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 OF RESPONDENT TENNESSEE FINE WINES AND SPIRITS, LLC, DBA TOTAL WINE SPIRITS BEER & MORE

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QUESTION PRESENTED

Whether the court of appeals correctly held that Tennessee's durational residency requirements for licenses to operate retail liquor stores are unconstitutional, when the State's Attorney General has previously admitted that the requirements are trade barriers that facially discriminate against interstate commerce and the State did not attempt to show that they serve a legitimate state interest.

PARTIES TO THE PROCEEDING

Petitioner is Tennessee Wine and Spirits Retailers Association. Respondents are Zackary W. Blair, in his official capacity as Interim Executive Director of the Tennessee Alcoholic Beverage Commission; Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More; and Affluere Investments, Inc., dba Kimbrough Fine Wine & Spirits.

RULE 29.6 STATEMENT

Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More has no parent corporation, and no publicly held company owns any shares in Respondent.

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INTRODUCTION

This case involves a dormant Commerce Clause challenge to Tennessee's durational residency requirements for licenses to operate in-state retail liquor stores (stores offering alcoholic beverages for "off-premises" consumption, also known as "package stores"). These restrictions are by far the most onerous in the nation. Tennessee effectively imposes a nine-year residency requirement on license applicants and, for corporations, a requirement that 100% of their officers, directors, and stockholders satisfy the nine-year rule. The only conceivable purpose of these requirements is to exclude nonresident owners from Tennessee's market for off-premises sales of alcohol and thereby protect in-state retailers from competition. The State said so itself in two opinions authored by its Attorney General, which disclaimed any other purpose for the requirements. The requirements are so manifestly protectionist that Tennessee is not willing to enforce them (it has not done so for six years). The State also is not willing to defend them. It declined to submit either a response to the petition for *certiorari* or a brief on the merits.

The requirements are also so extreme that the sole party actively defending them, Tennessee Wine and Spirits Retailers Association ("TWSRA")—an association of in-state retailers, who are the primary beneficiaries of the provisions—is only willing to defend one aspect of the scheme: the two-year residency requirement for initial licenses. This selective defense of Tennessee's residency scheme makes two points abundantly clear. *First*, there is no rationale for the State's regime other than protectionism. *Second,* and relatedly, TWSRA does not actually believe the Twenty-first Amendment

argument that it is making. If, as it contends, durational residency requirements fall within Tennessee's "core" powers under the Twenty-first Amendment, and States have authority to enact regulations within their core powers free of judicial scrutiny, then Tennessee had authority to enact the ten-year renewal requirement and the parallel residency requirements applicable to the owners, directors and officers of business entities. TWSRA's unwillingness to acknowledge this or the full consequences of its interpretation of the Twenty-first Amendment fundamentally undermines the soundness of its theory.

While Total Wine is vigorously challenging Tennessee's discriminatory residency requirements, it is not in any way challenging Tennessee's three-tier system, the in-state presence requirement inherent in that system, or the State's operational requirements for retail liquor stores. Total Wine and its affiliates own in-state retail stores that are licensed by and operate successfully *within* three-tier systems in the 23 States where they currently do business. Total Wine's interest here is to continue operating its store in Knoxville, which is threatened by Tennessee's bizarre license renewal requirement, and to prevent other States from adopting similarly protectionist barriers to entry. The constitutional infirmity of Tennessee's residency requirements is that they discriminate against nonresidents like the owners of Total Wine who wish to operate retail stores in Tennessee that comply in all respects with Tennessee's three-tier system. Nor is Total Wine seeking any revision to the principles that this Court has established and that were reaffirmed in *Granholm* v. *Heald*, 544 U.S. 460 (2005). Total Wine submits that under a straightforward application of

those principles, Tennessee's durational residency requirements are unconstitutional.

STATEMENT OF THE CASE

A. Statutory Background

Tennessee, like numerous other States, has a "three-tier system" for the distribution of alcoholic beverages. The State, through the Tennessee Alcoholic Beverage Commission ("TABC"), issues separate classes of licenses to (1) manufacturers and distillers, (2) wholesalers, and (3) retailers. Pet. App. 2a (citing Tenn. Code Ann. § 57-3-201). Manufacturers may sell only to licensed wholesalers; wholesalers may sell only to licensed retailers, or in some cases other wholesalers; and only licensed retailers can sell to consumers. *Id.* (citing Tenn. Code Ann. § 57-3-404(b)—(d)). This Court has stated that the three-tier system, which dates back to the end of Prohibition, is "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990)). By positioning independent wholesalers between producers and retailers, such systems "preclude the existence of a 'tied' system between producers and retailers, a system generally believed to enable organized crime to dominate the industry" and to encourage irresponsible alcohol sales. *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185, 187 (2d Cir. 2009).

The licenses at issue are licenses to operate brick-and-mortar retail package stores in Tennessee. Indeed, the license must be sought by the applicant for business premises that are specified in the application. Tenn. Code Ann. § 57-3-204(a). Tennessee's durational residency requirements should be considered against the background of the State's comprehensive regulation of package stores.

For example, in order even to qualify for a license, retailers must submit to a criminal background check, meet financial responsibility requirements, and demonstrate that they have appropriate moral character and business experience to operate a retail store in a lawful manner. See, *e.g.*, Tenn. Code Ann. §§ 57-3-104(c)(10), -208. Once licensed, package stores are subject to extensive regulations governing their operations, as well as detailed record-keeping requirements and inspections to ensure that they comply with the regulations. See, *e.g.*, Tenn. Code Ann. §§ 57-3-204, -222, -406, -409. These requirements ensure responsible sales practices and provide the State with the ability to penalize retailers who break the rules, including by suspending or revoking their licenses.[1]

In contrast to the foregoing regulations, which largely mirror those imposed by other States, Tennessee has enacted unique and onerous durational residency requirements for retail liquor store licenses that effectively prevent out-of-state residents from owning such stores.[2] These

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[1] This case does not involve sales of alcohol to consumers through direct shipping. Total Wine is challenging Tennessee's restrictions on the ownership of brick-and-mortar retail stores located in Tennessee. These in-state stores operate within the State's three-tier system and are fully subject to the State's laws that govern the retail sale of alcoholic beverages. Accordingly, contrary to the suggestion of some *amici*, the Court need not address the very different issues presented by *out-of-state* retailers who wish to sell alcohol directly to Tennessee consumers through interstate shipments.

[2] TWSRA's *amici* overstate the prevalence and effect of retailer residency requirements in other States. *See, e.g.*, States' Br. 24-25. Affiliates of Total Wine are currently operating licensed retail package stores in many of the States that are claimed to have residency requirements, including Arizona,

requirements are contained in Tenn. Code Ann. § 57-3-204(b)(2)(A) and (3)(A)-(B), which provide:

> (2) No retail license under this section may be issued or transferred to or held by, to any individual:
>
> (A) Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years;
>
> . . .
>
> (3) The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to, transferred to, or maintained by any corporation unless such corporation meets the following requirements:
>
> (A) No retail license shall be issued to, transferred to, or maintained by any corporation if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director or stockholder in their individual capacity;

California, Georgia, Kentucky, Massachusetts, Missouri, North Carolina, South Carolina, Virginia, Washington, and Wisconsin, despite the fact that the owners of those licenses are Maryland residents. Many state "residency" requirements are satisfied if business entities establish "resident status" by incorporating or registering to do business in the State. *See* BIO 21-23.

> (B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of the state for the two (2) years immediately preceding the date application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years[.]

The interplay of these provisions creates an almost insurmountable barrier to residents of other States who seek to open retail liquor stores in Tennessee. Individuals must establish residency in Tennessee and continue to maintain it for *at least nine years*. This is so because an individual must be a resident of Tennessee for two years in order to obtain an initial license, but that license—which is only valid for one year, Tenn. Code Ann. § 57-3-213—cannot be renewed unless the individual has been a Tennessee resident for ten years. No individual would make the significant investment necessary to obtain a license, open and stock a store, and build a business without the prospect of license renewal. Accordingly, this scheme effectively imposes a nine-year durational residency requirement on individuals seeking to own and operate Tennessee retail liquor stores.

By operation of Tenn. Code Ann. § 57-3-204(b)(3)(A)-(B), which incorporates the same discontinuity between initial applications and renewals, no business entity would seek a Tennessee retail store license unless *every* officer, *every* director, and *every* stockholder had established Tennessee residency for nine years prior to the date of application. These requirements render ineligible large specialty stores like Total Wine that are owned by out-of-state residents, and the "any stockholder"

requirement ensures that no publicly-traded corporation could ever obtain a Tennessee retail liquor store license.

A notable incongruity in Tennessee's regulatory scheme—one not addressed or even mentioned by TWSRA and its *amici*—is that Tennessee separately licenses retailers of spirits, wine and beer for on-premises consumption (*e.g.,* bars, hotels, and restaurants), Tenn. Code Ann. §§ 57-4-201 to -205, without imposing any residency requirements. Nonresidents can and do own and operate such businesses that serve alcoholic beverages to Tennessee consumers.

TWSRA and its *amici* also fail to mention that the Tennessee Attorney General has twice opined that the residency requirements for retail store licenses are unconstitutional. In 2008, in *Jelovsek* v. *Bredesen*, 545 F.3d 431, 438-39 (6th Cir. 2008), the Sixth Circuit held that nearly identical residency requirements for Tennessee winery licenses violate the dormant Commerce Clause. In the wake of that ruling, a member of the Tennessee General Assembly asked the Tennessee Attorney General whether the individual and corporate residency requirements for retail store licenses in § 204 also violate the dormant Commerce Clause. Relying on *Jelovsek* and this Court's decision in *Granholm*, the Attorney General concluded in Tennessee Attorney General Opinion No. 12-59 (2012), that the residency requirements for retail store licenses are "constitutionally infirm." BIO App. 5a. The Attorney General bluntly concluded that the residency requirements "constitute trade restraints and barriers that impermissibly discriminate against interstate commerce." *Id.* at 11a. He further acknowledged that the scant legislative history "reveals no

legitimate public policy to support these residency requirements and indeed provides some evidence that the legislative intent for the residency requirement for retailers was to deter the sale of alcoholic beverages from outside Tennessee." *Id.*[3] In addition, the Attorney General candidly noted that he could not "conceive of a legitimate local purpose, such as promoting the health and safety of Tennesseans, that could be served solely by enforcement of these residency requirements." *Id.* at 8a. Based on the Attorney General's opinion, the TABC stopped enforcing the residency requirements.

