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

BRIEF FOR LAW AND ECONOMICS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Twenty-first Amendment does not empower states to withhold a retail liquor license from an otherwise eligible applicant simply because the applicant has not resided in the state for a specified number of years?

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* submitting this brief are economists, law and economics scholars, and former Federal Trade Commission officials who teach, conduct research, and publish on economics and economic regulation and are therefore interested in the development of the Court's Commerce Clause jurisprudence.

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Jerry Ellig is a Research Professor at the Regulatory Studies Center at The George Washington University. He previously served as Chief Economist of the Federal Communications Commission, Deputy Director of the Office of Policy Planning at the FTC, and a Senior Economist at the Joint Economic Committee of the U.S. Congress. He is a coauthor of the FTC Staff Report, *Possible Anticompetitive Barriers to*

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[1] Pursuant to Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

E-Commerce: Wine (July 2013), which was cited extensively by the majority opinion in *Granholm v. Heald*, 544 U.S. 460 (2005).

Theodore A. Gebhard served as Senior Antitrust Policy Advisor at the FTC, as a Senior Antitrust Economist and Director of Economic Research for Export Trading Company Affairs at the Department of Commerce, and as an economist in the Antitrust Division of the Department of Justice. He taught economics at DePaul University and Eastern New Mexico University. He now consults on matters of law and economics and writes widely in the field.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals correctly concluded that Tennessee's facially discriminatory durational residency requirements for obtaining and renewing a retail liquor license cannot be reconciled with the dormant Commerce Clause's prohibition on discrimination in interstate commerce. Application of public choice economic theory to this case explains that Tennessee's residency requirements are exactly the kind of protectionist measure, divorced from legitimate need, that results when concentrated special interests, such as alcohol retailers within a state, lobby state government for rent-seeking legislation to protect their own economic interests by restricting out-of-state competitors. The ultimate harm from this system falls on consumers, from whom higher prices are exacted for the benefit of this lobby.

Rent-seeking legislation typically arises when there is, as here, a concentrated or well-organized interest with something to gain from consumers or the public at large. The Petitioner, Tennessee Wine & Spirits Retailers Association, is such an interest, proudly proclaiming on its website that, by "represent[ing] more than 500 liquor store owners across Tennessee," it can present "a powerful, cohesive stand that legislators and regulators cannot ignore." *See About TWSRA*, Tennessee Wine & Spirits Retailers Association.[2] Often, as here, the resulting legislation takes the form of barriers to competition, such as the exclusion of potential competitors. And, again as here,

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[2] *Available at* http://www.twsra.com/content/about-twsra.

the proponents of such legislation almost always seek to justify these measures on pretextual public-interest grounds, making arguments at odds with mainstream regulatory economics, which focuses on things like incentives and prices that directly generate desired outcomes. Here, for example, a state seeking to combat the ills associated with retail alcohol sales might use taxes, direct regulation, or enforcement to change retailers' and consumers' behavior; duration of residency is not even on the list of potential public-policy levers mainstream economics would consider.

As this Court has often recognized, the dormant Commerce Clause prohibits mere economic protectionism. Tennessee's residency requirements are nothing else, and thus this Court should affirm the decision of the Sixth Circuit.

ARGUMENT

Courts regularly employ public choice economics in assessing the validity of anticompetitive laws because it assists in identifying the purposes and consequences of economic regulation. *See, e.g.*, *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 285 (2d Cir. 2015) (citing an amicus brief on public choice theory); *Campion, Barrow & Assocs. v. City of Springfield*, 559 F.3d 765, 771 (7th Cir. 2009) (recognizing public choice theory as a tool for explaining collective decision-making); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 762 n.16 (5th Cir. 2001) (identifying public choice theory to explain government behavior); *Bd. of Cty. Comm'rs of Johnson Cty. v. Jordan*, 370 P.3d 1170, 1193 (2016) ("Simply put, incentives matter. And not just in the private marketplace. Public choice

theorists have shown that 'political decision makers behave just like consumers and businesses.'").

This *amicus* brief describes how public choice economics works and then applies it to the circumstances of this case. It helps to explain why and how special interest groups, such as the Petitioner here, lobby government for legislation like Tennessee's durational-residency requirements for obtaining and renewing a retail license to sell alcohol that stifle competition. Indeed, basic economics confirms that the Tennessee statute serves no purpose other than to protect an entrenched and politically powerful industry. In short, economic analysis confirms that Tennessee's residency requirements are exactly the kind of protectionist measure that the dormant Commerce Clause forbids. And it predicts that a decision upholding that requirement and sanctioning facial discrimination against out-of-state businesses would have serious negative consequences for the national economy.

