No. 18-96

In The
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, AFFLEURE INVESTMENTS, INC., AND TENNESSEE FINE WINES AND SPIRITS, LLC,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CONSUMER ACTION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF *AMICUS CURIAE*

Consumer Action has been a champion of underrepresented consumers nationwide for forty-seven years.[1] As a national non-profit 501(c)(3) organization, Consumer Action focuses on consumer education that empowers low-and moderate-income and limited-English-speaking consumers to financially prosper. It also advocates for consumers to advance consumer rights and promote change. Consumer Action knows through its advocacy work that many consumers are subjected to unlawful, unfair, or deceptive business practices. Consumer Action was the leading voice to protect consumers through the passage of "lemon laws." Consumer Action helps consumers assert their rights in the marketplace and make financially savvy choices by providing consumer education materials in multiple languages, a free national hotline, a comprehensive website (www.consumer-action.org) and annual surveys of financial and consumer services. Over 7,000 community and grassroots organizations benefit annually from its extensive outreach programs, training materials and support.

The organization achieves its mission through several channels, from direct consumer education to

[1] Pursuant to Rule 37.6, Consumer Action states that all parties through their respective counsels filed blanket consents to anyone who wanted to file an *Amicus* brief. No party or party's counsel authored this brief in whole or in part or contributed money intended to fund its preparation or submittal. No person other than *Amicus* or their members contributed money to fund its preparation or submittal.

issue-focused advocacy. As representatives of the public interest, Consumer Action submits this brief to provide its perspective on the potential impact of this Court's decision regarding Tennessee's durational residency requirements on the ability of states to regulate their alcohol markets, which will impact competition, consumers, as well as the welfare and safety of the public. All 50 states currently regulate the alcoholic beverage industry within their states. By constitutional design, each state was granted the authority to impose different laws and regulations on the industry so the laws and regulations regarding the distribution of alcohol are not uniform. That said, virtually all of the states operate a three-tier distribution system that is vital to promoting consumer protection and enhancing competition. Many states have durational residency requirements for new license applicants in the retail tier of the three-tier distribution system, which serves numerous public benefits such as keeping the public safe, encouraging responsible consumption, prohibiting underage and excessive drinking, and raising revenue. Millions of consumers drink beer, wine and spirits every day. Those consumers value the benefits of state regulation that ensures their safety and protects competition, resulting in increased innovation and greater variety of choice.

Importantly, the Sixth Circuit decision that durational residency requirements violate the dormant Commerce Clause undermines the three-tier distribution system, diminishes states' authority to regulate the distribution and sales of alcoholic beverages, and threatens to reduce competition and consumer choice. The Sixth Circuit's decision affects the ability of states to make important decisions relating to the welfare and safety of their local consumers of alcohol and the economic structure of the alcoholic beverage industry within their own borders. The Sixth Circuit's decision will result in deregulation of the alcoholic beverage industry in individual states potentially allowing dominant corporations to exert greater influence over the retail sector throughout the United States. If the decision stands, it will disrupt the markets in which all of these small businesses (distributorships, retailers, craft brewers, wineries, and distilleries) operate. Any sudden judicial disruption of the status quo is of considerable concern to consumers. As a result, customers have a special interest that is not already directly represented by the parties to this litigation, and why we respectfully request this Court to consider this proposed *Amicus* brief and the implications for consumers.

SUMMARY OF ARGUMENT

Amicus curiae Consumer Action submits this brief in support of Petitioner. The Tennessee law and alcohol laws like it across the country help spur competition, protect consumer choice and foster consumer protection. Tennessee, like many states, has a "three-tier" distribution system for alcohol that separately regulates (1) producers of beer, wine and liquor, (2) wholesalers, and (3) retailers that sell directly to consumers. Under Tennessee law, there is a two-year residency requirement for the initial license of a retailer that is now being scrutinized by this Court.

