No. 18-96

In the Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

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

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

BRIEF FOR ILLINOIS, ALABAMA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF AMICI CURIAE

Illinois, 34 States, and the District of Columbia submit this brief in support of Petitioner to urge reversal of the judgment of the court of appeals, which held that Tennessee's statutory durational residency requirement for retail alcohol licensees violated the dormant Commerce Clause.

All of the Amici States have enacted statutes that regulate the manufacture, distribution, and sale of alcohol within their borders. Some of them impose durational residency requirements on alcohol retailers, some do not impose residency requirements but do require that retailers have a physical presence in the State, and some assume monopolistic control over the in-state liquor market. But all of the Amici States recognize the need to exercise their Twenty-first Amendment authority to regulate the liquor market. These States realize that excessive alcohol consumption poses great risks to local health and safety and that the liquor market is uniquely susceptible to infiltration by criminal elements. Therefore, it is vital to the Amici States to have the authority to regulate the manufacture, distribution, and sale of alcohol within their borders, and the discretion to adapt their regulatory regimes to their particular needs.

SUMMARY OF ARGUMENT

As explained in Petitioner's opening brief, Tennessee's durational residency requirement for retail alcohol licenses does not violate the dormant Commerce Clause. This brief focuses on the important interests that are served by States' regulation of the manufacture, distribution, and sale of alcohol within their borders. States have long recognized the dangers associated with the liquor market, and the text of the Twenty-first Amendment guarantees them broad authority to regulate "the delivery or use" of alcohol to prevent those harms.

Contrary to the Sixth Circuit's decision, the States' need to regulate this market is not driven by economic protectionism. Instead, States have an interest in ensuring an orderly liquor market to avoid the evils that were brought about by the pre-Prohibition practice of tied houses and the Prohibition-era infiltration of the liquor market by organized crime. States also have an interest in enforcing their liquor laws, inspecting premises and records, and holding retailers accountable for violation of state laws that are designed to protect the public health and safety. And States have an interest in promoting a system in which alcohol retailers have a connection to the local communities they serve and an understanding of those communities' needs.

Durational residency requirements such as Tennessee's serve all of these interests by preventing absentee ownership of alcohol retail premises. Absentee owners have a lesser investment in the community than residents; States cannot effectively oversee absentee owners to ensure compliance with state laws; and absentee owners are less likely to be held accountable for violating a State's laws.

For the past 85 years, States have exercised their Twenty-first Amendment power to adopt and adapt regulatory regimes to control the retail liquor market within their borders. The breadth and variety of state responses to the risks endemic to the liquor market illustrate the need for broad discretion to regulate the retail sale of alcohol.

ARGUMENT

I. Durational residency requirements for liquor retailers serve important state interests.

States both before and after Prohibition have recognized the many ways in which alcohol presents a "potential danger to the community's safety and general welfare." *In re DLC Corp.*, 712 A.2d 389, 392 (Vt. 1998); *see also*, *e.g.*, *Ex parte Townsend*, 144 S.W. 628, 631 (Tex. Crim. App. 1911) ("[T]he use of intoxicating liquors is well nigh universally acknowledged to be injurious to the health, morals, and safety of the people . . . ."). When the nation chose to repeal the Eighteenth Amendment, it acknowledged that Prohibition's attempt to devise a one-size-fits-all federal response to that danger had been a failure. *See* Sidney J. Spaeth, *The Twenty-first Amendment and State Control over Intoxicating Liquor*, 79 CALIF. L. REV. 161, 162 (1991). In lieu of that flawed federal response, the drafters and ratifiers of the Twenty-first Amendment aimed to more effectively "promote temperance," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (internal quotation marks omitted), by returning to the States the authority to control the sale and consumption of alcohol, U.S. Const., amend. XXI, § 2.

The issue has always been one that the States are best positioned to understand and address, for excessive alcohol consumption occurs locally, and its costs—including increased criminal enforcement expenses, lost workplace productivity, and higher healthcare spending—are borne in significant part by state and local governments.[1] And States are on the front lines in combating the many ways in which the liquor market has attracted criminal activity, from impurities added to illegally distilled spirits to organized crime's involvement in channels of distribution. *See Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 198 (2d Cir. 2009) (Calabresi, J., concurring).