I. Public Choice Economics Analyzes How Special Interest Groups Act To Advance Their Own Interests

The premise of public choice economics is that rational actors generally act to advance their own self-interests—hardly a startling proposition. Economists have studied for years how this human imperative operates in the context of economic regulations. And their research confirms that economic regulation frequently reflects the influence of politically powerful interest groups acting to advance their own self-interests, not the interests of the general public. Public

choice thus provides a rigorous scientific explanation as to why many statutes and regulations are enacted, notwithstanding a lack of majority support from the public at large. Indeed, one core finding of public choice analysis is that the overwhelming majority of the public is completely ignorant of the details of most laws and regulations that are enacted.

Public choice economics is, in a nutshell, "the economic study of nonmarket decision making, or simply the application of economics to political science." Dennis C. Mueller, *Public Choice III* at 1 (2003); *see also* John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 Antitrust L.J. 1075 (2005) ("[T]he school of thought known as 'public choice'…holds that governmental entities, like private firms, will act in their economic self-interest."). It provides the best explanation for the enactment and employment of economic regulation. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 268 (1986) ("The [public choice] theory is now almost universally accepted among economists."). And what it teaches "is that politicians and constituents are rational economic actors. As such, constituents demand favorable regulation and politicians use the state's coercive power to supply it in return for political support." James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust L.J. 1091, 1100 (2005).

For around half a century, economists have studied why economic regulation often serves principally to

protect special interests. What they found is that, "[a]lthough regulation sometimes is needed to correct a market failure, it also can be used to restrict competition in order to transfer wealth from consumers to a favored industry." *Id.* at 1099–100. Often, these provisions take the form of economic regulations. There are powerful economic incentives for cohesive interest groups, such as members of a trade or industry, to employ regulation to erect barriers to entry into its market. Indeed, not only did James Buchanan win the 1986 Nobel Prize in Economics for his work in public choice economics, but at least a dozen recipients of that prestigious prize have contributed to the study of the field. Maxwell L. Stearns & Todd J. Zywicki, *Public Choice Concepts and Applications in Law* ix (1st ed. 2009).

The concern that interest groups—what the Framers called "factions"—might coopt government for their own selfish ends, however, dates to the Constitution itself. *See The Federalist No. 10* (James Madison). Indeed, the Framers were particularly concerned about the undue influence of interest groups on the local level and their tendency to lobby for barriers against interstate commerce. *Id.*

The practice of lobbying government actors for anticompetitive regulations that will restrict competition and raise prices above what would be charged in otherwise open markets is known as "rent seeking." James M. Buchanan, *Rent Seeking and Profit Seeking*, in *Toward a Theory of the Rent-Seeking Society* 7–8 (James M. Buchanan et al. eds., 1980). This term is derived from the concept of "rent," which is "that part of the payment to an owner of resources over and

above that which those resources could command in any alternative use," or "receipt in excess of opportunity cost." *Id*. at 3. The result of rent seeking is unnecessary economic regulation that creates barriers to entry into a certain market, which invariably results in higher prices and lower production, both to the detriment of consumers.

Yet consumers rarely protest rent seeking by concentrated or well-organized industries, because the harm to consumers is diffuse. Each facing only small cost increases as a result of protectionist legislation, individual consumers have little incentive to push back against protectionism or even inform themselves of the details. By contrast, individual members of an industry each have a large financial incentive to invest in seeking protectionist regulation that guarantees them above-market rents. Then there is the cost of organizing. Put simply, "small groups with similar interests—like members of a particular industry—can organize political support more effectively than large diffuse groups—like consumers generally…[and the] outcome of the political process is likely to be regulation that harms consumers by protecting a favored industry from competition." Cooper, *supra*, at 1101.

Despite the harm to consumers, government actors often side with industry over consumers in enacting restraints on trade. Public choice economics provides an explanation: government actors too are rational actors, motivated to advance their own self-interest. If a government actor "could confidently await reelection whenever he voted against an economic policy that injured the society, he would assuredly do so"—that is, vote against an economic policy that injures society—

but this does not happen because "[i]f the representative denies ten large industries their special subsidies of money or governmental power, they will dedicate themselves to the election of a more complaisant successor." George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ & Mgmt. Sci. 5, 11 (1971). In this respect, "[t]he [political] system is calculated to implement all strongly felt preferences of majorities and many strongly felt preferences of minorities but to disregard the lesser preferences of majorities and minorities." *Id*. at 12. In other words, quite often consumers lose out to well-organized special interests.