Amicus fully supports Petitioner's arguments on why Tennessee's two-year durational residency requirement for the initial license of a retailer is constitutional. *Amicus* writes separately to highlight how the Sixth Circuit's decision will harm small businesses and consumers. Tennessee's right to license and regulate local retailers is fundamental to its authority to establish and regulate a three-tier distribution system. Tennessee's residency requirement should be upheld for the following reasons. First, this Court should follow its own precedent and uphold the state's complete authority and right to regulate a three-tier distribution system within its borders because it undoubtedly has benefitted competition and consumers across the country. The Sixth Circuit's decision conflicts with this Court's reasoning in *Granholm v. Heald*, 544 U.S. 460 (2005), undermines the three-tier distribution system, harms competition and reduces consumer choice. The Sixth Circuit's decision will damage the businesses of small craft brewers, importers, wineries, and craft distillers, and ultimately result in less variety for consumers. Keeping the three-tier system in place is vital to promoting competition among distributors, retailers, brewers, wineries, and distillers and to continuing the explosive growth of new products that increases diversity of products for consumers. Second, preserving the three-tier system serves important policy goals related to protecting competition, promoting economic efficiency, strengthening consumer protection enforcement, and protecting the welfare, health, and safety of the public. The Sixth Circuit's flawed decision threatens to disrupt the competitive landscape, damage the structure of the alcohol distribution markets, weaken states' consumer protection enforcement capabilities, and reduce consumer confidence as health and safety risks increase. Third, *Amicus* fully supports Petitioner's arguments and reasoning that Tennessee's two-year durational-residency requirement is constitutional and further states that it does not violate the dormant Commerce Clause because it does not treat out-of-state producers of alcoholic beverages differently than in-state producers and the law is a reasonable means of ensuring that the companies that obtain licenses to sell alcoholic beverages to consumers within its state and local areas know and are invested in the welfare of the local community they serve. *Granholm* expressly recognized the importance of the three-tier distribution system, which allows states to make decisions on who may sell alcohol to its in-state consumers.

ARGUMENT

I. THREE-TIER DISTRIBUTION SYSTEM PROMOTES COMPETITION AND BENEFITS CONSUMERS

A. Background of Three-Tier Distribution System

The U.S. alcoholic beverage industry is complex and highly regulated. Under the Twenty-first Amendment, the states have plenary authority to regulate the sale and distribution of alcohol within their borders, including regulation of vertical relationships of alcohol companies through a three-tier distribution system of licensed and structurally separate producers, distributors, and retailers. *Granholm v. Heald*, 544 U.S. 460, 466, 473 (2005); *North Dakota v. United States*, 495 U.S. 423, 432 (1990); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The state laws, which allow for this regulation, came about after the repeal of Prohibition.[2] The Eighteenth Amendment to the Constitution, normally referred to as Prohibition, was in part a reaction to the system of "tied houses" that dominated the alcohol retail market.[3] Before Prohibition, producers of spirits and beer served small geographic areas and frequently either fully or partially owned the retail outlets. At the time, these brewers and distillers exerted exclusive control over retailers and used that control to pressure sales without concern for the safety or welfare of customers or the general public. The federal government was concerned with these "tied house" practices that resulted in producers of alcohol having control over retailers to favor their own brands and to engage in illicit behavior.[4]

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[2] Andre Barlow, *Right Distribution Is Key to Successful Beer Remedies*, Law 360 (Jan. 27, 2016); Barry Lynn, *Big Beer, A Moral Market, and Innovation*, Harv. Bus. Rev. (2012).

[3] Barlow, *supra* note 2; Lynn, *supra* note 2.

[4] Presidential Proclamation 2065 of December 5, 1933, in which President Franklin D. Roosevelt announces the Repeal of Prohibition. (President Roosevelt's official proclamation to the nation strongly shows the federal government was giving states

When Prohibition was repealed through Section 1 of the Twenty-first Amendment, the 50 states were tasked with putting in place systems that would prevent a repeat of this harmful state of affairs. Section 2 of the Twenty-first Amendment provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2. In other words, a state may prohibit the vertical integration of producers, wholesalers, and retailers to control the sale of alcohol within its borders. *See North Dakota* at 428, 432.

Each state took up this challenge to create its own regulatory framework, which resulted in 50 different state alcohol marketplaces rather than a nationally regulated one. The thought was that a vertically-integrated system has "all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident he was beyond local influence."[5] Many of the states created three-tier distribution systems where producers including brewers, wineries, and distillers sell to licensed wholesalers and distributors, which then market and sell the alcoholic beverages to

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every tool to fight the return of the tied house). Available at https://catalog.archives.gov/id/299967/3/public?contributionType=tag.