For these reasons, the manufacture, distribution, and sale of alcohol within a State are matters of paramount local concern. Accordingly, for well over a century, States have extensively regulated the provision of alcohol to their residents, first under their inherent police power to protect the health, safety, and morals of their citizens, and then under the extended authority conferred on them by the Wilson Act, the Webb-Kenyon Act, and section 2 of the Twenty-first Amendment. *See, e.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984) (recognizing States' core powers under the Twenty-first Amendment "to regulate the sale and use of liquor within [state] borders"); *Crowley v. Christensen*, 137 U.S. 86,

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[1] Centers for Disease Control and Prevention, Excessive Alcohol Use: A Drain on the American Economy, https://www.cdc.gov/alcohol/onlinemedia/infographics/excessive-alcohol-economy.html.

91 (1890) (recognizing States have a long tradition of regulating alcohol through police power). Indeed, the concern is so great that some States expressly grant their legislatures the power to regulate the liquor market in their state constitutions. *See, e.g.*, Mich. Const. art. IV, § 40; Ok. Const. art. XXVIII-A; Or. Const. art. I, § 39; S.C. Const. art. VIII-A.

States have used these powers to craft solutions tailored to their individual circumstances. Unsurprisingly, those solutions vary significantly from State to State, but there are patterns: since the end of Prohibition, the States have generally adopted one of two models. The so-called control States have assumed monopolistic control over the distribution and retail sale of alcohol. Other States have adopted a three-tier system that separates the layers of the alcohol market and places separate licensing requirements on manufacturers, distributors or wholesalers, and retailers. *See Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (recognizing the three-tier system as "unquestionably legitimate")).

The retail tier at issue in this case is comprised of both on-premises retail establishments, such as bars or taverns, and off-premises retail establishments where the alcohol is not consumed on-site, such as traditional liquor stores. This tier is the final link in the chain between the producer and the end consumer. As the remainder of this Section will show, regulation of the retail tier is closely tied to the States' interest in addressing the unique challenges posed by alcohol consumption.

A. Durational residency requirements serve the core state interest of maintaining orderly liquor markets.

States have an interest in promoting orderly liquor markets, *see North Dakota*, 495 U.S. at 432 (plurality op.), so that they can track the flow of alcohol from producer to consumer and facilitate the sale of lawful and safe goods, free from the influence of organized crime or other illegal interests.

The promotion of orderly liquor markets has long been identified as a core purpose of section 2 of the Twenty-first Amendment. *Id.* at 432, 440; *Arnold's Wines, Inc.*, 571 F.3d at 188 ("The purpose of section 2 was to protect certain core interests of the states in 'promoting temperance, ensuring orderly market conditions, and raising revenue' through regulation of the production and distribution of alcoholic beverages." (quoting *North Dakota*, 495 U.S. at 432)). Core interests under section 2 are treated "with particular care" and granted additional deference. *North Dakota*, 495 U.S. at 432, 440; *see also Bacchus*, 468 U.S. at 276 ("State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.").

To facilitate orderly markets, many States have established comprehensive three-tier regulatory systems. *North Dakota*, 495 U.S. at 432. This type of system "serve[s] to channelize the traffic in liquor and thus to prevent diversion of that traffic into unauthorized channels." *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345 (1964); *see also State Bd. of Equalization of Cal. v. Young's Market*

Co., 299 U.S. 59, 63 (1936), *abrogated on other grounds by Granholm*, 544 U.S. at 485 (retailer licensing fees "serve as an aid in policing the liquor traffic"). Within this system, the retail tier is crucial because retailers "form the final link in the distribution chain." Pet. App. 50a (Sutton, J., dissenting). As the final link, retailers assure that the goods sold to consumers are safe and legal, and that they have been distributed from manufacturer to consumer in accordance with state law.

