No. 18-96

IN THE

# Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
*Petitioner*,

v.

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

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

## REPLY BRIEF FOR PETITIONER


Richard L. Colbert
KAY GRIFFIN, PLLC
222 Second Ave. North,
Suite 340-M
Nashville, TN 37201

Benjamin M. Flowers
JONES DAY
325 John H. McConnell
Blvd., Suite 600
Columbus, OH 43215

Shay Dvoretzky
*Counsel of Record*
Jeffrey R. Johnson
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

*Counsel for Petitioner*

## QUESTION PRESENTED

Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**



**CONSTITUTIONAL AND STATUTORY AUTHORITIES**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**



**OTHER AUTHORITIES**

## INTRODUCTION

History and precedent point to a rule that resolves this case: The Twenty-first Amendment permits states to regulate the in-state sale and distribution of alcohol without regard to the Commerce Clause, provided they treat in-state and out-of-state alcohol identically. Under this rule, durational-residency requirements do not violate the Commerce Clause, since they regulate the sale and distribution of alcohol without discriminating between in-state and out-of-state alcohol.

Respondents do not like this rule. But in 121 pages of combined briefing, they never settle on an alternative. Instead they vacillate between two inconsistent positions. Sometimes they argue that, regardless of the Twenty-first Amendment, the Commerce Clause dooms any law that discriminates between in-state and out-of-state economic interests—even though three-tier systems would fail this test. Elsewhere, they argue that the Twenty-first Amendment permits all laws relating to alcohol if they have any non-protectionist justification—even though Respondents lose under this rule. Along the way, they ignore the states' authority to regulate alcohol sales before Prohibition—even though *Granholm v. Heald*, 544 U.S. 460 (2005), interpreted the Twenty-first Amendment to restore that authority.

The Court should reverse the Sixth Circuit.

## ARGUMENT

### I. RESPONDENTS IGNORE THE TWENTY-FIRST AMENDMENT'S HISTORY.

*Granholm* requires interpreting the Twenty-first Amendment through a historical lens. It recognized

that § 2 "restored to the States" their pre-Prohibition power to regulate alcohol; specifically, the "powers they had under the Wilson and Webb-Kenyon Acts." *Id*. at 484. The Court then struck down two state laws that, in its view, would have been held unconstitutional in the years before Prohibition. *See id*. at 483–84, 488–89.

Total Wine and Affluere ignore the historical inquiry *Granholm* demands. Indeed, their briefs do not even cite the Wilson or Webb-Kenyon Acts. They thus implicitly concede that the history supports reversal: Tennessee's durational-residency requirement passes constitutional muster under *Granholm*'s historical approach and (therefore) under the Twenty-first Amendment.

**A.** The Twenty-first Amendment "restored to the States the powers they had under the Wilson and Webb-Kenyon Acts." *Id.* at 484. Those Acts—which Congress enacted in response to rulings by this Court limiting state power to regulate out-of-state alcohol—together made it illegal to transport alcohol into a state where its use or sale would be illegal. *See* Opening Br. 25–28. Combined with the states' preexisting powers to regulate purely in-state sales, the Acts left the states with "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. The qualifier "virtually" is needed because neither the Wilson nor the Webb-Kenyon Act permitted states to treat imported liquor differently than "its domestic equivalent." *Id*. at 489. But aside from that restriction, states could regulate alcohol use and distribution even in ways that would otherwise violate the dormant Commerce Clause.

After ratification, courts understood the Twenty-first Amendment to restore this status quo, allowing states to regulate the consumption and distribution of liquor "unfettered by the Commerce Clause." *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). In the words of Justice Brandeis—writing for a unanimous Court just three years after ratification—allowing the Commerce Clause to limit states' § 2 authority "would involve not a construction of the amendment, but a rewriting of it." *State Bd. of Equalization v. Young's Market*, 299 U.S. 59, 62 (1936)

The states, like the courts, took the Twenty-first Amendment to mean "that the regulation of sales of alcohol *within* the State (such as a residency requirement for ownership of a retail liquor store) would be an exclusive state power." Pet.App.44a (Sutton, J., dissenting). This understanding is reflected in the many state laws, passed immediately after ratification, imposing residency requirements in general and durational-residency requirements in particular on liquor retailers. *See* Opening Br. 33–34 (collecting examples).