[5] *See* Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* (republished by Center for Alcohol Policy 2011).

independent, licensed off-premise (i.e., grocery and convenience stores) and on-premise (i.e., restaurants and taverns) retailers, which market and sell to consumers.[6] The result is a three-tier system, which restricts licensed producers, distributors, and retailers to their respective service functions with the practical goal of ensuring that no producer or seller of alcohol could become powerful enough to force its products onto consumers in local communities. This Court has expressly recognized that "the three-tier system itself is 'unquestionably legitimate.'" *Granholm* at 466 (*quoting North Dakota* at 432).

B. Consumer Choice Explodes With Three-Tier Distribution System

As a result of the three-tier system, consumer choice has exploded. It was put in place to prevent producers of beer, wine, and spirits from having too much control over what consumers purchase. The divided structure "prevents marketplace domination by large companies that would seek to greatly increase alcohol sales through aggressive practices, or by controlling the entire alcohol distribution chain."[7] Alcohol regulation, unlike other industry regulations, actually increases diversity of product on retail store shelves and in restaurants, bars, and liquor stores. Independent

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[6] Andre Barlow, *One Drink Too Many: Why Consumers Will Lose from the Latest Beer Merger*, Law 360 (Nov. 12, 2015).

[7] Pamela S. Erikson, Safe and Sound at 2 (Campaign for a Healthy Alcohol Marketplace), available at http://www.nabca.org/assets/Docs/Research/Studies/SafeandSound.pdf.

distributors and retailers sell beer, wine, and spirits driven by consumer demand when they are not beholden to powerful alcohol producers. As a result, retailers can sell an array of products and allow consumers to seek out whatever beer, wine, or spirit they most prefer.

By eliminating the manufacturer's ownership interest, distributors and retailers are free to take on additional brands, which has created a market for and spurred the growth of small craft brewers, wineries, and craft distillers. Indeed, the alcohol beverage market has consistently provided incredible variety and choice to legal drinking age consumers.

According to data from the U.S. Alcohol Tobacco Tax and Trade Bureau ("ATTB") Annual Report, the ATTB has approved over 1.1 million label applications for beer, wine and spirits brands over the past eight years. These new labels are in addition to the established and well-known alcohol beverage brands from years prior to 2010. These 1.1 million labels represent the opportunity that brewers, vintners, and distillers see in the existing regulatory environment of the current alcohol beverage marketplace.[8] Besides the evidence from the ATTB regarding the release of new beverages, consumers believe that an abundance of choices exist. To be sure, ninety-one percent of those surveyed in a bipartisan national survey agreed that it was easy for them to find a variety of alcoholic

[8] The Alcohol Tobacco Trade and Tax Annual Report, Fiscal Year 2017, available at https://www.ttb.gov/foia/pdf/ttbar2017.pdf.

beverages in their communities, and 84 percent agreed that there are more local and imported beers and liquors available than ever before.[9]

The flood of new varieties from craft brewers has occurred while two giants control over 70 percent of the beer production in the United States and in some areas of the country the combined shares are in excess of 90 percent.[10] This seeming paradox can be attributed to 50 different state regulatory regimes that oversee their markets. Craft brewers have met stiff competition and resistance from large established companies, yet they have been expanding. The vibrancy of the craft brew industry is directly related to the market structure that was created by the states and their decisions to keep wholesalers and retailers free from influence of powerful giants. Make no mistake, this "golden age of beer" is a result of state regulation.[11]

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[9] Center for Alcohol Policy, National Survey Finds Americans Overwhelmingly Support the Current System of Alcohol Laws and Regulation (2015) ("National Survey"), available at http://www.centerforalcoholpolicy.org/2015/08/18/national-survey-finds-americans-very-satisfiedwith-current-alcohol-laws-and-regulations-3/ (last visited Sept. 16, 2016). The national survey of 1,005 adults over the age of 21 was conducted using an online methodology by a bipartisan team of pollsters, Whitman Insight Strategies and WPA Opinion Research, on behalf of the Center for Alcohol Policy from April 27–May 3, 2015. The margin of error is ± 3.1%.

[10] *Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition*, Department of Justice Press Release, July 20, 2016.

