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

BRIEF OF THE CENTER FOR ALCOHOL POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

John C. Neiman, Jr.
Counsel of Record
Mary K. Mangan
MAYNARD COOPER & GALE, P.C.
1901 Sixth Avenue North
2400 Regions/Harbert Plaza
Birmingham, AL 35203
(205) 254-1228
jneiman@maynardcooper.com

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Alcohol Policy is a nonprofit entity that educates policymakers, regulators, courts, and the public about alcohol regulation. By conducting research and highlighting initiatives that maintain the appropriate state-based regulation of alcohol, the Center promotes safe and responsible alcohol consumption. It fights underage drinking and drunk driving. And it informs key entities about the personal and societal effects of alcohol consumption. Through these endeavors the Center seeks to maintain civic awareness about why States regulate alcohol differently from every other commodity.

In 2011, the Center republished *Toward Liquor Control*, a book John D. Rockefeller, Jr. commissioned during the Twenty-first Amendment's ratification. This publication guided the States' liquor-control systems in the years that followed. Its observations provide critical insight about Americans' repeal-era views of the diverse array of measures the Constitution would allow States to take to prevent the problems that led to prohibition in the first place. This brief sets out observations from the book that are pertinent to the important constitutional question now before the Court.

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Center for Alcohol Policy or its counsel made a monetary contribution to the brief's preparation or submission. The parties have filed blanket consent waivers with the Court consenting to the filing of all *amicus* briefs.

SUMMARY OF ARGUMENT

A 1933 book commissioned by John D. Rockefeller, Jr., *Toward Liquor Control*, provides important evidence about what Americans of the time understood the Twenty-first Amendment to mean. This writing played an unusually influential role in shaping States' alcohol laws moving forward. Two of the book's central observations suggest that Americans of that time would have viewed durational-residency laws as among the many tools States have at their disposal in addressing the problems that led to both prohibition and repeal.

A. First, *Toward Liquor Control* described alcohol regulation as a fundamentally local problem requiring fundamentally local solutions. Prohibition had failed not because alcohol posed no problems worth addressing, but because the Eighteenth Amendment imposed a national policy without accounting for local values. A similar failure led to prohibition, for one of the chief problems of the pre-prohibition era was the non-resident, absentee owner of the "tied house" saloon, who had incentives to promote consumption without regard for the costs to the local community.

Toward Liquor Control recommended that States tailor their alcohol-control laws to account for these local values and to eliminate these problems. It recommended that States let local communities decide whether to go wet or dry, and suggested that States cater their licensing decisions to the needs and desires of local communities. Laws like those of Tennessee and other States—which require license holders to

have resided in the community long enough to understand those local values—comport with those observations and recommendations.

B. Second, *Toward Liquor Control* shows that policymakers in 1933 understood that the regulatory goal was not to allow as many licensees as possible to sell alcohol at the lowest possible price. The goal was the opposite. The authors criticized the profit motives of pre-prohibition tied-house saloon owners, who set prices so low and opened so many establishments as to encourage socially undesirable consumption levels. *Toward Liquor Control* therefore recommended that States reduce consumption by keeping prices higher and limiting the number of licensees. The objectives sought by some entities looking to challenge laws like Tennessee's—objectives that include opening big-box, national chain stores that sell alcohol to customers at cut rates—would create a market structure that policymakers in 1933 would have deemed unwise and at the very least not constitutionally compelled. States may, consistent with the democratic compromise that gave rise to the Twenty-first Amendment, limit licensees to a relatively small number of small-scale, locally owned businesses that commit to selling alcohol on the terms those States have dictated.