**B.** Respondents completely ignore these state laws, and they never even cite the Wilson and Webb-Kenyon Acts. The closest they come to addressing this dispositive history is Total Wine's discussion of *Walling v. Michigan*, 116 U.S. 446 (1886), and *Scott v. Donald*, 165 U.S. 58 (1897). Both cases are consistent with the just-described understanding of the Twenty-first Amendment.

*Walling* struck down a Michigan state tax applicable only to out-of-state wholesalers and salespeople. 116 U.S. at 446–47. According to Total Wine, *Walling*

stands for the broad proposition that, before Prohibition, states had no power to "discriminate against nonresident owners of alcohol businesses." Total Wine Br. 39. But *Walling* pre-dated the Wilson and Webb-Kenyon Acts—indeed, it was part of the line of dormant Commerce Clause cases that those Acts overruled. *See Granholm*, 544 U.S. at 477–78. So it says nothing about the question *Granholm* deemed dispositive: what "powers" the states had "under the Wilson and Webb-Kenyon Acts." *Id*. at 484.

Now consider *Scott*. It struck down a law that created a state-run retail monopoly overseen by a commissioner who: (1) had to purchase his supplies from in-state producers if their products met quality and price requirements, and (2) could impose a higher mark-up on imported wines than domestic wines. 165 U.S. at 92–93. Both provisions, *Scott* held, violated the dormant Commerce Clause by giving preferential treatment to in-state products. *Id*. at 100. And while the Wilson Act created some exceptions to the Commerce Clause, it still required that imported and domestic goods receive equal treatment. *Id*.

According to Total Wine, *Scott* shows that states had no power to discriminate against "out-of-state business owners" before Prohibition. Total Wine Br. 40. Not so. As *Granholm* explained, *Scott* held only that "the Wilson Act 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.'" 544 U.S. at 479 (quoting *Scott*, 165 U.S. at 100). *Scott* recognized the very same exception to the Wilson Act that *Granholm* recognized under the Twenty-first Amend-

ment a century later: States must treat imported alcohol "the same as its domestic equivalent." *Id.* at 489. It does not follow that *all* burdens falling unequally on out-of-state business owners are unlawful. States *could* favor in-state residents when regulating the in-state sale and distribution of alcohol, as long as they treated in-state and out-of-state alcohol the same way.

*Vance v. W.A. Vandercook Company*, 170 U.S. 438 (1898), confirms this pre-Prohibition understanding. That case rejected a challenge to South Carolina's state-run monopoly. The challenger argued that such monopolies were "inherently discriminatory," in violation of the Commerce Clause, because state agents tend to prefer in-state goods out of loyalty. *Id.* at 450–51. But if that were right, the Court said, then the same would be true of a law that "authorized only residents to be licensed to sell liquor, and restricted the number of such licenses." *Id.* at 451. Since it would be absurd to hold that states could not pass such a law, the challenge to the state-run monopoly failed. *Id.* This reasoning—dismissed as mere dicta, *see* Total Wine Br. 40–41 n.9—speaks volumes about the constitutionality of residency requirements in the years before Prohibition. This Court viewed them as so obviously constitutional that any rule that would call them into question could not possibly be the law. That is strong evidence that states had power to impose them before the Eighteenth and after the Twenty-first Amendments.

**C.** One amicus, the National Association of Wine Retailers, tries to fill the historical gap in Respondents' briefs. The Wine Retailers charge the Associa-

tion with reading the Twenty-first Amendment to distinguish between producers and retailers, leaving the dormant Commerce Clause in place only for the former. This, they say, conflicts with the Commerce Clause's original meaning, under which retail sales were "commerce," while manufacture and production were not. Wine Retailers Br. 13.

It is strange to talk about the "original meaning" of the Commerce Clause in this case, since there was no *dormant* Commerce Clause as an original matter. *See McBurney v. Young*, 569 U.S. 221, 237 (2013) (Thomas, J., concurring). Regardless, the Wine Retailers' argument addresses a straw man. The Association's position is not that the Twenty-first Amendment applies to producers rather than retailers. It is that the Twenty-first Amendment immunizes states from dormant Commerce Clause scrutiny when they regulate alcohol on terms that "treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489. This rule applies not to the states' regulation of alcohol *production*, but rather to their regulation of the sale and distribution of alcohol *after* production—and it applies to all laws governing sale and distribution, whether they involve producers, retailers, or anyone else. Sale and distribution are indisputably "commerce." Thus, *Granholm* subjects only "commerce" to Commerce Clause scrutiny, consistent with that clause's original meaning.