In 2014, the Tennessee General Assembly eliminated the residency requirements for certain classes of retail licensees. It purported to address the constitutional infirmity of the durational residency requirements for package stores by adding (for the first time) a statement of legislative intent to the statute. This statement, which was enacted without any legislative fact-finding, is now codified at § 57-3-204(b)(4):

> It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in

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[3] The Attorney General's quotations from the floor debates included the following statements of Tennessee legislators: "This chamber just voted for interstate bank – I mean, to kill interstate banking. I think all this does is kill interstate whiskey" and "Why would we want to have people who are not residents have licenses in the state of Tennessee?" BIO App. 9a-10a.

> § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Later that year, another member of the Tennessee General Assembly asked the Attorney General to opine on the constitutionality of the residency requirements for individual applicants in § 204(b)(2)(A), in light of the added *post hoc* statement of legislative intent.

The Attorney General again opined in Tennessee Attorney General Opinion No. 14-83 (2014), that the residency requirements "facially discriminate against nonresidents" and that "the intent expressed in Tenn. Code Ann. § 57-3-204(b)(4) does not establish a local purpose sufficient to justify the discriminatory licensing provisions." BIO App. 13a; see also *id.* at 17a n.2 (finding that the residency requirements "effectively prevent retailers from other states from entering the liquor retail market"). The Attorney General found that the two-year residency requirement "*cannot* be related to any kind of regulatory or public-safety concern" because there are no educational requirements for potential applicants during the waiting period and no sales for the State to monitor. *Id.* at 17a (emphasis added). In addition,

the Attorney General relied on this Court's finding in *Granholm* that advances in technology—circa 2005—had made it easy for States to conduct electronic background checks and monitor nonresident owners. *Id.* at 18a. Based on this opinion, the TABC continued not to enforce the residency requirements.

B. Proceedings Below

1. Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More ("Total Wine") was formed as a Tennessee limited liability company in November, 2015 and on July 5, 2016, applied for a license to own and operate a retail package store in Nashville, Tennessee. Pet. App. 58a. Total Wine did not and does not satisfy the residency requirements because its members are residents of Maryland, but in its application Total Wine designated a general manager who planned to relocate and become a resident of Tennessee. And, of course, all of the store's prospective employees would be Tennessee residents.

Affiliates of Total Wine currently operate 193 retail alcohol beverage businesses in 23 States. All of the States in which affiliates of Total Wine do business have implemented some form of the three-tier system, and all of the stores are licensed under those systems. The local licensees are typically organized as corporations or limited liability companies. The principal owners of these licensees reside in only one of those States, Maryland. See footnote 2 *supra*.

Respondent Affluere Investments, Inc., dba Kimbrough Fine Wine & Spirits ("Affluere") is a corporation organized and existing under Tennessee law. Its sole owners, directors and officers are Douglas and Mary Ketchum, a married couple with a disabled adult daughter who became residents of

Tennessee in July 2016 because of her medical needs. See JA58. They sought a retail liquor license in Memphis in order to open a small business that would allow them to support themselves while providing care for her. See JA63-65.

TABC staff recommended that Total Wine's and Affluere's licenses be approved, but TWSRA threatened to sue the TABC if it approved the license applications. Pet. App. 4a. After the TABC twice deferred action on the applications, Clayton Byrd, former Executive Director of the TABC, filed an action in Tennessee state court seeking "a declaratory judgment that that [sic] the residency requirement in Tenn. Code Ann. § 57-3-204(b)(2)(A) is either constitutional or unconstitutional." JA17 (Compl. Prayer for Relief, ¶ 3). Section 204(b)(2)(A) includes both the two-year residency requirement for initial licenses and the ten-year residency requirement for renewals. TWSRA, Total Wine, and Affluere were named as defendants. The Complaint alleged that "the Commission's staff would recommend approval of both nonresidents' license applications but for the conflicting statutory residency requirement" because the TABC "[found] no other grounds for denying the nonresidents' license applications." JA14 (Compl. ¶ 14).

TWSRA removed the action to the district court based on the federal question raised in the State's Complaint, and the court realigned Total Wine and Affluere as plaintiffs alongside Byrd (after concluding that Byrd "does not intend to follow the residency requirement absent a court's determination that it is constitutional"), leaving TWSRA as the sole defendant. JA39-40; Pet. App. 4a & n.1.

Total Wine moved for partial summary judgment, arguing that the individual and corporate residency

requirements in §§ 57-3-204(b)(2)(A) and (3)(A) violate both the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV of the federal Constitution. JA46-49. TWSRA opposed the motion as did the State, but neither made any real effort to articulate a legitimate government interest served by the residency requirements, and neither proffered any factual evidence (not even an affidavit) in support of any such interest. Instead, they relied upon the legal defense that the residency requirements are protected by the Twenty-first Amendment.

2. The district court granted Total Wine's summary judgment motion, declaring the residency requirements unconstitutional under the dormant Commerce Clause and enjoining their enforcement. Pet. App. 57a-81a. The district court enjoined enforcement of all of the residency requirements "under Tenn. Code Ann. § 57-3-204," not just the two-year residency requirement. JA106.

The court found that the requirements discriminate against out-of-state residents "on their face" by "creating a barrier to entering the Tennessee retail liquor market." Pet. App. 73a-74a; see also *id.* at 74a ("nonresidents of Tennessee will always be unable to obtain a retail liquor license"). It also found that the discrimination cannot be justified on the ground that it advances a legitimate local purpose, noting that the State did not offer "any concrete evidence to show that the discrimination against out-of-state residents is demonstrably justified." *Id.* at 76a-78a. The court rejected the argument that the stated legislative purposes in § 204(b)(4) "suffice to save the residency requirements" because the State made "no attempt to show that nondiscriminatory means would fail to accomplish Tennessee's purposes." *Id.* at 78a-79a.

The district court rejected the argument of TWSRA and the State, purportedly based on this Court's decision in *Granholm* v. *Heald*, 544 U.S. 460 (2005), that the Twenty-first Amendment rendered the residency requirements completely immune from dormant Commerce Clause scrutiny. Pet. App. 65a-72a. It concluded that the fact that *Granholm* "affirmed the legitimacy of the three-tier system does not imply that a regulation, such as the retailer residency requirements at issue, is immune from Commerce Clause challenge." *Id.* at 71a-72a. Finally, the district court did not reach Total Wine's alternative argument based on the Privileges and Immunities Clause. *Id.* at 80a-81a.

3. TWSRA appealed, but the State did not. The State did not seek a stay of the district court's injunction, which allowed Affluere to obtain its liquor license and acquire an existing liquor store in Memphis in the summer of 2017. Total Wine lost its opportunity to obtain a license in Nashville, when it was unable to satisfy a licensing contingency in its store lease due to the pendency of this litigation. But after the court of appeals issued its decision, Total Wine applied for and received a retail license for a new package store in Knoxville. That 30,000 square-foot store opened on June 27, 2018. All of the store's employees, including its store manager, are Tennessee residents.

The State ultimately filed a brief in the court of appeals supporting the residency requirements, but declined to participate in oral argument.

The court of appeals affirmed "the district court's judgment declaring § 57-3-204(b)(2)(A), (3)(A)—(B), and (3)(D) in violation of the dormant Commerce Clause." Pet. App. 2a. The panel majority concluded that "the Twenty-first Amendment does not

immunize Tennessee's durational-residency requirements from scrutiny under the dormant Commerce Clause." *Id.* at 6a. It engaged in an extensive analysis of this Court's decision in *Granholm* and the historical analysis contained therein, and rejected TWSRA and the State's contention that the Twenty-first Amendment "*automatically* protects laws regarding wholesalers and retailers." *Id.* at 23a (emphasis added). It then examined whether Tennessee's interests in the durational residency requirements are "'closely related to the powers reserved by the Twenty-first Amendment,'" *id.* at 24a (quoting *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 275-76 (1984)), and concluded that they are not. It reasoned that "requiring wholesaler or retailer businesses to be physically located within Tennessee may be an inherent aspect of a three-tier system," but "imposing durational-residency requirements is not." *Id.* at 27a.

The panel majority then concluded that Tennessee's residency requirements violate the dormant Commerce Clause. It determined that they are "facially discriminatory" because they "prevent[] out-of-state residents from obtaining retail licenses and protect[] in-state residents who are retailers." Pet. App. 31a. It then noted that the State never "argue[d] that a reasonable, nondiscriminatory alternative cannot achieve Tennessee's goals," and listed several available alternatives. *Id.* at 31a-33a. The panel then severed Tennessee's unconstitutional residency requirements from the remainder of the retail licensing statute. *Id.* at 33a-38a. It did not address Total Wine's Privileges and Immunities Clause argument.

Judge Sutton concurred in part and dissented in part. Pet. App. 40a-56a. He concluded that "the text

of the Twenty-first Amendment, the original understanding of that provision's relationship to the Commerce Clause," and *Granholm* "all support the[] validity" of the residency requirements. *Id.* at 40a. Notably, however, Judge Sutton agreed that two aspects of the residency requirement "must fall": (1) the 10-year residency requirement for license renewals; and (2) application of the residency requirements to 100% of a retailer's stockholders. *Id.* at 54a. He candidly acknowledged that the renewal requirement is the "epitome of arbitrariness" because the State offered no reason why a two-year resident was deemed "local enough" to obtain a license but a three-year resident not "local enough" to renew it. *Id.* at 54a-55a. And he saw "no way to explain th[e] all-or-nothing-at-all stockholder requirement as doing anything other than promoting economic protectionism." *Id.* at 54a. See TWSRA Br. 16-17 (acknowledging that Judge Sutton found that these provisions reflect "impermissible economic protectionism").