ARGUMENT

There is no Federalist Paper about the Twenty-first Amendment, but one document comes close. Writings from 1787 tell us much about what the Framers believed their proposed Constitution would do. *See, e.g.*, *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2558–59 (2014) (citing THE FEDERALIST No. 76, p. 510 (J. Cooke ed. 1961)). Writings from 1933 can tell us just as much about what latter-day Hamiltons and Madisons understood their alcohol-specific amendment had achieved. In this brief, the Center for Alcohol Policy describes what many historians regard as the single most influential contemporaneous writing addressing States' options to remedy a pressing social problem of their time. That book, *Toward Liquor Control*, is a 1933 publication by Raymond B. Fosdick, a lawyer, and Albert L. Scott, an engineer. *See* RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL (Center for Alcohol Policy 2011) (1933). Over about 100 pages, *Toward Liquor Control*—also known as the Rockefeller Report—made critical observations about why prohibition and repeal had occurred and what regulatory options would be appropriate for States moving forward.

The book's foreword underscores the complexity and magnitude of a problem that is difficult to conceive of in today's time—and emphasizes that broad-ranging control of liquor by States was a crucial component of the compromise that brought the Twenty-first Amendment about. In that foreword John D. Rockefeller, Jr.—businessman and philanthropist, and son of the Standard Oil founder—explained that he "was born a teetotaler" and had stayed that way all his life. John D. Rockefeller, Jr., *Foreword* to TOWARD

LIQUOR CONTROL, *supra*, at xiii. He thus held the "earnest conviction that total abstinence is the wisest, best, and safest position for both the individual and society." *Id.* But "the regrettable failure of the Eighteenth Amendment" had persuaded him that "the majority of the people of this country are not yet ready for total abstinence, at least when it is attempted through legal coercion." *Id.* He explained that "[i]n the attempt to bring about total abstinence through prohibition, an evil even greater than intemperance resulted—namely, a nation-wide disregard for law, with all the attendant abuses that followed in its train." *Id.* These rule-of-law concerns had moved Rockefeller from supporting prohibition to favoring "repeal of the Eighteenth Amendment." *Id.*

But "with repeal," Rockefeller explained, the problems the country faced were "far from solved." *Id.* If abstinence could not be achieved through the Eighteenth Amendment, the "next best thing" would be "temperance." *Id.* Without it, he emphasized, "the old evils against which prohibition was invoked" could "easily return." *Id.* The only way to achieve a stable equilibrium between those social ills and the lawlessness that prohibition had brought about would be what Fosdick and Scott called a "fresh trail," FOSDICK & SCOTT, *supra*, at 11, which Rockefeller described as "carefully laid plans of control" by the States, Rockefeller, *supra*, at xiii.

Those observations highlighted an important reality about the constitutional amendment the country then "anticipated." FOSDICK & SCOTT, *supra*, at xvii. The Twenty-first Amendment would not wave the white flag on the goals the Eighteenth Amendment

had sought to achieve. Prohibition had failed not because Americans did not see a problem with alcohol, but because efforts to ban liquor had caused "lawlessness." Rockefeller, *supra*, at xiv. The solution was not ending prohibition by itself. If it had been, then the Twenty-first Amendment would have stopped with its first section, which repealed "[t]he eighteenth article of amendment to the Constitution." U.S. CONST. amend. XXI, §1. The solution was instead to strike a balance between limiting alcohol's deleterious effects and acknowledging the limits of law enforcement. As Fosdick and Scott would put it, the Twenty-first Amendment reflected American sentiment "that there is some definite solution for the liquor problem—some method other than bone-dry prohibition—that will allow a sane and moderate use of alcohol to those who desire it, and at the same time minimize the evils of excess." FOSDICK & SCOTT, *supra*, at 10–11. So immediately after its first section repealing prohibition, the new amendment's second section took the extraordinary step of making it a *federal* constitutional violation for someone to violate *state* laws regarding "[t]he transportation or importation" of alcohol "into any State, Territory, or possession of the United States for delivery or use therein." U.S. CONST. amend. XXI, §2.

