NO. 18-96

In the
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

ZACKARY W. BLAIR, Interim Director of the Tennessee Alcoholic Beverage Commission, et al.,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF WINE RETAILERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The National Association of Wine Retailers (NAWR) is an association that represents and promotes the unique interests of wine sellers nationwide. Through advocacy, education, and research, NAWR seeks to expand the opportunities for America's wine retailers, whether they serve the wine-buying public via small brick-and-mortar establishments, large retail chains, Internet-based businesses, grocery stores, auction houses, or clubs. NAWR seeks to unite and serve wine retailing interests by providing essential services, strategic advocacy, and calls to action that will lead to a stable and modernized environment for wine retailing.

Unfortunately, arbitrary and archaic laws and regulations built for an era that decidedly no longer exists not only hamper wine retailers' abilities to access modern and growing marketplaces locally and nationally, but also hamper consumer choice and customers' ability to access the robust retail market that NAWR's members seek to foster. Too often, moreover, these measures serve only to protect local commercial interests while hindering consumers' interests in a diverse and thriving retail market for wine. It is thus a core part of NAWR's mission to work to overcome arbitrary, archaic, and protectionist

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

market access and distribution laws to create a fair and level playing field where wine retailers can legally respond to customer demand.

The position petitioners advance in this case runs directly counter to NAWR's mission. *Granholm v. Heald*, 544 U.S. 460 (2005), was a landmark decision that reaffirmed that nothing in the Twenty-first Amendment licenses states to engage in discrimination against out-of-state interests. Yet if petitioners' position is embraced, states will have free rein to close their borders to out-of-state retailers and the diverse array of wine that they offer consumers, no matter how blatantly protectionist the motives. Nothing in the logic of *Granholm*, the Commerce Clause, or the Twenty-first Amendment justifies protecting producers, but not retailers, from discrimination. Indeed, petitioners' effort to limit *Granholm* to producers gets matters exactly backward from a constitutional perspective.

Petitioners' position also would have a devastating impact on the wine industry and consumer choice. Allowing the further proliferation of protectionist state liquor laws would serve only to further reduce consumer choice, relegating consumers to large-production wines well suited to the traditional distribution system. The ability of consumers to purchase small-production wines, wines from back vintages, or wines from emerging producers would suffer. Construing *Granholm* to favor producers, but not retailers, also would have the perverse result of skewing the wine market in favor of domestic wine, as small foreign vineyards are unlikely to be able to get their wine to domestic consumers if they cannot utilize

specialty retailers to do so. The resulting discrimination against foreign commerce would be particularly antithetical to the Framers' concerns about protecting commerce from state protectionism. NAWR thus files this brief to explain why petitioners' position not only makes little sense as a policy matter, but would produce results fundamentally at odds with the Constitution.

SUMMARY OF THE ARGUMENT

This case arises in the context of an effort to impose an exceedingly stringent—indeed, downright bizarre—durational-residency requirement on a retailer's ability to obtain a liquor license in Tennessee. But the case has the potential to have ramifications far beyond that context. Relying on much the same reasoning that petitioners advance here, states have passed increasingly stringent restrictions not just on who may sell alcoholic beverages *within* their borders, but on who may engage in *interstate* commerce in wine with their residents. In particular, while this Court's landmark decision in *Granholm v. Heald* has led most states to lift blatantly discriminatory laws against out-of-state *producers* and allowed them to sell and ship liquor directly to in-state consumers, an ever-increasing number of states have prevented out-of-state *retailers* from doing the same. Those states have done so, moreover, while permitting their own *in-state* retailers not only to sell liquor face to face, but to engage in the exact same Internet sales that are prohibited to out-of-state retailers. *See, e.g.*, *Lebamoff Enters., Inc. v. Rauner*, 909 F.3d 847, 849-50 (7th Cir. 2018).

According to petitioners, these protectionist measures are wholly outside the scope of the Commerce Clause and its nondiscrimination principle because that principle applies only to liquor laws that discriminate against out-of-state *products* or *producers*, not to laws that discriminate against the out-of-state retailers who wish to sell the products those producers make. That topsy-turvy proposition not only is irreconcilable with *Granholm*, but would also turn broader Commerce Clause principles on their head.