4. TWSRA filed a petition for *certiorari*, but the State did not and is therefore a nominal respondent pursuant to Sup. Ct. R. 12.6. The State could have filed a brief in support of the petition, *id.*, but declined to do so. It waived a response.

SUMMARY OF ARGUMENT

Tennessee's durational residency requirements for licenses to operate retail liquor stores undeniably violate the dormant Commerce Clause, the Twenty-first Amendment does not immunize them, and thus the district court properly enjoined them.

1. No party disputes that Tennessee's durational residency requirements cannot survive scrutiny under the dormant Commerce Clause (apart from any

Twenty-first Amendment defense). These requirements facially discriminate against interstate commerce and prevent out-of-state residents from obtaining retail licenses in order to protect Tennessee retailers from competition. Such exclusion of out-of-state businesses from in-state markets is a classic form of discrimination condemned by the dormant Commerce Clause. Accordingly, Tennessee's restrictions are virtually *per se* invalid and the State offered no defense of them not tied to the Twenty-first Amendment.

2. The constitutional amendment ending Prohibition does not save Tennessee's durational residency requirements. In *Granholm* v. *Heald*, 544 U.S. 460 (2005), this Court conducted a thorough review of the history leading up to the Twenty-first Amendment and its prior decisions interpreting the Amendment, and explained that its modern cases establish that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Id.* at 487. The Court used broad terms to describe that principle, making clear that it is not limited to alcohol "products" or "producers," and extends to out-of-state business interests. The Court's application of that principle in *Granholm* and other cases to prohibit discrimination against businesses in the alcohol trade confirms the common-sense proposition that "products" cannot be separated from the people and businesses that produce and sell them.

The nondiscrimination principle is fatal to Tennessee's residency requirements. This Court has made clear that the Twenty-first Amendment was not intended to "save" laws that have no purpose other than protecting in-state businesses. Tennessee's residency requirements are such a law. The State

expressly acknowledged this in recent Attorney General opinions; the State has never articulated, much less created a record to support, any nonprotectionist state purpose for the residency requirements; and no party disputes that the requirements create an insurmountable barrier to new entry by out-of-state owners. This should be the end of the matter.

TWSRA's arguments to the contrary misread and improperly attempt to narrow *Granholm* and this Court's modern alcohol decisions, are based on a faulty historical analysis, and posit a distinction between "core" and "non-core" state powers that disregards the evolution of Twenty-first Amendment case law. TWSRA's attempts to identify outside-the-record justifications for Tennessee's residency requirements are unconvincing—particularly given that Tennessee does not impose *any* residency requirements on owners of bars and other establishments that serve liquor by the drink.

The argument of TWSRA's *amici* that Total Wine is attacking the three-tier system is misguided. Total Wine owns a licensed brick-and-mortar retail store in Tennessee that operates within the State's three-tier system, and its affiliates similarly operate licensed brick-and-mortar retail stores within other States' three-tier systems. Total Wine is not challenging that fundamental system; it is challenging discriminatory residency requirements that exclude nonresidents who wish to operate retail stores in Tennessee and to comply in all respects with the State's three-tier system and other nondiscriminatory regulatory requirements the State imposes on the sale of alcohol.

3. The Court cannot consider Tennessee's two-year residency requirement in isolation. The district

court enjoined all of the residency requirements in the statute. TWSRA is asking this Court to issue an advisory opinion on a hypothetical state statute that imposes less blatantly protectionist provisions than the Tennessee statute as written. The Court should decline this invitation, particularly when the actual controversy for the respondents concerns the ten-year renewal requirement and the requirements governing the residency of all owners, directors and officers of business entities. Moreover, even if the Court were to review in isolation the two-year residency requirement for initial licenses, it would have to affirm the decision below no matter what it decides, because the two-year requirement is not severable from the other residency requirements in the statute.

4. If this Court vacates the court of appeals' ruling on the two-year residency requirement under the dormant Commerce Clause, it still should remand so that the district court can consider Total Wine's independent challenge to Tennessee's durational residency requirements under the Privileges and Immunities Clause.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENTS VIOLATE THE DORMANT COMMERCE CLAUSE.

TWSRA wisely does not argue that Tennessee's durational residency requirements can survive scrutiny under the dormant Commerce Clause independent of the Twenty-first Amendment. If Tennessee's residency requirements applied to any other type of retail license, they would be constitutionally doomed. See Br. of Wine and Spirits Wholesalers of America, Inc. 8 ("No party disputes

that these provisions would violate the dormant Commerce Clause if the regulated products were books or shoes.").

This concession renders it unnecessary to undertake extensive analysis of the dormant Commerce Clause. Nonetheless, an examination of its core concerns, and the extreme ways in which Tennessee's protectionist residency requirements undermine those concerns, provides important context for evaluating TWSRA's Twenty-first Amendment defense.

A. Tennessee's Durational Residency Requirements Facially Discriminate Against Interstate Commerce.

The fundamental concern of the dormant Commerce Clause is preventing economic protectionism by the States. State laws may not discriminate against interstate commerce, which this Court has defined as "mandat[ing] differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm*, 544 U.S. at 472. This prohibition is "essential to the foundations of the Union" because one of the central aims of the Constitution was "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Id.*; see also *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (a State "may not place itself in a position of economic isolation"). Ultimately, the dormant Commerce Clause seeks to prevent "trade rivalries," "animosities," and "exclusivity." *Granholm*, 544 U.S. at 473.

The different strands of this Court's dormant Commerce Clause jurisprudence reflect the fact that

discrimination against interstate commerce can take many forms. For example, this Court has prohibited States from disadvantaging out-of-state goods or products—including alcohol—through the imposition of discriminatory taxes, costs and regulations. *E.g.*, *Granholm*, 544 U.S. 460 (alcohol); *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269 (1988); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984) (alcohol); *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977); *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

States also cannot regulate commerce—including commerce in alcohol—that occurs outside of their borders, *i.e.*, state laws cannot have extraterritorial effect. *E.g.*, *Healy* v. *Beer Inst.*, 491 U.S. 324 (1989) (alcohol); *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S. 573 (1986) (alcohol); *Edgar* v. *Mite Corp.*, 457 U.S. 624 (1982) (plurality opinion); *Baldwin*, 294 U.S. 511. Such laws are often a form of economic protectionism that force "producers or consumers in other States [to] surrender whatever competitive advantages they may possess." *Brown-Forman*, 476 U.S. at 580.

And this Court has held that States cannot exclude out-of-state entities from competing in local markets. *E.g.*, *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980) (invalidating Florida law that prohibited out-of-state bank holding companies from owning Florida businesses that provide investment advisory or trust services); *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 391-92 (1994) (invalidating municipal ordinance that required all solid waste generated in the town to be processed at a designated local facility because it deprived out-of-state waste processors of "access to local demand for their services"). This Court stated in *Carbone* that the infirm municipal

ordinance was "just one more instance of local processing requirements that we long have held invalid" because they "bar the import of the processing service" for "the benefit of local businesses." *Id.* (citing cases).

The foregoing line of cases confirms that a fundamental and long-standing purpose of the dormant Commerce Clause is to "prohibit[] economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Limbach*, 486 U.S. at 273. In *BT Investment Managers,* for example, the Court struck down the Florida statute because it "overtly prevent[ed] [out-of-state] enterprises from competing in local markets." 447 U.S. at 39. The Court explained that the perniciousness of the statute was that it posed an "explicit barrier" to "out-of-state firms with the kinds of resources and business interests that make them likely to attempt *de novo* entry." *Id.*

The court of appeals correctly determined that Tennessee's durational residency requirements are "facially discriminatory." Pet. App. 31a. As the court of appeals explained, the requirements distinguish between in-state and out-of-state residents on their face, and "prevent[] out-of-state residents from obtaining retail licenses" in order to "protect[] in-state residents who are retailers." *Id.* The district court similarly found that the requirements create a "barrier" for nonresidents, who "will always be unable to obtain a retail liquor license." *Id.* at 74a. These requirements are thus quintessential protectionist provisions that "overtly prevent[] [out-of-state] enterprises from competing in local markets." *BT Inv. Managers*, 447 U.S. at 39. And TWSRA does not really contend otherwise. Accordingly, under this

Court's Commerce Clause precedents, Tennessee's discriminatory requirements are subject to "a virtually *per se* rule of invalidity." *Granholm*, 544 U.S. at 476.

B. The State Utterly Failed To Show That Its Durational Residency Requirements Serve Any Legitimate Purpose That Could Not Just As Readily Be Served By Nondiscriminatory Alternatives.

A state law that discriminates against interstate commerce can be upheld only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489. The burden is on the State to justify the discrimination, and it must satisfy an "exacting standard" and make the "clearest showing." *Id.* at 490, 492-93. "[M]ere speculation" and "unsupported assertions" are not enough. *Id.* at 490, 492. Instead, this Court requires "concrete record evidence" that "a State's nondiscriminatory alternatives will prove unworkable." *Id.* at 493.

Because Tennessee made no such showing below (or on appeal), the court of appeals correctly determined that the State did not satisfy its burden. The State's task was admittedly daunting because its Attorney General opined in 2012 that the legislative history pointed to protectionist motives and admitted that he could not "conceive" of a legitimate purpose for the requirements. BIO App. 8a, 11a. Even after the legislature added the *post hoc* statement of legislative intent, the Attorney General concluded that this statement did not "establish a local purpose sufficient to justify the discriminatory licensing provisions" and that the two-year residency requirement "*cannot* be related to any kind of

regulatory or public-safety concern" because it does nothing to address such concerns. *Id.* at 13a, 17a (emphasis added). Consistent with the Attorney General's views, the State did not even attempt to make an evidentiary showing in the district court in support of any purported state interests. The State's failure to make a record should be the end of the matter because its burden was to make a "clear[] showing," based on "concrete record evidence."