That language facilitated what Rockefeller argued was a crucial post-prohibition "objective": "focusing of all the forces of society upon the development of self-control and temperance as regards the use of alcoholic beverages." Rockefeller, *supra*, at xiv. Rockefeller therefore asked Fosdick and Scott to develop a "program of action" based on a "study of the practice and experience of other countries" as well as "experience in this country" regulating alcohol. *Id.*

That study played a significant role in shaping alcohol policy going forward. *Toward Liquor Control* was legislators' "only source of objective information" on these issues." Carole L. Jurkiewicz & Murphy J. Painter, *Why We Control Alcohol the Way We Do*, *in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL 7 (Carole L. Jurkiewicz & Murphy J. Painter eds., CRC Press 2008). So "Fosdick and Scott's work was very influential." Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 33. The book "became the most important proposal for post-Repeal regulation" because it "articulated commonly accepted ideas and packaged them in a form that demanded respect in a post-Progressive world." Stephen Diamond, *The Repeal Program*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 100. "Many of Fosdick and Scott's recommendations for prohibition's repeal have been enacted by state and local governments." Mark R. Daniels, Toward Liquor Control*: A Retrospective*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 230. A group of former government officials and scholars have said that in "shap[ing] modern American alcohol policy," no non-religious text "has done more." Jim Petro *et al.*, *Introduction* to TOWARD LIQUOR CONTROL, *supra*, at vii. Courts thus have cited the book as an authoritative guide to, as Justice O'Connor once wrote, "[c]ontemporaneous[]" views of the Twenty-first Amendment's meaning. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 357 (1987) (O'Connor, J., dissenting).[2]

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[2] *Accord Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 406 (S.D.N.Y. 2007); *Maxwell's Pic-Pac, Inc. v. Dehner*, 739 F.3d 936,

As Petitioner has observed, the legislation States passed in prohibition's immediate aftermath stands as compelling evidence that durational-residency requirements were among the laws the Twenty-first Amendment immunized from dormant Commerce Clause scrutiny. *See* Pet. Br. 33–35. The observations and proposals in *Toward Liquor Control* help explain why those policymakers passed those laws. Fosdick and Scott described the problems that led to prohibition and repeal and explained what regulatory tools States would need. Their analysis fits hand-in-glove, in two critical ways, with laws that limit the persons eligible to sell alcohol to residents who are familiar with the rules and standards unique to the communities in which they operate.

A. *Toward Liquor Control*'s focus on connecting alcohol policy to local values is consistent with durational-residency requirements.

The most critical observation from *Toward Liquor Control* was that alcohol is a hyper-local problem requiring hyper-local solutions. To the extent dormant Commerce Clause doctrine balances "the Framers' distrust of economic Balkanization" against the Constitution's respect for "local autonomy," Fosdick and Scott saw the scales tipping—in the unique context of alcohol regulation—decidedly in favor of the latter. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008).

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939 (CA6 2014); *Manuel v. State, Office of Alcohol & Tobacco Control*, 982 So. 2d 316, 323 (La. Ct. App. 2008).

To this end, Fosdick and Scott explained that the Eighteenth Amendment's "mistake" had not been the policy choice it embodied of banning alcohol *per se*—a measure they believed remained possible and appropriate in many locations—but in "regard[ing] the United States as a single community in which a uniform policy of liquor control could be enforced." FOSDICK & SCOTT, *supra*, at 6; *see also id.* at 14. "When the citizens of the United States" adopted the Eighteenth Amendment, "they forgot that this nation is not a social unit with uniform ideas and habits." *Id.* "They overlooked the fact that in a country as large as this, racially diversified, heterogeneous in most aspects of its life and comprising a patchwork of urban and rural areas, no common rule of conduct in regard to a powerful human appetite could possibly be enforced." *Id.* at 6–7. Even States were not "single communities," and "within the limits of a single city there would be subdivisions, the wishes and preferences of which would merit consideration." *Id.* at 8.