While petitioners attempt to divine a core of the Twenty-first Amendment, there is no serious debate that the core of the Commerce Clause is the protection of commerce, which is to say, the sale and transport of goods across state lines. Thus, from the perspective of the Commerce Clause, retailers are at the heart of the Clause and its protections, and producers are at the periphery. History bears this out. This Court had no difficulty upholding the constitutionality of state laws prohibiting the production and manufacture of alcoholic beverages precisely because they did not implicate "commerce," even when the manufacture was intended for export. *See, e.g.*, *Kidd v. Pearson*, 128 U.S. 1 (1888). At the same time, the Court held that the states' ability to prohibit domestic production and manufacture did not allow them to prohibit interstate commerce in alcoholic beverages. *See, e.g.*, *Leisy v. Hardin*, 135 U.S. 100 (1890).

As these decisions reflect, any reading of *Granholm* that would give states greater power to discriminate against out-of-state *retailers* than to discriminate against out-of-state *producers* would get

matters backward. And the anomalies of petitioners' position do not end there. In a world that protects out-of-state producers but not out-of-state retailers, consumers would have the ability to receive direct shipment of a wide range of domestic wines, but would have far more limited choices when it comes to wines from abroad. Given the Framers' acute concern with state laws that erect artificial and discriminatory burdens to foreign commerce, this license for greater discrimination against foreign commerce once again gets matters backward.

It is, of course, inherent in the nature of a constitutional amendment that it could alter the basic values underlying a provision in the unamended Constitution, like the Commerce Clause. But this Court generally interprets constitutional amendments to accomplish specific purposes while otherwise respecting fundamental constitutional values. In other words, this Court's tendency has been to interpret constitutional amendments in harmony with, not in derogation of, broader constitutional values. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982). *Granholm* is a case in point. This Court interpreted the Twenty-first Amendment to accomplish its framers' immediate purposes, but not to license discrimination against interstate commerce. And in doing so, the Court relied on a host of cases establishing that reading constitutional amendments to effect implied repeals is just as disfavored as any other implied repeal. *See Granholm*, 544 U.S. at 486-87.

That same approach dispenses with petitioners' effort to read the Twenty-first Amendment to turn

Commerce Clause values on their head by licensing more discrimination against out-of-state retailers than against out-of-state producers, and more discrimination against foreign commerce than domestic commerce. To be sure, as this Court recognized in *Granholm*, there may be some steps states may take in furtherance of their police powers in this realm that they may not take in others. But petitioners' position that any and all state laws regulating the retail sale and shipment of alcohol are wholly immune from Commerce Clause scrutiny finds no support in law, history, or common sense.

ARGUMENT

I. This Case Has Profound Implications For The Interstate And Foreign Wine Markets.

Particularly in today's increasingly online world, specialty wine retailers play a critical role in maximizing competition and consumer choice in the wine market. The vast majority of domestic U.S. wines are limited-production wines produced by small wineries that lack the economic resources either to work with wholesalers or to engage in significant direct out-of-state marketing themselves. Moreover, most brick-and-mortar retailers "simply do not have the shelf space to carry" anything approaching the "more than 25,000 domestic wine labels—most of which are produced by small wineries." Fed. Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* (*Barriers to E-Commerce*), at 100 (July 2003), https://bit.ly/2RBmVS1. As a result, consumers who want to purchase limited-production wines from small wineries rely on specialty retailers. Likewise, small wineries who want to broaden their

consumer base beyond those who visit their wineries also rely on specialty retailers, who in turn sell the wine principally through direct sales over the Internet to in- and out-of-state customers alike.

The importance of specialty retailers is even greater when it comes to foreign wines. For even the largest foreign producers, direct shipment to consumers in the United States is not a practical option. So for all but the largest producers, relatively small and specialized retailers are the principal means of broadening customer choice. While a resident of the District of Columbia who visits a small winery in California and returns home wishing she had bought a few bottles might be able to arrange for direct shipment from the winery, the same resident who visits a comparably sized winery in Tuscany and regrets not having made a purchase does not have the same option. As a practical matter, for limited-production foreign wines, it is specialty retailers or nothing. Restrictions on commercial channels for distributing and selling foreign wine thus directly restrict foreign commerce.

