NO. 12-461

In the

# Supreme Court of the United States

NATIONAL ASSOCIATION OF OPTOMETRISTS & OPTICIANS; LENSCRAFTERS, INC.; EYE CARE CENTERS OF AMERICA, INC.,

PETITIONERS,

v.

KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California; CHARLENE ZETTEI, Director, Department of Consumer Affairs,

RESPONDENTS.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF SPECIALTY WINE RETAILERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[*]

The Specialty Wine Retailers Association ("SWRA") is a nonprofit trade association that represents the interests of specialty wine retailers and the consumers they serve across the United States. Its membership is diverse and includes classic brick-and-mortar wine merchants, internet-based wine retailers, wine cataloguers, auction retailers, mass-market merchants, and wine lovers who support and patronize specialty retailers. SWRA believes that adult consumers in any state should be allowed to legally purchase and have shipped to them any wine from any retailer in America. Accordingly, SWRA supports efforts to eliminate discriminatory state laws that interfere with the development of a robust national wine market. It often participates in litigation where unconstitutional laws prevent consumers from legally obtaining the wines they want, and it supports legislative efforts to repeal protectionist measures that undermine consumer and retailer rights.

SWRA supports the petition because it raises an important, recurring question concerning the proper scope and application of this Court's dormant Commerce Clause jurisprudence. The Court's

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[*] Counsel for all parties received 10-day notice as required by Rule 37.2(a) and consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than SWRA and its counsel, made a monetary contribution to the preparation or submission of this brief.

precedents have recognized the need to protect against anti-consumer, anti-competitive state laws that, whether openly and obviously or through artifice and subterfuge, unfairly benefit in-state interests at the expense of out-of-state competition. Unfortunately, lower courts have not always faithfully applied this Court's precedents. Like the Ninth Circuit's decisions below, many courts have failed to undertake the meaningful analysis this Court's precedents demand and have instead held that state laws that have the purpose and effect of favoring in-state entities and disfavoring out-of-state competitors do not count as "discriminatory" merely because superficial differences exist between the in-state and out-of-state entities—including where the state itself has created those differences through a licensing scheme.

SWRA is filing this brief because the issues raised in the petition have significant implications for wine retailers and consumers across the country. This case presents a clean vehicle for the Court to clear up growing confusion among the lower courts regarding the analysis required when assessing the constitutionality of state laws that benefit in-state interests at the expense of consumers and out-of-state competition.

## INTRODUCTION AND SUMMARY OF ARGUMENT

To ensure that state legislation does not "deprive citizens of their right to have access to the markets of other States on equal terms," *Granholm v. Heald*, 544 U.S. 460, 473 (2005), this Court's precedents require a two-step inquiry when determining whether a state law violates dormant Commerce Clause principles: At step one, a reviewing court must determine whether the law discriminates against interstate commerce facially, in purpose, or in practical effect by treating similarly situated in-state and out-of-state entities differently. Then, if the law is found to be discriminatory, the court proceeds to step two and applies heightened scrutiny to determine whether the state can justify the discrimination. *See id.* at 489; *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986).

The decisions below distort this two-step analysis and undermine the constitutional values it protects by allowing superficial, irrelevant differences between in-state and out-of-state entities—even differences created by the state itself—to defeat a finding of discrimination at step one and, thereby, avoid *any* scrutiny of the state's justification at step two. Under the Ninth Circuit's approach, a state can shield protectionist measures from meaningful judicial scrutiny merely by imposing a licensing scheme that treats in-state and out-of-state entities differently and then arguing that, in

light of these state-created differences, the in-state and out-of-state entities are not similarly situated, even though they directly compete for the same customers in the same market. As the petition explains, in determining whether entities are similarly situated for Commerce Clause purposes, this Court has always focused on whether the entities are in direct competition, not on whether their businesses are identical in every respect. *See* Pet. 17 (citing cases). If left uncorrected, the Ninth Circuit's contrary approach threatens to transform the Commerce Clause from a fundamental bulwark against protectionist state legislation into an easily evaded formality.