This divergence between the nationwide rule established by the Eighteenth Amendment and the specific values of particular communities had, in Fosdick and Scott's assessment, destroyed public respect for the rule of law during prohibition. Echoing Rockefeller's words, they opined that, in places where prohibition "did not represent public opinion," liquor statutes" had been "unenforced and largely unenforceable." *Id.* at 5.[3]

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[3] As others documented during prohibition, the profits from illegal alcohol were "enormous" and were "the strength of gangs and corrupt political organizations in many places." Nat'l Comm'n on

Disparities between the national rule and local-government interests compounded the law-enforcement failures. Responsibility for enforcing the federal policy fell "almost entirely to the police officers and the inferior courts of the local units of government, in the hands of men who were responsible not to the federal government nor to the state government, but to the local voters." *Id.* at 7. This "centralizing of the determination of policy combined with the decentralizing of the execution of policy" had "nullified the experiment in those areas where sympathy for its purposes was nonexistent, and brought the inevitable trail of consequences in terms of the bootlegger, hypocrisy, corruption and failure." *Id.* Fosdick and Scott urged that "[t]he defiance of law that ha[d] grown up in the last fourteen years" due to failure to account for local community values—"the hypocrisy, the breakdown of governmental machinery, the demoralization in public and private life"—was "a stain on America that can no longer be tolerated." *Id.* at 9.

But it was not only prohibition's failure that highlighted the local nature of the problem. The excesses that had led to prohibition in the first place also had arisen from disconnects between the values of "the community" and those of market participants. *Id.* at 29. One of the chief "evils" of the pre-prohibition

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Law Observance & Enf't, Report on the Enforcement of the Prohibition Laws of the United States 55 (1931), https://www.ncjrs.gov/pdffiles1/Digitization/44540NCJRS.pdf. An estimated 500,000 speakeasies operated from 1921 to 1930, and in 1930 alone, over 200,000 distilleries were seized. *See* Jurkiewicz & Painter, *supra*, at 5.

"days," Fosdick and Scott explained, was the institution known as "[t]he saloon," which had led to "poverty and drunkenness, big profits and political graft." *Id.* at 10. "Tied houses" were largely "responsible for the bad name of the saloon." *Id.* at 29. Tied houses were "under contract to sell exclusively the product of one manufacturer" and thus "under obligation to a particular distiller or brewer." *Id.* Adverse consequences had followed because, while the house was tied to the manufacturer, the manufacturer was not tied to local values. *Id.* "The manufacturer knew nothing and cared nothing about the community" in which its saloon operated. *Id.* "All he wanted was increased sales." *Id.* "He saw none of the abuses, and as a non-resident he was beyond local social influence." *Id.* This "system had all the vices of absentee ownership" and, Fosdick and Scott argued, "should be prevented by all available means." *Id.* "The saloon, as it existed in pre-prohibition days, was a menace to society and," even though prohibition itself was ending, "must never be allowed to return." *Id.* at 10.[4]

In addition to suggesting that States stem these "absentee" non-residents' influence by banning tied-house arrangements—something virtually all States

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[4] The President emphasized this problem in his proclamation announcing the Twenty-first Amendment's ratification: "I ask especially that no State shall by law or otherwise authorize the return of the salon either in its old form or in some modern guise." Franklin D. Roosevelt, Proclamation 2065—Repeal of the Eighteenth Amendment (Dec. 5, 1933), https://www.presidency.ucsb.edu/documents/proclamation-2065-repeal-the-eighteenth-amendment.

eventually did in the wake of the Twenty-first Amendment[5]—Fosdick and Scott recommended that States take additional measures to ensure that alcohol laws reflect "[w]hat . . . the Community want[s]." *Id.* at 8. As a general matter, they suggested that States follow "the principle of 'local option,'" which placed "the determination of how the liquor problem shall be handled as close as possible to the individual and his home." *Id.* at 8. Voters in "individual cities and counties" could decide "whether their communities should be 'wet' or 'dry,'" and—if "wet"—what kinds of alcohol were legal and what venues could sell it. *Id.* at 35–36. Doing so would "place[] behind all the local officials who administer the system the same public opinion that determines the system." *Id.* at 8.[6]

