No. 18-96

In the
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

ZACKARY W. BLAIR, INTERIM DIRECTOR OF THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, et al.,
Respondents.

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

BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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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.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, Pacific Legal Foundation (PLF) is one of the most active nonprofit public interest law firms in the United States dedicated to defending the principles of limited government, federalism, and free enterprise. PLF litigates at all levels of the federal and state judiciaries, and has experience directly representing plaintiffs presenting Commerce Clause claims, *see, e.g.*, *People for Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*, 852 F.3d 990 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 649 (2018); *Sissel v. U.S. Dept. of Health and Human Services*, 760 F.3d 1 (D.C. Cir. 2014), *cert. denied*, 136 S. Ct. 925 (2016); and as *amicus curiae*. *See, e.g.*, *DaimlerChrysler v. Cuno*, 547 U.S. 332 (2006); *Gonzales v. Raich*, 545 U.S. 1 (2005); *Pharmaceutical Research and Mfrs. of America v. Concannon*, 538 U.S. 644 (2003); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). PLF's broad expertise litigating Commerce Clause issues, engaging in public policy advocacy for federalism, and adhering to constitutional principles offers the Court an important perspective that will be beneficial in reviewing the merits of this case.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Furthering this ideal, the Commerce Clause, which provides that "the Congress shall have Power . . . [t]o regulate commerce . . . among the several states . . . ." U.S. Const. art. I, § 8, cl. 3, creates an "area of free trade among the several States." *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 650 (1994) (quoting *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944)). This Court has long held that the corollary of the Commerce Clause, the "dormant" Commerce Clause, forbids state regulation of interstate commerce. *H. P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 537–38 (1949). This preserves "a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *General Motors Corp. v. Tracy,* 519 U.S. 278, 299 (1997). Despite the clear benefits of free trade and a national market for goods and services, states are sometimes tempted to enact regulations or taxes that impose costs on other states while the benefits remain in the state. Richard A. Posner, Economic Analysis of Law § 25.3, at 699 (5th ed. 1998).

This is precisely what Tennessee seeks to accomplish here: to protect its established residents who engage in the retail liquor marketplace while discouraging new entrants in the market from out of state. Specifically, Tennessee law forbids the issuance

of a retail liquor license to any individual who has not resided in the state for two years prior to the application for a license. Tenn. Code. Ann. § 57-3-204(b)(2)(A) (2018). The state did not enforce the rule after the state's Attorney General twice opined that the two-year durational residency requirement violates the Commerce Clause. *See* Tenn. Office of the Attorney General, Opinion No. 14-83 (Sept. 12, 2014); Tenn. Office of the Attorney General, Opinion No. 12-59 (June 6, 2012). But the Tennessee Wine and Spirits Retailers Association, a lobbying group representing Tennessee's established liquor retailers, threatened to sue the Tennessee Alcoholic Beverages Commission for failing to enforce the residency requirement. The Commission did not wait for the threatened lawsuit, instead filing its own complaint for a declaratory judgment as to the constitutionality of the law. *Byrd v. Tenn. Wine and Spirits Retailers Ass'n*, 883 F.3d 608, 613 (6th Cir. 2018). The district court and Sixth Circuit both held that the residency requirement violated the Commerce Clause.

In our federal system, only Congress has power to promulgate uniform national standards to govern an industry. As the Founders knew and this Court's dormant Commerce Clause jurisprudence has recognized, allowing one state to impose its laws on commerce nationwide would place commerce at the mercy of local, parochial interests and create an anarchy of conflicting state legal regimes that destroys commercial confidence and creates hostility between the states. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 406 (1994) (O'Connor, J., concurring) (differing state regimes regulating flow of solid waste would result in "the type of balkanization the Clause is primarily intended to

prevent"). Tennessee's durational residency requirement not only conflicts with the original purpose of the Commerce Clause to restrict the ability of states to enact protectionist policies, but other constitutional provisions evidencing the Framers' overall design of inter-state parity. Additionally, the law cannot be justified because it fails to achieve Tennessee's stated goals in ensuring a responsible market for spirits. For these reasons, the decision below should be affirmed.