The Wine Retailers also argue 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." Wine Retailers Br. 24. Again, however, the Wine Retailers misstate the Association's position.

The Association recognizes that neither Act conferred "upon any state the power to make injurious discriminations *against the products* of other states." *Brennen v. S. Express Co.*, 90 S.E. 402, 404 (S.C. 1916) (emphasis added) (quoted at Wine Retailers Br. 23–24). At the same time, neither Act displaced the states' pre-existing power to regulate the purely *in-state* sale of alcohol—which is why *Vance* acknowledged the permissibility of residency requirements for retailers. Neither the Wine Retailers nor anyone else has come up with any contrary evidence.

* * *

There is no serious dispute that Tennessee's durational-residency requirement would have been upheld in 1917 or 1934. Consistent with *Granholm's* historical inquiry, it must be upheld in 2019 as well.

## II. THIS COURT'S PRECEDENTS SUPPORT REVERSAL.

**A.** Because *Granholm* made clear that the Twenty-first Amendment restored to states the powers they had under the Wilson and Webb-Kenyon Acts, the historical and precedential inquiries merge. As *Granholm* recognized, the Wilson and Webb-Kenyon Acts granted states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." 544 U.S. at 488. In particular, states were free to regulate the in-state sale and use of alcohol so long as they did not "discriminate[] against liquor produced out of state." *Id.* at 483. That line makes sense: The Twenty-first Amendment, like the temperance movement that ultimately produced it, responded not to

problems with the production of alcohol, but to the consequences of its sale and use.

Although *Granholm* did not frame the rule in terms of "core" versus "non-core" Twenty-first Amendment authority, that terminology, drawn from prior cases, reflects the same principle. Put in those terms, states are unfettered by the dormant Commerce Clause when they exercise their "core § 2 power": the power "directly to regulate the sale or use of liquor within [their] borders." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984).

In applying that principle, this Court has *never* struck down a core law on dormant Commerce Clause grounds. Instead, it has consistently recognized that state laws that "funnel sales through [a] three-tier system" are "'unquestionably legitimate.'" *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). *See also, e.g., Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 277, 283–84 (1972) (upholding laws that allowed producers to transfer liquor to in-state wholesalers only through a "resident representative"); Opening Br. 37–39.

By contrast, this Court (since the 1960s) has *always* applied dormant Commerce Clause scrutiny to laws that fall outside that sphere of core authority. *See* Opening Br. 40–43. It has most often applied that scrutiny to laws that regulate out-of-state alcohol distribution. *See, e.g., Healy v. Beer Inst., Inc.*, 491 U.S. 324, 343 (1989). Most recently, the Court has done so in the context of laws that fail to "treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489; *accord Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 265 (1984).

**B.** Respondents offer no coherent alternative to this Court's core–versus–non-core approach—much less a rule for adjudicating dormant Commerce Clause challenges to in-state liquor regulations going forward. No version of their position can be reconciled with *Granholm* and its forebears.

**1.** Throughout most of their briefs, Respondents appear to argue that the dormant Commerce Clause's non-discrimination principle applies in full to all alcohol-related regulations, the Twenty-first Amendment notwithstanding. The Court's precedents foreclose ascribing so little force to the Twenty-first Amendment.

For one thing, this rule leaves no continuing role for § 2 of the Twenty-first Amendment in dormant Commerce Clause analysis. That contradicts the Court's repeated recognitions that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause." *Capital Cities*, 467 U.S. at 712. It also ignores the reality that alcohol is different—it caused such significant problems that the People adopted an amendment altering the dormant Commerce Clause's normal operation.

For another thing, this rule would render *all* residency requirements invalid—including non-durational ones. Indeed, Respondents' rule would make three-tier systems unconstitutional, since the residency requirements "inherent in" those "system[s]," Total Wine Br. 2, contradict the non-discrimination principle by treating in-state economic interests more favorably than out-of-state interests. So if Respondents are right, the Court has repeatedly erred by recognizing the "'unquestion[ed] legitima[cy]'" of state laws that "funnel sales through [a] three-tier system." *Granholm*, 544 U.S. at 489 (quoting *North Dakota*,

495 U.S. at 432 (plurality op.)). Not even Respondents, who concede the constitutionality of non-durational residency requirements and three-tier systems, Total Wine Br. 2, embrace that result.

