No. 18-96

IN THE
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, *ET AL.*,

Respondents.

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

BRIEF OF WINE AND SPIRITS WHOLESALERS OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

Wine & Spirits Wholesalers of America, Inc. ("WSWA") is a national trade organization and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents nearly 400 companies in all 50 states and the District of Columbia that hold state licenses to act as wine and/or spirits wholesalers and/or brokers. Wholesalers directly account for more than 74,000 jobs paying more than $6.5 billion in wages, and WSWA's members distribute more than 80% of all wine and spirits sold at wholesale in the United States. This case implicates the interests of WSWA and its members because it calls into question the validity of long-standing state laws that regulate the alcohol industry in general, and alcohol wholesalers in particular. WSWA and its members have a strong interest in ensuring that states remain able to determine how best to regulate the distribution and sale of alcohol within their borders.

Alcohol is a unique product in American law and for good reason. The detrimental impacts on individuals, families, and society as a whole that result from overconsumption and underage consumption of alcohol are dramatically different from those related to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no one other than the *amicus* and its counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel for *amicus curiae* states that Petitioner and Respondents have all entered blanket consents on the docket to the filing of *amicus curiae* briefs.

the use of other products, whether measured by scale, severity, nature, or remediability.

Since the end of Prohibition, most states have used a three-tier system to regulate effectively the distribution and sale of wine, beer, and spirits (collectively "liquor" or "alcohol"). The three-tier system generally separates (and separately regulates) the production, distribution, and retail levels. Under this system, a producer of liquor sells its product to a licensed wholesaler, who generally pays applicable state excise taxes and delivers it to a licensed retailer. *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185, 187 (2d Cir. 2009). The retailer then sells the liquor to consumers and, where applicable, collects state and local sales taxes. *Ibid*. Vertical integration between tiers is generally prohibited. Christopher G. Sparks, *Out-of-State Wine Retailers Corked*, 30 N. Ill. U. L. Rev. 481, 487 (2010).

States have chosen the three-tier system because it allows them to examine records and collect taxes more efficiently, creates effective barriers to the sale of alcohol to minors, and ensures orderly market conditions by preventing monopoly or over saturation of the market. In addition, separating the tiers and directly regulating each one allows states to prevent organized crime from gaining control of alcohol distribution. *See Arnold's Wines*, 571 F.3d at 187. These regulatory systems balance regulation with competition and protect citizens from the harms of alcohol misuse. They have created a transparent and accountable liquor market that is the best in the world for safety, choice, and innovation.

A common feature of three-tier systems is a requirement that retailers and wholesalers be residents

of the state. This requirement flows from the recognition that in-state wholesalers and retailers can more readily be held accountable and are likely to be more socially responsible because they are exposed to the negative consequences that sometimes result from alcohol consumption. *See Southern Wine & Spirits of Am. Inc.* v. *Div. of Alcohol and Tobacco Control,* 731 F.3d 799, 811 (8th Cir. 2013) (Colloton, J). A substantial number of states further require that retailers and wholesalers reside in the state for a certain period of time before being eligible for licenses. For example, the Tennessee statute at issue here requires retailers and wholesalers to reside in the state for two years before applying for a license. *See* Tenn. Code Ann. §§ 57-3-203(b)(1), (f)(1)(A), 57-3-204(b)(2)(A), (3)(A)-(B). These requirements are simply an expression of the same underlying interests that support a residency requirement in the first place: A state is entitled to *define* residency for these purposes as a *bona fide* period of time required for a would-be wholesaler or retailer to become integrated into the community such that it is willing and able to protect the state's interests related to liquor distribution. As Judge Sutton put it below, requiring licensees "to reside in one place for a sustained, two-year period ensures that they will be knowledgeable about the community's needs and committed to its welfare." Pet. App. 50a.

Nevertheless, Respondents contend, and the Sixth Circuit agreed, that Tennessee's durational-residency requirements violate the Commerce Clause because they are "facially discriminatory and there is no evidence that Tennessee cannot achieve its goals through nondiscriminatory means." Pet. App. 29a. The Sixth Circuit also concluded that "the Twenty-first Amendment does not immunize Tennessee's durational-resi-

dency requirements from scrutiny under the Commerce Clause" because "a three-tier system can still function without these restrictions." Pet. App. 27a.

That gets the constitutional analysis exactly backwards. As the history of the Twenty-first Amendment demonstrates, apart from repealing Prohibition, the whole point of the Amendment was to "create[] an exception to the normal operation of the Commerce Clause." *Craig* v. *Boren*, 429 U.S. 190, 206 (1976). Thus, it has long been understood that the Amendment "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 712 (1984). In this setting, a party who challenges a state liquor regulation as "discriminatory" in violation of the Commerce Clause is, as a practical matter, advancing a claim the Amendment was expressly designed to extinguish.

I. The Twenty-first Amendment prohibits the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. CONST. amend. XXI, § 2. As the Amendment's history confirms, the broad language of Section 2 was intended to provide states with plenary authority to regulate liquor free from the constraint of the Commerce Clause.

In the 1880s, the Supreme Court struck down, on dormant Commerce Clause grounds, state laws banning or burdening the sale of imported liquor. Congress responded by enacting the Wilson Act, which was intended to curtail dormant Commerce Clause challenges to state liquor regulations. However, this Court largely vitiated the Act by not allowing states

to discriminate against out-of-state liquor or prohibit shipments from out-of-state sources.

Congress again responded, this time with the Webb-Kenyon Act, which prohibits "[t]he shipment or transportation" of liquor into a state in violation of that state's laws. 27 U.S.C. § 122. Following the failed experiment with Prohibition, the Twenty-first Amendment effectuated a political compromise that allowed commerce in liquor to resume (Section 1) while granting states the plenary authority over in-state distribution and sale of liquor that Congress had previously conferred in the Webb-Kenyon Act (Section 2).