The petition thus presents an important question that has broad implications for businesses and consumers across the Nation, including SWRA and its members. States face strong temptations to enact laws that have the purpose or effect of discriminating against out-of-state competitors, and to dress up those protectionist measures in the guise of facially neutral regulations. Too often, states give in to these temptations. This growing problem is powerfully illustrated by a number of circuit court decisions issued after *Granholm* that are of particular significance to wine retailers and consumers. Although some courts have complied with this Court's precedents, other courts have embraced the misguided approach taken in the decisions below by permitting thinly veiled state protectionism to escape meaningful judicial scrutiny.

The division and confusion among the lower courts confirms that this Court's intervention is

needed. The Court should grant review to protect our national markets and to reaffirm that the Commerce Clause's prohibition on unjustified discrimination against interstate commerce must be respected, not circumvented. Instituting a regulatory regime that treats in-state and out-of-state competitors differently and then invoking that regime to avoid Commerce Clause scrutiny on grounds that the disfavored out-of-state competitors are differently situated is using discrimination to avoid any need to justify discrimination. If states can defeat the Commerce Clause that easily, the temptation to favor in-state interests will be difficult indeed to resist.

## REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the conflict between the decisions below and the precedents of this Court and those of other circuits. In addition, the Court should grant review to reinforce the important principle that the Commerce Clause prohibits discrimination in whatever form against interstate commerce, including state legislation that in operative effect is a means of discriminating in favor of local interests and against out-of-state competitors. The issues presented raise important, recurring questions that have wide applicability not only to the market for competitive eyewear sales in California, but also to other markets across the Nation, including the national market for wine.

## I. The Ninth Circuit's Approach Opens The Door For States To Circumvent Important Commerce Clause Protections.

The principles recognized in this Court's dormant Commerce Clause jurisprudence have deep roots stretching back to the founding of the Republic. The Framers recognized that the states would always have strong incentives to favor local economic interests to the detriment of the national Union. *See* Ltr. J. Madison to T. Jefferson (Oct. 24, 1787), *in James Madison: Writings* 146 (Jack N. Rakove, ed. 1999) (the Constitution "supposes the disposition" on the part of the states "which will evade" constitutional limitations by "an infinitude of legislative expedients"). The Commerce Clause's anti-discrimination rule was then and remains now "essential to the foundations of the Union." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). It "was considered the more important" aspect of the Commerce Clause "by the 'father of the Constitution,' James Madison." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994). And it "reflects a central concern" that "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm*, 544 U.S. at 472 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)).

To be meaningful, any provision prohibiting discrimination must be accompanied by a vital, enforceable anti-circumvention principle. This Court has thus long interpreted the Commerce Clause to

prohibit the states from discriminating against interstate commerce through artful legislation or litigation, rejecting formalistic approaches that would limit the Commerce Clause's protections to "the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). Instead, the Court has looked behind a state law's purported veneer of neutrality, stating time and again that a "finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992) (citations omitted) (quoting *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984)); *see also, e.g.*, *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 394 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 361–63 (1992); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350–53 (1977).

As the Court explained long ago, the Commerce Clause, "by its own force, prohibits discrimination against interstate commerce, whatever its form or method," and this prohibition applies whenever "state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state." *S.C. Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185–86 (1938) (citations omitted). More recently, this Court reaffirmed that bedrock anti-circumvention principle in *Granholm*,

striking down state statutes regulating wine shipment. The Court saw through the states' attempts to portray the laws as neutral licensing requirements and held that the laws were discriminatory because they were "an indirect way of subjecting out-of-state wineries, but not local ones," to regulatory burdens. *Granholm*, 544 U.S. at 474. The laws were therefore subject to the same burden of justification and careful judicial scrutiny that applies to state laws that discriminate against interstate commerce.

In stark contrast, the court below adopted a formalistic approach that creates a large and enticing opening for states to enact laws that artfully discriminate against out-of-state entities and impose improper burdens on the free flow of interstate commerce. As the petition explains, the decisions below allow states to avoid any judicial scrutiny of their preferential treatment of in-state economic interests by merely pointing to superficial differences between in-state and out-of-state entities and claiming that these differences make them not similarly situated. Worse, the decisions allow states to justify their discrimination based on superficial differences *that the states have themselves created*—such as differences arising from state licensing or regulatory regimes. In the Ninth Circuit's view, as long as these superficial differences exist, the law does not qualify as "discriminatory" and therefore no inquiry is needed into whether the state's regime disfavors out-of-state entities or whether the state can show that its regime is justified.