Respondents' position is equally inconsistent with another residency requirement that this Court already upheld. In *Heublein*, which Respondents never discuss, the Court upheld laws requiring producers to transfer liquor through a "resident representative," reasoning that the "resident representative" process was "an appropriate element in the State's system of regulating the sale of liquor"—and thus shielded by the Twenty-first Amendment from dormant Commerce Clause scrutiny. 409 U.S. at 277, 283. Had the non-discrimination principle applied in full, that law would have been held invalid.

**2.** Respondents sometimes step back from their broad rule, suggesting that even facially discriminatory liquor laws are constitutional unless they "have no purpose other than protecting in-state businesses." Total Wine Br. 34. But Respondents do not even attempt to ground that rule in the pre-Prohibition Wilson and Webb-Kenyon framework, which controls under the holding in *Granholm*. 544 U.S. at 484–85. And it is irreconcilable with the long line of precedents holding that it is "unquestioned" that states are uninhibited by the dormant Commerce Clause when they exercise their core § 2 "power to restrict, regulate, or prevent the traffic and distribution of intoxicants within [their] borders." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *see also Capital Cities*, 467 U.S. at 713.

Moreover, the cases on which Respondents' protectionist-based theory primarily rests, *Bacchus*, 468

U.S. 263, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), and *Healy*, 491 U.S. 324, stand for nothing of the sort. *Bacchus* held only what *Granholm* did: The Twenty-first Amendment is inapplicable to laws that discriminate against out-of-state alcohol. *See* Opening Br. 42–43. Similarly, *Brown-Forman* and *Healy* stand only for the proposition that laws fall outside states' core Twenty-first Amendment authority when they have the "inherent practical extraterritorial effect of regulating liquor prices in other States." *Healy*, 491 U.S. at 343; *Brown-Forman*, 476 U.S. at 585. The Twenty-first Amendment gives states no power to regulate outside their borders, so even laws relating to subjects *otherwise* within the core of the Twenty-first Amendment (such as price) fall outside that core if they have an extraterritorial effect. *Contra* Total Wine Br. 45 (claiming that these cases involve the exercise of "core" Twenty-first Amendment power). There is thus nothing controversial about *Granholm*'s citing *Healy* and *Brown-Forman* in support of the conclusion "that the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge." 544 U.S. at 488. Insofar as Justice Scalia's opinion concurring in the judgment in *Healy* endorsed a broader rule, *see* Total Wine Br. 32–33, that view garnered a single vote.

But the Court need not decide whether the Twenty-first Amendment incorporates a free-floating economic-protectionism exception, since Tennessee's law survives that test. *See* Opening Br. 47–51; *infra* 13–21.

**3.** Finally, both Respondents pluck individual lines from *Granholm* and, taking them out of context, try to extract from that decision the most favorable

possible holding. That is no way to discern a holding. Instead, one must consider the case's language in its context. The context in *Granholm* consisted of a long historical analysis, which showed that the Twenty-first Amendment creates no Commerce Clause exception to laws that discriminate against out-of-state alcohol. 544 U.S. 476–86. In light of that context, the Court held that state laws allowing only in-state producers to sell wine directly to consumers violate the dormant Commerce Clause because those laws "discriminate[] against liquor produced out of state." *Id.* at 483. Of course, the very same history confirms that state laws regulating in-state distribution and sale of alcohol "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent"—which is why *Granholm* recognized the validity of these laws. 544 U.S. at 489. In other words, the Twenty-first Amendment protects laws enacted pursuant to states' core § 2 power: the power "directly to regulate the sale or use of liquor within [their] borders." *Capital Cities*, 467 U.S. at 713. That rule resolves this case.