II. Tennessee's Residency Requirements Benefit Incumbent Retailers at the Expense of Consumers and Competitors

From the perspective of public choice economics, there is no question but that Tennessee's durational residency requirements for liquor retailers are rent-seeking legislation that protects in-state economic interests—entrenched local retailers—at the expense of consumers and competitors. Tennessee's statute provides that an individual cannot obtain a retail license to sell alcohol unless that individual has "been a bona fide resident of this state during the two-year period immediately preceding the" application for a retail license. Tenn. Code Ann. § 57-3-204(b)(2)(A). The same requirement applies to corporations attempting to obtain a retail license. *Id*. § 57-3-204(b)(3)(A). Moreover, all owners, directors, and shareholders of a corporation must satisfy Tennessee residency requirements as well, effectively prohibiting out-of-state retailers from opening branches in Tennessee. *Id*. Residency

requirements for renewal applications discriminate on behalf of Tennessee residents to an even greater extent, imposing a ten-year residency requirement for renewals. *Id*. § 57-3204(b)(2)(A). In short, the statute by definition prohibits out-of-state retailors from obtaining licenses to sell alcohol, and thus excludes out-of-state retailers from competing in Tennessee's retail market for alcoholic beverages.

These provisions bear all the hallmarks of rent-seeking legislation intended to transfer wealth from consumers to an entrenched special interest. In so doing, the statute produces exactly what the dormant Commerce Clause prohibits: interstate trade barriers that create "economic isolation or jeopardize[] the welfare of the Nation as a whole, as it would do if [states] were free to place burdens on the flow of commerce across its borders." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995); *see also Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (explaining that the Framers believed that the dormant Commerce Clause was crucial for "avoid[ing] the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

A. Tennessee's Durational Residency Requirements Are a Classic Example of Rent-Seeking Law

Rent-seeking statutes and regulations typically possess two common characteristics: a concentrated or well-organized special interest that will enjoy the benefit of the restriction and dispersed consumer interests that will bear the resulting burden. *See* Jeremy Kidd, *Fintech: Antidote to Rent-Seeking?*, 93 Chi.-Kent L. Rev. 165, 171 (2018); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 3 (1971) ("In the sharing of the costs of efforts to achieve a common goal in small groups, there is however a surprising tendency for the 'exploitation' of the great by the small.").

Tennessee's durational residency requirements embody both of these characteristics. To begin with, the requirements' chief advocate—indeed, the sole advocate, given the state's refusal to defend them—is the Petitioner, Tennessee Wine & Spirits Retailers Association. It is the very archetype of an entrenched and well-organized special interest, "represent[ing] more than 500 liquor store owners across Tennessee," so as to present (in its words) "a powerful, cohesive stand that legislators and regulators cannot ignore." *See About TWSRA*, Tennessee Wine & Spirits Retailers Association;[3] *see also* J.A.11. It advocates to advance one thing and one thing only: the commercial interests of those 600 or so alcohol retailers.

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[3] *Available at* http://www.twsra.com/content/about-twsra.

By contrast, that public interest is quite diffuse. Tennessee's population is 6.7 million. *Quick Facts: Tennessee*, U.S. Census Bureau.[4] Around 46.3 percent of Tennessee's population has consumed at least one alcoholic beverage within the past 30 days. *Tennessee: Alcohol Consumption*, Center for Disease Control.[5] So roughly three million Tennesseans regularly consume alcoholic beverages, versus the 600 or so retailers who sell them. And, of course, the market for alcohol sold in Tennessee is not limited to the state's population, with tourist attractions in the Nashville area drawing nearly 15 million visitors in 2017[6] and the major metropolitan area surrounding Memphis encompassing three states. Moreover, the owners and employees of out-of-state businesses that might want to enter the Tennessee market are not even eligible to vote in the state.

So it is little surprise that the bloc of 600 or so retailers was able to band together to lobby successfully to exclude out-of-state retailers from setting up shop, competing against them, and driving down prices. The benefit to those retailers individually and as a group is great, while the cost to individual consumers is small, reducing their incentive to organize. And that is why Tennessee's anticompetitive law is unlikely to be overturned through legislation. *See generally* Maxwell L. Stearns & Todd J. Zywicki, *Public Choice Concepts and Applications in Law* (1st ed.