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[5] States that "selected licensing along the model of Fosdick and Scotts' 'three-tiered system,' interpos[ed] a wholesaler level between the supplier and retailer, as the best method of correcting past abuses, establishing an orderly system of distribution and control of alcoholic beverages and preventing the evil of the 'tied house." Lawson, *supra*, at 33. Today, most States continue to forbid vertical integration among alcohol businesses. *Id.* at 31.

[6] States generally followed this recommendation, such that even today, many cities and counties remain dry. Thus, one political scientist observed in 1934 that post-Twenty-first Amendment alcohol policy was a sharp departure from the trends towards centralization that marked the New Deal. As he put it, "one of the paradoxes of American politics" is "that we have destroyed the possibility of centralization in the field of liquor control at the same time that we have been attempting to achieve greater centralization in a number of activities hitherto believed to be completely in the field of state authority." Dayton E. Heckman, *Contemporary State Statutes for Liquor Control*, 28 AM. POL. SCI. REV. 628, 628 (1934).

Fosdick and Scott also emphasized the importance of local values and interests when prescribing ways for States to control alcohol after they had legalized it. They believed that the best system would funnel all sales of heavier alcohol through state-owned monopolies—such as the ABC Stores still prevalent in many States[7]—which would be well suited to "meet the local sentiment of small sections and communities." *Id.* at 54. Under that system, a state alcohol authority could "declin[e] to locate shops for the sale of liquor" in or near communities that did not want them, and could "close[]" a particular state-owned shop when local sentiment demanded as much. *Id.* at 55. Likewise, States opting for a regime under which the government granted private entities the privilege to sell liquor—the system Tennessee and many other States currently use[8]—could serve the same interests by "consulting neighborhood and community desires" before "grant[ing] or refus[ing]" a particular license. *Id.* at 30.

Toward Liquor Control did not specifically address residency requirements for these license holders, but these measures—prevalent at the time of repeal, and

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[7] "As of 2000, eighteen 'control' states maintained some form of monopoly based on alcohol content and market segment . . . ." Lawson, *supra*, at 33. That said, "much variation exists among the monopolies." Daniels, *supra*, at 227. But "[n]o state has set up monopoly drinking establishments," and "[a]ll monopoly states also license the private sale of alcohol." *Id.*

[8] Most States now have chosen this option, under which they license a distribution system with three tiers. *See* Lawson, *supra*, at 33.

prevalent today—were a natural offshoot of Fosdick and Scott's observations and recommendations. They had attributed one of the pre-prohibition era's chief social ills to saloons' "absentee ownership" by "non-resident[s]" who "knew nothing and cared nothing about the community." *Id.* at 29. They had concluded that prohibition had failed because federal policymakers had not understood the "heterogeneous" values of individual communities within the country. *Id.* at 6. They believed that, above all else, the "defiance of law" present during prohibition needed to be eliminated. *Id.* at 9. And they advocated solutions under which the focus—either from state regulatory authorities or licensing boards—was always on "the local sentiment of small sections and communities." *Id.* at 54.

For States that opted to license private retailers rather than establish government-owned monopolies, it made sense—and continues to make sense—to limit licensees to persons and businesses who had been residents of the relevant community for enough time to prove their commitment to the values and laws governing them. Unlike tied-house owners from pre-prohibition days, those persons and businesses would, as the Eighth Circuit has put it, have reason to care about the "negative externalities" of "liquor distribution" state policymakers were concerned about. *S. Wine & Spirits of Am. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (CA8 2013). Unlike the non-resident owners who had been "beyond local social influence," FOSDICK & SCOTT, *supra*, at 29, those persons and businesses would be "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." *S.*

Wine & Spirits of Am., 731 F.3d at 811. They would, as Judge Sutton suggested below, be more likely to be "knowledgeable about the community's needs and committed to its welfare" in a manner that *Toward Liquor Control* deemed to be critical to the path ahead. Pet.App.50a (Sutton, J., dissenting).