Interpreting Section 2 in the years following ratification, this Court repeatedly held that "[t]he Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132, 138 (1939); *see also State Bd. of Equalization of Cal.* v. *Young's Mkt. Co.*, 299 U.S. 59 (1936). The text and history of Section 2, as well as this Court's early precedent, confirm that the "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* v. *Heald*, 544 U.S. 460, 484 (2005).

II. The Court's more recent decisions have clarified that Section 2 "primarily created an exception to the normal operation of the Commerce Clause," but did not give states carte blanche to ignore "their obligations under other [constitutional] provisions" when regulating liquor. *Capital Cities Cable*, 467 U.S. at 712. For example, the Court has held that Section 2 does not authorize states to enact liquor regulations

in violation of the First Amendment, the Equal Protection Clause, the Export-Import Clause, or the Due Process Clause. Nor may a state regulate in areas "outside of its jurisdiction," *North Dakota* v. *United States*, 495 U.S. 423, 431 (1990), such as by regulating alcohol distribution on federal land or enacting laws that have the practical effect of controlling prices in *other* states. Successful challenges to state attempts to regulate extraterritorially do not, however, suggest the existence of a freewheeling Commerce Clause "exception" to the Twenty-first Amendment. Rather, those are cases in which the Amendment simply does not apply.

With respect to the originally intended scope of the Amendment—displacement of all *dormant* Commerce Clause challenges to state liquor regulation—the Court has recognized only a single, narrow exception to the broad immunity afforded states by the Twenty-first Amendment, and then only very recently. In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the Court held that state regulations passed for "mere economic protectionism" of in-state liquor products—*i.e.*, where the state concedes that the law is designed solely to increase consumption of in-state products—are not shielded from scrutiny under the Commerce Clause. *Id.* at 276. And in *Granholm*, the Court invalidated state laws that allowed local wine producers to ship directly to consumers—thereby avoiding the three-tier system—while requiring out-of-state wine to go through the three-tier system. 544 U.S. at 485. But this exception is extremely narrow. It applies only to overt discrimination against out-of-state *products*. *Granholm* emphatically reiterated that a state has "virtually complete control" over "how to structure the liquor distribution system." *Id.* at 488-89.

III. Like many states, Tennessee has chosen to include durational-residency requirements as core components of its liquor distribution system. These requirements, which do not discriminate against out-of-state liquor products, fall squarely within the zone of state regulatory authority protected by the Twenty-first Amendment from scrutiny under the dormant Commerce Clause.

Residency requirements for wholesalers and retailers have been a common feature of three-tier systems since the ratification of the Twenty-first Amendment. These requirements advance legitimate Twenty-first Amendment interests in temperance, tax collection, and orderly market conditions—which can include preventing monopoly and combatting organized crime—by ensuring that market participants have a meaningful connection to the communities they serve and that the infrastructure for in-state liquor distribution remains subject to state oversight and regulation.

Duration requirements directly advance these interests by *defining* who counts as a *bona fide* resident authorized to do business within the context of the three-tier system. Duration requirements are thus justified on the same grounds as residency requirements—those with established roots in the local community are more likely to be sensitive to local concerns and held accountable by the community. Duration requirements also allow the state to better evaluate the applicant's qualifications and history. Because residency and duration requirements are a staple of many states' three-tier systems, a challenge to these requirements amounts to "a frontal attack on the constitutionality of the three-tier system itself." *Arnold's*

Wines, 571 F.3d at 190. That argument must fail because, as this Court has repeatedly held, the three-tier system is "unquestionably legitimate" under the Twenty-first Amendment. *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432).

ARGUMENT

After Prohibition, many states began regulating the importation, transportation, and distribution of liquor through the "unquestionably legitimate" three-tier system, *Granholm*, 544 U.S. at 489—under which licensed producers sell only to licensed wholesalers, and licensed wholesalers sell only to licensed retailers. Like many states, Tennessee's three-tier system includes a durational-residency requirement for licensed retailers and wholesalers to ensure effective regulatory oversight and public accountability. Tenn. Code Ann. §§ 57-3-204(b)(2)(A), 57-3-203(b)(1).

No party disputes that these provisions would violate the dormant Commerce Clause if the regulated product were books or shoes. But the challenged laws stand on different footing because they regulate alcohol. The text and history of the Twenty-first Amendment, as well as this Court's unbroken precedent interpreting Section 2, confirm that reasonable durational-residency requirements are immunized from invalidation under the dormant Commerce Clause. The Sixth Circuit's decision striking down Tennessee's durational-residency requirements on dormant Commerce Clause grounds should thus be reversed.

I. SECTION 2 WAS INTENDED TO IMMUNIZE STATE REGULATION OF IN-STATE LIQUOR DISTRIBUTION AND SALE AGAINST DORMANT COMMERCE CLAUSE CHALLENGES

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." *Granholm*, 544 U.S. at 488 (quoting *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). To understand why that is so, it is essential to understand the circumstances that led to the Eighteenth Amendment's prohibition of intoxicating liquors and the political compromise that resulted in the Twenty-first Amendment's ratification.

A. "The history of state regulation of alcoholic beverages dates from long before adoption of the Eighteenth Amendment." *Craig*, 429 U.S. at 205. As far back as the mid-nineteenth century, this Court "recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders" under the police powers "free from implied restrictions under the Commerce Clause." *Ibid*. (citing *License Cases*, 46 U.S. (5 How.) 504, 579 (1847)). However, in a series of cases in the 1880s, this Court invoked the dormant Commerce Clause to invalidate state laws banning or burdening the sale of imported liquor. *See Bowman* v. *Chi. & Nw. Ry. Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890). These cases found the state laws to be "repugnant" to the Commerce Clause because liquor sold in its "original package" was part of interstate commerce, which states had no power to interfere with in the "absence of congressional permission." *Leisy*, 135 U.S. at 124-25.