The courts below focused on the 2014 statement of legislative intent, because that is all they had. They concluded that the vague, high-level state interests asserted in that provision—(1) protecting the "health, safety and welfare" of Tennessee citizens, and (2) ensuring "oversight, control and accountability" for retail store owners and managers, § 204(b)(4)—cannot justify the discrimination. Pet. App. 31a-33a, 76a-80a. The district court "fail[ed] to see how the retailer residency requirements" advance these interests. *Id.* at 80a. It also noted that this Court in *Granholm* "rejected greater regulatory control as a sufficient justification when reasonable nondiscriminatory alternatives could serve that purpose." *Id.* at 79a. The court of appeals concluded that the State has myriad nondiscriminatory alternatives to address these interests, *id.* at 32a-33a, and there are many more in use in Tennessee and other three-tier States, such as requiring out-of-state residents to operate through a business entity organized under state law, requiring the designation of a general manager resident in the State, requiring retailers to post bonds to secure their licenses, conducting regular audits of a retailer's operations to ensure compliance with local laws, or creating an electronic database to monitor the sales practices of all licensed retailers.

TWSRA, its *amici*, and the dissenting panel member, do not identify any shortcomings in the lower courts' analysis. Instead, they simply assert justifications for the discriminatory requirements. Their *post hoc* efforts to identify state interests seem inherently fanciful because Tennessee is not currently enforcing the residency requirements (and has not done so for six years). If these concerns were real, they would have manifested themselves long before now. But in any event the purported justifications are unpersuasive on their own terms. TWSRA, for example, cites the importance of restricting licenses to long-time residents who "know a community" and have incentives to avoid irresponsible alcohol sales in that community. TWSRA Br. 48-50; see also Pet. App. 50a (Sutton dissent). The problem with this justification is that the residency requirements do not serve that purpose because they do not require any licensees to have local community ties or familiarity. A retailer does not have to reside *in the community* in which it owns a store, either before or after it obtains a license; the retailer need only reside somewhere in Tennessee. See Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 7-8 (1933) (States are not "single communities" for purposes of liquor legislation). The notion that someone living in Memphis is more in touch with Knoxville than someone living in Asheville, North Carolina, which is 250 miles closer, is silly.

At the same time, TWSRA ignores that a store's general manager and employees—the persons who actually check IDs and make point-of-sale decisions—will naturally be residents of the surrounding community, regardless of where the store's owners reside. And a retailer's license is always subject to

suspension or nonrenewal if a store's owner or employees permit unlawful sales to minors or commit other violations of local laws or ordinances—no matter where the store's owners reside.

TWSRA also asserts that the residency requirements further the State's purpose of encouraging temperance, citing a truncated version of an exchange during the floor debates on the 1984 statutory amendments. TWSRA Br. 50-51. The State's Attorney General, however, rejected this view of the State's interests and the legislative history. Quoting the full exchange, and its references to restricting liquor sales, the Attorney General concluded that it "reveals *no valid public policy concerns*" to support the requirements. BIO App. 9a-10a (emphasis added). In any event, a restriction on where the owners of Tennessee package stores reside has no effect on how much alcohol Tennesseans purchase and consume.

TWSRA also cites the State's interests in conducting fitness reviews and exercising control and oversight over retailers. TWSRA Br. 48. As the district court noted, Pet. App. 79a-80a, this Court rejected similar arguments in *Granholm* as a justification for discriminatory regulations, 544 U.S. at 492, citing the ease of electronic background checks and financial monitoring—which have only become more sophisticated since 2005. Tellingly, the TABC had no trouble making fitness determinations for respondents here, and stated in the Complaint that they met every license qualification but for the residency requirement. JA14 (Compl. ¶ 14). Residency requirements with respect to store owners are hardly necessary to ensure that licensees employ responsible managers and sales personnel, or designate an agent to receive in-state service of

process. See TWSRA Br. 48. States can and often do impose such simple requirements. See, *e.g.*, Tenn. Code Ann. § 57-3-221 (requiring liquor store managers to obtain a manager's permit and undergo training in alcohol awareness and state regulations); *id.* § 57-3-818 (requiring liquor stores to participate in a responsible vendor training program that certifies all employees).

Finally, all of the purported state interests identified by TWSRA and its supporters ring hollow given that Tennessee does not impose *any* residency requirements on individuals and corporations that own and operate bars, restaurants, and hotels, or grocery stores that are licensed to sell beer and wine. For all of TWSRA's rhetoric about the importance of retailers having community ties and encouraging temperance, Tennessee has not seen fit to impose any residency requirements on modern-day "saloons"—retailers who serve alcohol by the drink to Tennessee consumers.[4] Out-of-state residents are free to open bars "the minute they establish an in-state corporate entity." TWSRA Br. 51. And TABC plainly is able to make fitness determinations for them. Tennessee's selective approach to retailer residency requirements forecloses any argument that Tennessee is genuinely concerned about nonresidents' suitability to own retail alcohol businesses.

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[4] Amicus U.S. Alcohol Policy Alliance, *et al.*, 16 n.36, notes that in 2017 Tennessee had 2,876 licensed "on-premise" outlets for spirits (bars, restaurants, hotels), but only 552 "off-premise" outlets (retail package stores). The lack of residency requirements for the much larger group of retailers in Tennessee who serve alcohol by the drink wholly undermines the notion that the residency requirements are necessary to serve legitimate policy interests.

As one court concluded in invalidating a Kansas residency requirement for alcohol wholesaler licenses, which Kansas attempted to justify on the ground that it facilitated background checks, "[t]he fact that the state inconsistently allows corporate liquor-by-the-drink retailers" to be nonresidents "undercuts" the claim that the residency requirement "legitimately promotes a state interest." *Glazer's Wholesale Drug Co.* v. *Kansas*, 145 F. Supp. 2d 1234, 1243 n.13 (D. Kan. 2001); see also *Capital Cities Cable, Inc.* v. *Crisp,* 467 U.S. 691, 715 (1984) ("Although a state regulatory scheme obviously need not amount to a comprehensive attack on the problems of alcohol consumption in order to constitute a valid exercise of state power under the Twenty-first Amendment, the selective approach Oklahoma has taken toward liquor advertising suggests limits on the substantiality of the interests it asserts here").

The court of appeals correctly concluded that Tennessee's durational residency requirements constitute rank economic protectionism that cannot survive scrutiny under the dormant Commerce Clause. It is unsurprising that TWSRA concedes the dormant Commerce Clause violation and is seeking refuge in the Twenty-first Amendment.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE TWENTY-FIRST AMENDMENT DOES NOT SAVE TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENTS.

In the lower courts, TWSRA and the State argued (with more and less fervor, respectively) that the residency requirements are not subject to dormant Commerce Clause scrutiny by virtue of the Twenty-first Amendment. The lower courts rejected this Twenty-first Amendment defense, based on thorough

analyses of this Court's decision in *Granholm* v. *Heald*, 544 U.S. 460 (2005). Their rulings were correct. TWSRA's arguments to the contrary misread and improperly attempt to narrow the straightforward holdings of *Granholm* and this Court's other modern alcohol decisions that discriminatory efforts aimed solely at protecting local economic interests are not protected by the Twenty-first Amendment simply because the State happens to be regulating the sale of alcohol. A faithful application of those holdings dooms Tennessee's statute.

A. The Twenty-first Amendment Does Not Save Tennessee's Residency Requirements That Discriminate Against Out-Of-State Business Interests.

The Twenty-first Amendment not only ended Prohibition, it also granted the States regulatory authority over the distribution and transportation of alcohol within their borders. Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend XXI, § 2. This provision establishes two fundamental principles: (1) it authorizes but does not require States to allow the sale and consumption of alcohol within their borders; and (2) it grants the States authority to regulate the system of alcohol distribution within each State, thus authorizing the three-tier system of alcohol distribution that most States use.

In *Granholm*, this Court addressed a dormant Commerce Clause challenge to Michigan and New York laws that "allow[ed] in-state wineries to sell

wine directly to consumers" in those States, but "prohibit[ed] out-of-state wineries from doing so." 544 U.S. at 466. Michigan and New York, like TWSRA here, defended their facially discriminatory direct-shipping laws on the ground that the Twenty-first Amendment authorized them. This Court rejected the States' Twenty-first Amendment defense.

In addressing the interplay between the dormant Commerce Clause and the Twenty-first Amendment, the Court conducted a thorough review of the history leading up to the Twenty-first Amendment and its prior decisions. *Id.* at 476-86. It acknowledged inconsistencies in its case law, and particularly recognized that certain cases decided in the years following ratification of the Twenty-first Amendment failed "to consider the history underlying the Twenty-first Amendment" and took a broad view of State authority to pass discriminatory laws that this Court later disavowed. *Id.* at 485-86 (criticizing *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U.S. 59 (1936)).

After summarizing the history, this Court distilled its modern Twenty-first Amendment cases as establishing three principles: (1) "state laws that violate other provisions of the Constitution," such as the First Amendment and Equal Protection Clause, "are not saved by the Twenty-first Amendment"; (2) the Twenty-first Amendment "does not abrogate Congress' Commerce Clause powers with regard to liquor"; and (3) "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm*, 544 U.S. at 486-87. For the third principle, the Court cited *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S.

573 (1986); and *Healy* v. *Beer Inst.*, 491 U.S. 324 (1989). *Granholm*, 544 U.S. at 487.