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[4] *Available at* https://www.census.gov/quickfacts/tn.
[5] *Available at* https://www.cdc.gov/brfss/brfssprevalence/.
[6] *Available at* https://www.tennessean.com/story/money/2018/01/25/nashville-area-set-new-record-tourism-14-5-million-visitors-2017/1065628001/.

2009). After all, the same incentives that influenced the political process to enact such a protectionist law still prevail.

In sum, from an economic viewpoint, the effect of Tennessee's durational residency requirements for a retail liquor license is the transfer of wealth from a large group of consumers to a small group of long-time in-state retailers—a classic example of rent-seeking legislation. Public choice economics suggests that Tennessee's residency requirements are far more reflective of the interests of retailers than those of the much larger group of consumers.

B. Tennessee's Durational Residency Requirements Raise Prices for Consumers, Confirming Their Rent-Seeking Nature

The functioning of Tennessee's residency requirements confirms their rent-seeking nature and impermissibly discriminatory purpose. The Court has repeatedly held that a state law or regulation discriminating against out-of-state interests will be struck down absent concrete evidence to justify it. *See Granholm v. Heald*, 544 U.S. 460, 490 (2005). "[T]his Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976). "State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Bacchus Imports, Ltd. v.*

Dias, 468 U.S. 263, 276 (1984). The fact that the good in question is alcohol does not fundamentally change the dormant Commerce Clause inquiry, especially when it comes to the anti-discrimination requirements of the Constitution. *See* Todd Zywicki & Asheesh Agarwal, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J.L. & Liberty 609 (2005).

Price effects can and should inform that inquiry. Indeed, the Court has long considered impact on price in evaluating whether a restriction is impermissibly discriminatory in violation of the dormant Commerce Clause. *See, e.g.*, *Best v. Maxwell*, 311 U.S. 454 (1940); *Bacchus*, 468 U.S. at 263; *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994)). As the Court's precedents implicitly recognize, "direct assessment of price effects can help reveal whether a purportedly discriminatory law actually alters marketplace outcomes." Jerry Ellig & Alan E. Wiseman, *Price Effects and the Commerce Clause: The Case of State Wine Shipping Laws*, 10 J. Empirical Legal Stud. 196, 197 (2013) [hereinafter "Ellig & Wiseman 2013"].

In this regard, state statutes that facially discriminate against out-of-state retailers also have discriminatory effects in practice, in the form of higher prices for consumers. The presence of that price effect, in turn, confirms that a statute's purpose is not benign, but discriminatory: "we can be more confident that state laws that appear to be discriminatory on their face also have discriminatory effects in practice; they exclude competitors who really could capture market share by offering consumers a better deal." *Id*. at 202.

In a 2013 article in the *Journal of Empirical Legal Studies*, economists Jerry Ellig and Alan Wiseman analyzed two types of state statutes: "restrictions on the size of wineries that may ship directly to consumers, and laws that permit out-of-state wineries, but not out-of-state retailers, to ship alcohol directly to consumers." *Id*. at 197. Their focus was Virginia's ban on direct shipment, which was ultimately repealed, and thus data existed from both before and after the repeal.

They found that "excluding retailers from direct shipment deprives consumers of access to substantial online price savings…because wineries' online prices plus shipping costs usually exceed those of the bricks-and-mortar stores" and that "combin[ing] production caps with exclusion of retailers…are the most restrictive of all" and "ultimately deprive[s] consumers of access to lower prices online." *Id*. at 222. Even beyond the harm to consumers from increased prices, state restrictions on interstate trade in wine also hurt consumers by reducing variety. The study "confirm[ed] what intuition suggests: it is not physically possible for a retailer to stock every wine a consumer might want to buy, even from a sample of top-selling wines. E-commerce thus expands the product variety available to consumers." Jerry Ellig & Alan E. Wiseman, *The Economics of Direct Wine Shipping*, 3 J.L. Econ. & Pol'y 255, 271 (2007) [hereinafter "Ellig & Wiseman 2007"]. Thus, the cumulative effect of Virginia's anti-competitive law was increased costs and reduced choices.

Notably, the study found that state bans on direct wine shipment from wineries to consumers exist primarily to protect the economic interests of certain special interest groups. As it observed, "the creation of various restrictions on interstate alcohol trade has often been marked by substantial lobbying activity by those who stood to benefit from such laws." Ellig & Wiseman 2013, *supra*, at 222.