Congress responded by enacting the Wilson Act, which subjected imported liquors to the states' police power "upon arrival in [the] State, . . . to the same extent and in the same manner" as liquor produced in-state, whether or not the liquor was in its "original packages." Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121). Although the Act attempted to protect state liquor regulations from dormant Commerce Clause challenges, a trio of cases in the 1890s rendered the Act ineffectual. *See Scott* v. *Donald*, 165 U.S. 58, 100 (1897) (concluding that the Wilson Act was "not intended to confer upon any State the power to discriminate injuriously against [out-of-state] products" that are "subjects of legitimate commerce"); *Rhodes* v. *Iowa*, 170 U.S. 412, 426 (1898) (holding that "arrival in [the] State" meant that liquor could not be regulated until it had reached its "point of destination"); *Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438, 451-52 (1898) (holding that the "right to ship merchandise from one State into another" was "wholly unaffected by" the Wilson Act). "In consequence, agents of out-of-state dealers were able to solicit orders from individuals, and have the liquor shipped directly to them." Note, *Legislation, Liquor Control*, 38 Colum. L. Rev. 644, 645 (1938).

To stop this burgeoning mail-order business, Congress enacted (over President Taft's veto) "[a]n act [d]ivesting intoxicating liquors of their interstate character in certain cases," known as the Webb-Kenyon Act. Act of Mar. 1, 1913, ch. 90, § 1, 37 Stat. 699 (codified at 27 U.S.C. § 122). The Webb-Kenyon Act "prohibit[s]" any "shipment or transportation" of "intoxicating liquor" "from one State" "into any State" "in violation of any law of such State." *Id*. As the House Report explained, the bill was "intended to withdraw

the protecting hand of interstate commerce from intoxicating liquors transported into a State or Territory and intended to be used therein in violation of the law of such State or Territory." H.R. Rep. No. 1461, 62d Cong., 3d Sess., 1 (1913).

This Court upheld the Webb-Kenyon Act in *James Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U.S. 311 (1917), which recognized that the Act's "purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws." *Id.* at 324. The Court explained that, in light of the Webb-Kenyon Act, there is "no possible ground for claiming" that a state law is invalid merely "because the liquor was shipped in interstate commerce." *Ibid*. The Court thus interpreted the Webb-Kenyon Act as "t[aking] the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law." *Id*. at 325.

In short, the Webb-Kenyon Act "was an attempt to eliminate the regulatory advantage, *i.e.*, its immunity characteristic, afforded imported liquor," so that states could regulate the internal distribution and sale of liquor unfettered by the dormant Commerce Clause. *Granholm*, 544 U.S. at 482 (citing *Clark Distilling*, 242 U.S. at 324).

B. The national experiment with Prohibition was widely recognized as a failure, and in 1933 the Eighteenth Amendment was repealed by the Twenty-first. But the states would not have ratified the Amendment had it meant returning to the pre-Webb-Kenyon regime where states were powerless to regulate the distribution and sale of liquor that happened to cross state lines. Indeed, the Amendment was "the result of a consistent demand from the states to be permitted

an unrestricted power to regulate the transportation, sale, and use of intoxicating liquor within their respective borders." Note, *Constitutional Law—Power of States to Regulate Manufacture and Sale of Liquor Under Twenty-First Amendment*, 14 NYU L. Q. Rev. 361, 361 (1937). The Twenty-first Amendment thus "made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority" by "subordinating rights under the Commerce Clause to the power of a State to control . . . the traffic in liquor within its borders." *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 300 (1945) (Frankfurter, J., concurring).

Section 2 of the Twenty-first Amendment prohibits "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. CONST. amend. XXI, § 2. As one of the Amendment's authors explained, the purpose of Section 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors." 76 Cong. Rec. 4,143 (Feb. 15, 1933) (statement of Sen. Blaine); *see also id.* at 4,145 (Statement of Sen. Wagner) (expressing concern that a proposed—but ultimately rejected—section that would have given Congress concurrent power to regulate liquor was contrary to the amendment's purpose "to restore to the States control of their liquor problem"). Section 2 thus embodied a compromise that allowed commerce in liquor to resume while ensuring that states could regulate the distribution and sale of liquor free from the constraints of the Commerce Clause.

This compromise was accomplished by effectively constitutionalizing the gist of the Webb-Kenyon Act into Section 2. *See Granholm*, 544 U.S. at 484 (noting

that Section 2 "closely follows" the language of the Webb-Kenyon Act) (quoting *Craig*, 429 U.S. at 205-06); *see also id*. at 514 (Thomas, J., dissenting). As the *Granholm* majority explained, Section 2 "restored to the States the powers they had under the Wilson and Webb-Kenyon Acts," *id.* at 484—including comprehensive regulation of in-state retailers and wholesalers free of any restraints otherwise imposed by the Commerce Clause.

Consistent with that history, this Court's early post-ratification cases held that Section 2 gave states plenary authority to regulate their domestic liquor markets, even when such regulation involved overt discrimination against out-of-state liquor products. For example, in *Young's Market*, the Court upheld a California law imposing a license fee on wholesalers to import beer. Although the law imposed a "direct burden on interstate commerce," the Court held that the fee was authorized by the Twenty-first Amendment. 299 U.S. at 62. The Court rejected the argument that states must "let imported liquors compete with the domestic on equal terms," finding that this "would involve not a construction of the Amendment, but a rewriting of it." *Ibid*. The Court reasoned that the states' authority to prohibit the manufacture and sale of beer included the "lesser" power to impose "a state monopoly of the manufacture and sale of beer" or to "channelize desired importations by confining them to a single consignee." *Id.* at 63.