Even the limited market access allowed by the current patchwork of state laws has been critical to expanding interstate commerce in wine.[2] For example, one Chicago-based retailer reported last year

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[2] Eric Asimov, a wine writer for the New York Times, has noted that the patchwork of state laws that control wine production and distribution has resulted in "a complicated Venn diagram with scores of different circles and few points of intersection." Eric Asimov, *Why Can't You Find That Wine?*, N.Y. Times, Feb. 11, 2014, https://nyti.ms/2E1o0OX. Indeed, "every state, maybe every municipality, offers a different [wine] selection." *Id.*

that it sold approximately half of its wine to out-of-state customers. *See* Eric Asimov, *Wines Are No Longer Free to Travel Across State Lines*, N.Y. Times, Oct. 23, 2017, https://nyti.ms/2i0Ifjb. Another retailer of specialty wines reported that he did approximately $1 million worth of sales with out-of-state customers. Ben O'Donnell, *In Courthouses and State Capitols, Wine Retailers Are Fighting for Direct Shipping*, Wine Spectator, Feb. 2, 2018, https://bit.ly/2AQA8z5.

Unsurprisingly, the consumer benefits from even limited interstate commerce in wine have been substantial in terms of both increased variety and decreased price. For instance, one study found that 15 percent of a sample of popular wines available online were not available from brick-and-mortar wine stores within 10 miles of McLean, Virginia. *See Barriers to E-Commerce* at 17-18. And the difference is far greater when one moves from broadly popular wines to bottlings prized by a small but dedicated following. While a Banfi Brunello or Beringer Cabernet may be widely available on retail shelves, the chances of seeing a Soldera Brunello or MacDonald Cabernet on a typical wine store shelf are slim to none. For consumers interested in such wines, specialty retailers are the key to meaningful consumer choice.

The benefits to consumers are not limited to expanded choice. Direct sales also drive down the price point of wine, often at statistically significant levels. *Id.* at 19. Moreover, retailers further enhance diversity in the U.S. wine market because they are the primary sellers of rare, older, and collectible wines, as well as wine-of-the-month clubs featuring a wider selection. In short, retailers make many wines that

otherwise would be completely off the table available to consumers at a cost-effective price.

Ideally, retailers could engage in—and customers could benefit from—direct retail-to-consumer shipments across the country. But due in large part to states yielding to the temptation to protect entrenched local interests, that ideal remains far from reality. While the Internet becomes an ever more important and powerful engine for interstate and foreign commerce for almost everything else, *see South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018), wine commerce on the Internet remains hobbled by increasingly restrictive state laws targeting and retarding interstate commerce. Currently, retailers can provide direct-to-consumer shipments in only 13 states and the District of Columbia.[3] If the Court accepts petitioners' narrow view of *Granholm* and

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[3] For a brief overview of these regulations, *see* Alex Koral, *Direct-To-Consumer Shipping: Where is Retailer DTC Still Permitted?*, ShipCompliant, Nov. 28, 2017, https://bit.ly/2BynTXE. The Eastern District of Michigan recently struck down Michigan's ban on retailer-to-consumer direct shipping. *Lebamoff Enters., Inc. v. Snyder*, --- F. Supp. 3d ---, 2018 WL 4679612, at *7 (E.D. Mich. 2018). An appeal of that decision remains pending. Likewise, the Seventh Circuit recently reversed a district court's dismissal of a challenge to Illinois's ban on out-of-state retail shipments for failure to state a claim, holding that plaintiffs had adequately pleaded that the ban violated the Commerce Clause. *Lebamoff Enters.*, 909 F.3d at 856-87. But in doing so, the court noted that the disposition of this case could impact the ultimate determination of whether Illinois's ban passes constitutional muster. *Id.* at 849. Both decisions make plain the need for guidance from this Court on whether the Commerce Clause indeed protects retailers from discrimination.

expansive view of the Twenty-first Amendment, then the remaining states will perceive a green light to erect similar barriers, thus exacerbating a situation that already disfavors competition, consumer choice, and interstate commerce. This concern is far from hypothetical. Over the past two years alone, three more states (Missouri, Illinois, and Michigan) have proscribed retailer-to-consumer shipping. *See* Emma Balter, *Wine Lovers Face Increasing Hurdles Ordering Online*, Wine Spectator, Feb. 1, 2018, https://bit.ly/2zLWGBh.