The nondiscrimination principle controls this case, and is fatal to TWSRA's Twenty-first Amendment defense. Although the facts of *Granholm* involved differential treatment of in-state wine and out-of-state wine—and much of the language in the opinion therefore naturally addresses alcohol products and producers—this Court used broad terms to define "the nondiscrimination principle of the Commerce Clause." The Court's language plainly encompasses discrimination against out-of-state business interests, the central concern of the dormant Commerce Clause. For example, this Court began its discussion of the dormant Commerce Clause by stating that "state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state *economic interests* that benefits the former and burdens the latter.'" *Granholm*, 544 U.S. at 472 (emphasis added) (quoting *Or. Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). In the sentence following its statement that state alcohol laws are limited by the nondiscrimination principle of the Commerce Clause, the Court defined a state law as discriminatory "when its effect is to favor in-state *economic interests* over out-of-state *interests*." *Id.* at 487 (emphasis added) (quoting *Brown-Forman*, 476 U.S. at 579).[5] The Court also relied on its prior statement in *Bacchus* that the Twenty-first Amendment was not intended "to

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[5] *Brown-Forman*, in turn, drew its definition of discrimination from three of this Court's dormant Commerce Clause decisions: *City of Phila.* v. *New Jersey*, 437 U.S. 617 (1978); *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189 (1925); and *Edgar* v. *MITE Corp.*, 457 U.S. 624, 640-43 (1982) (plurality opinion). *See Brown-Forman*, 476 U.S. at 579.

empower States to favor local liquor *industries* by erecting barriers to competition." *Id.* (emphasis added) (quoting *Bacchus*, 468 U.S. at 276). And in describing the evils of discriminatory laws, this Court stated that they "deprive *citizens* of their right to have access to the markets of other States on equal terms." *Id.* at 473 (emphasis added).

Tellingly, the analysis in *Granholm* focused as much on the nonresident businesses that produce wine (wineries) as on the wine itself—illustrating the common-sense truth that "products" cannot be separated from the people and businesses that produce and sell them. This Court explained that the constitutional infirmity of Michigan's law allowing only in-state wineries to ship wine directly to Michigan consumers was that it allowed the in-state wineries to avoid the "two extra layers of overhead" in Michigan's three-tier system, creating a "cost differential" for out-of-state wineries, which could "effectively bar small wineries from the Michigan market." *Id.* at 473-74. The Court similarly condemned New York's scheme because it "grant[ed] in-state wineries access to the State's consumers on preferential terms," and indeed, no out-of-state winery had ever "run the State's regulatory gauntlet" to enter the New York direct shipping market. *Id.* at 474.[6]

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[6] This discussion also makes clear that *Granholm* cannot be conceptualized as a case solely about wine *producers* or *production*. Michigan and New York were allowing in-state wineries to serve as their own retailers in certain circumstances, and the commerce at issue was retail sales to in-state consumers. The Michigan and New York laws at issue therefore impacted both the production and retail tiers of the distribution system, and the wholesale tier as well since the States were allowing in-state wineries to bypass that tier. As *Granholm* illustrates, a given state alcohol regulation can impact

This Court likewise recognized in the pre-*Granholm* cases that the Twenty-first Amendment does not permit States to discriminate against out-of-state business interests. *Bacchus* and *Brown-Forman* describe the dormant Commerce Clause's nondiscrimination principle as prohibiting favoritism of "local liquor industries" and "in-state economic interests," respectively. *Bacchus*, 468 U.S. at 276; *Brown-Forman*, 476 U.S. at 579. In *Bacchus*, this Court recognized that Hawaii's discriminatory tax exemptions in favor of Hawaii-produced liquors not only discriminated against out-of-state alcohol products, but also necessarily discriminated against the businesses that produce those products. The Court emphasized that the constitutional problem with Hawaii's attempt to bolster its domestic liquor industry was that it had chosen a means that "favor[ed] local businesses over out-of-state businesses." 468 U.S. at 272. The Court relied upon dormant Commerce Clause decisions holding that States cannot shore up domestic industries "by means of unequal and oppressive burdens upon the industry and business of other States." *Id*.

Healy also squarely involved discrimination against businesses in the alcohol trade. In *Healy*, this Court struck down a Connecticut price affirmation requirement for brewers and shippers of beer for two reasons: (1) it impermissibly regulated commerce in other States; and (2) it "discriminate[d] against brewers and shippers of beer engaged in interstate commerce" by imposing the affirmation requirement only on brewers and shippers who sold in both Connecticut and a border state. *Healy*, 491 U.S. at 340-41. Justice Scalia concurred in part and

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commerce and businesses in more than one tier of a three-tier system.

concurred in the judgment. He disagreed with the Court's extraterritoriality rationale, but agreed that the law's invalidity was established by its "facial discrimination" against businesses engaged in interstate commerce. *Id.* at 344. Justice Scalia stated that the law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment," *id.*, and *Granholm* quoted that language with approval, 544 U.S. at 488.

This Court's adherence in *Granholm* to the nondiscrimination principle recognized and applied in its prior cases was unequivocal. The States in *Granholm* had argued that *Bacchus* "should be overruled or limited to its facts," because they recognized that *Bacchus* was "fatal" to their facially discriminatory statutes. *Id.* at 488. The Court expressly rejected this invitation, reiterating that "the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge." *Id.* It further noted that "[a] retreat from *Bacchus* would also undermine *Brown-Forman* and *Healy*," *id.*, because, as noted, the nondiscrimination principle that the Court confirmed in *Granholm* was acknowledged and applied in those cases.

The case law under the dormant Commerce Clause further confirms that the "nondiscrimination principle of the Commerce Clause" which limits state alcohol laws, *id.* at 487, is expansive. That principle encompasses discrimination against out-of-state economic actors such as the owners of Total Wine. As shown above, this Court's dormant Commerce Clause decisions have long recognized that protectionism and discrimination against interstate commerce can take many forms, including preventing out-of-state businesses from competing in local markets. *E.g.*, *BT Inv. Managers*, 447 U.S. 27; *Carbone*, 511 U.S. 383.

This line of cases establishes that a key purpose of the dormant Commerce Clause is to prohibit state laws that erect entry barriers to out-of-state economic interests. Many of these cases involve economic actors who provide services rather than produce goods, such as the investment advisory services at issue in *BT Investment Managers* or the waste processing services at issue in *Carbone*. See also *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 577 n.10 (1997) (dormant Commerce Clause jurisprudence applies "to service industries").[7]

The nondiscrimination principle established and reaffirmed in these cases is "fatal" to Tennessee's residency requirements, just as it was fatal to the laws at issue in *Granholm*, *Bacchus*, and *Healy*. These cases establish that the Twenty-first Amendment was not intended to "save" laws that have no purpose other than protecting in-state businesses. *Granholm*, 544 U.S. at 488 (a law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment") (quoting *Healy*, 491 U.S. at 344 (Scalia, J., concurring in part and concurring in judgment)); *Bacchus*, 468 U.S. at 276 ("State laws that constitute mere economic protectionism are therefore not entitled to the same

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[7] Although this Court in *Granholm* left no doubt that discriminatory alcohol laws are not "saved" by the Twenty-first Amendment, it did not address whether the Amendment eliminates *Pike* balancing with respect to alcohol laws that are even-handed. *See Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (an even-handed law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits"). This case does not raise any issue of *Pike* balancing, however, because Tennessee's residency requirements facially discriminate against out-of-state residents.

deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor"); *Healy*, 491 U.S. at 340-41 (invalidating discriminatory alcohol law because the Court "perceive[d] no neutral justification for this patent discrimination"); see Pet. App. 49a (Judge Sutton acknowledging that state alcohol laws are unconstitutional if "a challenger can show that they serve no purpose besides 'economic protectionism'") (quoting *Bacchus*, 468 U.S. at 276)).

As shown above, Tennessee's requirements facially discriminate against out-of-state residents who wish to own retail liquor stores in Tennessee and there is no purpose for the State's regime other than protectionism. The State expressly acknowledged this in the recent Attorney General opinions, in the clearest terms. *E.g.*, BIO App. 8a, 11a-12a (concluding that the residency requirements "constitute trade restraints and barriers" and that the Attorney General's office could not "conceive of a legitimate local purpose" for them).

During this litigation, Tennessee has never clearly articulated, much less created a record to support, any legitimate state purpose for the residency requirements. The fact that the State stopped enforcing the requirements six years ago confirms that the TABC does not think that they serve any important regulatory purpose. And the Court cannot ignore the irony that a trade association of in-state retailers—which frankly admits that its standing is based on its interest in avoiding "competitive injury," Cert. Reply Br. 8—brought the case to this Court and is defending the Tennessee laws, wearing the shoes of the State. Given that Total Wine complies with every regulatory requirement that Tennessee imposes on its in-state retailers, the only basis for petitioner to be in this Court is its desire to limit competition.

In sum, Tennessee's requirements create an insurmountable barrier to new entry by nonresident owners. That wall at the Tennessee border violates the principle that States may not "favor local liquor industries by erecting barriers to competition." *Granholm*, 544 U.S. at 487 (quoting *Bacchus*, 468 U.S. at 276). This should be the end of the matter.[8]

B. TWSRA's Attempt To Avoid The Clear Import Of *Granholm* And Its Predecessors Is Unavailing.

No doubt recognizing that the nondiscrimination principle reaffirmed in *Granholm* is fatal to Tennessee's residency requirements, TWSRA repeats the approach of the unsuccessful States in *Granholm*: arguing that the principle should be limited in its application. This Court again should decline the invitation to limit the nondiscrimination principle.