ARGUMENT

I

TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENT CONFLICTS WITH THE PURPOSE AND RATIONALE OF THE COMMERCE CLAUSE

A. The Framers Included the Commerce Clause in the Constitution Specifically To Prevent States from Enacting Protectionist Policies

By early 1787, the government of the United States under the Articles of Confederation was on the brink of total collapse. *See* Michael J. Klarman, *The Founders Coup: The Making of the U.S. Constitution*, 11–12 (Oxford University Press, New York, NY) (2016). Under the Articles, the confederation congress was expressly denied the power to regulate the commerce of individual states. S*ee* Articles of Confederation of 1781, art. IX. In the wake of the Revolutionary War, Great Britain and other European nations began an ardent campaign of discrimination against the economy of the newly independent and economically vulnerable American nation. Klarman, *supra*, at 21. Individual states soon

began enacting their own retaliatory measures against British imports and commerce. *Id.* at 22–23. Often contradictory and self-defeating, these restrictive protectionist policies were soon extended to the economic activities of their neighboring states. *See id.* at 23–24. Despite the clear need for national unity, every congressional and state-based effort to amend the Articles to give the confederation congress authority to regulate interstate commerce met regional resistance that doomed all attempts. *See id.* at 34–39.

When the Annapolis Convention, called for the limited purpose "to consider how a uniform system in [the states] commercial regulations may be necessary to their common interest and permanent harmony,"[2] failed to garner support from a sufficient number of states, James Madison and others in attendance took the bold step of calling for a general convention, "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union."[3] The resulting Constitutional Convention debated many elements of the general government of the American republic in great detail, including the composition and apportionment of the national legislature, the powers of the executive, and the creation of a federal judicial system. But the delegates understood the clear need to "remedy the omissions

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[2] Resolution Authorizing a Commission to Examine Trade Regulations (Jan. 21, 1786), *The Papers of James Madison*, 8:471 (Congressional Series) (Robert R. Rutland and William M.E. Rachal, eds., Chicago 1977).

[3] Address of the Annapolis Convention (Sept. 14, 1786), *The Papers of Alexander Hamilton*, 3: 688–89 (Harold C. Syrett, ed., New York, 1961).

that had proved to be glaring deficiencies in the Articles," including the lack of a congressional power to regulate interstate commerce. Klarman, *supra*, at 147–151. Mindful of the continuing trade wars, delegates approved a general legislative power over interstate and international commerce. *Id.* at 151–52. Madison later noted that the Commerce Clause "grew out of the abuse of power by [] states . . . and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the general government."[4]

Tennessee's durational residency requirement for liquor retailers, like the protectionist measures enacted by states during the era of the Articles of Confederation, undermines the common benefits and national marketplace essential for the thriving of a unified republic. While it is undisputed "that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry . . . the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (citing *Welton v. Missouri*, 91 U.S. 275, 280 (1876)). "This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). The historical record demonstrates that preventing individual states from enacting "mere economic

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[4] Letter of James Madison to J.C. Cabell (Feb. 3, 1829), *The Records of the Federal Convention of 1787*, 3:478 (Max Farrand, ed., rev. ed. 1966).

protectionism," *Bacchus*, 468 U.S. at 271, was the primary reason that the Framers included the Commerce Clause in the Constitution.

The free-trade objectives of the Commerce Clause further the efficient allocation of resources within American society, just as free trade among nations helps to further the efficient allocation of resources in the world. Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 Emory L.J. 1227, 1227–28 (1995). No historical event or progress has occurred since the Convention that would mitigate the need for the commerce power to be vested in the national government, including the passage of the Twenty-First Amendment. Protectionist policies still disrupt the free flow of goods and services, have a damaging effect on economic growth, and prevent the development and maintenance of common markets. *See, e.g.*, Colin Grabow, et al., *The Jones Act: A Burden America Can No Longer Bear*, Cato Institute Policy Analysis No. 845 (June 28, 2018).[5] Individual states like Tennessee still favor protectionist policies that ostensibly give an advantage to its own residents. The durational residency requirement in this case is powerful evidence that the threat of economic protectionism is just as strong now as it was over 200 years ago; and the Commerce Clause's restriction on the power of states just as necessary.

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[5]https://www.cato.org/publications/policy-analysis/jones-act-burden-america-can-no-longer-bear.