* * *

*Granholm* requires courts to assess the legality of state liquor laws using its historical approach. That approach results in a clean rule, which is fully consistent with the core–versus–non-core test embraced in earlier precedents: The Twenty-first Amendment permits states to regulate the in-state sale and distribution of alcohol without regard to the Commerce Clause so long as they do not differentiate between in-state and out-of-state alcohol. That is the best available synthesis of this Court's precedents, especially

when compared with Respondents' inconsistent alternatives. Even if language in a few of those precedents does not fit perfectly in that mold, there is no reason to extend those statements to further undermine the historical understanding of the Twenty-first Amendment and the powers it conferred upon the states. *See Arnold's Wines, Inc. v. Boyle*, 571 F.3d 18, 192–201 (2d Cir. 2009) (Calabresi, J., concurring) (endorsing this general approach).

## III. TENNESSEE'S DURATIONAL-RESIDENCY REQUIREMENT IS JUSTIFIED ON POLICY GROUNDS.

Because Tennessee exercised its core Twenty-first Amendment power when it enacted its durational-residency requirement, the policy justifications for that requirement are irrelevant. That is the whole point of § 2: State legislatures, not federal courts, get to weigh pros and cons and decide "how to structure [state] liquor distribution system[s]" given the preferences and needs of their populations. *Granholm*, 544 U.S. at 488. But even if core laws justified only by economic protectionism are unconstitutional, Tennessee's two-year durational-residency requirement is constitutional.

**A.** Durational-residency requirements like Tennessee's serve at least four overlapping policy goals.

*First*, residency requirements ensure that liquor retailers know their community, "are known by the[ir] community," and "have a demonstrated stake in th[eir] community's well-being." States Br. 20; *see also* Opening Br. 48–49. And residing in a community for a meaningful period of time further strengthens

that bond. That matters because the dangers of alcohol are communal; the drunk driver puts not only himself at risk, but all those with whom he shares the streets. So too for the domestic abuser and the underage drinker. "An absentee owner without a relationship to the local community" does not share in these risks and, as a result, "is less likely to be invested in the community's well-being." States Br. 20; *see also* B. Fosdick & A. Scott, *Toward Liquor Control* 29 (1933) ("The 'tied house' system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident he was beyond local social influence.").

While it is true that many *employees* are local residents even if the license holder is not, *see* Total Wine Br. 24, an employee's job is to please his boss. Tennessee's durational-residency requirement helps align the community's interest with that of the employer, and thus the employee. It helps ensure those who control liquor retailers—those in the best "position to alter or influence the retailer's behavior"—have an interest in the communities where their businesses operate. Pet.App.51a (Sutton J., dissenting). Retailers who are invested in the community's well-being have an incentive to sell responsibly that goes above and beyond a fear of getting caught and penalized for legal non-compliance. *Contra* Law & Economics Scholars Br. ("L&E Br.") 17–20 (ignoring this incentive).

*Second*, residency requirements facilitate state regulation and monitoring of liquor-retail operations. Opening Br. 47–48; States Br. 14–19. The Tennessee

legislature specifically cited its interest in "maintain[ing] a higher degree of oversight" in support of its durational-residency requirement. Tenn. Code Ann. § 57-3-204(b)(4). That interest is especially important as applied to retailers given the lack of federal regulation at that tier. *See* States Br. 15. And requiring retailers to reside in-state directly serves states' oversight interest because in-person books and premises "inspections are the lynchpin of enforcing state alcohol regulations." National Alcohol Beverage Control Association ("NABCA") et al. Br. 15. "[I]t is simply not possible" for state regulators "to traverse the country inspecting retailers or speaking to far-flung owners," States Br. 7—especially since those regulators "are already overburdened" and under-resourced, NABCA Br. 15. *Durational*-residency requirements, moreover, are particularly useful at the application stage, because they make it more likely that community members will have had a chance to *observe* the applicant's character. *See Hinebaugh v. James*, 192 S.E. 177, 178 (W.V. 1937). This gives the state an opportunity to receive and assess relevant information unlikely to show up in a background check, *contra* Cato Institute Br. 14—for example, whether the applicant is a threat unlawfully to run the business "on behalf of another." Tenn. Code. Ann. § 57-3-204(b)(2)(G).