It is hard to overstate the harms that these anticompetitive, protectionist measures engender for specialty wine retailers and the consumer choice that they foster. Restricting consumers' access to out-of-state retailers means restricting (or in many cases eliminating) their access to the wide range of wines provided by small vineyards. Small wineries, in turn, cannot sell their products on a truly national U.S. market without the aid of retailers. And specialty retailers themselves may not be able to specialize if they are restricted to an intrastate market. There are only so many lovers of German Riesling or Walla Walla Syrah, let alone Uruguayan Tannat, for a specialty retailer to be able to stock its shelves for the local community. But when those retailers can access an interstate market, they have the potential to offer consumers dozens of auslesen or every one of Cayuse's single vineyard selections. In short, laws that give in-state retailers a monopoly over direct sales to consumers have the same impact as the laws this Court struck down in *Granholm*: They "deprive citizens of their right to have access to the markets of

other States on equal terms." *Granholm*, 544 U.S. at 473.

II. Petitioners' Theory Would Produce Results At Odds With The Original Meaning And Purposes Of The Commerce Clause.

In *Granholm*, this Court confronted the unadorned version of petitioners' contention that the Twenty-first Amendment empowered states to discriminate against interstate commerce in wine and rendered interstate wine shipments unprotected by the most basic requirements of the Commerce Clause. Petitioners' junior-varsity version of that argument, under which the Commerce Clause protects wine producers, but not wine retailers, from blatantly discriminatory state laws has, if anything, even less to recommend it. Not only does petitioners' argument ignore the thrust of this Court's decision in *Granholm*; it would turn basic Commerce Clause principles on their head.

The Commerce Clause, as its name suggests, protects interstate commerce, not intrastate production with an eye toward the production's subsequent introduction into commerce. Thus, historically, states were free to ban the production and manufacture of alcoholic beverages, but they could not interfere with interstate commerce in alcohol. While the Twenty-first Amendment grants the states additional power to regulate liquor, it neither empowers them to discriminate against interstate commerce nor flips the basic constitutional order on its head. *Granholm* establishes the former principle beyond cavil, and nothing in *Granholm* or the Twenty-first Amendment supports the counterintuitive notion

that producers wholly outside the original protection of the Commerce Clause have a uniquely superior ability to engage in interstate commerce relative to retailers who directly engage in the kind of commerce that has always been at the heart of the protections of the Commerce Clause.

Petitioners' argument would further invert Commerce Clause principles by favoring domestic commerce over foreign commerce. Foreign producers and domestic customers interested in purchasing foreign wine are dependent on specialty retailers. A regime in which customers can avail themselves of direct shipments from producers in California but must depend on local retailers for wines from France has nothing to recommend it. Certainly, nothing in the Framers' conception of the Commerce Clause as an instrument for protecting against state obstacles to foreign commerce supports a regime that uniquely favors domestic producers and domestic commerce over foreign commerce.

A. Confining Commerce Clause Protections to Laws that Regulate Wine *Producers* Flips the Commerce Clause on its Head.

Article I of the Constitution provides that "Congress shall have Power … [t]o regulate Commerce … among the several States." U.S. Const. art. I, §8, cl. 3. This Court has long construed that power as prohibiting states from engaging in "economic protectionism—that is, [state] regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273

(1988). And the clearest violations of the Commerce Clause are laws that expressly discriminate against out-of-state commerce. *See, e.g.*, *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). It was thus no great surprise that this Court held in *Granholm* that laws that allowed only in-state wineries to ship wine directly to consumers violated the Commerce Clause, notwithstanding the Twenty-first Amendment. *See Granholm*, 544 U.S. at 471 (holding that Twenty-first Amendment "does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers").