B. *Toward Liquor Control* advocated curbing consumption by limiting alcohol supply, not increasing it—and by keeping prices relatively high, not encouraging competition that would create the lowest possible prices

A second overarching observation from *Toward Liquor Control* offers pertinent insight about the end-goals Americans in 1933 had in mind for the Twenty-first Amendment and how they differ from those held by parties who would challenge state alcohol-control laws under the dormant Commerce Clause now. One of the Respondents here, Total Wine, is part of a national company that "operate[s] 193 superstores across 23 states and continue[s] to grow." *Our Company*, TOTAL WINE & MORE, https://www.totalwine.com/about-us/our-company (last visited Nov. 19, 2018). Total Wine explained in its brief in opposition that the Sixth Circuit's ruling allowed it to open the "largest retail establishment of its kind in" Tennessee, where it now offers alcohol "at competitive prices not previously seen in Tennessee." Br. Opp'n Tenn. Fine Wines & Spirits, LLC at 3 n.1. Fosdick and Scott did not understand the path to temperance to look at all like that.

Fosdick and Scott explained that in a system that attained true liquor "control" and thus the temperance the Twenty-first Amendment was designed to

achieve, "[t]he retail price level of alcohol beverages" would be key—in a way quite different from the one Total Wine's brief in opposition suggests. Alcohol pricing "not only determines profits, but also has a direct bearing," crucial for regulators who wished to achieve temperance, on "the amount of consumption." FOSDICK & SCOTT, *supra*, at 52. "[T]oo low a level of prices" could lead to unwanted "stimulation of consumption" that marked the pre-prohibition era. *Id.* at 53–54.[9] Yet producers would want "to set comparatively low prices to attract trade," and their profit motives would pose a substantial obstacle to temperance. *Id.* at 52.

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[9] Contemporary evidence confirms that "[i]ncreases in price can have positive effects on all classes of drinkers in terms of health, crime and employment." Pamela S. Erickson, *The Dangers of Alcohol Deregulation: The United Kingdom Experience* 24 (2009), https://www.centerforalcoholpolicy.org/wp-content/uploads/2010/11/Dangers_of_Deregulation_UK_Experience.pdf (last visited Nov. 19, 2018). Price thus remains "a very critical factor in alcohol control." *Id.* Indeed, the World Health Organization concluded that "an increase in alcohol prices reduces consumption and the level of alcohol-related problems." *Id.* at 16 (quoting World Health Org., *What are the most effective and cost-effective interventions in alcohol control?* 4 (2004)). And researchers in a university in the United Kingdom concluded that alcohol "policies which result in price increases reduce alcohol-attributed hospital admissions and deaths, incidence of crime and reduced unemployment (defined as loss of job due to alcohol and absenteeism due to alcohol)." *Id.* (citing Univ. of Sheffield, U.K., *Independent Review of the Effects of Alcohol Pricing and Promotion*). In contrast, an alcohol-related "price war driving alcohol prices ever lower" in England is largely believed to "have been a major contributor to the alcohol epidemic" in that country. *Id.* at 2, 12.

Indeed, Fosdick and Scott attributed pre-prohibition excesses to absentee saloon owners' exclusive goal of "big profits." FOSDICK & SCOTT, *supra*, at 10. The "abuse of drink" had been "fostered by" pricing and sales practices geared toward this profit "drive." *Id.* at 26. "All" they "wanted was increased sales," which contributed to a "large excess of sales outlets" approximating the number of gas stations in some communities. *Id.* at 29. Thus, although "[s]tudents of liquor systems and proponents of plans have differed widely in their analyses and in their recommendations," there was "general agreement that the elimination of the profit motive, if it can be accomplished is, for America at least, the most promising road to successful control." *Id.* at 37.