Unsurprisingly, the economic consequences of these kinds of anticompetitive statutes fall on consumers. *See* Ellig & Wiseman 2007, *supra*, at 263 (observing that a state's "prohibition of interstate direct shipment deprived consumers of access to noticeable and statistically significant price savings."); Alan E. Wiseman & Jerry Ellig, *The Politics of Wine: Trade Barriers, Interest Groups, and the Commerce Clause,* 69 J. Politics 859, 872 (2007) (finding that, in Northern Virginia, "[f]ollowing the legalization of direct shipment, the online-offline price differential decreased nearly 40% between 2002 and 2004"). And these are not small. A 2001 analysis found that "American consumers pay a minimum of $15 billion more annually for goods and services as a result of such e-commerce protectionism." *See* Robert D. Atkinson, *Revenge of the Disintermediated: How the Middleman is Fighting E-Commerce and Hurting Consumers*, Progressive Policy Institute (Jan. 26, 2001).

One can reasonably extrapolate that the principal effect of Tennessee's durational residency requirements, which effectively bar out-of-state retailers, is to increase prices for consumers and thus to create rents for in-state retailers. And that, in turn, confirms the statute's actual purpose: protectionism.

C. Tennessee's Durational Residency Requirements Advance No Legitimate Local Purpose

There is no countervailing benefit of statutes like Tennessee's, as compared to non-discriminatory means the state might have employed to achieve its avowed purposes. And that is fatal, because it is the state's burden to demonstrate that discriminatory legislation like Tennessee's "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489.

Tennessee's durational residency requirements fail to serve the claimed purposes for which they were enacted: "to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises." Tenn. Code Ann. § 57-3-204(b)(4). In particular, the State and Petitioner cite the risks of drunk driving, domestic abuse, and underage drinking. Pet.App.50a. Those risks, the Petitioner argues, are addressed by the durational residency requirements because in-state retailers are "closest to the local risks" and "will be knowledgeable about the community's needs and committed to its welfare." Pet. Br. 49.

But this rationale fails as a matter of both economic logic and simple common sense. From the economic viewpoint, a state that seeks, for example, to reduce sales to underage consumers would naturally seek to alter incentives to that end. The law recognizes that

economic incentives are the way that government influences behavior, given that "our legal system is in large parts premised upon the notion that as the cost associated with a particular type of behavior increases, the quantity of such behavior will decrease." *Smith v. Nat'l Transp. Safety Bd.*, 981 F.2d 1326, 1328 (D.C. Cir. 1993) (citing Richard A. Posner, *Economic Analysis of Law* 5 (4th ed. 1992)); *see also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1724 (2017) (recognizing that Congress can use "economic and legal incentives" to encourage "good behavior"); *Northwest Airlines, Inc. v. Wis. Dep't of Revenue*, 717 N.W.2d 280, 285 n.7 (Wis. 2006) (explaining that states can "use[] financial incentives to induce desirable behavior.").

For example, a state seriously seeking to reduce alcohol consumption across the board would first turn to taxation. Raising taxes, as compared to a convoluted durational residency requirement, is much more likely to do the trick, because with a "tax in place, people will typically buy less of a good—or partake in less of an activity—than they would in the absence of the tax." Joseph J. Minarik, *Taxation, A Preface*, in *The Concise Encyclopedia of Economics* (1st ed. 1993).[7] As for the residency requirement, any reduction in consumption is just a side effect.

Likewise, a state seriously seeking to address underage drinking would first turn to age-related regulation and enforcement. Indeed, states typically fine and otherwise penalize retailers that sell alcohol to

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[7] *Available at* http://www.econlib.org/library/Enc1/TaxationAPreface.html.

underage or inebriated consumers, and that incentivizes retailers to prevent such sales, so as to avoid the cost of punishment. *See, e.g.*, Cal. Civ. Proc. Code § 1218; Conn. Gen. Stat. § 51-33; N.Y. Judiciary Law § 753; Tenn. Code Ann. § 29-9-103; Tex. Gov't Code § 21.002; Va. Code Ann. § 18.2-457 (providing for fines). Going beyond bare regulation, stepped-up enforcement further increases the expected cost of such conduct to retailers, spurring them to adopt policies such as universal identification checks and improved training for retail staff.