[11] *See* American Craft Beer website, available at https://www.americancraftbeer.com/the-golden-age-of-american-craft-beer/; AEI

The three-tier distribution system, in particular, has become the safety valve that keeps beer markets competitive as the United States Department of Justice's Antitrust Division ("DOJ") demonstrated in its challenge to Anheuser-Busch InBev's ("ABI") acquisition of SABMiller. In that action, the DOJ made clear that "[e]ffective distribution is important for a brewer to be competitive in the beer industry."[12] Because there are only two beer distributors of scale in most local markets, the DOJ alleged that the merger of the two largest global brewers "would increase ABI's incentive and ability to disadvantage its beer rivals by impeding the distribution of its beers."[13] The concern was that ABI could use its market power at the supplier level to exert a tremendous amount of influence over what beer wholesalers/distributors carry and what retailers would sell. The DOJ found in its investigation that new entry from craft brewers, which worked with independent distributors and retailers, led to an increase in innovation and consumer choice as new beers with a wide range of unique styles and tastes were being introduced to consumers every day.

The DOJ, however, recognized that small breweries cannot grow in scale and effectively compete without access to efficient beer distribution networks.

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website, available at http://www.aei.org/publication/charts-of-the-day-welcome-to-the-golden-age-of-american-craft-beer/.

[12] *United States v. Anheuser-Busch InBev and SABMiller, plc*, Competitive Impact Statement 8 (July 20, 2016).

[13] *United States v. Anheuser-Busch InBev and SABMiller, plc*, Compl. ¶ 7, 45–47 (July 20, 2016).

Accordingly, the DOJ entered into a consent decree that requires ABI to engage in certain conduct going forward that will promote distributor freedom, cap its ability to grow its own distribution business, and submit to oversight for the next eight years, all in an effort to protect the growth of the craft brew industry in furtherance of state regulatory goals.[14]

The federal government's consent order regulating ABI's day-to-day conduct is noteworthy for three reasons. First, it shows that the goals and purposes that motivated the creation of the three-tiered distribution networks are still relevant to the industry today. Second, the DOJ felt compelled to limit a large brewer's ability to increase its control over distribution to keep the beer market competitive. Third, the bottom line for the DOJ is that consumers are better off when they have more choices via independent distribution of scale.

Importantly, there is no one-size overarching alcohol policy for the United States. The last one-size-fits-all federal solution was the 18th Amendment which imposed National Prohibition. That one-size-fits-all approach was replaced with a 50-size approach combined with federal laws. This court in *Granholm* implicitly recognizes this by noting states can "funnel sales through the three-tier system." *Granholm*, 544 U.S. at 488–89. Each state determines whether and how to funnel sales through its distribution system.

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[14] *United States v. Anheuser-Busch InBev and SABMiller, plc*, Final Judgment, Civil Action No. 1:16-cv-0148 (Oct. 22, 2018).

This "funnel" process of each state's three-tier system was recognized by the DOJ as important. Hence, its consent order requires that the distribution funnel remain open to the tremendous variety of breweries (domestic and import) seeking to sell to retailers in the United States. State laws such as physical presence or residency are all tools in the tool chest to help states make this system open.

Local producers (i.e., craft beer, local wineries, and craft distilleries), wholesalers and retailers are more amenable to state and local regulation and are more accountable to their local communities. By separating the tiers, states have allowed for competition to flourish, which has resulted in the availability of a diversity of products. As small brewers, wineries, and distillers bottle a wide variety of alcoholic beverages, consumers have a plethora of craft beer, wine, and spirit options from which to choose. This diversity has been enhanced as the states have reduced the economic incentives for wholesalers and retailers to favor the products of large corporate suppliers to the exclusion of small mom-and-pop producers.

Unquestionably, state alcohol regulation has promoted competition spurring the growth of small businesses. Indeed, today's craft beer, winery, and distillery renaissance in the United States was made possible by the complex regulations that exist in many of the 50 states. The craft beer, wine, and craft distillery industries have experienced tremendous growth under the current system. The craft brew industry grew by double digits from 2004 to 2015 and there are now approximately 6,000+ craft breweries in the United States, more than at any other time in history.[15] Since 1995, the number of U.S. wineries has grown more than five-fold, from approximately 1,800 to 9,200.[16] And the craft distillery industry is also experiencing incredible growth as the number of active craft distillers grew from 200 local distilleries in 2005 to 1,835 as of August 2018.[17]

A Boston Group Consulting ("BGC") study demonstrates how the open independent distribution system helped entrepreneurial craft brewers increase market share over a 14-year period of time when overall beer sales remained flat.[18] The BGC study explains that small craft brewers were able to enter and grow

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15 *See* Chris Furnari, *Brewers Association: Craft Growth Slows to 5 Percent*, BrewBound (Aug. 1, 2017, 4:58 PM), available at https://www.brewbound.com/news/brewers-association-craft-growth-slows-5-percent; *Number of Breweries*, Brewers Association.org, available at https://www.brewersassociation.org/statistics/number-of-breweries/.