These concerns contributed in no small part to Fosdick and Scott's conclusion that the best "means of control" would be a state-owned "liquor monopoly," which would control pricing and supply of "the heavier beverages for off-premises consumption." *Id.* at 41. The state government would "take[] over, as a public monopoly, the retail sale, through its own stores." *Id.* The advantage of that system was to eliminate "the profit motive." *Id.* at 37. The government could set prices high enough to keep the "amount of consumption" reasonable, but not so high they brought "on the problem of the bootlegger" selling at cut-rate prices on the black market. *Id.* at 52. The government would set a "profit policy" solely for "progressive liquor control," *id.* at 48, not maximizing the bottom line or "extend[ing] its sphere wherever business may be obtained," *id.* at 56. Avoiding the "overstimulated retail sale" the pre-prohibition market had produced, *id.* at 42, the state-run authority could price alcohol "in such

a way as to meet a minimum, unstimulated demand within conditions established solely in the interests of society," *id.* at 11.

If States opted to license private retailers instead, Fosdick and Scott recommended similar measures to keep prices relatively high and consumption relatively low. They advised that "[t]he license law should prohibit, as far as possible, all sales practices which encourage consumption," including "treating on the house" and "bargain days." *Id.* at 32. Laws forbidding tied-house arrangements would stem the intemperance problems that saloon-era "competition in the retail sale of alcoholic beverages" had caused. *Id.* at 29. Efforts could "be made under the licensing system to control prices" by establishing "minimum and maximum prices for the sale of liquor" and capturing "as excise all profits in excess of a specified rate or a percentage of all profits." *Id.* at 34. And States could temper consumption rates by "reduc[ing] the number of licenses from year to year" and limiting "[t]he number of licenses" on "a population basis." *Id.* at 30.[10]

None of that is to say *Toward Liquor Control* would have viewed Total Wine's different objectives—"commit[ing]," as it explains on its website, "to having the lowest prices" and using "tremendous buying power and special relationships with producers, importers and wholesalers [to] bring . . . considerable

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[10] Indeed, "[r]egulators deplored what they considered to have been the profligate granting of licenses just after Repeal and the entrance into the business of those described as seeking quick money rather than a steady business." Diamond, *supra*, at 107.

savings" to customers—as an experiment the Constitution itself would affirmatively prohibit. *Our Company*, TOTAL WINE & MORE, https://www.totalwine.com/about-us/our-company (last visited Nov. 19, 2018). Fosdick and Scott recognized that the Twenty-first Amendment did not irrevocably tie States to particular alcohol policies. *See* FOSDICK & SCOTT, *supra*, at 98. So nothing in their analysis suggests that the Constitution would bar States from adopting systems, if they so chose, that allowed national-scale, big-box retailers to open franchises on every street corner offering massive volumes of liquor at cut-rate prices. But *Toward Liquor Control* suggests that Fosdick and Scott would have considered any such market structure unwise as a matter of policy, and at the very least their work shows that no regulator in 1933 would have imagined that the Constitution would affirmatively compel States to allow such a system.

The repeal-era vision of the right path forward involved higher prices rather than lower ones, and fewer licensees rather than more. Just as the Constitution allows the States to deviate from that original vision, it allows them to adhere to it, too. It is consistent with laws, like Tennessee's, that limit licensees to a relatively small number of small-scale, locally owned businesses that commit to selling alcohol on the terms their States have dictated.

* * *

If the magnitude and complexity of the problems Fosdick and Scott grappled with in 1933 are difficult to comprehend now, it is only because the experiment

in democracy and federalism the Twenty-first Amendment effectuated turned out to be remarkably "successful." Petro *et al.*, *supra*, at x. Today the tied house does "not exist," and "bootlegging and racketeering have been widely eliminated." Daniels, *supra*, at 230. But the success of the program does not mean it must now end, by rote application of this Court's dormant Commerce Clause precedents, under the premise that times have changed. It means the opposite.