This is an abdication of the federal judiciary's important obligation to protect the Nation's markets against state laws that unjustifiably discriminate in favor of in-state interests, and it cannot be reconciled with this Court's precedents. As noted above, this Court has long held that if a state favors its own in-state licensees over out-of-state competitors, its professed reasons for doing so must be able to withstand searching scrutiny. *See, e.g.*, *id.* The mere existence of a state-created licensing regime for in-state entities cannot operate at *step one* to obviate *any* inquiry into the state's justifications for the differential treatment. That sort of bootstrapping would allow the existence of differential treatment to justify differential treatment—or, more precisely, to excuse the state from even needing to try to justify the differential treatment. Accordingly, any differential treatment must be evaluated at *step two*, where a court must carefully examine the state's arguments to ensure that they are not a mere pretext for local protectionism.

If not corrected, the lower court's misguided approach provides a roadmap for states to circumvent the Commerce Clause and to discriminate with impunity against out-of-state economic interests by crafting protectionist laws around superficial, irrelevant differences, including differences that the states themselves create. Under the Ninth Circuit's approach, even the thinnest of veils—including professed concerns about "business structures," Pet. App. 42, that have nothing to do with the discrimination at issue—is enough to cut off inquiry and to earn a stamp of judicial approval. If the decisions below are left standing, states will

invoke them to justify all manner of discrimination in favor of local, brick-and-mortar businesses, which almost always employ different "business structures" and "methods of operation," *id.*, than their out-of-state competitors. The Ninth Circuit has extended an open invitation to the states to circumvent the Commerce Clause's anti-discrimination rule. Because the Constitution "'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (citations omitted), this Court should grant certiorari and protect our national economy by revoking that invitation.

## II. The Issues Raised In The Petition Are Broadly Important And A Source Of Division And Confusion Among The Lower Courts.

The Court should also grant review because the problem of regulatory circumvention transcends the eyewear market and the particular circumstances of this case. The Ninth Circuit's approach is typical, for example, of several circuit court decisions in the alcoholic beverage context that—despite the clear teaching of *Granholm*—have continued to permit state protectionism under the guise of purportedly neutral statutes linked to otherwise legitimate licensing regimes. These cases illustrate the confusion among the lower courts and the unfortunate trend of courts abdicating their constitutional role of protecting interstate commerce from unjustified, discriminatory state measures.

In *Granholm*, this Court held that although the Twenty-First Amendment allows states to regulate alcoholic beverages, state laws in this area must still comply with the Commerce Clause; that is, they must "treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. The Court concluded that states could not "regulate the direct shipment of wine on terms that discriminate in favor of in-state producers." *Id.* at 476. Although *Granholm* did not question the legitimacy of the traditional "three-tier system" itself, in which states require alcoholic beverages to pass from producers (*e.g.*, wineries) to licensed wholesalers to retailers before being sold to consumers, it emphasized that the three-tier system is not a license for states to discriminate against interstate commerce. *Id.* at 489. In short, in the wine market, as in any other market, states may not afford preferential treatment to in-state entities over their out-of-state competitors.

In the wake of *Granholm*, however, many states have tried to do just that by relieving in-state entities, but not their out-of-state competitors, from the burdens and inefficiencies imposed by the three-tier system. These burdens can be severe, particularly for small-scale wine producers, many of whose wines are produced in insufficient quantity, or lack sufficient consumer demand, to attract wholesaler representation. *See id.* at 467. The lower courts have not responded consistently to these attempts at circumvention, and the resulting case law shows profound divisions among the lower courts on the proper application of the Commerce Clause and the limits on states' ability to discriminate in favor of local interests.