*Third*, residency requirements ensure that retailers can be held accountable when they fail to adhere to state regulatory requirements. Opening Br. 48; States Br. 19; *Hinebaugh*, 192 S.E. at 178. Again, Tennessee's legislature recognized this in its statement of legislative purpose. Tenn. Code Ann. § 57-3-204(b)(4) ("[I]t is in the interest of this state to main-

tain a higher degree of . . . accountability for individuals involved in the ownership, management and control of licensed retail premises."). And it is easy to see how holding liquor retailers accountable is "far easier when the owners live in the State." States Br. 19. That is particularly true when they have resided in-state for some time, so that they are less likely to move outside the state's jurisdiction, and more likely to have substantial in-state assets "that can be attached by enforcement agents in an *in rem* proceeding"—an important enforcement tool in regulators' arsenal. NABCA Br. 17.

*Fourth*, durational-residency requirements advance "the core state interest of promoting temperance," States Br. 20, for the simple reason that they make it harder to sell—and thus purchase—alcohol. Opening Br. 50–51. Respondents and their amici hope to make alcohol as cheaply and as widely available as possible. For instance, the economists bemoan "increased prices," L&E Br. 15, while others complain that they cannot easily track down "a 1998 Chateau Margaux" or a "highly rated Kistler Chardonnay," 81 Wine Consumers Br. 1. But promoting temperance was the animating purpose of the Twenty-first Amendment. *See Bacchus*, 468 U.S. at 276; Opening Br. 50–51; Center for Alcohol Policy Br. 14–19. And it is exactly what Tennessee legislators said they intended to do when debating the residency requirements on the House floor. *See* BIO.App.9a.

Respondents must concede that these legitimate state interests justify *residency* requirements—such requirements serve precisely these purposes, and Respondents (purport to) accept the constitutionality of "in-state presence requirements." Total Wine Br. 2.

The constitutionality of *durational*-residency requirements, which bolster the same interests even more, follows directly. After all, the state gets to decide what it means to be a resident for a particular purpose. If, as *Granholm* made clear, "it is beyond question that States may require wholesalers to be 'in-state' without running afoul of the Commerce Clause, then . . . States [must] have flexibility to define the requisite degree of 'in-state' presence" for purposes of liquor licensing—no less than they do for other purposes, like receiving in-state tuition discounts or being eligible to obtain a state-sanctioned divorce. *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 810 (8th Cir. 2013).

**B.** Respondents nevertheless complain that Tennessee failed to *prove* that its law has had its intended effect, and they speculate that the State could have achieved its goals through other means. Total Wine Br. 22–27.

Although they never come out and say it, Respondents are asking this Court to subject core Twenty-first Amendment regulations like Tennessee's to narrow-tailoring review. On the one hand, they contend that Tennessee's durational-residency requirement is overbroad because the State could, for example, have required that a store's general manager and employees reside in Tennessee. *Id.* at 24. On the other hand, they assert that Tennessee's law is underinclusive because it neither demands residence in a particular municipality nor applies to bars or restaurants. *Id.* at 24–26. To top it off, they insist that the State ought to have made "an evidentiary showing in the district court in support of any purported state interests." *Id.* at 23.

Those are textbook narrow-tailoring arguments. But this Court has *never* undertaken a reasonableness review—much less a narrow-tailoring review—of a law "regulat[ing] the sale or use of liquor within [state] borders." *Capital Cities*, 467 U.S. at 713. For good reason. As the failure of nationwide Prohibition showed, there is no one-size-fits-all solution to alcohol. Opening Br. 30–32. Thus, § 2 of the Twenty-first Amendment gives states wide berth to craft regulatory regimes that *they* deem appropriate to protect their citizens from the inherent risks of drinking. It does not require perfection. It does not require "concrete record evidence." Total Wine Br. 23. And it does not permit courts to substitute their own judgment for that of state legislatures. Indeed, the Twenty-first Amendment creates "an important distinction between state power over the liquor traffic and state power over commerce in general" *precisely because* of Americans' "unsatisfactory experience" with judicial interference regarding state liquor policy. *Duckworth v. Arkansas*, 314 U.S. 390, 398–99 (1941) (Jackson, J., concurring in result). Respondents' call for narrow tailoring involves precisely the sort of judicial examination that the Amendment sought to prevent.

Were this Court to take the unprecedented step of requiring states to narrowly tailor regulations governing in-state liquor distribution, it would leave no continuing role for § 2 of the Twenty-first Amendment. Alcohol, from the perspective of the dormant Commerce Clause, would be no different from any other product. Again, that is not the law.