To be sure, state laws controlling alcohol can and should change in certain ways—and in some cases, dramatically so. Fosdick and Scott were wise enough to recognize that "[n]o recommendations which we or anyone else could make carry with them an element of finality." FOSDICK & SCOTT, *supra*, at 97. "[N]ecessities and ideals cannot escape the processes of change," and Fosdick and Scott warned "against any system of control that has outlived its usefulness [or] that no longer represents the prevalent ideas and attitudes of the community." *Id.* at 98. "The opinion of this decade is not likely to be the opinion of the next; and in their attempt to find a method of regulation which meets the contemporary mood and attitude, lawmakers are often sorely perplexed." *Id.*

States thus are constantly updating their alcohol laws to comport with modern times and modern realities. "Many important regulatory functions were developed" after Fosdick and Scott's "book as state governments put the theories of *Toward Liquor Control* into practice." Petro *et al.*, *supra*, at ix–x. "State alcohol laws are among the most rapidly changing in the country," as "there have been at least 1,700 changes to state alcohol laws" in the last six years. FOCUS, *State-Level Alcohol Laws Face a Federal Challenge in*

the Supreme Court, http://www.leoninepublicaffairs.com/focus/state-level-alcohol-laws-face-federal-challenge-supreme-court/ (last visited Nov. 19, 2018). So as one of the more ardent defenders of the proposition that "the Constitution as a whole does and must evolve" has suggested, when it comes to alcohol regulation and the Twenty-first Amendment in particular, the task of updating the law is best left to the democratic processes rather than the courts. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 200 (CA2 2009) (Calabresi, J., concurring).

That is especially so because the Twenty-first Amendment was a remarkable democratic achievement in its own right. We live in times when Congress encounters great difficulty seeking even statutory solutions to pressing social problems, and when constitutional amendments are thought to be practical impossibilities. Yet even though alcohol was a pressing social problem in 1933 much like many others we face today, Americans of diverse viewpoints marshalled the democratic resources to address the problem on a constitutional level. And they did so in a way that reflected the most careful of compromises. Many, like Rockefeller initially, might have preferred prohibition to continue. Others might have preferred an open alcohol market without any state regulation. What three-fourths of Americans signed onto, and what all America got, was something in the middle. The Twenty-first Amendment's first section ended prohibition, but its second guaranteed that states would have considerable leeway to take steps—previously unavailable to them under the Court's dormant Commerce Clause precedents—to ensure that the end result of that experiment was temperance, not excess.

Fosdick and Scott's work shows that the mindset in 1933 was that States were free to use a wide array of laws and "many types of experiment" to achieve this end. FOSDICK & SCOTT, *supra*, at 97.

That democratic compromise is worthy of deference and respect, as are the numerous democratic compromises States have developed in their efforts to achieve and maintain temperance in the years since. States continue to take measures—whether they fit hand-in-glove with the ones Fosdick and Scott proposed, or whether they mark new innovations adapted to changed conditions—to maintain control over the market that in the years leading up to 1933 had caused manifest disregard for the rule of law and had threatened to tear the country apart. These laws remain a crucial component of alcohol control today, and it cannot be assumed that the 1933 project's successes will be preserved if they are struck down in the name of the dormant Commerce Clause. Laws like Tennessee's have been a part of the complex and diverse systems that kept those problems under control, and the Twenty-first Amendment ensures that the dormant Commerce Clause will not stand in their way.

CONCLUSION

This Court should reverse the judgment of the Sixth Circuit.

Respectfully submitted,

John C. Neiman, Jr.
Counsel of Record
Mary K. Mangan
MAYNARD COOPER & GALE, P.C.
1901 Sixth Avenue North
2400 Regions/Harbert Plaza
Birmingham, AL 35203
(205) 254-1228
jneiman@maynardcooper.com

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