Petitioners do not ask this Court to overrule *Granholm*, but they do make the puzzling argument that the protections of *Granholm* should be limited to *producers* (a.k.a., wineries) and not extended to *retailers*. In particular, they contend that even though the Twenty-first Amendment does not allow states to discriminate against alcohol *producers*, it wholly "exempts state laws regulating the *retail* sale of alcohol—its 'delivery'—from dormant Commerce Clause scrutiny, at least where the laws in question treat alcohol produced in and out of state on equal terms." Petr.Br.24-25 (emphasis added).

As explained below, *see infra* Part III, that argument fails as a reading of *Granholm* and the relevant history of the Twenty-first Amendment. But at a more fundamental level, it turns basic Commerce Clause principles on their head. Put simply, the discrimination against the wineries in *Granholm* was unconstitutional not because they were producers, but because they wanted to sell and ship their production

in interstate commerce. The production itself was the one thing states historically *could* regulate without fear of running afoul of the Commerce Clause. Thus, treating retailers less favorably than producers because the retailers engage only in activities that have always been at the absolute core of the Commerce Clause, while producers engage in commerce incidental to production activities that were *not* historically protected by the Clause, gets matters exactly backward.

From a historical standpoint, there can be no serious debate that retailers who want to ship wines in interstate commerce are engaged in commerce to a greater degree than any producer. "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States v. Lopez*, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring) (citing dictionaries). The Framers often used the terms "trade (in its selling/bartering sense) and commerce interchangeably," *id.* at 586, but both terms were "used in contradistinction to productive activities such as manufacturing and agriculture," which were not protected by the Clause, *id.* at 586-87. In other words, it was crystal clear that Congress had plenary power over the sale of products in interstate commerce, while the states had plenary power over production.

Indeed, after plumbing the Constitution's drafting and ratification proceedings, including James Madison's notes on the Constitutional Convention, the *Federalist Papers*, and "every use of the term 'commerce' that appears in the reports of the state

ratification conventions," one commentator concluded that the Framers uniformly referred to commerce as "trade or exchange of goods." Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 112, 114-25 (2001); *see also, e.g.*, Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 858 (2003) (finding "overwhelming consistency of the usage of 'commerce' to refer to trading activity (especially shipping and foreign trade)").

This basic dichotomy between the trade, shipment, and exchange of retailers—*i.e.*, commerce—and production is squarely reflected in this Court's cases. Indeed, it is the reason that states were free, even before the Eighteenth Amendment, to ban the production and manufacture of alcoholic beverages, *see, e.g.*, *Kidd*, 128 U.S. 1, but not free to prohibit interstate commerce in those same beverages, *see, e.g.*, *Leisy*, 135 U.S. 100.

In *Kidd*, for example, this Court upheld an Iowa law that prohibited the manufacture and production of alcoholic beverages against a Commerce Clause challenge. In rejecting that challenge, the Court relied expressly and emphatically on the distinction between manufacture and commerce, proclaiming that "no distinction is more popular to the common mind, or more clearly expressed in economic and political literature." *Kidd*, 128 U.S. at 20. The Court viewed manufacture as "transformation—the fashioning of raw materials into a change or form of use." *Id.* Commerce was different: "The buying and selling and the transportation incidental thereto constitute commerce." *Id.* Based on that distinction, the Court

had little difficulty concluding that Iowa could exercise its police power to prohibit the manufacture of alcoholic beverages. Moreover, the Court specifically rejected the argument that a manufacturer's intent to produce alcoholic beverages solely for shipment out-of-state created a defense to the general prohibition or implicated the Commerce Clause. Instead, the Court held that "the manufacture of intoxicating liquors in a state is nonetheless business within a state" notwithstanding that "the manufacturer intends, at his convenience, to export such liquors to foreign countries or to other states." *Id.* at 24.