For several decades the Court adhered to the original view that the Twenty-first Amendment completely immunized states from all dormant Commerce Clause challenges. For example, in *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938), the Court stated that it was "settled" that "discrimination

against imported liquor is permissible" under the Twenty-first Amendment. *Id.* at 403 (upholding state law that "clearly discriminate[d] in favor of liquor processed within the State"). Similarly, in *Ziffrin*, the Court declared that "[t]he Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." 308 U.S. at 138. In the same year the Court upheld a Michigan law prohibiting beer dealers from selling any beer manufactured in a state which discriminated against Michigan because even if the law could "properly be described as a protective measure, . . . the law [wa]s valid." *Ind. Brewing Co.* v. *Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *see also Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395, 397-98 (1939) ("[T]he right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."). In short, the Court "made clear in the early years following adoption of the Twenty-first Amendment" that under Section 2, "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964).[2]

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[2] One virtue of the absolutist view expressed in *Young's Market* and its progeny was that the Court "relieved itself of the thankless task of trying to define the hazy line between proper and improper state police and revenue measures where interstate business is concerned." Joseph E. Kallenbach, *Interstate Commerce in Intoxicating Liquors Under the Twenty-First Amendment*, 14 Temple L. Q. 474, 482 (1940). It is difficult to differentiate "measures appropriate to a policy of strict regulation for ordinary police or revenue purposes, and measures going

Although more recently the Court has held that state laws enacted solely to protect local liquor *products* from competition by out-of-state products are *not* immunized from dormant Commerce Clause scrutiny, *see* Part II.C-D, *infra*, it has steadfastly maintained that the "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*, 544 U.S. at 484.

II. THIS COURT'S PRECEDENTS CONFIRM THAT STATES RETAIN BROAD AUTHORITY TO STRUCTURE THEIR THREE-TIER SYSTEMS

The Court's recent decisions have clarified that the Twenty-first Amendment does not authorize the states to enact alcohol regulations that violate other constitutional provisions, such as the Equal Protection Clause and Due Process Clause. Nor may states

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beyond them for economic needs." *Ibid.*; *see also Carter* v. *Virginia*, 321 U.S. 131, 142 (1944) (Frankfurter, J., concurring) (arguing that allowing courts to determine whether a given liquor regulation is "reasonably necessary" would "open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-First Amendment"). As the circuit split addressed in this case illustrates, *Granholm* and *Bacchus* have created confusion as to the interplay between the Twenty-first Amendment and the Commerce Clause. Should the Court be inclined to reconsider those decisions, Justice Brandeis's unanimous opinion in *Young's Market* provides not only a more administrable rule for lower courts to apply, but also the best evidence of the original meaning of Section 2. *Cf. McDonald* v. *Chicago*, 561 U.S. 742, 776-78 (2010) (relying on sources contemporaneous to the ratification of the Fourteenth Amendment to ascertain its original public meaning).

regulate outside their jurisdiction by controlling liquor sales on federal enclaves or setting prices in other states. However, with respect to regulation of *in-state* liquor transportation, distribution and sale, the Court has recognized only a single, narrow exception to the general immunity states enjoy against dormant Commerce Clause challenges: overt attempts by a state to protect its local alcohol products from competition by out-of-state *products*. Aside from that narrow carve-out, this Court has consistently affirmed that states have plenary authority over the in-state alcohol-distribution system, which for many states includes durational-residency requirements for retailers and wholesalers.

A. Recognizing that Section 2 "primarily created an exception to the normal operation *of the Commerce Clause*," this Court has held that the Twenty-first Amendment "does not license the States to ignore their obligations under *other provisions* of the Constitution." *Capital Cities Cable*, 467 U.S. at 712 (emphasis added); *see also Young's Mkt.*, 299 U.S. at 64 (rejecting an argument that authorizing the challenged "licensed-fee would involve a declaration that the Amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution"). For example, the Court has held that the Amendment does not give states authority to: tax imported liquor in violation of the Export-Import Clause, *Dep't of Rev.* v. *James Beam Co.*, 377 U.S. 341 (1964); insulate the liquor industry from equal-protection requirements, *Craig*, 429 U.S. at 204-09; violate due process, *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1971); delegate zoning authority related to alcohol sales to churches, *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5

(1982); or impose advertising bans on liquor that contravene the First Amendment, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996).

The Court also has held that the Twenty-first Amendment does not authorize states "to regulate in an area or over a transaction that f[alls] outside of its jurisdiction." *North Dakota*, 495 U.S. at 431. For example, a state may not: regulate alcohol use within a national park, *see Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); regulate a transaction between an out-of-state liquor supplier and a federal military base, *see United States* v. *Mississippi Tax Comm'n*, 412 U.S. 363 (1973); or tax directly a federal instrumentality on an enclave over which the United States exercises concurrent jurisdiction, *see United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599 (1975). The Court has reiterated, however, that "within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *North Dakota*, 495 U.S. at 431 (plurality opinion) (quoting *Midcal Aluminum*, 445 U.S. at 110).

B. The Court first suggested that at least some Commerce Clause challenges to state liquor regulations remained possible in *Hostetter*, where it asserted that the Twenty-first Amendment had not "somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned." 377 U.S. at 331-32. The Court reasoned that "[i]f the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." *Id.* at 332. "Both the Twenty-first Amendment and the Commerce Clause are parts

of the same Constitution," the Court reasoned, 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." *Id.* at 332.

Hostetter was not, however, a *dormant* Commerce Clause case; it involved the federally regulated sale of alcohol to passengers departing Idlewild (now JFK) airport, which the passengers did not even receive until they arrived at their "foreign destination." 377 U.S. at 325. In that context, the Court held that New York's regulations were an impermissible effort "to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations." *Id.* at 334.