16 Cody Jennings, *Predictions for Wine Industry M&A in 2018 Success of the premium wine segment should drive much of the activity* Wines and Vines, available at https://www.winesandvines.com/features/article/193821/Predictions-for-Wine-Industry-M-and-A-in-2018, January 2018.

17 Kara Newman, *Craft Distilleries Growth Continues*, Wine Magazine, September 27, 2018. The data comes from The Craft Spirits Data Project, a study led in conjunction with the ACSA, the *International Wine and Spirits Research* (IWSR) and advisory services consultancy *Park Street*. Lisa Rabasca Roepe, Sage, *Craft Distillers*, August 27, 2018.

18 Neil Houghton and Marin Gjaja, *For Small and Large Brewers, the U.S. Market Is Open*, Boston Consulting Group, June 19, 2014, available at https://www.bcg.com/publications/2014/consumer-products-for-small-large-brewers-us-market-open.aspx.

because the states required an open and independent distribution and how they would have had a difficult time affording all the warehouses and trucks needed to distribute beer over wide territories on their own. Without independent distributors, small brewers would mostly be limited to distributing in a very limited geographic area. Independent distributors make warehousing and trucking more efficient by aggregating all the various brands. The BGC study compared the brewing industry to direct store delivery ("DSD") categories and determined that state regulation made the brewing industry more competitive than the unregulated markets where large DSDs have a significant competitive advantage in DSD categories such as ice cream, soda, and snacks.[19] The BGC study notes that the three-tier distribution protections prevent the two powerful breweries from using their scale to extract advantages from the distribution system the way that powerful DSD suppliers dominate in other product categories.[20] By comparison, note how Coke and Pepsi dominate the soda aisles in many grocery stores, whereas beer offerings generally extend beyond just ABI and MillerCoors products.[21]

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[19] *Id.*

[20] *Id.*

[21] *See Ensuring Competition Remains on Tap: The AB InBev/SABMiller Merger and the State of Competition in the Beer Industry: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. (2015). (statement of Craig Purer, National Beer Wholesalers Association) available at https://www.judiciary.senate.gov/imo/media/doc/12-08-15%20Purser%20Testimony.pdf.

To be sure, nothing in the record indicates that Tennessee's alcoholic beverage industry, the wholesale tier, and the retail tier are not competitive or that consumers have been harmed by its durational residency requirements. On the contrary, the facts suggest that Tennessee has a strong alcohol beverage retail industry.[22] According to a press report in 2016, the number of new liquors-by-the-drink licenses has gone up every year since 2009.[23] In Tennessee, "[t]here are more distilleries every year, more local wineries, more breweries and more breweries making high-gravity beer. There are more wholesalers too, which means more products in more places."[24] In short, Tennessee's alcoholic beverage market appears to be competitive indeed. In summary, the alcoholic beverage industry is one of the most highly regulated industries in the United States, but the Tennessee and U.S. national alcoholic beverage markets are healthier than unregulated markets, which are characterized by large dominant players without any substantial growth of small businesses.

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[22] Ed Marcum, USA Today, *Tennessee grocery stores say wine sales a success*, March 17, 2017; Carie Wade Gervin, *With wine in grocery stores and a new head of the ABC, Tennesseans are optimistic about the future of alcohol in the state*, Nashville Scene, June 30, 2016.

[23] Carie Gervin, *Tennesseans are optimistic about the future of alcohol in the state*.

[24] Carie Gervin, *Tennesseans are optimistic about the future of alcohol in the state*.

