties to it. The parties are competing business interests fighting over the right to sell wine in Tennessee. But, how the Court resolves that dispute will obviously affect wine consumers, either limiting or expanding their access to the broad variety of wines sold by national chains, out-of-state sellers, and internet retailers. Eighty-one wine consumers have therefore submitted this brief to

urge the Court to affirm the Sixth Circuit's decision that Tennessee's residency rule, which prevents out-of-state entities from obtaining retail liquor licenses, is unconstitutional, and to declare unambiguously that the Twenty-first Amendment does not overrule the nondiscrimination principle of the Commerce Clause when state laws are regulating retail sales.

II. SUMMARY OF ARGUMENT

As this Court observed in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2095-97 (2018), the internet has transformed the national economy and redefined interstate commerce in ways that must be taken into account in implementing the Commerce Clause. A consumer's favorite store is now just as likely to be an online merchant located at the other end of the country as it is a bricks-and-mortar merchant located downtown. Most Americans shop online, which gives them access to a greater variety of goods than are available locally. The internet has fulfilled the Founders' vision of a national economic union.

Among the goods sold online is wine. There are hundreds of thousands of wines approved for sale in the U.S., but only a fraction is available in local grocery stores and wine shops. If a consumer wants a brand or type of wine not carried locally, the consumer can usually find it for sale from an out-of-state retailer over the internet. The only problem is that many states do not allow such transactions. They utilize various kinds of residency rules to deny licenses to out-of-state retailers and limit sales to merchants physically located in the state. This benefits in-state

businesses by protecting them from competition, but at the expense of consumers.

The case before the Court does not concern internet wine sales directly. It involves a different kind of residency rule that prevents out-of-state entities from obtaining retail licenses in Tennessee. However, the implication for consumer access to the internet marketplace is obvious. If the Court were to rule that the Twenty-first Amendment overrides the Commerce Clause and permits states to deny licenses to nonresidents for bricks-and-mortar retail stores, this precedent would also give states the authority to deny licenses to online retailers based on residency. In-state businesses could take internet orders and make home deliveries; those located out of state could not. This would cut off consumer access to the most important national marketplace and stand the Commerce Clause on its head.

Since 1964, this Court has consistently said that the Twenty-first Amendment does not override the Commerce Clause when alcoholic beverages are involved. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Most recently in *Granholm v. Heald*, 544 U.S. 460, 487-89 (2005), the Court said explicitly that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," and discriminatory laws are "not saved by the Twenty-first Amendment." A residency rule that benefits local interests and prevents competition from those outside the state is a classic type of discrimination forbidden by the Commerce Clause.

Despite this Court's consistent precedents, some lower courts have held to the contrary, that the nondiscrimination principle does not apply to residency rules for wine retailers. Their reasons have varied. Some read *Granholm* as saying that the nondiscrimination principle applies only to producers and not to retailers; others that the nondiscrimination principle does not apply to laws regulating the basic operation of the three-tier system. These strained interpretations of *Granholm* are based on *dicta* and phrases taken out of context, and should be rejected, as the Seventh Circuit did in *Lebamoff Enterpr., Inc. v. Rauner,* __ F.3d ___, 2018 WL 6191351 (7th Cir. 2018). This Court's prior decisions and its discussion of the history and meaning of the Twenty-first Amendment lead to only one conclusion: Whatever power the Amendment gave states to impose even-handed burdens on interstate commerce in alcohol, it did not give them the authority to enact discriminatory laws. A state does not have to authorize the sale of wine by remote ordering and home delivery, but if it does -- and many states are beginning to -- it must allow out-of-state retailers to participate.

III. ARGUMENT

A. State laws prohibiting buying wine from out-of-state retailers harm consumers

In 2003, the FTC issued a report called *Possible Anticompetitive Barriers to E-Commerce: Wine*.[5] The FTC concluded that state laws prohibiting buying wine on the internet from out-of-state sellers harmed consumers by limiting choices, reducing supply and increasing prices. FTC Report at 3-4.[6] Even 15 years ago, the FTC took note that the internet was "transforming the nation's economy [and letting] consumers purchase an unprecedented array of goods and services from the convenience of their homes." *Id.* at 1. Instead of a few local wine stores with limited inventories, the internet gave consumers access to "thousands of goods" from online retailers. *Id.* The problem was that many states prohibited their citizens from buying wine over the internet and restricted them to whatever might be available locally.