In *Leisy*, by contrast, this Court held that while Iowa could prohibit the manufacture of alcoholic beverages within the state, it was not free to prohibit the importation of such beverages into the state because doing so improperly regulated interstate commerce. The Court observed that "ardent spirits, distilled liquors, ale, and beer are subjects of exchange, barter, and tariff, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world"; in short they are "articles of commerce." *Leisy*, 135 U.S. at 110. The Court reiterated that "[f]or the purpose of protecting its people from the evils of intemperance," a state "has the right to prohibit the manufacture within its limits of intoxicating liquors." *Id.* at 114. But the Court nonetheless held that an effort to prohibit the import of such beverages in their original packaging was "repugnant" to the Commerce Clause. *Id.* at 125.

To be sure, in its subsequent Commerce Clause cases, this Court has moved away from a categorical

approach to defining commerce and the original package doctrine. Moreover, in response to cases like *Leisy*, Congress enacted statutes to authorize state regulation of alcohol that are relevant to interpreting the Twenty-first Amendment. *See infra* Part III. But none of those subsequent developments obscures the absurdity of favoring interstate shipment of wines by producers relative to interstate shipment of wines by retailers. According to petitioners' theory, the most obvious form of commerce imaginable—"selling, buying, and bartering, as well as transporting for these purposes," *Lopez*, 514 U.S. at 585 (Thomas, J., concurring)—would be unprotected by the Commerce Clause when undertaken by a retailer, but not when undertaken by the one actor in the chain—the producer—who is least obviously within the scope of the Clause. That rule would take a Commerce Clause that is already untethered from its original moorings and make it positively unrecognizable to the Framers.

It is far more consistent with the Commerce Clause's original meaning (not to mention common sense) to conclude that *all* state regulation of the alcohol market, whether it involves out-of-state products or producers or out-of-state retailers or wholesalers, "*is limited* by the nondiscrimination principle of the Commerce Clause." Pet.App.21 (citing *Bacchus Imps. v. Dias*, 468 U.S. 263, 276 (1984)); *see also Lebamoff Enters.*, 909 F.3d at 854-55. And under that principle, states can no more close their borders to commerce with out-of-state retailers than they can close their borders to commerce with out-of-state producers.

B. Petitioners' Theory Would Distinctly Disadvantage Foreign Commerce.

Petitioners' theory would invert the constitutional order in yet another dimension. Not only would it disadvantage retailers vis-à-vis producers; it also would disadvantage foreign commerce relative to domestic commerce.

While the federal government's inability to regulate commerce among the several states was one of the most prominent problems with the Articles of Confederation, *see Granholm*, 544 U.S. at 472, the inability to maintain a united front in regulating foreign commerce was an even more glaring problem because it created the potential for a single state to embroil the entire nation in a foreign trade war. As noted by James Madison, staunch defender of strict limits on national power, "[t]he want of [authority] in [Congress] to regulate Commerce had produced in foreign nations particularly [Great Britain], a monopolizing policy injurious to the trade of the [United States], and destructive to their navigation." James Madison, *The Writings of James Madison 1783-1787* 403 (G.P. Putnam's Sons 1901).

Such restrictive policies necessarily limited the trade opportunities available to the United States, a fact that any one state working alone could not overcome. *See Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827), *abrogated on other grounds by Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). As Alexander Hamilton explained in *The Federalist* No. 22,

> [s]everal States have endeavored by separate prohibitions, restrictions, and exclusions to

> influence the conduct of that kingdom in this particular, but the want of concert, arising from the want of a general authority and from clashing and dissimilar views in the States, has hitherto frustrated every experiment of the kind, and will continue to do so as long as the same obstacles to a uniformity of measures continue to exist.

Id. at 140 (A. Hamilton) (Charles R. Kesler ed., 1961).

In addition, the United States could not retaliate against policies in foreign nations that were hostile to American interests and progress, which hindered the nascent nation's ability to assert itself on the world stage. In the words of John Jay, because the United States remained a rival with many European countries "in navigation and the carrying trade[,] we shall deceive ourselves if we suppose that any of them will rejoice to see it flourish; for, as our carrying trade cannot increase without in some degree diminishing theirs, it is more their interest, and will be more their policy, to restrain than to promote it." *The Federalist* No. 4, at 41 (J. Jay) (Charles R. Kesler ed., 1961). To allay those concerns, the Constitution expressly grants Congress plenary power "[t]o regulate Commerce with foreign Nations." U.S. Const. art. I, §8, cl. 3.