Applying the same reasoning, the Court has invalidated state statutes that authorized or required liquor pricing schemes that violated federal statutes. *See*, *e.g.*, *Midcal Aluminum*, 445 U.S. at 114; *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 350 (1987). But these cases, like *Hostetter*, did not implicate the dormant Commerce Clause. Accordingly, neither *Hostetter*, nor *Midcal Aluminum*, nor *324 Liquor* called into question the principle that states have plenary authority to structure their in-state distribution systems as they see fit in the absence of a conflicting exercise of federal authority. On the contrary, as the Court observed in *Hostetter*, the "view of the scope of the Twenty-first Amendment" expressed in *Young's Market* "with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its border has remained unquestioned." *Id*. at 330.

The Court also has recognized that the Twenty-first Amendment does not authorize states to enact liquor laws that have the effect of regulating extra-

territorially. In *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), the Court struck down New York's price-affirmation statute, which required liquor distillers and producers selling to wholesalers within the state to sell at a price that is no higher than the lowest price the distiller charges wholesalers in any other state. The effect of the statute was to give New York control over prices in other states. The Court recognized that the Twenty-first Amendment "gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States." *Id.* at 585. And in *Healy* v. *The Beer Institute*, 491 U.S. 324 (1989), the Court reaffirmed that "to the extent that an affirmation statute has the practical effect of regulating out-of-state liquor prices, it cannot stand under the Commerce Clause irrespective of the Twenty-first Amendment." *Id.* at 342.

In short, the text of the Twenty-first Amendment makes clear that the "Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country, or another State." *Brown-Forman*, 476 U.S. at 585. But this is less a "limitation" on (or a Commerce Clause "exception" to) the Twenty-first Amendment than a feature of our federal system of government. State power to impose burdens on interstate commerce is "not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States," which have "'autonomy . . . within their respective spheres.'" *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 571 (1996) (quoting *Healy*, 491 U.S. at 335-36). The Court's cases dealing with extra-

territorial regulation reflect the fact that the Amendment was never intended to authorize one state to invade the police powers of sister states or defy the authority of the federal government. The Amendment simply does not apply in those situations. Those cases thus have little to say about regulations of in-state wholesalers and retailers, and in no way undermine the validity of regulations structuring states' liquor distribution systems. Indeed, the Court in *Brown-Forman* reiterated that states have authority "to regulate the importation and distribution of liquor within their territories." 476 U.S. at 584.

C. The Court made a more dramatic turn from the *Young's Market* understanding of Section 2 in *Bacchus*, which involved a dormant Commerce Clause challenge to a Hawaii law that exempted two locally produced liquors from the 20 percent excise tax imposed on sales of liquor at wholesale. Throughout the litigation, Hawaii offered no Twenty-first Amendment justification (such as temperance, etc.) for the law, but rather defended it solely as an "aid [to] Hawaiian industry." *Id*. at 271. Indeed, "the State expressly disclaimed any reliance upon the Twenty-first Amendment in the court below and did not cite it in its motion to dismiss or affirm." *Id.* at 274 n.12. Although the state belatedly attempted to rely on the Amendment in its merits briefing, *ibid.*, it continued to acknowledge that the "purpose" of the tax "was 'to promote a local industry.'" *Id.* at 276. In this context, the Court held that the relevant "question" was "whether the *principles* underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 275 (emphasis added).

Although the Court did not enumerate those principles, it stated that "one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276. Accordingly, the Court held that "State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Ibid.* Because Hawaii conceded that the law was designed merely "to foster the local industries by encouraging increased consumption of their product," *id.* at 269, the Court held that the tax "violate[d] a central tenet of the Commerce Clause but [was] not supported by any clear concern of the Twenty-first Amendment." *Id.* at 276.

Bacchus thus carved out a very narrow subset of state laws from the broad immunity otherwise afforded by the Twenty-first Amendment—namely, laws enacted purely to protect local liquor manufacturers from competition, thereby discriminating against out-of-state products.

D. The Court's most recent Twenty-first Amendment decision—*Granholm*—is consistent with the view that Section 2 provides states with plenary authority to regulate the structure of their in-state distribution systems unfettered by the Commerce Clause so long as their regulations are not aimed at protecting in-state liquor products from competition by out-of-state products.

In *Granholm*, the Court addressed two state licensing regimes (Michigan and New York) that placed out-of-state wineries at a competitive disadvantage vis-à-vis in-state wineries. Michigan authorized in-state wineries to obtain a license allowing them to

ship directly to consumers, but required out-of-state wineries to distribute their products "through [Michigan's] three-tier system." 544 U.S. at 468-69. "These two extra layers of overhead increase[d] the cost of out-of-state wines to Michigan consumers." *Id.* at 474.

Similarly, New York "channel[led] most wine sales through the three-tier system," but "allow[ed] local wineries to make direct sales to consumers in New York on terms not available to out-of-state wineries." 544 U.S. at 470. This was just "an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system," increasing costs for out-of-state wineries. *Id*. at 474.

The states argued that the Twenty-first Amendment authorized their discriminatory licensing regimes, but a narrow majority of the Court rejected that argument. First, the Court held that the Wilson Act and Webb-Kenyon Act "did not displace[] the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state." 544 U.S. at 483. Second, the Court held that "[t]he Amendment did not give States the authority to pass nonuniform laws in order *to discriminate against out-of-state goods*, a privilege they had not enjoyed at any earlier time." 544 U.S. at 484-85 (emphasis added). Because Michigan and New York's three-tier system applied "only for sales from out-of-state wineries," *id.* at 467, the Court held that the challenged laws "involve[d] straightforward attempts to discriminate in favor of local producers" and thus were "not saved by the Twenty-first Amendment," *id.* at 489. In this regard, *Granholm* involved the same type of overt discrimination against out-of-state products at issue in *Bacchus*. *Id.* at 488-89.