Moreover, as a practical matter, adopting Respondents' approach would inundate courts with dormant Commerce Clause challenges to other state

laws regulating the in-state sale or use of liquor. Those laws include a wide variety of residency-related requirements, durational and otherwise, *see* States Br. 22–25, each of which, in Respondents' view, would apparently require individualized, evidence-based review to determine whether a less-restrictive alternative would be workable. If Tennessee's two-year requirement is too restrictive, what about South Carolina's 30-day requirement? *See* S.C. Code Ann. § 61-2-90(5). What about Virginia's system, which prohibits private sales of spirits and includes a one-year residency requirement for beer and wine retailers? *See* Va. Code Ann. §§ 4.1-119, 207, 208, 222(B). Respondents' preferred alternatives to durational-residency requirements—like requiring an in-state general manager or requiring out-of-state retailers to post bonds—would pose a whole new set of questions. But courts are in no better position than state legislatures to undertake a rigorous evaluation of these sorts of nuanced policy judgments. Inviting such review would "permit courts … to substitute their own notions of modern needs for those of the majority"—a result that is particularly problematic given that the constitutional valence of such judicial decisions "may remove serious issues from the democratic process and from legislative deliberation." *Arnold's Wines*, 571 F.3d at 200 (Calabresi, J., concurring).

Respondents' amici argue that the states cannot be trusted with the power the Twenty-first Amendment gave them. They claim that Tennessee's residency requirement is a case in point, since it has "all the hallmarks of rent-seeking legislation intended to transfer wealth from consumers to an entrenched spe-

cial interest." L&E Br. 10. That would be legally irrelevant if it were true; the Constitution no more enacts Mr. James Buchanan's public-choice theory than Mr. Herbert Spencer's Social Statics. But it is not true. Tennessee first imposed its durational-residency requirement in the same bill that legalized alcohol, 1939 Tenn. Pub. Acts, ch. 49, § 8, which means there was no "entrenched and politically powerful industry," L&E Br. 5, to lobby for its passage. This history shows the limits of abstract theorizing. And much of the theorizing is unpersuasive even on its own terms. Take, for example, the same scholars' assertion that upholding the law will inevitably lead states to pass even more such laws to benefit local companies. L&E Br. 21. Why? Surely major interstate retailers like Total Wine are politically powerful, too.

**C.** Total Wine fixates on a former Tennessee Attorney General's apparent disagreement with the legislature's view of the wisdom of a two-year durational residency requirement. But Tennessee's legislature, not its Attorney General, gets to decide how alcohol sales should be regulated within state borders. The Tennessee Attorney General's analysis of federal constitutional law is entitled to no special weight here.

Insofar as the views of Tennessee officeholders matter to the constitutional question at hand, the *current* Tennessee Attorney General filed a letter with this Court expressing "strong[]" support for the view that Tennessee's durational-residency requirement is constitutional and adopting the Association's merits argument, "which fully represents Tennessee's position." Ltr. of Resp. Byrd 12. Despite Total Wine's potshots, the State's decision to allow the Association—

who has been an active party to this case from the outset—to take the laboring oar and to spare this Court from duplicative briefing has no bearing on the constitutionality of Tennessee's durational-residency requirement. And the amicus brief filed by 35 states and the District of Columbia leaves no doubt about the states' interest in preserving the Twenty-first Amendment.

## IV. RESPONDENTS' ALTERNATIVE BASES FOR AFFIRMANCE FAIL

### A. This case no longer involves Tennessee's ten-year residency requirement applicable to license renewals.

This case is about the two-year residency requirement in Tenn. Code. Ann. § 57-3-204. Tennessee law also imposed a ten-year residency requirement for license renewals. The Sixth Circuit struck down both requirements. It erred in doing so: However the ten-year provision would fare if there were an economic-protectionism exception to the Twenty-first Amendment, there is no such carve-out. *See* Opening Brief 43–44. But the Association opted to avoid that question—and limit this case to the kind of residency requirement on which the courts of appeals are squarely divided—by seeking and obtaining review only of the two-year requirement applicable to individuals and to corporate officers and directors. *See* Cert. Reply 2–3.

Despite the Association's decision to challenge only this aspect of the Sixth Circuit's decision, Respondents insist that the two-year residency requirement cannot be considered independently.