B. Alternative Anti-Discriminatory Constitutional Provisions Support the Framers' Design for Interstate Parity

The Commerce Clause is one of several constitutional provisions designed to ensure interstate parity, such as the Privileges and Immunities Clause of Article IV, *see, e.g., Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), the Equal Protection Clause of the Fourteenth Amendment, *see, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972), and the Privileges or Immunities Clause of the Fourteenth Amendment, *see, e.g., Saenz v. Roe*, 526 U.S. 489 (1999). Still other provisions, such as the Import-Export Clause[6] and the availability of federal courts for diversity actions,[7] also ensure the vital goal of national equality.

While these various constitutional provisions play different roles in the overall federal scheme, they

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[6] "As one follows the tortuous and anguished endeavors to establish a free trade area within Western Europe, unhampered by interior barriers, against the opposition of inert and narrow conceptions of self-interest by the component nations, admiration for the farsighted statecraft of the Framers of the Constitution is intensified. Guided by the experience of the evils generated by the parochialism of the new states, the wise men at the Philadelphia Convention took measures to make for the expansive United States a free trade area . . . . They accomplished this by two provisions in the Constitution: the Commerce Clause and the Import-Export Clause." *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 551 (1959) (Frankfurter, J., dissenting).

[7] Alexander Hamilton expressly linked the Privileges and Immunities Clause with "the concern over state parochialism that gave rise to the federal courts' diversity jurisdiction under Article III." *United Bldg. and Const. Trades Council of Camden Cty. v. Mayor and Council of City of Camden*, 465 U.S. 208, 225 (1984).

serve the same overarching purpose: interstate parity. As described below, these clauses serve to reinforce one another and fill in gaps. The Framers enacted these interlocking provisions out of concern "about centralizing control over trade and ending discriminatory taxes." *See* Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship under Article IV*, 45 Loy. U. Chi. L.J. 1, 17 (2013).

1. Privileges and Immunities Clause of Article IV

The Privileges and Immunities Clause of Article IV is a robust anti-protectionist tool enacted by the Framers along with the Commerce Clause. Both provisions have their origins in Article IV, § 1, of the Articles of Confederation, *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371, 379 (1978), and their separation "may have been an assurance against an anticipated narrow reading of the Commerce Clause." *Id.* at 379–80 (citing *Ward v. Maryland*, 79 U.S. 418, 429–30 (1870)). Alexander Hamilton considered it to be the very "basis of the Union." *The Federalist No. 80* (George Stade ed. 2006 at 440).

From the earliest interpretations of the Clause, its applicability and hostility to state-based economic protectionism was clear. In *Corfield v. Coryell*, Justice Bushrod Washington explained that the clause protects, among other things, "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . ." 6 F. Cas. 546, 552 (Circuit Court, E.D. Pa. 1823). Later, Justice Stephen Johnson Field wrote that "it was undoubtedly the object of the [Privileges and Immunities Clause of Article IV] to place the citizens of each State upon the same footing

with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. 168, 180 (1868), *rev'd on other grounds, United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Among other things, Justice Field explained that the provision "insures to [the citizens of each State] in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness." *Id.* He further noted that "no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this." *Id.*

This Court relied on the Privileges and Immunities Clause to strike down protectionist state laws in a variety of contexts, such as hiring preferences, *Hicklin v. Orbeck*, 437 U.S. 518, 534 (1978), and bar admission requirements, *Piper*, 470 U.S. at 288. And where the dormant Commerce Clause doctrine is not available to invalidate protectionist state policies, whether because they do not implicate interstate commerce or because they fall within an exception to the dormant Commerce Clause doctrine, this Court has often relied upon the Privileges and Immunities Clause to do the job. *See, e.g, Hicklin*, 437 U.S. at 531–32 ("[T]he mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause . . . renders several Commerce Clause decisions appropriate support" for the Court's holding under the Privileges and Immunities Clause.).