The Framers envisioned protecting foreign commerce as perhaps the most critical function of Article I, §8, cl. 3, as well as the exclusive purpose of the Foreign Commerce Clause. Petitioners' effort to read *Granholm* as protecting producers but not retailers would disadvantage foreign commerce at the expense of domestic commerce. Many domestic

wineries are too small to engage in significant direct shipment, but they can still take advantage of *Granholm* to ship wine to consumers in most states. As a result, a consumer who visits a west coast winery can order wine for shipment home, sign up for a mailing list, or join a wine club. Although consumers may still need to rely on retailers for back vintages, they at least have some access to interstate commerce in domestic wines through producers.

The situation for foreign wines is far bleaker. The costs of international shipment and the difficulties of applying for an importer's license make it virtually impossible for all but the largest foreign wineries to engage in direct shipment to customers in the United States. Thus, for a customer desiring a particular bottle of Italian or Argentine wine, it is retail or nothing. And for anything but the largest-production wines, only a specialty retailer with the ability to ship in interstate commerce will be able to satisfy consumer demand. A jurisprudence that artificially favors producer-shippers over retailer-shippers thus would skew the market against foreign commerce and against those more exclusively involved in what the Framers would recognize as commerce.

There is, of course, an alternative to piling up Commerce Clause anomalies. This Court can apply the logic and historical analysis of *Granholm* faithfully to protect retailers and producers alike. As demonstrated next, that is the better reading of both *Granholm* and the relevant history of the Twenty-first Amendment.

III. The History Of The Twenty-first Amendment Does Not Support The Artificial Distinction Petitioners Advance.

Petitioners seek to justify their sweeping view of state authority by resorting to the history of the Twenty-first Amendment, claiming that this history confirms that the Amendment leaves states free to close their borders to commerce with out-of-state retailers. Petr.Br.24-25. But petitioners' narrative blinks reality and ignores key pieces of evidence. Indeed, this Court reviewed this same history in *Granholm* and concluded that the Twenty-first Amendment never abrogated the nondiscrimination principle embedded in the Commerce Clause. Nothing in *Granholm* or the relevant history suggests that Congress somehow meant to discriminate in retaining that nondiscrimination principle, allowing laws that discriminate against out-of-state *retailers*, but not those that discriminate against out-of-state *producers*. Such a rule not only would be bizarre, but would be wholly antithetical to the nondiscrimination and broader Commerce Clause principles that the Twenty-first Amendment left undisturbed.

More than 30 years before Prohibition, this Court clearly held that state laws that discriminate against interstate commerce in alcohol are "a usurpation of the power conferred by the constitution upon the congress of the United States." *Walling v. Michigan*, 116 U.S. 446, 455 (1886); *see also Rhodes v. Iowa*, 170 U.S. 412, 424 (1898) (noting that state alcohol-related "legislation, which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of

congress"). The Court did not confine that proposition to laws that discriminated against alcohol *produced* out of state; to the contrary, the Court repeatedly confirmed that states are prohibited from discriminating "against *the citizens* or products of other states." *Walling*, 116 U.S. at 449 (emphasis added).

Petitioners claim that the Wilson Act, ch. 728, 26 Stat. 313, 313 (1890) (codified at 27 U.S.C. §121), and the Webb-Kenyon Act, ch. 90, 37 Stat. 699, 699 (1913) (codified at 27 U.S.C. §122), displaced this nondiscrimination principle and granted states virtually unfettered authority over alcohol distribution. But as this Court already concluded in *Granholm*, that misreads the history. To be sure, petitioners are correct that Congress passed the Wilson Act to empower states to prohibit the importation of out-of-state alcohol notwithstanding the "original package doctrine" applied in cases like *Leisy*. But the point of the Wilson Act was certainly not to empower states to discriminate against interstate commerce. Instead, the point was to abrogate a doctrine that precluded states from keeping Illinois beer out of Iowa even though Iowa had previously banned the domestic production of beer and other alcoholic beverages. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 852 (7th Cir. 2000). Thus, far from freeing states to discriminate in favor of in-state producers or retailers, the Wilson Act required liquor "transported" into the state to be treated "*in the same manner* as though such liquids or liquors had been produced in such State." 27 U.S.C. §121 (emphasis added).