That might not seem like a significant problem at first glance. There are thousands of retail wine outlets in every state, from big-box stores like Wal-Mart and

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[5] https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf (last visited Nov. 29, 2018).

[6] The FTC report was cited heavily by this Court in *Granholm v. Heald*, 544 U.S. 460, 466, 467, 468, 490, 491, 492 (2005).

Costco, to grocery chains like Kroger and Safeway, to package stores, fine wine shops, drug stores, and convenience stores. But wine availability is not a question of quantity -- it is a matter of variety and selection. Some wines are available everywhere, like the Gallo brands Apothic and Barefoot that sell for under $10. Others, like a $350 Penfolds Grange, may be available only at two or three outlets in the entire country. Wines are not interchangeable. *See Bridenbaugh v. Freeman-Wilson* 227 F.3d 848, 849 (7th Cir. 2000) (inability to obtain a special wine is a palpable injury).

Local retailers carry only a small percentage of the wine that has been approved for sale by the Alcohol and Tobacco Tax and Trade Bureau (TTB). The National Association of Wine Retailers (NAWR) calculated that the TTB approved 405,513 wines from 2014-2017, but only 44,233 wines were on sale in Michigan and 7,438 in New Hampshire.[7] That means a majority of wines are not actually available to most consumers. There are several reasons for this.

a. Some producers cannot find a wholesaler, especially those making small-production wines or trying to introduce new products. *See Granholm v. Heald,* 544 U.S. at 467-68.

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[7] *See* NAWR, *Michigan Wine Lovers Have No Access to 89% of Wines* (2017) (https://nawr.org/commentary/); NAWR, *Liquor Commission Banning New Hampshire Consumers from Buying More Than 200,000 Wines* (2018) (https://nawr.org/press- releases/) (sites last visited Dec. 3, 2018).

b. Collectible, rare, and uncommon wines are sold primarily by a small number of specialty wine stores and auction houses in New York and other major cities.. *Freeman v Corzine*, 629 F.3d 146, 154 (3d Cir. 2010); H. Lee Murphy, *Interstate sales ban hurts local wine merchants*, Crain's Chicago Business (Nov. 10. 2017)[8]

c. A popular wine may sell out at local stores that do not carry deep inventories, especially if it gets a good review in a national wine magazine. *Siesta Village Mkt., LLC v. Granholm*, 596 F.Supp.2d 1035, 1037 (E.D. Mich. 2008).

d. Consumers may have difficulty getting to a store with a large wine inventory if they live in small towns or rural areas, Eric Asimov, *supra* n.2, or if they are elderly or disabled.

If a consumer cannot find a particular wine at a local retailer, sometimes the consumer can obtain it directly from the winery. Forty-five states now allow some form of direct shipping from wineries. Free the Grapes, *Issue Summary* ¶ 2 (2018).[9] However, this option is only available for domestic wine, and more than two-thirds of the wine approved for sale by the TTB is imported from other countries. Foreign wine cannot be ordered directly from the winery and is

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[8] An online edition is at https://www.chicagobusiness.com/article/20171110/ISSUE01 (visited Dec. 3, 2018).

[9] https://freethegrapes.org/issue-summary/ (last visited Nov. 29, 2018).

available to consumers only from retailers. NAWR, *Liquor Commission Banning New Hampshire Consumers from Buying More Than 200,000 Wines*, *supra.*. Ordering directly from the winery is also feasible only if the winery has a retail operation (many do not), has not sold out, and has not already allocated the wine to other purchasers.[10]

Lack of local availability of wine is the inevitable by-product of a three-tier system in which only in-state entities may participate and interstate competition is prohibited. FTC Report at 3-4. If Tennessee will not issue retail licenses to out-of-state entities, then consumers are limited to whatever inventory their local retailers with limited shelf space decide to stock. Consumers end up cut off from 80% or more of the wines being sold elsewhere in the country. This is significant, because the "critical consideration" in Commerce Clause cases is "the overall effect of the statute on both local and interstate activity." *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.,* 476 U.S.573, 578-79 (1986).