The mutually reinforcing nature of the clauses can be seen in the related cases of *White v. Massachusetts Council of Const. Employers, Inc.*, 460

U.S. 204 (1983), and *United Bldg. and Const. Trades Council of Camden Cty. and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 221–22 (1984). In *White*, the Court considered Boston's requirement that at least half of the workforce for any city-funded construction project be comprised of city residents in a challenge brought under the Commerce Clause. The Court upheld the law on the grounds that Boston was not acting as a sovereign but as a "market participant," and, as such, was not bound by the doctrine established by the dormant Commerce Clause. *Id.* at 214. The next year, however, in *Camden*, the Court held that a nearly identical law was subject to challenge under the Privileges and Immunities Clause of Article IV, which has no "market participant" exception. *See* 465 U.S. at 221–22.

2. Equal Protection Clause of the Fourteenth Amendment

Free-trade plaintiffs may also rely on the Equal Protection Clause as justification for challenging certain protectionist policies. *See* Bryan H. Wildenthal, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 Stan. L. Rev. 1557, 1557–58 (1989). For example, in 1944, the Court overturned a longstanding rule that insurance does not constitute "commerce," under the Commerce Clause, thereby imperiling the then-existing regime in which states freely imposed taxes and regulations favoring in-state insurance companies. *See South-Eastern Underwriters*, 322 U.S. at 552–53. In response, Congress passed the McCarran-Ferguson Act of 1945, explicitly approving state-level discriminatory laws

regarding insurance. Jonathan R. Macey and Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role of Insurance Regulation*, 68 N.Y.U. L. Rev. 13, 25 (1993). Because Congress explicitly authorized these policies, there was no legitimate claim that the law violated the dormant Commerce Clause. Yet in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 883 (1985), this Court turned to the Equal Protection Clause to accomplish what the Commerce Clause could not and struck down an Alabama law that taxed out-of-state insurance companies at a higher rate than their domestic counterparts. The Court found that Alabama's aim in passing the law, "to promote domestic industry," represented "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Id.* at 878.[8]

3. Fourteenth Amendment Privileges or Immunities Clause

Finally, the Privileges or Immunities Clause of the Fourteenth Amendment represents—at least theoretically—yet another avenue for striking down discriminatory state policy which evidences the overall design for interstate parity. Although tightly cabined by early analysis, *see Slaughter-House Cases*, 83 U.S. 36 (1873), this clause has nevertheless proven capable of ensuring that states do not burden the fundamental right to travel. As this Court explained

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[8] *See also Western and Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 667–68 (1981) (states may not impose "more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination . . . bears a rational relation to a legitimate state purpose").

in *Saenz v. Roe*, 526 U.S. at 502, the Privileges or Immunities Clause of the Fourteenth Amendment protects "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."

This right to travel protected by the Privileges or Immunities Clause is "firmly embedded in [Supreme Court] jurisprudence." *Id.* at 498. It is "a virtually unconditional personal right, guaranteed by the Constitution to us all." *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969)). Even the *Slaughter-House Cases*, commonly understood to have gutted the Privileges or Immunities Clause, recognized that the Clause protected the right to travel. The Court explained that the Clause guarantees that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 83. U.S. at 80. Indeed, recognition of this right of interstate parity can be traced back long before *Slaughter-House*: this Court has compared the constitutional guarantee that new residents have "the same right to vital government benefits and privileges" as other citizens with the Biblical command that "Ye shall have one manner of law, as well for the stranger, as for one of your own country," *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974) (quoting Leviticus 24:22 (King James Version)).

C. The Twenty-first Amendment Should Not Be Read To Allow Discrimination Against Out-of-State Interests

Constitutional history and the application of anti-protectionist provisions demonstrate that interstate parity is essential to the foundation of our constitutional framework. This Court has made ample use of the Commerce Clause and other provisions to safeguard this vision of the Framers. Whether classed as a protection against economic protection, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 343 (2007), the right to equal protection of the laws, *Metropolitan Life*, 470 U.S. at 869, or the right to travel freely, *Saenz*, 526 U.S. at 489, this Court's decisions reveal a strong antipathy to state protectionism and a norm of invalidation for such policies. *See* Wildenthal, *supra*, at 1557–58.