1. TWSRA's principal argument is that *Granholm* and the cases that preceded it stand for the proposition that the Twenty-first Amendment does not empower States to discriminate against out-of-state alcohol "products," but does not restrict the States from discriminating against the people and companies that sell those products. *E.g.*, TWSRA Br. 41-44, 52, 54. In TWSRA's view, States have *carte blanche* to discriminate against nonresidents who wish to own in-state businesses, so long as they "'treat liquor produced out of state the same as its

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[8] TWSRA argues that courts cannot determine that an alcohol law is protectionist without engaging in an intrusive "reasonableness review." TWSRA Br. 43-44. This Court, however, had no trouble identifying protectionism in *Granholm*, *Bacchus*, and *Healy*, and no "reasonableness" review is necessary here, where Tennessee has not identified a legitimate nonprotectionist purpose for any of the residency requirements.

domestic equivalent.'" *Id.* at 55 (quoting *Granholm*, 544 U.S. at 489). This argument is both legally and logically flawed.

a. The above discussion of *Granholm* and this Court's other modern alcohol cases shows that the nondiscrimination principle that this Court recognized in those cases is not limited to discrimination against out-of-state alcohol products. This Court has certainly never stated such a limitation. To the contrary, the language of this Court's opinions is broader and expressly encompasses discrimination against out-of-state business interests, which remains the fundamental concern of the dormant Commerce Clause. TWSRA acknowledges this broad language in *Granholm* and *Bacchus*, but attempts to dismiss it as the Court merely describing "background principle[s]" of the dormant Commerce Clause. TWSRA Br. 53. This is wishful thinking, however, because the Court held that state alcohol laws are limited by "the nondiscrimination principle *of the Commerce Clause*," *Granholm*, 544 U.S. at 487 (emphasis added). This plainly indicates that "discrimination" should be defined with reference to all of the dormant Commerce Clause principles this Court has articulated. One of those principles is that state laws that exclude out-of-state businesses from entering local markets constitute a form of impermissible discrimination.

Moreover, in *Granholm*, *Bacchus*, and *Healy*, the States' discrimination against interstate businesses was part of this Court's rationale for striking down the state laws at issue. *Granholm*, 544 U.S. at 473-74; *Bacchus*, 468 U.S. at 272; *Healy*, 491 U.S. at 340-41. This Court recognized that the States' discrimination against out-of-state products went

hand-in-hand with their discrimination against the businesses that produced and sought to sell the products in interstate commerce. TWSRA's attempt narrowly to characterize these cases as merely involving discrimination against out-of-state products not only ignores this Court's full analysis, but also attempts to downplay the importance of a type of discrimination (discrimination against out-of-state business interests) that this Court recognizes as of equal constitutional concern in the alcohol context.

b. TWSRA attempts to avoid the clear import of the modern Twenty-first Amendment cases by asserting that historical analysis shows that the Amendment only restricts the States from discriminating against out-of-state alcohol products. This foray into the complex history and case law concerning alcohol regulation ignores that the broad nondiscrimination principle that this Court reaffirmed in *Granholm* was based on a thorough analysis of that history. More importantly, however, that history is fully consistent with this Court's recognition just 13 years ago in *Granholm* that state laws cannot discriminate against either out-of-state alcohol products or out-of-state economic actors.

TWSRA acknowledges that state laws that discriminate against out-of-state alcohol products are not authorized by the Twenty-first Amendment. TWSRA explains that States "had no power to pass laws that discriminated against out-of-state products before Prohibition," and that because the Twenty-first Amendment "simply restored state authority over alcohol regulation" to what it was before Prohibition, States are "left without authority to discriminate against out-of-state liquor." TWSRA Br. 41-42. TWSRA's resort to pre-Prohibition history tracks this Court's recognition in *Granholm* that the

Twenty-first Amendment did not give States authority to discriminate against "out-of-state goods" because that was "a privilege they had not enjoyed at any earlier time." *Granholm*, 544 U.S. at 484-85; *id.* at 483 ("The Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state.").

Under this analysis, however, state laws that discriminate against nonresident owners of alcohol businesses are not authorized by the Twenty-first Amendment for the same reason: the States did not have power to enact such laws before Prohibition. *Walling* v. *Michigan*, 116 U.S. 446 (1886), and *Scott* v. *Donald*, 165 U.S. 58 (1897), illustrate this principle. TWSRA characterizes *Walling* as invalidating a Michigan "tax imposed only on out-of-state liquor," TWSRA Br. 26, but the tax at issue was not imposed on alcohol *products* at all. It was levied on persons who, on behalf of nonresident businesses, engaged in the sale of liquor to be shipped into Michigan. *Walling*, 116 U.S. at 459; see *Scott*, 165 U.S. at 94. The Commerce Clause challenge was brought by a salesman for an Illinois liquor wholesale business, who was criminally prosecuted for not paying the tax. *Walling*, 116 U.S. at 450. This Court invalidated Michigan's tax because it "discriminate[d] against the *citizens and products* of other States." *Id.* at 460 (emphasis added); see also *id.* at 461 (noting that the tax "operate[d] as a discriminative burden against the introduction and sale of the products of another State, *or against the citizens of another State*") (emphasis added). Thus, the constitutional infirmity of the tax in *Walling* was as much its discrimination against the out-of-state wholesaler

and its representative, as its discrimination against imported alcohol products.

In *Scott*, this Court invalidated a South Carolina law that required all liquor sales to be channeled through a state liquor commissioner, on the ground that the law included provisions that "discriminated against out-of-state manufacturers." *Granholm*, 544 U.S. at 479. The Court relied on *Walling* and its reasoning. *Scott*, 165 U.S. at 94. It also stated that alcohol is entitled to "the same measure of protection, under the constitution and laws of the United States, as is given to other articles." *Id.* at 91. The Court therefore relied upon Commerce Clause cases involving nonalcohol products that had voided state statutes on the ground that they "discriminat[ed] against the products *and business* of other states." *Id.* at 97 (emphasis added).

Like this Court's more recent cases, *Walling* and *Scott* demonstrate that discrimination against alcohol *products* and discrimination against the *people who own businesses* that sell them cannot be separated for analytical purposes. They further demonstrate that TWSRA's assertion that only laws discriminating against out-of-state products are subject to the dormant Commerce Clause is historical revisionism. Because the Twenty-first Amendment did not grant the States powers to discriminate against interstate commerce that "they had not enjoyed at any earlier time," *Granholm*, 544 U.S. at 484-85, it left States without power to discriminate against either out-of-state products or out-of-state business owners, because they did not have either power in the pre-Prohibition era.[9]

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[9] TWSRA repeatedly suggests that this Court upheld a residency requirement for liquor licenses in *Vance* v. *W.A.*

2. Some of TWSRA's *amici* attempt to limit *Granholm* in another way, arguing that it only prohibits discrimination against out-of-state *producers*, but not *wholesalers* or *retailers*. See, *e.g.*, Br. of American Beverage Licensees 13-18. TWSRA wisely does not make this argument. Again, this Court did not state such a limitation in *Granholm*. And as shown, although the Court naturally referred to alcohol "products" and "producers" throughout the *Granholm* opinion because the case involved wine and wineries, the language of the opinion broadly encompasses out-of-state business interests—without any limitation to out-of-state producers. See also *Granholm*, 544 U.S. at 472 ("States may not enact laws that burden out-of-state producers *or shippers* simply to give a competitive advantage to in-state businesses.") (emphasis added). This argument also ignores that *Granholm* itself was fundamentally

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Vandercook Co., 170 U.S. 438 (1898), but no such requirement was at issue in that case. *See* TWSRA Br. 18, 27, 35. *Vance* involved a constitutional challenge to South Carolina's law that gave state officers exclusive authority to buy liquor for resale in the State, subject to an exception for shipments of liquor from out-of-state sellers to South Carolina residents for personal use. 170 U.S. at 443. One of the arguments against that law was that it discriminated against interstate commerce by providing the state agents with the "opportunity" to "buy in one State to the detriment and exclusion of the products of every other State." *Id.* at 450. In rejecting that argument, the Court analogized to a *hypothetical* state law in which the in-state agents were private individuals ("residents"). *Id.* at 451. The Court used the hypothetical to explain that neither South Carolina's actual system nor the hypothetical one would exclude out-of-state liquor because South Carolina consumers still could purchase such products for personal use. *Id.* at 451-52. In posing the hypothetical, the Court did not actually consider or address the States' authority to impose residency requirements, much less durational residency requirements like those at issue here.

about *retail sales*, and whether wineries could serve as their own *retailers* and *wholesalers*. Accordingly, any suggestion that *Granholm* was merely about "producers" ignores the realities of that case. Moreover, that limitation would distort the legal inquiry by encouraging disputes over artificial attempts to categorize regulations as affecting only one tier or another, which is wholly unnecessary to protect the three-tier system.

This proposed limitation of dormant Commerce Clause protections to producers also is inconsistent with this Court's prior decisions. In *Bacchus*, for example, Hawaii's discriminatory excise tax was imposed on *wholesale* liquor sales, and the appellants who brought the constitutional challenge were *wholesalers*. *Bacchus*, 468 U.S. at 265-66. This Court specifically held that the wholesalers had standing to challenge the tax, *id.* at 267, clearly recognizing that the discriminatory effects of Hawaii's scheme extended beyond "products" and "producers." Similarly, in *Healy*, this Court condemned Connecticut's price affirmation scheme because it discriminated against both brewers *and shippers* of beer engaged in interstate commerce. *Healy*, 491 U.S. at 340-41; *id.* at 329 (noting that the plaintiffs included "major producers *and importers* of beer") (emphasis added). Thus, nothing in *Granholm* and this Court's prior decisions supports the notion that, with respect to the alcoholic beverages industry alone, the nondiscrimination principle is limited to producers.

3. TWSRA also attempts to re-classify this Court's precedents based on whether the laws at issue were within a State's "core powers" under the Twenty-first Amendment. TWSRA Br. 37-44. According to TWSRA, a law is "core" if it directly

regulates the sale or use of liquor within a State's borders. TWSRA Br. 6 (citing *Capital Cities*, 467 U.S. at 713). And, according to TWSRA's analysis, if a state law is core, the State's authority is "unfettered by the dormant Commerce Clause." *Id.*

This argument also disregards the evolution of Twenty-first Amendment case law. The *Capital Cities* opinion alluded to the older, "core power" rubric—in a case rejecting a Twenty-first Amendment defense of a state law that prohibited in-state alcoholic beverage advertising, including from cable signals originating out-of-state. (The Commerce Clause was not at issue in *Capital Cities*; the question was whether federal cable broadcasting regulations pre-empted the Oklahoma advertising ban.) Notwithstanding its reference to a State's core powers, the *Capital Cities* decision balanced the competing state and federal interests in a matter involving how liquor could be marketed within the State in order to determine whether the state law could be salvaged by the Twenty-first Amendment. 467 U.S. at 712-16.