States have been creative and persistent in their attempts to circumvent the Commerce Clause and this Court's decision in *Granholm*. For example, states have imposed consumer import limitations, allowing in-state wineries to sell unlimited amounts of wine to the state's citizens, but preventing consumers from leaving the state, visiting out-of-state wineries, and returning with an amount of wine over a certain cap (or any wine at all). *See, e.g.*, Va. Code Ann. § 4.1-310(E). States have required that transactions take place face-to-face at a winery before that winery may sell directly to consumers, which confers an obvious benefit on in-state wineries as compared to similarly situated wineries located outside the state. *See, e.g.*, Ariz. Rev. Stat. Ann. § 4-203.04(J)(1). And some laws favor small wineries over large ones. *See, e.g.*, *id.* § 4-205.04(C)(7), (9). Because 98% of the Nation's wine is produced on the West Coast, the rest of the wine-producing states tend to host small wineries, so discrimination on the asserted basis of winery size is a ready fig leaf for states that want to protect local wineries at the expense of their out-of-state competitors.

Applying this Court's precedents, several courts have appropriately struck down these improper attempts to evade the Commerce Clause's essential protections. *See, e.g.*, *Freeman v. Corzine*, 629 F.3d 146, 160 (3d Cir. 2010) (striking down "one-gallon cap on the importation of out-of-state wine"); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 433 (6th Cir. 2008) (striking down state law exempting on-the-premises sales at small wineries from direct-shipment ban); *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1 (1st Cir. 2010); *see also Siesta*

*Vill. Mkt., LLC v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008) (striking down a state law prohibiting direct shipping by retailers without an in-state presence), *vacated as moot after state amended statute*, Order Dismissing Action, No. 06-13041 (July 17, 2009). In *Family Winemakers*, for example, the First Circuit struck down a Massachusetts law that exempted wineries producing less than 30,000 gallons of wine from its direct shipment ban. 592 F.3d at 4. The state argued that the cap was non-discriminatory because it applied equally to in-state and out-of-state wineries, but the First Circuit saw through that pretext and recognized that the cap's effect was to "to change the competitive balance between in-state and out-of-state wineries in a way that benefits Massachusetts's wineries and significantly burdens out-of-state competitors." *Id.* at 5. In reaching that conclusion, the First Circuit found that large and small wineries were "similarly situated" for relevant purposes because they compete with each other, *id.* at 5, 10—the exact opposite of the Ninth Circuit's conclusion that irrelevant differences created by the state's regulatory regime sufficed to take California's law outside of the realm of constitutional scrutiny. As the First Circuit explained, "the wine market is a single although differentiated market, and [the state law]'s two provisions operate on that market together." *Id.* at 13.

But not all courts have followed this same careful approach. In fact, the lower courts are deeply divided, with many courts allowing state schemes to avoid meaningful judicial scrutiny. *See, e.g.*, *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1227 (9th

Cir. 2010) (upholding in-person requirements and small-winery exemption from direct-shipment ban); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 30–31 (1st Cir. 2007) (rejecting challenge to Maine law requiring a face-to-face transaction before a winery may sell wine directly to customers); *Brooks v. Vassar*, 462 F.3d 341, 349 (4th Cir. 2006) (upholding a Virginia statute limiting the amount of alcohol that consumers could personally carry into the state for their own use). The different result reached in these cases is not a reflection of differences in the quality or kind of justification provided by the state at step two of the required analysis. To the contrary, in each case the court made a threshold determination that no scrutiny was required because the superficial differences the states had created rendered in-state and out-of-state entities not similarly situated.

Indeed, in an important line of cases, several courts have allowed states to enact discriminatory direct-shipping laws that apply to wine *retailers*, even though *Granholm* held that states may not enact discriminatory direct-shipping laws that apply to *wineries*. In these cases, courts have concluded that the alleged discrimination did not violate the Commerce Clause because it was an incident of the legitimate three-tier regulatory scheme. *See, e.g.*, *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 819–20 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 1602 (2011); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009).

This line of cases is closely analogous to the Ninth Circuit's decisions below in that they both

assume that because certain regulations of in-state entities are valid exercises of the state's police powers, any resulting discrimination is exempt from meaningful scrutiny. In other words, because the state has created a regulatory scheme that is valid in itself (the three-tier system in the wine cases, and the professional licensing scheme for eye doctors in this case), participants within that regulatory scheme are differently situated from those who are either outside of, or play a different role within, that scheme. As the petition underscores, this approach allows the state to *create* the differences between in-state and out-of-state entities that the state then uses to defeat a finding of discrimination. The state can thus map its own escape from the fundamental protections recognized in this Court's dormant Commerce Clause jurisprudence.