The Twenty-first Amendment does not eliminate these protections because "the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other . . . ." *Bacchus*, 468 U.S. at 275 (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)). So too, each provision must be read in light of the Constitution as a whole. Considering the dexterous and many-sided architecture of interstate parity in the Constitution, the limitations of the Twenty-first Amendment's second section are thrown into relief. The most obvious purpose of § 2 was to allow dry states to remain dry. Senator Blaine of Wisconsin, who sponsored the Twenty-first Amendment, explained that the aim of § 2 was "to assure the so-called dry

States against the importation of intoxicating liquor into those States . . . ." 76 Cong. Rec. 4141 (1933).[9] This sentiment was echoed by others. *See* 76 Cong. Rec. 4168, 4170 (1933) (statements of Senator Simeon D. Fess of Ohio and Senator William Borah of Idaho).

Of course, states possess regulatory powers concerning alcohol that fall short of outright prohibition. But while the Twenty-first Amendment permits states to "combat the perceived evils of an unrestricted traffic in liquor" notwithstanding any *incidental* burdens on interstate commerce, it does not allow states to pass *discriminatory* regulations designed to protect local economic interests. *See Bacchus*, 468 U.S. at 276. There is little doubt that the policy aims of states today differ markedly from those that the Twenty-first Amendment was intended to protect: no more dry states remain; states employ their regulatory authority only for protectionist ends.

Before Prohibition, states wanted to keep alcohol out of their citizens' hands, but the Commerce Clause required them to allow alcoholic beverages to enter unregulated. *See Granholm*, 544 U.S. at 477–78; *see also* Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, in Social and Economic Control of Alcohol 44 (Carole L. Jurkiewicz & Murphy J. Painter ed., 2008). Today, states like Tennessee want to allow the sale of alcoholic beverages, but seek to afford in-state actors

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[9] Another comment by Senator Blaine has been read to contradict this one. *See Bacchus*, 468 U.S. at 274–75. Looking to the congressional record as a whole, however, suggests that the narrower view is the better one. *See* Aaron Nielson, *No More Cherry-Picking*: *The Real History of the 21st Amendment's § 2*, 28 Harv. J.L. & Pub. Pol'y 281, 287–88 (2004).

an advantage in the marketplace. *See id.* As such, Tennessee's durational residency requirement "deprive[s] citizens of their right to have access to the markets of other States on equal terms," and "risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid." *Granholm*, 544 U.S. at 473.

II

TENNESSEE OFFERS NO LEGITIMATE JUSTIFICATION FOR ITS DURATIONAL RESIDENCY REQUIREMENT

Tennessee's durational residency requirement for liquor retail licenses fails to achieve Tennessee's stated goals in ensuring a responsible market for spirits. Even in Twenty-first Amendment cases, states must present evidence that discriminatory laws are "justified by a valid factor unrelated to economic protectionism." *Lebamoff Enterprises Inc. v. Rauner*, No. 17-2495, 2018 WL 6191351, at *3 (7th Cir. Nov. 28, 2018) (quoting *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 340–41 (1989)). State laws constituting "mere economic protectionism" are not entitled to Twenty-first Amendment deference. *Bacchus*, 468 U.S. at 276. A careful examination of Tennessee's liquor distribution regime reveals that the justifications it offers for its discriminatory policies do not stand up to scrutiny.

Tennessee argues that its durational residency requirement is justified because retailers are "closest to the local risks that come with selling alcohol, such as drunk driving, domestic abuse, [and] underage drinking, and requiring a two-year residency period

ensures that they will be knowledgeable about the community's needs and committed to its welfare."[10] Pet. Br. at 16. But Tennessee allows out-of-state manufacturers to ship their products into the state without protest. Tenn. Code Ann. § 57-3-217 (2018). It also allows third-party delivery services to purchase alcoholic beverages from retailers and deliver it straight to consumers' doors. *Id.* § 57-3-406(k). There is no residency requirement for the delivery service itself or for its drivers. *See id.* §§ 57-3-224, 57-3-225.