It is reasonable for States to conclude that absentee ownership of alcohol retailers harms the interest in maintaining orderly liquor markets. Durational residency requirements aim to ensure that retailers remain accountable to state or local interests by being accessible to regulators and courts. Unlike residents, absentee liquor retailers with no meaningful connection to the State may not share the State's interest in maintaining an orderly market. Nor are States and local governments able to hold non-resident retailers to account to the same extent as resident retailers, as it is simply not possible for state regulators to traverse the country inspecting retailers or speaking to far-flung owners. Without effective State oversight of retail sales, States cannot, for example, ensure that organized crime or other unscrupulous interests are kept out of the liquor markets.

Residency and presence requirements are not new; requiring retailers to reside in-state or to maintain an in-state presence is a practice that long predates Prohibition. *See, e.g.*, *State v. Adams*, 6 N.H. 532, 533 (N.H. 1834) (requiring "licensed houses" to obtain a "license, in writing, from the selectmen of the town or place where such person resides" or, if no selectmen are available, from the court of Common Pleas "to exercise the business of a taverner"). In the 1880s, for example, Nebraska imposed a residency requirement on retailers, and Indiana followed suit soon afterward. *See Mette v. McGuckin*, 25 N.W. 338 (Neb. 1885); *Welsh v. State*, 25 N.E. 883 (Ind. 1890).

These requirements were widely understood to be constitutional at the time. As the Indiana Supreme Court explained in a contemporaneous decision, "[i]t is not an unreasonable requirement that a person who desires to avail himself of a license to retail intoxicating liquor shall submit himself to the jurisdiction of the state, by becoming an inhabitant thereof." *Welsh*, 25 N.E. at 885; *see also Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 451–52 (1898) (positing that a residency requirement would be lawful so long as the resident retailers did not "discriminate against the persons or places from where or from whom they did not buy").

Residency requirements were of limited utility in ensuring orderly markets, however, until Congress granted States the authority to regulate liquor that had been shipped in interstate commerce. Without the protections of the Twenty-first Amendment, liquor was treated largely the same as any other good in interstate commerce. *See Leisy v. Hardin*, 135 U.S. 100, 121–23 (1890), *superseded by statute*, Wilson Act, 27 U.S.C. § 121, *as recognized in Granholm*, 544 U.S. at 478. Accordingly, the interstate distribution of liquor in original packages could not be limited by the States without express congressional authority. *See id.* at 119 ("[W]here the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, congress can alone act upon it, and provide the needed regulations.”).

In practical terms, this meant that States with durational residency statutes could not prohibit or regulate sales of liquor in its original package by nonresident liquor retailers to their resident consumers. *See id.* at 122–23; *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 852 (7th Cir. 2000) (“[T]o enforce these laws states had to deal with liquor arriving from other states and nations—and their ability to do so was regularly defeated by decisions invoking the commerce clause.”). This state of affairs caused many problems, as States were forced to allow out-of-state liquor shipments to enter their territory, without any ability to verify their provenance, ensure their safety, or otherwise maintain an orderly market. *See, e.g.*, Lindsay Rogers, *Interstate Commerce in Intoxicating Liquors before the Webb-Kenyon Act*, 4 VA. L. REV. 353, 364 (1917). By 1912, it was estimated that approximately 20 million gallons of liquor were shipped in interstate commerce to dry States. *See* 49 Cong. Rec. 699–700 (1912) (statement of Sen. Sanders). To take one example, out-of-state retailers would ship jugs of liquor to express offices in Iowa with no deliverable address. Rogers, *Interstate Commerce in Intoxicating Liquors before the Webb-Kenyon* Act, 4 VA. L. REV. at 364–65. Without a delivery address, the liquor would remain in the express office until it was retailed “to whomever would pay the case charges, the value of the liquor, and the cost of transportation.” *Ibid*. As a result of these “daily trainloads of liquors in bottles, jugs, and other packages,” the express offices were “converted into the most extensive and active whisky shops, from which whisky [was] openly distributed in great quantities." 49 Cong. Rec. 761 (1912) (statement of Sen. Kenyon).