This approach is wrong in the wine market, and it is just as wrong in the eyewear market. In both markets, discrimination against out-of-state competitors is in no way a necessary incident of a legitimate state regulatory scheme. For example, maintaining a three-tier system is fully compatible with allowing remote sales and direct shipments by out-of-state retailers, because the three-tier system of the home state of the shipping retailer remains operative with respect to that retailer. Direct-shipping permits issued by (say) Texas could be conditioned on a California retailer being in compliance with California law pertaining to authority to sell wine, collection of taxes, and use of appropriate shipping measures to protect against underage access.

The "three-tier system *itself*" may be "unquestionably legitimate," *Granholm*, 544 U.S. at 489 (emphasis added), but it does not follow that a state can design its three-tier system to discriminate against out-of-state interests. To the contrary, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Id.* at 487; *see also Siesta Vill.*, 596 F. Supp. 2d at 1039 (recognizing that while this Court "did state that the three-tier system was an appropriate use of state power, it did not approve of a system that discriminates against out-of-state interests"). As a result, if a state chooses to depart from a strict regime of (for example) requiring that all retail wine sales be face-to-face and allows retailers to ship wine to consumers, the state must do so in a way that does not have the purpose or effect of "favor[ing] in-state economic interests over out-of-state interests." *Granholm*, 544 U.S. at 487 (internal quotation marks omitted). The fact that in-state retailers, but not their out-of-state competitors, are part of the state's three-tier system does not transform such discrimination into something other than discrimination. To be sure, at step two of the Commerce Clause analysis, the state may attempt to justify that discrimination. But the state cannot make that discrimination disappear and avoid having to carry its proper burden of justification simply by linking the discrimination to a regulatory regime that is otherwise legitimate.

Similarly, there is nothing about California's optometrist licensing regime that necessitates discriminating against national eyewear companies. California's regulation of and licensing requirement

for optometrists may be valid in itself, but that truism does not advance the analysis under the dormant Commerce Clause—let alone eliminate any need for such analysis, as the Ninth Circuit mistakenly believed. That is because how California regulates eye doctors has nothing to do with the relevant question for Commerce Clause purposes, namely, whether California must allow out-of-state eyewear sellers to compete on an equal basis if California chooses to allow its licensed eye doctors to sell eyewear in addition to providing eye care. Accordingly, California's reasons for favoring in-state optometrists should be carefully scrutinized at step two, rather than immunized at step one just because California's regulation of optometrists, in itself, is valid.

In short, a state may not barefacedly license in-state wineries only and then decree that only licensed entities' wine can be sold in the state's retail outlets. Nor should a state be allowed to grant licenses only to in-state optometrists and then use the fact that only in-state optometrists have licenses to practice optometry as a pretext to give the preferred in-state optometrists exclusive access to the lucrative business opportunity of offering one-stop shopping for eye care and eyewear. If the state has a legitimate justification for such a regime—if such a regime is not a pretext for local protectionism—the state can demonstrate its justification at step two. The serious threat posed by the decisions below, and similar decisions in cases like *Wine Country Gift Baskets*, *Arnold's Wines*, and *Brooks*, is that they allow states to cut off inquiry at step one by the simple expedient of pointing to their own regulatory

regimes as a reason to find that in-state and out-of-state interests are not similarly situated. These states have successfully regulated their way out of the strictures of the Constitution.

The Court should step in to prevent this ongoing circumvention of the Commerce Clause. The Court should grant certiorari to reaffirm its precedents and provide much-needed guidance to the lower courts on the importance of not allowing states to shield discriminatory measures from meaningful judicial scrutiny. The Framers of our Constitution understood, and this Court has reaffirmed, that the anti-discrimination rule of the Commerce Clause is "essential to the foundations of the Union." *Granholm*, 544 U.S. at 472. The Court should not permit that rule to be transformed into an easily evaded formality.

## CONCLUSION

For these reasons, and the reasons set forth in the petition for certiorari, the Court should grant the petition.

Respectfully submitted,

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