C. The Sixth Circuit's Decision Undermines the Three-Tier Distribution System and Threatens To Reduce Competition and Consumer Choice

The Sixth Circuit's decision conflicts with this Court's reasoning in *Granholm* and undermines the three-tier distribution system, which if it stands, will harm competition and reduce consumer choice. The Sixth Circuit's decision undercuts Tennessee's right under the Twenty-first Amendment to structure the alcoholic beverage distribution system within the state and, specifically, to create a three-tier distribution system that balances a number of public policy goals including the prevention of large firms from dominating local markets through vertical integration and promotion of competition. Its decision, if applied throughout the United States, would disrupt the markets in which beer brewers and importers, wineries, craft distillers, distributors and retailers currently operate, allowing dominant corporations to exert greater influence over the sale of alcoholic beverages to consumers. This will undoubtedly stifle competition and reduce consumer choice.

The sobering truth is that large big box retail chains, such as Costco, Total Wine, Walmart, national grocery stores, such as Safeway, and national retail pharmacies such as Walgreens, typically sell the most fast-moving products so they carry a limited number of SKUs (stock keeping units).[25] Although there are

[25] Mack Burke, *Four states watching Oklahoma closely as lawmakers push liquor law overhaul*, Norman Transcript, October 9,

now more than 9,000 wineries in the United States, the typical Costco location only carries 235 SKUs, which also includes beer and spirits in places where regulations allow all three to be sold in the same location.[26] Walgreens has a very targeted approach as it only stocks 150 SKUs for wine, 50 for spirits, and 35 for beer.[27] In other words, markets dominated by large corporations actually offer less choice not more. They make centralized purchasing decisions, a dynamic that makes it difficult for smaller alcoholic beverage producers to sell their products to large retail chains' customers. Moreover, large retailers have limited refrigerator and shelf space, so it is difficult for smaller producers to compete with larger producers and more recognized brands for the display of their products. In addition, dominant producers have increased their expenditures for point of sale marketing in retail establishments so that their brands will be promoted in the

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2015, available at https://www.normantranscript.com/news/four-states-watching-oklahoma-closely-as-lawmakers-push-liquor-law/article_d4058ece-6c48-11e5-abd7-67860a35ccb7.html; Bryan Pearson, *Walmart Inventory Cuts*, Forbes, November 9, 2015, available at https://www.forbes.com/sites/bryanpearson/2015/11/09/walmart-inventory-cuts-5-ways-to-make-room-for-the-best-shoppers/#51155b59378c.

[26] Andrew Adams, Costco Wine Buyer Talks Shelf Strategy, Wines & Vines, February 16, 2017, available at https://www.winesandvines.com/news/article/180732/Costco-Wine-Buyer-Talks-Shelf-Strategy.

[27] Lee Murphy, Walgreens Beverage Alcohol Powerhouse, Shaken News Daily, August 22, 2017, available at http://www.shankennewsdaily.com/index.php/2017/08/22/19048/walgreens-beverage-alcohol-powerhouse/.

store.[28] Accordingly, smaller producers have difficulty getting large retailers to display their products and as the three-tier system is weakened so will the protections that have allowed small businesses to grow and consumers to choose from a variety of products.

In contrast, the result of the three-tier distribution system throughout the United States and in Tennessee, specifically, is that the alcoholic beverage industry is diverse, characterized by a wealth of consumer choice of products at various price points. Today, local small producers of alcohol currently have access to distributors, retailers, and consumers. The astonishing growth at the producer level suggests that competition has increased and that consumers have been the beneficiaries of that competition in the form of innovative products at relatively lower prices.

Moreover, the record is devoid of any facts to support any claim that there is some form of consumer harm present in Tennessee. The only claim from Respondents is that an out-of-state retailer may be excluded because the state requires that any retailer applying for a liquor license must be a resident of the state for a certain period of time. Again, the public policy goal behind the durational residency requirement is to make sure that all licensed retailers know and are vested in the local community that they serve. While

[28] FTC Releases Fourth Major Study on Alcohol Advertising and Industry Efforts to Reduce Marketing to Underage Audiences, available at https://www.ftc.gov/news-events/press-releases/2014/03/ftc-releases-fourth-major-study-alcohol-advertising-industry.

state licensing requirements and the antitrust laws have different goals, it is worth noting that the purpose of the antitrust laws is to protect competition not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (*citing Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Tennessee's interests in regulating what firms are selling alcohol directly to consumers within its state are much more important, let alone germane, than an out-of-state big box retailer, which is concerned about profits, having the ability to sell alcohol within the state. Without the three-tier system, Tennessee and U.S. consumers would likely lose out on the innovation, variety, and choice that exists today.