B. There is inconsistency in the lower courts about how the Commerce Clause should apply to wine retailer regulations

This Court has long held that the Commerce Clause, U.S. CONST., art. I, § 8, cl. 3, denies states the power to discriminate against out-of-state goods moving in interstate commerce. *Or. Waste Sys., Inc. v.*

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[10] For an explanation of allocation, see http://www.kistlervineyards.com/ wines/how-to-acquire-kistler-wines/

Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994). This principle is driven by concerns about economic protectionism, i.e, regulations that restrict competition from out-of-state sellers and provide economic benefits to in-state businesses. *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008). Such trade barriers are inherently destructive of national economic unity. Therefore, if a law discriminates against interstate commerce on its face, purposefully, or in practical effect, courts apply strict scrutiny and usually strike it down. *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.,* 476 U.S. at 578–79. A discriminatory law may only be saved if the state proves that the difference in treatment of in-state and out-of-state entities advances a legitimate local purpose that cannot adequately be served by less discriminatory alternatives. The standards for such justification are exacting and require concrete record evidence. G*ranholm v. Heald*, 466 U.S. at 492-93

In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, this Court said that "[t]o draw a conclusion ... that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would ... be an absurd oversimplification, ... patently bizarre and ... demonstrably incorrect." 377 U.S. at 331-32. In *Bacchus Imports Ltd. v. Dias*, this Court held that the nondiscrimination principle applied to state liquor laws, prohibited economic protectionism, and was not overridden by the Twenty-first Amendment. 468 U.S. 263, 276 (1984). In *Healy v. Beer Inst.*, Justice Scalia wrote that a liquor law's discriminatory character

eliminates whatever immunity might otherwise be afforded by the Amendment. 491 U.S. 324, 344 (1989) (Scalia, J., concurring). In *Granholm v. Heald,* the Court built upon *Hostetter, Bacchus* and *Healy*, and held that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," 544 U.S. at 487, and "not saved by the Twenty-first Amendment." *Id.* at 489. Despite this seemingly clear language, lower federal courts have been inconsistent when asked to apply the nondiscrimination principle to state laws regulating wine retailers in ways that favor local interests. *See Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *4 (summarizing different interpretations).

Some courts have followed the quartet of Supreme Court cases and held that state laws regulating liquor retailers are limited by the nondiscrimination principle of the Commerce Clause just like the law regulating liquor taxes in *Bacchus*, winery direct shipping in *Granholm*, and beer prices that could be charged by shippers in *Healy*. The leading circuit court case is *Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *3-5. The Seventh Circuit in a thorough opinion by Chief Judge Wood held that the nondiscrimination principle applied to state laws allowing in-state but not out-of-state retailers to ship wine to Illinois consumers and declared the Illinois law unconstitutional. In *Cooper v. Texas Alcoholic Beverage Comm'n*, 820 F.3d 730, 742-43 (5th Cir. 2016)), the Fifth Circuit applied the nondiscrimination principle and struck down a durational residency rule for retail licenses. In *Lebamoff*

Enterpr., Inc. v. Snyder, __ F. Supp. 3d ___, 2018 WL 4679612 at *4-5 (E.D. Mich. 2018), the district court found the language in *Granholm* clear and struck down a Michigan law that allowed in-state retailers to sell wine over the internet and ship or deliver it to consumers' homes, but prohibited out-of-state retailers from doing so.

Other courts have not extended the nondiscrimination principle to laws regulating retailers. In *Arnold's Wines v. Boyle,* 571 F.3d 185, 189-91 (2d Cir. 2009), a panel of the Second Circuit refused to apply the nondiscrimination principle to a New York law that gave in-state wine retailers exclusive rights to make home deliveries.[11] It said that laws regulating retailers were immune from challenge under the Commerce Clause and criticized this Court's decision in *Granholm* as "judicial activism." 571 F.3d at 197-98 (Calabresi, concurring). The Second Circuit seized on two phrases in *Granholm*. First, that state laws 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 read this not as a restatement of the nondiscrimination principle but as a substantive limit upon it, i.e., that principle *only* applied to producers. *Contra Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *4

[11] The law at issue did not actually discriminate against interstate wine shippers because New York retailers were also banned from using common carriers to ship wine and had to deliver in their own vehicles. 571 F.3d at 188.

(*Granholm* did not draw a line between producers and retailers because the case before did not present that question). Second, that "[w]e have previously recognized that the three-tier system itself is 'unquestionably legitimate.'" 544 U.S. at 489. The Second Circuit read this phrase not just as a restatement of the principle that the Twenty-first Amendment gives a state broad power to regulate alcohol distribution in even-handed ways, but as a substantive extension of that power to immunize even discriminatory laws from Commerce Clause scrutiny if they regulated the retail tier. In *So. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 809-10 (8th Cir. 2013), the Eighth Circuit went further and said that these two phrases in *Granholm* amounted to a "bright line between the producer tier and the rest of the system." It upheld a residency rule for liquor wholesaler licensees.