Justice Thomas, joined by the Chief Justice and Justices Stevens and O'Connor, dissented. Although he agreed that the Twenty-first Amendment unquestionably allows states to control their liquor distribution systems, Justice Thomas would have held that the Webb-Kenyon Act and Twenty-first Amendment both displace any negative Commerce Clause barrier to state regulation of liquor sales to in-state consumers, even if those regulations discriminate against out-of-state liquor. 544 U.S. at 497-98, 517-18 (Thomas, J., dissenting). Justice Thomas noted that following ratification of the Twenty-first Amendment, "[m]any States had laws that discriminated against out-of-state products in addition to out-of-state wholesalers and retailers." 544 U.S. at 518-19 (Thomas, J., dissenting) (discussing state statutes); *see also Interstate Commerce*, 14 Temple L.Q. at 483 (noting that 34 states had laws that "discriminate[d] against out-of-state alcoholic beverages) (citation omitted). He argued that this "contemporaneous state practice refute[d] the Court's assertion that the Twenty-first Amendment allowed States to discriminate against out-of-state wholesalers and retailers, but not against out-of-state products." *Granholm*, 544 U.S. at 520.

Although the Court was closely divided as to whether the Twenty-first Amendment allows states to engage in protectionism designed to disadvantage out-of-state products—largely because they disagreed about the history and scope of the Wilson Act and Webb-Kenyon Act—all nine Justices agreed that the Twenty-first Amendment authorizes states to "mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment." *Id.* at 466; *see also id.* at 520 (Thomas, J., dissenting). As the majority opinion therefore took pains to em-

phasize, *Granholm* did not "call into question the constitutionality of the three-tier system." *Id*. at 488. Rather, it held that "State policies are protected under the Twenty-first Amendment" so long as "they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. Indeed, *Granholm* specifically observed that states have "virtually complete control over whether to permit importation or sale of liquor and how to structure the *liquor distribution system*." *Id*. at 488 (emphasis added) (quoting *Midcal Aluminum*, 445 U.S. at 110).

Of particular note, in emphasizing the "unquestionabl[e] legitima[cy]" of the three-tier system, the *Granholm* majority quoted approvingly Justice Scalia's concurring opinion in *North Dakota*, which had expressly recognized that the Twenty-first Amendment "empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring)). Thus, even under *Granholm* and *Bacchus*, state regulation of in-state liquor distribution and sale—including through a three-tier system that incorporates residency and duration requirements—is shielded from dormant Commerce Clause scrutiny.

III. DURATIONAL-RESIDENCY REQUIREMENTS ARE WITHIN THE POWER RESERVED TO THE STATES BY SECTION 2

As part of its three-tier system of liquor regulation, Tennessee imposes reasonable durational-residency requirements on retailers and wholesalers. Residency requirements are designed to promote the very interests the Twenty-first Amendment authorizes states to protect—including temperance, crime

prevention, and tax collection. And a *duration* requirement merely establishes the minimum time a particular state decides is reasonably necessary for a retailer or wholesaler to become sufficiently rooted in the community; it thus demarcates *bona fide* residents from those deemed insufficiently established in the community to help protect those interests. Here, Tennessee's durational-residency requirements fulfill that Twenty-first Amendment role, and do not exceed reasonable limits on the state's legislative choices. They are thus immunized from scrutiny under the dormant Commerce Clause.

A. The compromise memorialized in the Twenty-first Amendment granted each state authority to regulate liquor within its jurisdiction in the manner that best fits its particular circumstances. Most states have used this authority to regulate liquor distribution through the three-tier system. Sparks, 30 N. Ill. U. L. Rev. at 486-87. Historically, "[t]he main purpose of the three-tier system was to preclude the existence of a 'tied' system between producers and retailers, a system generally believed to enable organized crime to dominate the industry." *Arnold's Wines,* 571 F.3d at 187; *see also* Sparks, 30 N. Ill. U. L. Rev. at 488. "Some courts have also recognized the prevention of monopolies" as a valid state interest furthered by the three-tier system, *Dickerson* v. *Bailey*, 336 F.3d 388, 404 (5th Cir. 2003), while others have noted states' interests in "promotion of orderly markets," *Costco Wholesale Corp.* v. *Maleng*, 522 F.3d 874, 902 n.23 (9th Cir. 2008). States have also long "assert[ed] that the three-tier regulatory system allows the state to collect taxes more efficiently and prevent the sale of alcohol to minors." *Arnold's Wines*, 571 F.3d at 188; *see also* Sparks, 30 N. Ill. U. L. Rev. at 488. Some states have also adopted a three-tier system as a way

of promoting temperance. Daniel Glynn, *Granholm's Ends Do Not Justify the Means: The Twenty-First Amendment's Temperance Goals Trump Free-Market Idealism*, 8 J.L. Econ. & Pol'y 113, 133 (2011). Today, the three-tier system serves many of these same purposes while protecting citizens from the negative consequences of adulterated or counterfeit products, evasion of state excise taxes, sales to underage and intoxicated consumers, and drunk driving, among other harms.

Wholesalers are the vital middle tier in this well-established system, linking producers and retailers. Since products must generally pass through a wholesaler, wholesalers play an indispensable role in states' regulation of the alcohol marketplace. For many states, wholesalers are the single point of excise tax collection. Wholesalers help ensure that liquor distributed to retailers is genuine and unadulterated. They also promote competition by providing distribution logistics to small brands and retailers, enabling them to compete effectively with large national brands and chains, fostering consumer choice. And wholesalers act as a central authority for developing and implementing comprehensive policies on the prevention of underage access and drunk driving. *See generally* Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tiers System Maintains Its Legal Validity and Social Benefits After* Granholm, 14 DePaul Bus. & Com. L.J. 209 (2015).