II. PRESERVING THE THREE-TIER DISTRIBUTION SYSTEM SERVES IMPORTANT POLICY GOALS INCLUDING STRONG CONSUMER PROTECTION ENFORCEMENT

Indisputably, the states were given the power to regulate the sale and distribution of alcohol within their borders. *North Dakota v. United States*, 495 U.S. 423, 432 (1986); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) (noting that the Twenty-first Amendment sanctions the state the right to prohibit the production, distribution, or sale of liquor); and *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945) (noting that the Twenty-first Amendment "bestowed upon the states broad regulatory power over the liquor traffic within their territories"). Each state adopted comprehensive rules and regulations that resulted in 50 different regulatory frameworks and markets for alcoholic beverage companies. The goal of state alcohol regulation is to protect the welfare, health, peace, morals and safety of the public by "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432. Alcohol regulation attempts to balance appropriate control over licensed producers, distributors and retailers with robust competition. The states and local governments make decisions that are based on their own community norms and standards. Thus, while states may have different views on how to regulate the production, transportation, distribution and sale of alcohol within their borders—Utah and California, for example, surely have distinct perspectives on how to organize this endeavor—each state should be allowed to make these decisions.

The three-tier system offers many economic benefits to society. First, it results in tax revenue to the federal, state, and local governments.[29] Second, it promotes small entrepreneurial businesses. For small producers (craft brewers, small wineries, and craft distilleries), they are given equal access to the marketplace that they would not receive without state regulation, which allows sales of their products to a wider range of consumers. They are allowed to compete

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[29] KPMG, *An Analysis of the Structure and Administration of State and Local Taxes on the Distribution and Sale of Beer*, NBWA (2009) and update in 2014, available at https://www.nbwa.org/resources/kpmg-tax-study-state-and-local-taxes-distribution-and-sale-beer-0.

on a level playing field. Third, consumers have more choices to a variety of alcoholic products. Fourth, it is a win-win proposition that has resulted in procompetitive effects.

The three-tier system also attempts to minimize public health and safety risks. First, these laws and regulations provide safeguards for the safe handling of alcoholic beverages before they get to consumers. *North Dakota*, 495 U.S. at 432–33. This regulatory framework increases consumer confidence because only licensed distributors and retailers are able to provide and sell alcoholic beverages. It makes producers, wholesalers, and retailers accountable to local communities. Second, the system fosters controlled and accountable sales of alcohol. Third, the system also prevents the marketplace from being dominated by major companies that can use deceptive marketing tactics to increase alcohol sales causing customers to overdrink and overspend on alcohol, which creates numerous public health issues. Fourth, each state can do what it wants to set up a system to protect consumers. A state can test a product and/or decide not to allow the sale or listing of a product. For example, some states have prohibited the sale of grain alcohol or alcoholic energy drinks prior to any intervention by the federal government.[30]

[30] Anna King, *States Consider Banning Alcoholic Energy Drinks*, NPR (Nov. 9, 2010); Johns Hopkins Bloomberg School of Public Health Press Release, *Governor Signs Bill Banning Extreme-Strength Alcohol in Maryland*, May 5, 2014, available at https://www.newswise.com/articles/view/617429/?sc=dwhr&xy=

Moreover, consumer protection efforts are enhanced by the three-tier distribution system. Consumer Action is consistently on the front line in protecting consumers from deceptive and fraudulent conduct, so it believes that consumer protection efforts should be strengthened not weakened especially with regards to the alcoholic beverage industry. Because of significant federal and state regulation, the alcohol beverage industry in the United States is relatively safe. The three-tier system prohibits the sale of contaminated alcohol and ensures that producers, wholesalers, and retailers meet certain safety and quality standards. Unfortunately, that is not the case in most of the world. Euromonitor recently released a report entitled "Size and Shape of the Global Illicit Alcohol Market" indicating that 25 percent of the alcohol sold around the world is illicit.[31] Indeed, other countries do not have the same heightened scrutiny, controls, and regulations that the 50 states within the United States employ, so those countries face credibility issues and real health and safety risks especially in Africa and Latin America where it is estimated that up to half of all alcoholic

5047613; Danae King, *Laws including high-proof grain alcohol ban take effect Tuesday*, Baltimore Sun, June 30, 2014, available at https://www.baltimoresun.com/news/maryland/bs-md-grain-alcohol-illegal-tuesday-20140630-story.html; Alcohol Policy Information System website available at https://alcoholpolicy.niaaa.nih.gov/.