Eleven days after *Capital Cities*, the Court struck down Hawaii's wholesale liquor tax that exempted two locally manufactured alcoholic beverages—a law that was clearly within TWSRA's broad conception of Hawaii's "core powers" to regulate the sale of beverages within the State. *Bacchus*, 468 U.S. 263. In *Bacchus* (as in *Granholm*), the Court recognized that despite broad language in some of its early opinions, it had "more recently" recognized "the obscurity of the legislative history of § 2" of the Twenty-first Amendment. *Id.* at 274. In fact, "[n]o clear consensus concerning the meaning of the provision is apparent." *Id.* Consequently, the Court held that alcohol regulations that discriminate

against out-of-state interests must be subjected to a "pragmatic effort to harmonize state and federal powers." *Id.* at 275 (quoting *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980)). And the Court concluded that state laws are not immune from Commerce Clause scrutiny merely because they regulate the sale or use of liquor inside the State. On the contrary, state laws that constitute "mere economic protectionism" are not entitled to the same deference as those "enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276.

Thus, a state liquor law that discriminates against out-of-state interests is judged not simply by whether it regulates in-state distribution (the "core power" rubric), but also by whether it promotes a core purpose of the Twenty-first Amendment, and whether the promotion of that purpose outweighs the Commerce Clause interests at stake. *Id.* at 275-76. The core purposes of § 2 are typically identified as the promotion of temperance, see *id.*, and the preservation of "orderly market conditions," see *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion), which is often said to include the facilitation of taxation. *E.g.*, *Bainbridge* v. *Turner*, 311 F.3d 1104, 1115 (11th Cir. 2002). The precise boundaries of core § 2 purposes are inherently fuzzy, but "erecting barriers to competition" in order to favor local liquor industries is decidedly outside of them. *Bacchus*, 468 U.S. at 276. After *Bacchus* (and at times before), this Court has regularly invalidated state laws that facially regulate in-state distribution but clearly promote economic protectionism. See *Brown-Forman*, 476 U.S. 573 (laws that facially regulate in-state sales but effectively regulate commerce in other States are not insulated from

Commerce Clause scrutiny); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 348 (1987) (purely in-state pricing regulations were invalidated by federal law even if State intended the regulations to protect small retailers); *Healy*, 491 U.S. 324 (invalidating Connecticut law that required beer distributors to affirm that prices to Connecticut wholesalers were no higher than prices in bordering States); *Granholm*, 544 U.S. at 493 (States' power to ban direct shipping by out-of-state wineries is not unfettered when state law permits direct shipping by in-state wineries).

TWSRA's effort to classify all inconvenient cases as "non-core" is unpersuasive. See TWSRA Br. 40-41. To claim that these cases were "unrelated to the structure of the alcohol distribution system," *id.* at 41, is fantasy; the laws at issue in *Midcal*, *324 Liquor*, *Bacchus*, *Brown-Forman*, *Healy*, and *Granholm* all related to in-state pricing, taxation, or shipping of alcoholic beverage products as they moved through the relevant State's three-tier system. Indeed, TWSRA recognizes that *Bacchus* does not fit its taxonomy, so it claims that discrimination against out-of-state products is non-core while, presumably, any other type of discrimination against out-of-state economic interests or market participants is core. TWSRA Br. 43. That makes no sense. As noted, the argument ignores that the Tennessee law at issue facially discriminates against out-of-state persons who want to sell products, most of them originating from out-of-state, through in-state retail stores. Because the objects of the State's discrimination are the persons who wish to sell alcoholic beverages rather than the alcoholic beverages themselves, TWSRA contends that the Tennessee law is within the State's purported "core power" to discriminate. Even so, TWSRA's products-only rule is inconsistent

with *Granholm*, which invalidated a law that discriminated against out-of-state suppliers, as much as the products they supplied.

The Court should not adopt TWSRA's awkward attempt to bifurcate the case law. This Court's modern cases set forth a practical analysis that balances how well a discriminatory state law serves a core Twenty-first Amendment purpose against the Commerce Clause interests at stake. When the law is fundamentally and undeniably aimed at protecting in-state economic interests by creating barriers to entry, as the Tennessee law here unquestionably is, the Twenty-first Amendment provides no exemption from the dormant Commerce Clause's "core purpose" of prohibiting such economic "Balkanization." Instead, "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Granholm*, 544 U.S. at 476 (quoting *City of Phila.* v. *New Jersey*, 437 U.S. 617, 624 (1978)).

4. A number of *amici* supporting TWSRA falsely depict this case as an attack on the three-tier system prevalent in most States. TWSRA itself is more circumspect; it sees the three-tier system as a justification for certain types of interstate discrimination, but does not quite say that the decision below will dismantle the three-tier system. The "attack" argument is presented most hyperbolically in the States' *amici* brief, which makes no discernible effort to understand what this case is about and consequently presents page after page of argument that is fully consistent with Total Wine's position, and indeed with its business model. *E.g.*, States' Br. 28-29 (worrying that "a State cannot inspect the premises of retailers that operate out of state").

Total Wine is a brick-and-mortar retailer operating in Knoxville, Tennessee, and sells alcoholic beverages to Tennessee residents only from that store. Its owners also operate retail stores in many other States but Total Wine does not use them, or want to use them, to sell products to Tennesseans. Total Wine's Knoxville store is owned by a Tennessee LLC (organized under the laws of Tennessee, but whose owners are nonresidents). Total Wine possesses, and wants to retain, a Tennessee license to sell alcoholic beverages. Total Wine purchases the product it sells at retail in Tennessee exclusively from Tennessee-licensed wholesalers. Total Wine's managers and employees are Tennessee residents and generally live in or around Knoxville, where the store is located. Total Wine adheres to the extensive Tennessee laws and regulations that govern the retail sale of alcoholic beverages in Tennessee; indeed, Total Wine's vast experience gives it many advantages in fulfilling state and community imperatives such as combating underage liquor sales; tracking inventory; paying taxes; and so forth. The decision below changes none of this, except the requirement that the LLC members be Tennessee residents for nine years. That modest change is not even a superficial wound to the three-tier system, much less the mortal blow that many *amici* conjure.

The rationales for a durational residency requirement advanced by TWSRA and its *amici*—whether for two years or ten—are flimsy, unsupported by empirical or even anecdotal evidence. The most common rationale is that residency requirements ensure licensee investment in the welfare of the community, whose members bear the benefits and burdens of liquor sales. Yet no one who advances this rationale can explain why Total Wine,

with dozens of community employees and millions of dollars in community investment, will not understand or care about the local community in which it does business. Nor can anyone explain how the Tennessee residency requirement, which applies to state residency, has any effect on community investment. For example, a resident on the south side of State Street in Bristol, Tennessee, can own a store 500 miles away in Memphis, while a resident of the north side (in Bristol, Virginia) cannot even own a store on the south side.

Predictably, the *amici* briefs invoke the historic evils of prostitution, gambling, organized crime and, more dubiously, "tied houses." *E.g.*, States' Br. 12-13. All parties, assuredly including Total Wine, stoutly oppose the first three of these vices, and tied-houses no longer exist under the three-tier system, which is why Total Wine supports that system. But none of these historic evils has a rational connection to a durational residency requirement for retail-store licensees. (A residency requirement would not have saved Illinois or any other State from the predations of Al Capone, who flourished during Prohibition, when liquor regulation was at its zenith.) The historic concerns about nonresident ownership arose from the belief that ownership of saloons by national or regional breweries (the tied-house concept) was tainted by a profit motive to sell more product for immediate (or "on-premises") consumption. Tennessee has never alluded to any such concerns in this litigation—and it could not credibly do so, given that it permits nonresident ownership of saloons, bars, and restaurants that sell liquor by the drink.

Numerous *amici* also contend that States cannot adequately regulate nonresident owners. This is nonsense. Tennessee has vast authority to regulate

Total Wine, which invested millions in a 30,000 square-foot brick-and-mortar store and an extensive inventory consisting of more than 10,000 separate products. Total Wine employs Tennessee residents who operate the store, and its license and corporate charter are issued by the State and subject to its plenary control. That the owners of the LLC reside in other States does not mean they are difficult to regulate. Tennessee can (and does) predicate issuance of a license on thorough background checks of the owners and operators of all package stores, even (or perhaps especially) those owned by nonresidents like Total Wine. And the State can impose any number of other conditions such as in-person interviews of owners, appointment of in-state agents for service of process, forfeiture bonds, and so forth, so long as the conditions are nondiscriminatory. In sum, none of the *amici* who argue that durational residency requirements are important to the States' regulatory purposes adequately explain how regulatory control is improved by requiring durational residency for owners—as opposed to, or in addition to, physical presence of the retail stores.

A common feature of all forms of discrimination is the insiders' belief that outsiders are somehow immoral, depraved, uncaring, or ignorant. These beliefs are usually grounded in fear, prejudice, or protectionism, rather than evidence. And certainly TWSRA and its *amici* cite no evidence (and there is none in the record) that a Tennessee company with a Tennessee license that operates a Tennessee liquor store through Tennessee employees will lead to untoward sales of alcohol simply because the company is owned by persons who have not lived in Tennessee for nine years. Given that no other State

has a similarly restrictive requirement, it is hard to take seriously the suggestion that this insuperable barrier to entry is even a rational way to promote Tennessee's regulatory interests.

Commercial discrimination against nonresidents may not have the same moral force as racial discrimination against African-Americans or gender discrimination against women, but it is nonetheless highly suspect as a legislative rationale and fundamentally inconsistent with the Constitutional design. The nondiscrimination principle of the dormant Commerce Clause saves the States from the economic Balkanization that escalates whenever one State discriminates against another's products *or its citizens*. The logical response is retaliation, followed by further protectionist measures, and ultimately a nation of fragmented and insular markets. This Court must police the boundaries and strike down senselessly protectionist laws, like Tennessee's in this case.