*First*, Total Wine argues that because the Sixth Circuit's judgment struck down the two-year *and* the

ten-year provisions, it is "procedurally improper" to defend only the former. Total Wine Br. 52. This is hard to understand. The Court often reverses a judgment only in part, and it is not "improper" to request that relief. Total Wine says this amounts to a request for "an advisory opinion on whether a hypothetical state statute" is constitutional. *Id.* at 52–53. But there is nothing advisory about seeking reversal of an actual judgment holding several actual provisions of an actual Tennessee law unconstitutional.

*Second*, Total Wine claims that since it already obtained its initial license after the district court's decision, the case now turns, "in substantial part, on the validity of the ten year renewal requirement." *Id.* at 53. That is wrong: Total Wine must surrender its current license if the two-year provision is valid. Tennessee law provides that "[n]o retail license . . . may be . . . *held by*" anyone "[w]ho at the time of application for renewal of any license under this section would not be eligible for the license upon a first application." Tenn. Code. Ann. § 57-3-204(b)(2)(H). Since Total Wine does not satisfy the two-year requirement applicable to those seeking a "license upon a first application," and because it will not meet that requirement on the date of renewal, it cannot lawfully hold its current license if the two-year requirement is valid. The ten-year requirement is irrelevant.

*Finally*, Total Wine argues that the entire statute must be considered together, because the two-year residency requirement that the Association defends is not severable. Total Wine Br. 53–55. The Sixth Circuit already held, unanimously, that Tennessee's general severability statute permits severing the unconstitutional portions of § 57-3-204 from the rest.

Pet.App.33a–37a; Pet.App.40a (Sutton, J., dissenting). Rightly so. Tennessee's severability statute provides: "It is hereby declared that the sections, clauses, sentences and parts of the Tennessee Code are severable . . . and any of them shall be exscinded if the code would otherwise be unconstitutional." Pet.App.35a (quoting Tenn. Code. Ann. § 1-3-110). Any unconstitutional "parts" of the residency requirements are thus severable from the constitutional parts. Indeed, Tennessee first enacted its two-year requirement independently of the ten-year renewal requirement, *see* 1939 Tenn. Pub. Acts, ch. 49, § 8, so there is no doubt that "the legislature would have enacted the act in question" even "with the [allegedly] unconstitutional portion omitted," Total Wine. Br. 54 (quoting *In re Swanson*, 2 S.W. 3d 180, 189 (Tenn. 1999)). Of course, if the Court doubts this, it can vacate the judgment below and leave severability for remand. *Id.*

### B. The Court should not address Respondents' Article IV or Fourteenth Amendment arguments.

Total Wine seeks a remand on whether the durational-residency requirement is unconstitutional under the Privileges and Immunities Clause, U.S. Const. art. IV, § 2. Because the lower courts never addressed this argument, and because it is outside the scope of the question presented, it would be appropriate for this Court to leave it for remand.

The same is not true for Affluere's argument that the durational-residency requirement violates the Fourteenth Amendment's Privileges *or* Immunities Clause. Like Total Wine's Article IV argument, this one was not decided below and is outside the scope of

the question presented. But unlike Total Wine's argument, Affluere *cannot* press this one on remand. Affluere forfeited it by failing to raise it in the District Court, the Sixth Circuit, or a certiorari-stage brief. Regardless, this Court should "not engage" in Affluere's "halfway originalism." *Janus v. AFSCME*, 138 S. Ct. 2448, 2469 (2018). Affluere devotes page after page to its originalist argument about the Privileges or Immunities Clause, but altogether ignores the original meaning and history of the amendment that this Court granted certiorari to address. There is little doubt that, when *both* provisions are given their original meanings, the Association must prevail: "A classification permitted by Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." *Young's Market*, 299 U.S. at 64.

## CONCLUSION

The Sixth Circuit erred in striking down Tennessee's two-year residency requirement for individuals, corporate officers, and corporate directors. This Court should reverse.

January 4, 2019

Respectfully submitted,

Richard L. Colbert
KAY GRIFFIN, PLLC
222 Second Ave. North,
Suite 340-M
Nashville, TN 37201

Benjamin M. Flowers
JONES DAY
325 John H. McConnell
Blvd., Suite 600
Columbus, OH 43215

Shay Dvoretzky
*Counsel of Record*
Jeffrey R. Johnson
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

*Counsel for Petitioner*