A durational residency requirement, by contrast, does not alter marginal incentives at all. It does not, for example, increase the expected cost to the retailer of selling alcohol to an underage or inebriated consumer.[8] Instead, as the court below put it, the Tennessee law here "do[es] not relate to the flow of alcoholic beverages within the state," but only "the flow of individuals who can and cannot engage in economic activities." Pet.App.27a. Because it has basically no impact on incentives, it would be expected to have no impact on behavior. It is orthogonal to addressing the ills identified by the State and the Petitioner.

In short, this is not a case where "the principles underlying the Twenty-first Amendment are sufficiently

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[8] *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169, 170 (1968) (arguing that criminal activity can be deterred through economic incentives); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. Crim. L. & Criminology 765, 766 (2010) ("[T]hat sanction threats can deter crime is at the very heart of the criminal justice system").

implicated…to outweigh the Commerce Clause principles that would otherwise be offended" by a protectionist measure. Instead, Tennessee's durational residency requirement, like the "in-state presence requirement" in *Granholm*, "runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" 544 U.S. at 475.

III. Upholding Tennessee's Durational Residency Requirements Would Open the Door to Anti-Consumer Rent-Seeking on a Massive Scale

Public choice economics not only informs as to the nature of Tennessee's protectionist residency measure but also predicts the fury of anti-competitive legislation that would be unleashed by a decision upholding it. Such a decision would undermine the integrated national economy that the dormant Commerce Clause protects by incentivizing actors in other states to lobby for and achieve the enactment of a raft of similarly protectionist policies.

The key to the Petitioner's argument is to tie the trade restriction at issue here—durational residency requirements—to Tennessee's three-tier system, despite that the restriction is far from integral to it. *See, e.g.*, Pet. Br. 45–46. But potentially any type of competitor-based restriction could be tied in the same manner to a three-tier system, based on the same rationale proffered by the State and Petitioner here, the need to "to maintain a higher degree of oversight, control and accountability" over those involved in the al-

cohol trade. Tenn. Code Ann. § 57-3-204(b)(4). For example, although *Granholm* barred discrimination against out-of-state wine *shipments*, the Petitioner's argument would permit a state to achieve the same result by regulating out-of-state wine *shippers*—after all, what do they know about "the community's needs"? *See* Pet. Br. 22.

The consequences of a decision upholding Tennessee's attempt to circumvent *Granholm* and the Court's other dormant Commerce Clause precedents are all too predictable. Public choice economics predicts that, freed from the limitation of the dormant Commerce Clause, alcohol wholesalers and retailers will pursue their financial interests by lobbying for restraints on interstate trade in alcohol. And it predicts that they are likely to succeed, based on the same kind of interest-group politics that spurred Tennessee legislators to enact that state's discriminatory durational residency restrictions. There may be no more powerful lobby at the state level. *See* Gina M. Riekhof & Michael E. Sykuta, *Regulating Wine by Mail*, 27 Reg., No.3, at 30 (2004) (finding that, with respect to alcohol shipments, consumer interests predominate in no states).

In fact, that is exactly what happened following this Court's decision in *Granholm*, even though it enforced the dormant Commerce Clause to strike down a barrier to interstate trade. Just two years after the decision, Federal Trade Commission officials surveyed states' legislative responses. Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 Antitrust L.J.

505 (2008). What they found was that states contrived a variety of schemes to evade this Court's holding and restrict interstate trade, such as on-site purchase requirements and production limitations. *Id*. at 513–16. These are precisely the kinds of restrictions that empirical research has shown deprive consumers of access to lower prices. Ellig & Wiseman 2013, *supra*, at 197–98. Although avoiding facial discrimination, these states managed to "effectively make direct shipping by out-of-state wineries economically impossible." Ohlhausen & Luib, *supra*, at 506. The cause? Interest-group politics pitting a concentrated, organized industry against the diffuse public interest. Thus, their conclusion: "A Commerce Clause challenge may be the only practical way to attack these restrictions and protect the interests of producers and consumers in enjoying the benefits of a competitive, national market." *Id*.

And that was what happened in the wake of a decision *enforcing* the dormant Commerce Clause! A decision declining to do so, and sanctioning facial discrimination against out-of-state retailers, would open the floodgates to all manner of restriction, limited only by the creativity of state trade associations like the Petitioner and their legislative allies. That would be a blow to interstate trade in alcoholic beverages, to the national market, and ultimately to consumers.

CONCLUSION

The Court should affirm the judgment of the court below.

Respectfully submitted,

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