[31] *Size and Shape of the Global Illicit Alcohol Market*, Euromonitor, November 6, 2018, available at https://www.securingindustry.com/food-and-beverage/a-quarter-of-alcohol-is-illicit-in-emerging-markets-report/s104/a8779/#.W-YHHpNKhaQ.

drinks are illicit.[32] Furthermore, the Euromonitor Report concluded that there are five main factors driving the illicit trade in alcohol, including low awareness of the risks, low prices driving demand, inadequate regulation that can encourage the illicit market, a lack of enforcement, and poorly-regulated distribution channels. Fortunately, in the United States, there is strong state regulation of the wholesale and retail tiers and interlocking state laws that prevent monopolies in alcohol sales and minimize the risks of counterfeit, tainted, bootleg, or illegal alcohol being sold in our local communities.[33]

The Court's most recent opinion regarding the three-tier distribution system refused to retreat from this long history of state control: "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run

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[32] Karen McVeigh, *Toxic and untaxed: perils of global trade in bootleg liquor exposed*, Guardian, June 11, 2018, available at https://www.theguardian.com/globaldevelopment/2018/jun/11/bootleg-liquor-africa-latin-america.

[33] Robert M. Tobiassen, *The Fake Alcohol Situation in the United States*, Federal Regulatory and Compliance Consultant (2014), available at https://www.centerforalcoholpolicy.org/wp-content/uploads/2015/04/The_Fake_Alcohol_Situation_in_the_United-States_compressed.pdf.

outlets." *Granholm*, 544 U.S. at 488–89. If a state can decide to ban sales and assume direct control and operate its own state-run outlets, it surely has the authority to determine what firms will have the privilege of selling alcohol to its citizens. This Court further explained: "[T]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm*, at 484–85 (emphasis added).

While America's state-based, three-tier distribution system provides consumers with some accountability, certainty, and reliability regarding the sale of alcoholic beverages, the Sixth Circuit's decision invalidating Tennessee's durational residency requirement threatens the status quo. Special economic interests including large, big box retailers such as Respondent Total Wine, are seeking to deregulate alcohol through litigation. The result could be a reduction in a state's ability to control alcohol effectively. The rationale of the durational residency requirement for new license applicants is to make sure that new licensees know the local market, are accountable to the local community, and will encourage restrained and non-excessive alcohol consumption. Because of alcohol's well-known externalities, the state knows that the greatest output of alcohol is not the optimal goal of regulation.[34]

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[34] National Institute on Alcohol Abuse and Alcoholism, available at https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics.

In summary, *Granholm* expressly recognized the importance of the three-tier distribution system, which allows states to prohibit and control the sale of alcohol, and license in-state retailers who will be selling alcohol to its in-state consumers. The three-tier system promotes competition and economic efficiency, while minimizing the health and social risks. Keeping the three-tier system in place is vital to keeping consumers safe. It serves as a framework for effective regulation, which has benefitted consumers, producers and society as a whole. Americans understand that alcohol is different from other commodities. The sale of alcohol must be regulated to reduce the chances of abusive excessive consumption, underaged drinking, and illicit alcohol sales, which can result in public health and social welfare problems. Large publicly held retailers selling alcohol have one goal: sell as much alcoholic beverages as possible to the consuming public to drive profits. Individual states are in the best position to tailor the regulations to local conditions and norms. A decision that further restricts the state's ability to regulate alcohol within its borders could potentially result in more harm than good as it would weaken consumer protection efforts. As noted by this Court, state alcohol laws are supported by "a strong presumption of validity and should not be set aside lightly." *North Dakota*, 495 U.S. at 433; *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691, 714 (1984) (emphasis added).

CONCLUSION

Consumer Action urges the Court to be mindful of the effects its decision in this case will have on the ability of states to regulate and enforce their alcohol laws that are designed to promote competition, strengthen consumer protection enforcement, and protect the health and safety of consumers. Further, Consumer Action urges the Court to strongly consider the negative consequences an affirmance will have on the price, variety, quality, and choice of alcohol in Tennessee and throughout the country.

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