The problems that arose during this period led to the passage of the Wilson Act in 1890 and the Webb-Kenyon Act in 1913, both of which were designed to improve the States' ability to control and regulate their liquor markets. *See* 27 U.S.C. §§ 121–22. The Wilson Act granted States the power to regulate "the resale of imported liquor," and the Webb-Kenyon Act enabled States to "forbid shipments of alcohol to consumers for personal use, provided that the States treated in-state and out-of-state liquor on the same terms." *Granholm*, 544 U.S. at 480–81 (citing *Rhodes v. Iowa*, 170 U.S. 412, 421 (1898); *Clark Distilling Co. v. W. Maryland Ry. Co.*, 242 U.S. 311 (1917)). As their authority to regulate expanded, more States implemented residency requirements. *See, e.g.*, R.I. Gen. Laws, ch. 123 § 2 (1909); Tex. Rev. Civ. Stat., art. 7446 (1911).

All of these state regulatory schemes were cast aside during Prohibition, which "bred a new kind of lawlessness" dominated by "a violent and unruly organized crime industry." *Maxwell's Pic-Pac, Inc. v. Dehner*, 739 F.3d 936, 938–39 (6th Cir. 2014). Worse yet, this lawlessness remained largely unchecked, because the Eighteenth Amendment "gave concurrent enforcement powers to state and federal authorities," and "[e]verybody's business soon became nobody's responsibility." *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 856 (S.D.N.Y. 1985). "The state and local officials had more important work to do than enforce this unpopular law," and the federal government removed these "cases from the regular federal law enforcement agencies and entrusted the work to special agents," who were underpaid and easily corrupted. *Ibid.*; *see also* Spaeth, *Twenty-first Amendment and State Control*, 79 CALIF. L. REV. at 162.

In the wake of Prohibition's failure, the States' regulatory authority was reinstated and further solidified by the ratification of the Twenty-first Amendment, which was "adopted with 'unexpected speed.'" *Nat'l Distrib. Co., Inc. v. U.S. Treasury Dep't, Bureau of Alcohol, Tobacco & Firearms*, 626 F.2d 997, 1004 (D.C. Cir. 1980) (quoting H.R. Rep. No. 1542, 74th Cong., 1st Sess. 3 (1935)). At the time of ratification and shortly thereafter, both the States and this Court understood the States' ability to regulate the distribution and sale of liquor to be nearly limitless. *Granholm*, 544 U.S. at 485–86; *see also, e.g.*, *Young's Market Co.*, 299 U.S. at 62. Some States banned liquor altogether, but the States that allowed liquor sales either implemented a three-tier system or opted to become control States. *See Granholm*, 544 U.S. at 517 (Thomas, J., dissenting). Of the three-tier States, at least 18 imposed a form of residency requirements in the years following ratification. *See id.* at 518 n.6 (Thomas, J., dissenting).[2]

[2] 3 Colo. Stat. Ann., ch. 89, § 4(a) (1935) (residency requirement); Ill. Rev. Stat., ch. 43 § 120 (Smith-Hurd 1937) (residency requirement); Ind. Stat. Ann. § 3730(c) (1934) (residency requirement); 1 Md. Ann. Code, Art. 2B, § 13 (1939) (residency requirement); 4B Ann. Laws of Mass., ch. 138, §§ 18, 18A (1965) (residency requirements); 5 Comp. Laws Mich. § 9209–32 (Supp. 1935) (residency requirement); 1 Mo. Rev. Stat. § 4906 (1939) (citizenship requirement); Neb. Comp. Stat., ch. 53, Art. 3, §§ 53-317, 53-328 (1929 and Cum. Supp. 1935) (residency and physical presence requirement); 1 Nev. Comp. Laws § 3690.05 (Supp.

One primary reason that States chose to implement residency requirements following the repeal of Prohibition was the failed experiment of "tied houses" in the late nineteenth century. *See* Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control*, ch. 4 (The Center for Alcohol Policy 2011) (1933); *In re Metz Bros. Brewing Co.*, 129 N.W. 443, 443–44 (Neb. 1911) (describing 1907 law prohibiting manufacturers from "becom[ing] interested directly or indirectly in any retail license for the sale of intoxicating or malt liquors"). Tied houses, which flourished in the late 1800s, were "establishments under contract to sell exclusively the product of one manufacturer." Fosdick & Scott, *Toward Liquor Control*, ch. 4; *see also* City of Chicago, Dep't of Hous. & Econ. Dev., Landmark Designation Report, (Former) Schlitz Brewery-Tied House at 11 (Feb. 3, 2011), https://tinyurl.com/yaj5w3qs.