Tennessee is not required to allow these activities. Even after *Granholm*, a state may prohibit direct shipment from out-of-state producers as long as it similarly prohibits shipment from their in-state equivalents. *See Granholm*, 544 U.S. at 493. And yet, despite the alleged importance of retailers being both knowledgeable about the community's needs and committed to its welfare, apparently Tennessee does not perceive similar needs arising from out-of-state manufacturers or delivery drivers recently arrived in the state. The correlation between duration of residency in Tennessee and knowledgeability and commitment to local communities is tenuous at best. Given basic geography, a would-be retailer residing in West Memphis, Arkansas—just across the border—is surely better situated to understand and be committed to the needs and welfare of adjacent Memphis, Tennessee, than a retailer doing business

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[10] It is worth noting that while Tennessee introduced the durational residency requirement in 1939, Pet. Br. at 11, but did not pronounce these rationales until 2013, Tenn. Pub. Acts, Ch. No. 554, 108th General Assembly, a year after Tennessee's Attorney General first opined that the residency requirements were unconstitutional. *See* Tenn. Office of the Attorney General, Opinion No. 12-59 (June 6, 2012).

in Johnson City, nearly 500 miles northeast of Memphis. *Cf. Lebamoff Enterprises*, at *6.

Furthermore, it is not clear *how* the requirement is meant to serve the purposes asserted. For example, Tennessee argues the requirement combats underage drinking. But the vast majority of underage drinkers do not purchase alcohol at retail stores, which are required by law to check identification, and instead obtain alcohol from friends or family members above the legal drinking age. Ovgu Kaynak, et al., *Providing Alcohol for Underage Youth: What Messages Should We Be Sending Parents?*, 75 J. Stud. Alcohol & Drugs 590, 590 (2014). Additionally, underage drinking has been on the decline across the nation, with 40% fewer 8th, 10th, and 12th graders reporting alcohol use in 2017 than 20 years prior. Richard A. Miech, et al., *Monitoring the Future: National Survey Results on Drug Use, 1975–2017*, *Vol. I* at Table D-2 (Ann Arbor: Institute for Social Research, U. of Michigan (2018).[11] Tennessee has offered no evidence that it differs from this national trend. A similar justification was proffered by the state in *Granholm*. But this Court noted that the states provided "little evidence" that protectionist policies would have a significant effect on underage drinking. *Granholm*, 544 U.S. at 490. Tennessee also fails to shed light on how its durational residency requirement alleviates the problems it identifies, short of "unsupported assertions." *See id.*

Finally, the economic landscape today is drastically different than it was when states developed their liquor distribution systems the 1930s. The goal of these "three-tier" systems, whereby

[11] http://monitoringthefuture.org/pubs/monographs/mtf-vol1_2017.pdf.

producers, wholesalers, and retailers are stratified and tightly regulated, was to fragment and weaken economic actors to prevent collusion and corruption typical of the pre-Prohibition era. Lawson, *supra*, at 50; *see also* Douglas Glen Whitman, *Strange Brew: Alcohol and Government Monopoly* 3 (2003). Before Prohibition, producers frequently provided incentives for retailers to carry their brands on an exclusive basis, and sometimes even owned the saloons outright. Whitman, *supra*, at 3. These collusive arrangements resulted in so called "tied houses," and were believed to encourage the consumption of alcohol. *Id.*

But economic, technological, and social changes have undermined this aim by prompting consolidation at each level in the industry. Lawson, *supra*, at 50. Today, suppliers are largely multinational corporations producing big-name brands that wholesalers and retailers alike must carry to be competitive. *Id.* Whitman, *supra*, at 3. In any case, the Federal Alcohol Administration Act was created to address the type of problematic practices typical of the tied houses. *Id.* at 4; *see* Alcohol and Tobacco Tax and Trade Bureau, U.S. Dep't of the Treasury, *Federal Alcohol Administration Act.*[12] Thus, three-tiered systems have proven ineffective at preventing the relationships thought to engender harmful practices that promote alcohol consumption. Meanwhile, federal regulation directly prohibits collusion and corruption, rendering the state analogs superfluous. No justification is left. The "concept of promoting

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[12] https://www.ttb.gov/trade_practices/federal_admin_act.shtml (last visited Dec. 7, 2018).

temperance by limiting local sale of alcoholic beverages to local businesses that are sensitive to the needs of their community and impervious to pressure to increase sales because of the separation of the tiers, if it was ever viable, no longer applies." Lawson, *supra*, at 50. The inescapable conclusion is that Tennessee enacted its durational residency requirement for the purposes of protectionism; a purpose repugnant to the Constitution.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

DATED: December, 2018.

Respectfully submitted,

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