The Fifth and Sixth Circuits have sought a middle ground in which some state retailer laws are subject to the nondiscrimination principle and others are not, depending on whether they regulate an "inherent" aspect of a state's three-tier system. They derive this from language in two cases that did *not* involve a state law that discriminated against interstate commerce. *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. at 332 says that "the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984), says that the

issue in each case is "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."

In *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 819 (5th Cir. 2010), the Fifth Circuit defined the "inherent" aspects of retailing as retailers doing what retailers do, a not very helpful analytical tool. They upheld a law allowing in-state but not out-of-state retailers to take remote orders and ship wine to consumers in the immediate area of the store because these sales were "being made to proximate consumers, not those distant to the store," even though they no longer have to enter the store. It called these "conceptual" local sales. In *Byrd v. Tenn. Wine & Spirits Retailers Assoc.,* 883 F.3d 608, 623 (6th Cir. 2018), the case now before the Court, the Sixth Circuit struck down a 2-year durational residency rule because where a licensee lived prior to becoming a licensee was irrelevant (not inherent to) to a three-tier system.

This middle-ground position has been criticized as unworkable by the Seventh and Eighth Circuits. In *So. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d at 810, the Eighth Circuit said that '[t]here is no archetypal three-tier system from which the 'integral' or 'inherent' elements of that system may be gleaned." It noted that "*Granholm* itself involved two different versions of that system from New York and Michigan." The Seventh Circuit

agreed, noting that Illinois had 30 categories of liquor licenses, including ones for airplanes. A legal standard that allowed a state to discriminate with respect to some licenses whose operations are inherent to the three-tier system, but but not others would be unworkable. *Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *5. The district court in *Lebamoff Enterpr., Inc. v. Snyder*, __ F. Supp. 3d ___, 2018 WL 4679612 at *3 (E.D. Mich. 2018) similarly found the idea unworkable, noting that Michigan had "departed from a hermetically-sealed three-tier system when it chose to permit its [own] wine retailers to join the digital marketplace and engage in direct shipping to customers ... in a manner above-and-beyond that of a traditional three-tier system." Indeed, it is absurd to suggest that states still maintain a traditional three-tier system where alcohol sales are exclusively channeled through a wholesaler and retailer. Whatever may have once been the case, alcohol is no longer sold just at liquor stores to walk-in customers, but from hotel minibars, winery tasting rooms, brewpubs, craft distillers, grocery stores, farmers' markets, souvenir shops, airplanes, ships, football stadiums, wine clubs, and over the internet from out-of-state wineries.

There are at least three cases pending in the lower courts in which consumers complain that state laws regulating online retail wine sales discriminate against interstate commerce. In each, the state allows in-state retailers to take remote orders by internet or telephone and ship wine to consumers, but will not give out-of-state businesses the opportunity to apply

for any kind of similar shipping license. Consumers are effectively foreclosed from the national wine marketplace. *Lebamoff Enterpr., Inc. v. Snyder*, __ F. Supp. 3d ___, 2018 WL 4679612 at *4-5 (appeal pending); *Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 (remanded to N.D. Ill); and *Sarasota Wine Mkt. v. Parsons,* 4:17-cv-02792 (E.D. Mo.) (motion to dismiss pending). In each case, the parties are fighting over whether the nondiscrimination principle applies to laws regulating the retail tier. This Court needs to clarify the extent to which state liquor laws regulating retailers are constrained by the nondiscrimination principle.

C. Discrimination favoring in-state over out-of-state wine retailers violates the Commerce Clause and is not saved by the Twenty-first Amendment

This case concerns discriminatory residency rules for traditional bricks-and-mortar wine retailers, but it will set the precedent for internet retailers as well. This Court has noted that there is no longer a meaningful distinction between them. "Modern e-commerce does not align analytically with [old rules based on] physical presence," so the implementation of Commerce Clause doctrines today must accommodate the "far-reaching systemic and structural changes in the economy" and "many other societal dimensions" caused by the Cyber Age. *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2095, 2097 (2018). "A visit by a consumer to a favorite store is now an easy click away, regardless of where the physical storefront is located." *Direct Mktg. Ass'n v. Brohl,* 135 S.Ct. 1124,