In sum, the Tennessee durational residency requirements at issue here are blatantly discriminatory against nonresident business interests, and the State has not met its burden of demonstrating that they are justified by legitimate regulatory interests that outweigh the protections of the dormant Commerce Clause.

III. THE COURT SHOULD NOT CONSIDER TENNESSEE'S TWO-YEAR RESIDENCY REQUIREMENT IN ISOLATION, BUT IF IT CONCLUDES THAT A TWO-YEAR REQUIREMENT MIGHT BE CONSTITUTIONAL, IT STILL SHOULD AFFIRM BECAUSE THAT REQUIREMENT IS NOT SEVERABLE FROM THE REMAINING PROVISIONS ENJOINED BY THE COURTS BELOW.

In its petition and briefing, TWSRA attempts to avoid review of the actual Tennessee statute as written, and in the form in which it was enjoined by the lower courts. The district court enjoined in its entirety a Tennessee statute that required an individual applicant for a retail liquor license to establish two years of Tennessee residency before qualifying for an initial license, and ten years of consecutive Tennessee residency before qualifying to renew that license after it expired a year later. With respect to corporations and other business entities, the Tennessee statute imposed those requirements on *every* officer, director, and stockholder of a prospective licensee. See JA106 (enjoining enforcement of "the residency requirements under Tenn. Code Ann. § 57-3-204," which include the ten-year residency requirement for renewals and the requirements for business entities).

Unwilling to defend several aspects of that scheme, TWSRA seeks to carve out for constitutional approval the two-year residency requirement for initial licenses—and thereby urges this Court to disregard the ten-year renewal requirement and the 100% stockholder requirement for business entities (which even the dissenting judge in the court of appeals

could not abide).[10] The Court should decline this invitation, for multiple reasons.

First and foremost, the two-year residency requirement is as discriminatory and indefensible as the other requirements in the statute. For all of the reasons previously described, that requirement presents an insurmountable barrier to nonresidents who have no desire to relocate to Tennessee, such as the owners of Total Wine, and serves no state interest other than the impermissible one of protecting TWSRA's members from competition.

Second, TWSRA's request is procedurally improper. This Court's function is to review the judgments that come before it, *California* v. *Rooney*, 483 U.S. 307,

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[10] TWSRA asserts that this case "asks whether Tennessee violated the dormant Commerce Clause by limiting retail liquor licenses to individuals who have resided in Tennessee for the previous two years, and to corporations whose directors and officers satisfy the same requirement." TWSRA Br. 6.

TWSRA asserted at the petition stage that "this case is, and has always been, about" only the two-year residency requirement, Cert. Reply Br. 2, but that is wishful thinking. Although the introduction of the State's Complaint for declaratory judgment addressed only the two-year residency requirement, JA10-11, the body of the Complaint quoted the license renewal provision in § 57-3-204(b)(2)(A), JA12-13 (Compl. ¶ 7), and described both Affluere and Total Wine as business entities that did not meet the residency requirements in § 204(b)(2)(A), JA14 (Compl. ¶¶ 12-13). More importantly, after the district court realigned Total Wine and Affluere as plaintiffs, Total Wine sought summary judgment with respect to the individual and corporate residency requirements in §§ 57-3-204(b)(2)(A) and (3)(A), which include the ten-year renewal provision and the 100% stockholder requirement. JA46-49. The lower courts therefore addressed all of these provisions (as TWSRA concedes, TWSRA Br. 13-14, 16-17), and they all are currently enjoined under the district court's order, which was affirmed *in toto* by the court of appeals.

311 (1987) (per curiam), and not to carve out from those judgments academic questions that do not resolve the case. The judgment here enjoined all of the residency requirements in § 57-3-204, without any differentiation or separate treatment of them. TWSRA is trying to avoid review of the actual judgment and statute at issue by asking this Court to issue an advisory opinion on whether a hypothetical state statute that imposed less blatantly protectionist provisions might pass constitutional muster. The Court should deny this request and review the statute that was enacted, has been enjoined, and that frames the actual controversy between the parties. Because both respondents have now obtained initial licenses, this case turns for them, in substantial part, on the validity of the ten-year renewal requirement. In addition, both respondents are business entities subject to the "any officer, director, or stockholder" provision of § 57-3-204(b)(3); even today Total Wine cannot satisfy that provision.

Third, even if the Court were to review in isolation the two-year residency requirement for initial licenses, it would have to affirm the decision below no matter what it decides. This is because the two-year requirement is not severable from the other residency requirements in § 57-3-204(b).

The question whether the residency requirements in § 57-3-204(b) are severable from each other "is of course a matter of state law." *Virginia* v. *Hicks*, 539 U.S. 113, 121 (2003). The issue of severability was not briefed below, and neither lower court addressed it. The court of appeals found that the residency scheme as a whole could be severed from other provisions of Tennessee's retail license law, which address various "unrelated" topics (*e.g.*, minimum age requirement, application fees), Pet. App. 33a-37a, but

it did not address the distinct and more difficult question whether the individual components of Tennessee's residency scheme can be severed from each other. Normally, this Court would remand such an unaddressed question of state law and could do so here. See, *e.g.*, *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006).

Alternatively, the Court could affirm because it is clear that the two-year residency requirement cannot be severed under Tennessee law. Tennessee's "doctrine of elision" permits severance, but the doctrine "is not favored." *State* v. *Tester*, 879 S.W. 2d 823, 830 (Tenn. 1994). Elision is appropriate only "if it is made to appear *from the face of the statute* that the legislature would have enacted it with the objectionable features omitted," and if this conclusion can be reached "*fairly clear of doubt from the face of the statute*." *Id.* (emphases added). A severability clause "in the statute" is evidence in favor of elision. *Id.* While the Tennessee Code contains a general severability provision, Tenn. Code Ann. § 1-3-110, that provision is not "automatically" applicable to every situation. *In re Swanson*, 2 S.W. 3d 180, 189 (Tenn. 1999). To the contrary, elision is appropriate only "when a conclusion can be reached that the legislature would have enacted the act in question with the unconstitutional portion omitted." *Id.*

Tennessee's retail licensing law itself does not contain a severability clause, and there is no evidence on the face of the residency requirements or the licensing provisions as a whole to indicate that the legislature would have enacted the residency requirements without the provisions that TWSRA is unwilling to defend. As shown above, it is the interplay between the residency requirements for an initial license and the ten-year renewal requirements

that creates the powerful (and insurmountable) barrier to entry for out-of-state residents that the legislature enacted. The various provisions enjoined by the courts below plainly work together and, indeed, the protectionist whole is greater than the sum of the component parts. In these circumstances, the Court cannot reach a conclusion "clear of doubt" that the legislature would have enacted the two-year durational residency requirement as a stand-alone provision and omitted the renewal requirements entirely, or that it would have enacted some residency requirement for business entities that did not include all of the applicant's officers, directors, and stockholders.

This Court frequently has held that it will not "rewrite a state law to conform it to constitutional requirements." *Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988); *Ayotte*, 546 U.S. at 329. Yet TWSRA is asking the Court to do exactly that, and in a way that will require taking a scalpel to § 57-3-204(b)(2)(A) and (3)(A)-(B). The ten-year residency requirement for renewals is contained in the *same sentence* as the two-year requirement for initial applications in both § 204(b)(2)(A) and (3)(B). As a result, severance would require this Court to reach the highly improbable conclusion that one clause of a statutory sentence reflects protectionism and legislative arbitrariness, while the other clause does not. In addition, the 100% stockholder requirement could not be excised from the statute without redrafting it. See Pet. App. 54a (Judge Sutton suggesting that a 51% stockholder requirement might be constitutional). As a result, a judicial remedy would necessarily "entail quintessentially legislative work." *Ayotte*, 546 U.S. at 329.

The Court should invalidate Tennessee's constitutionally infirm residency scheme in its entirety. This is what the lower courts did, and their judgments should be affirmed.

IV. IF THE COURT OF APPEALS' DECISION IS REVERSED, THIS COURT SHOULD REMAND TO PERMIT THE LOWER COURTS TO CONSIDER TOTAL WINE'S PRIVILEGES AND IMMUNITIES CLAUSE CHALLENGE.

Total Wine argued in the district court and the court of appeals that Tennessee's durational residency requirements violate both the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV of the federal Constitution. U.S. Const. art. IV, § 2, cl. 1; JA46-49. It contended that the requirements deprive Total Wine's individual owners of any opportunity to engage in a lawful business in Tennessee "on terms of substantial equality with the citizens of that State," a right protected by the Privileges and Immunities Clause. *Supreme Court of N.H.* v. *Piper*, 470 U.S. 274, 280 (1985); see also *Lebamoff Enters., Inc.* v. *Rauner*, No. 17-2495, 2018 WL 6191351, at *7-8 (7th Cir. Nov. 28, 2018) (reversing dismissal of out-of-state retailer's challenges to Illinois restrictions on direct shipment and remanding case for further consideration of claims presented under both the dormant Commerce Clause and the Privileges and Immunities Clause).

Total Wine briefed this issue in the lower courts, but the district court declined to reach it, Pet. App. 80a-81a, and the court of appeals did not address it. Accordingly, if this Court reverses the court of appeals' ruling on the dormant Commerce Clause, it ordinarily would and in this case should remand the case so that the district court can address this

independent constitutional challenge to Tennessee's durational residency requirements. See *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920-22 (2017) (remanding for consideration of an argument "never confronted" below).[11]

CONCLUSION

For the foregoing reasons, the decision below should be affirmed. If the Court reverses the decision below, it should remand for consideration of Total Wine's Privileges and Immunities Clause challenge.

Respectfully submitted,

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[11] Total Wine obviously is not opposed to an affirmance on this ground or the alternative ground proposed by Affluere.