As part of their three-tier systems, many states "limit the issuance of retail, wholesale, and manufacturing licenses to residents of the state or to domestic corporations." Note, *Economic Localism in States Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1148

(1959); *see also Granholm*, 544 U.S. at 518 n.6 (Thomas, J., dissenting) (listing state statutes with residency and physical presence requirements). States reasonably view such residency requirements as a legitimate exercise of their Twenty-first Amendment authority.

Most importantly, residency requirements ensure that someone within the state's jurisdiction can be held accountable. For example, Tennessee justifies its residency requirements for retailers on the ground that "it is in the interest of th[e] state to maintain a higher degree of oversight, control and accountability for individuals involved in" liquor retailing. Tenn. Code Ann. § 57-3-204(b)(4). Similarly, because residency "facilitates law enforcement against wholesalers," states use residency requirements "for close control over the licensees and for amenability to prosecution." *Economic Localism*, 72 Harv. L. Rev. at 1149. States may reasonably believe that local wholesalers are more likely than their out-of-state counterparts to fear prosecution by the state and thus to conform their conduct to state policy.

Residency requirements also reflect the reasonable belief that in-state wholesalers and retailers may be "more apt to be socially responsible" and thus better suited than out-of-state counterparts to promote temperance. After all, in-state "officers, directors, and owners are residents of the community and thus subject to negative externalities—drunk driving, domestic abuse, underage drinking—that liquor distribution may produce." *Southern Wine & Spirits,* 731 F.3d at 811. A legislature could "sensibly . . . suppose" that state residents "are more likely [than non-residents] to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter

day-to-day in ballparks, churches, and service clubs." *Ibid.*

Similarly, states reasonably view residency requirements as an effective tool for ensuring that the infrastructure for in-state liquor distribution remains subject to state oversight. Many states, for example, require wholesalers to maintain their warehouses in-state to facilitate inspections and promote oversight. *Three Cheers for Three Tiers*, 14 DePaul Bus. & Com. L.J. at 219. Given their susceptibility to prosecution and their exposure to the negative consequences sometimes caused by liquor, in-state wholesalers and retailers are also likely to be more vigilant about preventing "unlawful diversion of liquor" from regulated to unregulated channels. *North Dakota*, 495 U.S. at 431. States may also believe that they can better rely on in-state wholesalers to collect any applicable excise taxes and on in-state retailers to collect sales taxes, *see, e.g.*, Wis. Stat. § 125.01—an especially weighty concern for states confronting budget deficits. Indeed, these interests are why states reasonably can require that "all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment).

Many states expressly identify these Twenty-first Amendment interests as the reasons for their chosen distribution systems generally—and for residency requirements specifically. *See*, *e.g.*, Tenn. Code Ann. § 57-3-204(b)(4); Ind. Code Ann. § 7.1-1-1-1; Mo. Rev. Stat § 311.015; Wis. Stat. Ann. § 125.01. For these states, and others like them that require in-state residency for wholesalers and retailers, "an argument that compares the status of an in-state retailer with an out-of-state retailer" is "nothing different than an

argument challenging the three-tier system itself." *Brooks* v. *Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (op. of Niemeyer, J.); *Arnold's Wines*, 571 F.3d at 190. Yet this Court has repeatedly held that the three-tier system is "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432).

B. States implementing liquor distribution systems after Prohibition "[o]ften" required "a fixed period of prior residence" to obtain a retailer or wholesaler license. *Economic Localism*, 72 Harv. L. Rev. at 1148. Today, 15 states impose some form of durational-residency requirement for wholesalers, with some states requiring as little as 30 days of residence and others requiring as long as five years.[3] Even more states impose durational residency requirements for retailers. *See* Petn. 24 n.3.

These requirements are supported by the same interests that justify a residency rule in the first place—a state surely has a significant interest in determining the minimum residency it deems necessary for purposes of alcohol regulation. As Judge Sutton recognized, if states may "require retailers and wholesalers to reside within their borders"—which *Granholm* has said they may—they "must 'have flexibility to define the requisite degree of in-state presence' necessary for

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[3] Ariz. Admin. Code § R19-1-201(A)(1)(b) (residency); Ark. Code Ann. § 3-4-606(a)-(b) (five years); Ind. Code Ann. § 7.1-3-21-3 (five years); Ky. Rev. Stat. Ann. § 243.100(1)(f) (one year); La. Stat. Ann. § 26:80(A)(2) (two years); Me. Rev. Stat. tit. 28-A, § 1401(5) (six months); Md. Code Ann., Alcoholic Beverages, § 3-102 (two years); Mo. Rev. Stat § 311.060.2(3)-3 (three years); N.C. Gen. Stat. Ann. § 18B-900(a)(2) (residency); Okla. Stat. Ann. tit. 37A, § 2-146(A)(1) (five years); S.C. Code Ann. § 61-6-110(2) (30 days); Tenn. Code Ann. § 57-3-203(b)(1) (two years); Wis. Stat. Ann. § 125.04(5)(a)2 (90 days).

participating as a retailer or wholesaler." Pet. App. 50a (quoting *S. Wine*, 731 F.3d at 810). In other words, each state must be free to choose a period of time that, in its reasonable judgment, shows that the residency is not only *bona fide* but also is likely to lead to the types of community ties that would make the resident sufficiently attuned to the concerns of the resident's new community. And it is certainly reasonable for a state legislature to believe that "[r]equiring individual retailers to reside in one place for a sustained, two-year period ensures that they will be knowledgeable about the community's needs and committed to its welfare." Pet. App. 50a. It is also reasonable for states to conclude that a period of sustained in-state presence helps to ensure accountability to government authorities, facilitate the task of regulators in vetting applications, increase their familiarity with regulated parties, ease inspections of storage facilities and required records, and mete out any required discipline—all interests at the core of the states' Twenty-first Amendment powers. A person who lacks sufficient ties to the community is less likely to feel a sense of accountability and therefore is a greater risk of being a "fly by night" who ignores public safety concerns.