1135 (2015) (Kennedy, J., concurring). The Internet has changed the very structure of the retail marketplace. Last year, e-commerce retail sales were estimated at $453.5 billion. Dept. of Commerce, *U.S. Census Bureau News, Quarterly Retail E–Commerce Sales: 4th Quarter 2017* (CB18–21, Feb. 16, 2018), cited in *S.D. v. Wayfair, Inc.*, 138 S.Ct at 2097. Nearly 70% of Americans are shopping online. PricewaterhouseCoopers, *Understanding How U.S. Online Shoppers Are Reshaping the Retail Experience* 3 (Mar. 2012), cited in *Direct Mktg. Ass'n v. Brohl,* 135 S.Ct. at 135. If the Court were to decide that the nondiscrimination principle of the Commerce Clause does not apply to state regulation of liquor retailers, it would have a profound effect on (and effectively eliminate) internet sales for most consumers, because most internet retailers will be located in states other than the one in which a consumer resides. This would stand the Commerce Clause on its head.

The Commerce Clause has long been understood to deny states the power to discriminate against the flow of goods moving in interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. at 98. Regulatory measures that benefit in-state economic interests and burden their out-of-state competitors are virtually *per se* invalid whether the discrimination is purposeful or a matter of practical effect. *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.,* 476 U.S. at 578–79. A state can justify discrimination only by proving that the difference in treatment of in-state and out-of-state entities advances a legitimate local purpose that cannot

adequately be served by less discriminatory alternatives. *Granholm v. Heald*, 466 U.S. at 492-93. Given that forty-five states already allow other kinds of internet ordering and direct-to-consumer shipping (e.g., from wineries), it is hard to imagine that states will be able to meet this burden.

In *Granholm v. Heald*, this Court held that the nondiscrimination principle of the Commerce Clause applied to state liquor laws. It invalidated laws from Michigan and New York that allowed in-state wineries to sell and ship directly to consumers, but prohibited out-of-state wineries from doing so. Petitioner argues that the *Granholm* decision is not controlling in this case because it only applies to laws regulating wine producers and not to wine retailers. This argument is factually false. The wineries involved in the *Granholm* case were not only wine producers, they were also wine retailers. The Michigan statute at issue provided that "[t]he following classes of vendors may sell alcoholic liquor *at retail* .... (o) Wine maker where wine may be sold by direct shipment *at retail* on the licensed premises. Mich. Comp.L. §436.1537(1) (2004) (emphasis supplied). The discrimination between in-state and out-of-state wineries concerned the wineries' retail operations, not their production. In-state wineries could sell at retail and ship to consumers but out-of-state wineries could not. *Granholm* is direct precedent that the nondiscrimination principle applies to laws regulating wine retailers.

To the extent that Petitioner is contending that the Commerce Clause in general gives greater

protection to producers than retailers, the argument is without support. The case that first articulated the nondiscrimination principle 194 years ago did not involve producers, but boat companies shipping goods and passengers across the Hudson River. *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824) (Johnson, J., concurring). Retailing is the heart of commerce, and this Court has routinely applied Commerce Clause doctrine to retail transactions. *E.g., Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641 (1994) (mail-order sales); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 73-74 (1963) (retail sale of used oil well equip-ment); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940) (retail sales). Not a single prior Supreme Court case has said that states are more free to discriminate against out-of-state retailers than out-of-state producers in any context.[12]

Petitioner also asserts that the Twenty-first Amendment changes (and weakens) how the nondiscrimination principle applies to state liquor laws and allows Tennessee to discriminate among retailers based on residency. It contends that the Amendment gives states broad power to regulate the retail sale of wine within their borders, up to and including the power to discriminate against out-of-state interests. *Granholm* rejected this argument..The Court held that "discrimination is neither authorized nor permitted by the Twenty-first Amendment," 544 U.S. at 466, which "does not allow States to regulate

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[12] *See also Healy v. Beer Inst.*, 491 U.S. at 327-31 (nondiscrimination principle applies to both producers and shippers of beer).

the direct shipment of wine on terms that discriminate." 544 U.S. at 476. It said that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," 544 U.S. at 487, that "discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment," 544 U.S. at 489, and that "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." 544 U.S. at 493.[13] The Court cited its prior holding in *Bacchus Imports, Ltd. v. Dias*, that the Twenty-first Amendment did not "empower States to favor local liquor industries by erecting barriers to competition," 468 U.S. at 276, and said in *Granholm* that this precedent "forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny." 544 U.S. at 487-88. It also cited favorably Justice Scalia's concurrence in *Healy v. Beer Inst*., 491 U.S. at 344, that a liquor "statute's invalidity is fully established by its facial discrimination against interstate commerce .. despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." 544 U.S. at 488

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[13] *See Lebamoff Enterpr., Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *3 (once a state allows its in-state licensees to ship wine anywhere within the state, refusing to extend that privilege to out-of-state businesses is facially discriminatory).