Moreover, the Wilson Act notably provided that liquor "shall upon arrival" be subject only to laws of the state "enacted in the exercise of its police powers." 26 Stat. 313. That is key because, as this Court recognized when interpreting the Wilson Act in *Scott v. Donald*, 165 U.S. 58 (1897), to be a valid exercise of that police power, such laws *could not discriminate against interstate commerce*. *Id.* at 100. The Wilson Act thus "was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden." *Id.* Instead, the Wilson Act simply ensured that dry states could adequately enforce their prohibition laws against in-state and out-of-state liquor alike.

As for the Webb-Kenyon Act, that Act did not purport to eliminate the nondiscrimination principle that the Wilson Act retained. Instead, it simply made clear that "States were now empowered to forbid shipments of alcohol to consumers for personal use, *provided that the States treated in-state and out-of-state liquor on the same terms*." *Granholm*, 544 U.S. at 481 (emphasis added); *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 323-24 (1917). In other words, like the Wilson Act before it, the Webb-Kenyon Act merely sought to enable states to pursue *prohibition* more effectively. Once again, this meant that state laws had to be valid exercises of the police power—*i.e.*, they must comply with the Commerce Clause's nondiscrimination principle—to pass muster under the Webb-Kenyon Act. Numerous state courts understood the law exactly this way, *see, e.g.*, *Brennen v. S. Express Co.*, 90 S.E. 402, 404 (S.C. 1916) (noting that Webb-Kenyon Act "was not intended to confer

and did not confer upon any state the power to make injurious discriminations against the products of other states which are recognized as subjects of lawful commerce").

In sum, in the time leading up to passage of the Eighteenth Amendment and the onset of Prohibition, courts understood that the Wilson and Webb-Kenyon Acts did not cede to states the novel and untrammeled authority to intrude upon the traditionally plenary federal power to regulate interstate commerce. When Prohibition ended, the Twenty-first Amendment simply restored to states the police power they had enjoyed before Prohibition, but no more. Thus, if states wanted to ban the in-state sale of liquor, they could ban the import of liquor as well. But they could not ban the latter while permitting the former. The textual relationship between the Webb-Kenyon Act and the Amendment makes this clear. Whereas the Webb-Kenyon Act "prohibit[s]" the "shipment or transportation" of alcohol into a state where it is "intended … to be received, possessed, sold, or in any manner used … in violation of any law of such State," 37 Stat. 699, 699-700, Section 2 of the Twenty-first Amendment "prohibit[s]" "[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," U.S. Const. amend XXI, §2. Thus, the text of the Amendment closely tracks pre-Prohibition legislation, which in turn embodied *all* of the Commerce Clause's nondiscrimination principles, not just the principle that states may not discriminate against interstate commerce with out-of-state *producers*.

Much of this history was surveyed in *Granholm* and supported the Court's conclusion that the Twenty-first Amendment did not amount to a novel, sweeping grant of power to the states to discriminate against interstate commerce. Nothing in that history or *Granholm* supports the bizarre notion that in withholding the power to discriminate against interstate commerce, the Amendment nonetheless granted an unprecedented power to discriminate between forms of interstate commerce—favoring both in-state retailers and out-of-state producers over out-of-state retailers. Such a construction has no grounding in history and would offend the broader principle, well reflected in *Granholm*, that constitutional amendments should be read in harmony with broader constitutional principles. *See Granholm*, 544 U.S. at 486-87. Whatever disputes there may be about the scope of the Commerce Clause, it plainly protects the core activity of retailers who want to ship wine in interstate commerce, and just as plainly prohibits discrimination against out-of-state entities. Nothing in the Twenty-first Amendment remotely stands as an obstacle to those enduring constitutional principles.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted,

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