This is not to say, of course, that states may impose *any* sort of durational-residency requirement. Under even the most deferential standard of review, a durational-residency requirement that is wholly irrational could be struck down under the Equal Protection Clause or other constitutional provision. For example, a state could be prohibited from requiring that every living relative of a prospective wholesaler reside in the state—not because such restrictions violate the dormant Commerce Clause, but because they are not

a reasonable exercise of the state's authority to regulate alcohol distribution within its borders. In fact, Judge Sutton concluded that Tennessee's rule requiring 10-year residency for a license renewal was "the epitome of arbitrariness" in light of the two-year requirement for the initial license. Pet. App. 55a. Here, however, it was not unreasonable for Tennessee to determine that two years of residence are necessary for a would-be retailer or wholesaler to become sufficiently integrated in the community and committed to its welfare. Courts must accord due deference to states' choices in determining how best to meet the needs of their respective circumstances.

This deference is not diminished by recent changes in technology. Although this Court has revisited its dormant Commerce Clause jurisprudence in other contexts in light of "the Internet revolution" and the changing dynamics of "[m]odern e-commerce," the Court has been careful not to infringe "on States' authority to collect taxes and perform critical public functions." *South Dakota* v. *Wayfair, Inc*., 138 S. Ct. 2080, 2095, 2097 (2018). Where alcohol is concerned, those critical public functions include imposing durational residency requirements on both retailers and wholesalers to ensure that the three-tier system fulfills its purposes. In any event, states are not obligated to embrace every aspect of the Internet economy—especially when the product concerned has the capacity to inflict societal harms if abused. The Twenty-first Amendment permits states to choose from a spectrum of options in regulating the use and distribution of liquor within their borders, and courts are not empowered to assess the wisdom of these choices or to determine whether they need "updating" in light of new commercial realities.

C. The Sixth Circuit majority struck down Tennessee's durational residency requirements because, in its view, "a three-tier system can still function without these restrictions." Pet. App. 27a. In so holding, however, the panel countermanded the Tennessee legislature's reasonable judgment that durational-residency requirements best serve the policy interests underlying Tennessee's three-tier system. It is no answer to say that that durational-residency requirements are not "inherent" in the three-tier system, Pet. App. 27a. No state is *required* by the Amendment to adopt a particular form of the three-tier system, and thus the Sixth Circuit's distinction between those attributes of the system that are "inherent" or somehow essential has no footing in the Constitution. Indeed, the three-tier system itself is not essential, but this Court has never held that the system is invalid merely because a state *could* do without it. *See Granholm*, 544 U.S. at 488.

Nor is there any constitutional basis for upholding in-state residence requirements but not *durational*-residency requirements. *See Cooper* v. *Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016). Nothing in the Twenty-first Amendment's text or history supports a distinction between according states the power to require "residency" but denying them the authority to define what residency *means* by stipulating a particular period of time. Nor are there any obvious judicially manageable standards that would permit courts throughout the country to know when the legislative choice between x and y years exceeds constitutional bounds—at least absent statutory periods bordering on irrationality or demonstrably offensive to other constitutional provisions. Indeed, a *dormant* Commerce Clause challenge provides an es-

pecially incongruous context to make such distinctions, since the Twenty-first Amendment was expressly meant to preclude such challenges.

The point of Section 2 was to give each state the power to chart its own course in liquor regulation. But applying the Sixth Circuit's test would lead to the elimination of *all* Twenty-first Amendment immunity. For example, at least one court applying *Byrd*'s "inherent" aspect test has struck down portions of Michigan's three-tier system that distinguish between in-state and out-of-state *retailers*, not merely *products*. *See Lebamoff Enter.* v. *Snyder*, No. 17-10191, 2018 WL 4679612, at *5 (E.D. Mich. Sept. 28, 2018). That ruling, like the Sixth Circuit's decision, strikes at the heart of states' authority to structure their three-tier systems as they think best. Moreover, as both decisions fail to appreciate, the fact that some states have adopted specific regulations—such as durational-residency requirements—while others have not is a *feature* of the Twenty-first Amendment's grand compromise, not a judicially-correctable "defect."

Indeed, a state is free to dispense with the three-tier system entirely and instead implement a state monopoly over distribution—and some states have chosen to do. *See* National Alcohol Beverage Control Association, *Control State Directory and Info*, https://www.nabca.org/control-state-directory-and-info (last visited Nov. 12, 2018). If states are prohibited from defining requirements for distribution channels to address local concerns, more states may elect to implement a state monopoly. Thus, a decision holding that states lack authority to set durational-residency requirements may lead to a dampening of private market forces, not a free-market panacea, as states choose to exercise even greater control through

state-run distribution systems. Policy arguments against "protectionism" may carry the day in other contexts, but they should not prevail here because the Twenty-first Amendment gives states "nearly unfettered" authority to structure their liquor distribution systems to mitigate the negative consequences that sometimes result from alcohol consumption and foster public accountability.

* * *

Durational-residency requirements are a legitimate exercise of state regulatory authority under the Twenty-first Amendment. A decision categorically invalidating those requirements under the dormant Commerce Clause would call into question the validity of the three-tier system itself and start the Court down the path of effectively reading Section 2 out of the Twenty-first Amendment. This Court should decline Respondents' invitation to rewrite the Constitution.

CONCLUSION

The Court should reverse the Sixth Circuit's decision.

Respectfully submitted.

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