Petitioner and its amici base their argument on a single phrase in *Granholm* where this Court noted that in *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990) it had "previously recognized that the three-tier system itself is 'unquestionably legitimate.'" 544 U.S. at 489. Petitioner repeats this phrase in its main brief seven times (pp. 13, 16, 22, 35, 45, 46, 54), as if repetition could somehow elevate this phrase into a holding that discriminatory state laws are immune from Commerce Clause scrutiny. The argument is without merit, for three reasons.

First, the sentence appears in *Granholm* unaccompanied by any discussion, explanation, analysis or reasoning, and does not actually say anything about discriminatory state liquor laws. That is not the way this Court announces its holdings.

> We resist reading a single sentence unnecessary to the decision as having done so much work. In this regard, we recall Chief Justice Marshall's sage observation that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Arkansas Game & Fish Com'n v. U.S., 568 U.S. 23, 35 (2012) (citation omitted).

Second, Petitioner is taking the phrase out of context, thereby distorting its meaning. The phrase appears in *Granholm* only after an extended

discussion of prior case law and the conclusion that the nondiscrimination principle applies to state regulation of alcohol. 544 U.S. at 486-88. In context, the Court was clarifying that its holding prohibiting discrimination did not cast into doubt the constitutional authority of states to make basic even-handed decisions about what kind of liquor distribution system to create. The Court says that

> A State [may choose] to ban the sale and consumption of alcohol altogether..., assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate."

544 U.S. at 488-89. The three-tier system is simply the licensing process by which a state regulates how alcohol arrives on retail shelves, which remains intact with or without residency requirements. There is not the slightest indication that the Court meant that states were free to discriminate as to who could obtain a license or that laws regulating retailers were exempt from its extensive prior discussion and conclusion that the nondiscrimination principle applied to state liquor laws. *See Lebamoff Enterpr. Inc. v. Rauner*, __ F.3d ___, 2018 WL 6191351 at *5.

Third, the case from which the "unquestionably legitimate" sentence originates -- *North Dakota v. U.S.,*-- was a plurality opinion in a Supremacy Clause case about liquor sales on military bases that involved neither the Commerce Clause nor retailers nor

discrimination[14] and therefore cannot possibly be precedent that discriminatory wine retailer laws are immune from Commerce Clause scrutiny. *Arkansas Game & Fish Com'n v. U.S.*, 568 U.S. at 35. Indeed, the *Granholm* Court cautioned against this very interpretation

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding [that] discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

Granholm, 544 U.S. at 488-89.

The task for this Court is to weigh the strong federal interest in a national unified commercial marketplace against the core concerns of the Twenty-first Amendment. In *Granholm*, it said those core concerns were temperance and tax collection. 544 U.S. at 489. The requirement that a consumer may only buy wine from a retailer physically located in the state does not advance temperance because residents can purchase the same quantity of alcohol locally. Nor does it advance tax collection because a state can require internet retailers to collect and remit the same tax. *South Dakota v. Wayfair, Inc.*, 138 S.Ct. at 2094 et seq. The law also is unnecessary to advance a

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[14] Indeed, Justice Scalia joined the *North Dakota* plurality only because the law at issue was not discriminatory. 495 U.S. at 444 (Scalia, J., concurring).

state's secondary Twenty-first Amendment concerns, such as facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability, because those objectives too can be achieved by requiring a license as a condition for making retail sales, and revoking that license for misbehavior. This how the states regulate their own in-state retailers. *Granholm*, 544 U.S. at 492.

Residency requirements just give economic protection to local businesses and protect them from competition at the expense of consumers. They are a type of local processing rule, which this Court has repeatedly condemned, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994), because it views "with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 145 (1970).

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the ruling of the court below that the nondiscrimination principle of the Commerce Clause prohibits Tennessee from imposing residency rules on the issuance of retail liquor licenses.

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