Although the tied house system was initially lauded as an innovation, it later became clear that it revealed

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1931-1941) (residency and physical presence requirements); 2 Rev. Stat. of N.J. § 33:1–25 (1937) (citizenship and residency requirements); N.C. Code Ann. § 3411(103)(1$^{1/2}$) (1939) (residency requirement); 1 N.D. Rev. Code § 5-0202 (1943) (citizenship and residency requirements); Ohio Code Ann. § 6064-17 (1936) (residency and physical presence requirements); R.I. Gen. Laws, ch. 163, § 4 (1938) (residency requirement); 1 S.D. Code § 5.0204 (1939) (residency requirement); Texas Liquor Control Act, ch. 467, § 18, 1935 Tex. Laws 2d Called Sess. 1814 (residency requirement); Vt. Rev. Stat., Tit. 28, ch. 271, § 6156 (1947) (residency requirement); 8 Rev. Stat. Wash. §§ 7306-23G, 7306-27 (Supp. 1940) (physical presence, citizenship, and residency requirement); Wis. Stat. § 176.05(9) (1937) (citizenship and residency requirements); Wyo. Rev. Stat. Ann. § 59-104 (Supp. 1940) (citizenship and residency requirements).

"all the vices of absentee ownership." Fosdick & Scott, *Toward Liquor Control*, ch. 4. Manufacturers, who largely resided out of state, "knew nothing and cared nothing about the community," and were also "beyond local social influence." *Ibid.*; *see also* Landmark Designation Report at 21 (out-of-state breweries were nonresponsive to local complaints and were "regarded as giant and soulless monopolies"). In Chicago, for example, "the tied-house system created multiple saloons" in locations where there had been a single saloon before, with each new saloon "selling only one brand of beer." Landmark Designation Report at 20. As a result, "the lack of job security and increased competition between the ever-growing number of saloons forced some saloon keepers to host vice on their premises in exchange for kickbacks." *Ibid.*; *Maxwell's Pic-Pac, Inc.*, 739 F.3d at 938–39 (during this era, the "free market for alcohol in the United States begot political corruption, prostitution, gambling, crime, and poverty" as "[n]ational manufacturers built saloons near factories to attract workers, saturating neighborhoods with alcohol suppliers").

The tied system was further "believed to enable organized crime to dominate the industry." *Arnold's Wines, Inc.*, 571 F.3d at 187. Preventing "organized crime from (re)gaining control of the alcohol industry" was a "core concern" of section 2 of the Twenty-first Amendment. *Dickerson v. Bailey*, 336 F.3d 388, 404 (5th Cir. 2003); *see North Dakota*, 495 U.S. at 426 (describing the "interest in preventing the diversion of liquor"); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 139 (1939), *abrogated by Granholm*, 544 U.S. at 485 (describing a statute that "declare[d] whiskey removed from permitted channels contraband subject to immediate seizure," to address the problem of unlawful manufacture and illicit distribution, among others). The tied house experience, in short, shows that state efforts to combat absentee ownership were grounded in history and lived experience, not economic protectionism.

But while the interest in an orderly liquor market is rooted in the lessons of history, it is not merely a historical relic. Oklahoma, for example, overhauled its alcohol laws in a popular referendum in 2016, which retained and adjusted a durational residency requirement for spirits retailers. *See Retail Liquor Ass'n of Oklahoma v. Oklahoma Alcoholic Beverage Laws Enf't Comm'n*, 276 F. Supp. 3d 1230, 1233–34 (W.D. Okla. 2017); *see also, e.g.*, Mo. Rev. Stat. § 311.015 (purpose clause enacted in 2007 asserts that "[t]he provisions of this chapter establish vital state regulation of the sale and distribution of alcohol beverages in order to . . . achieve other important state policy goals such as maintaining an orderly marketplace composed of state-licensed alcohol producers, importers, distributors, and retailers"); Mont. Code Ann. § 16-1-101(3) (declaration of policy amended in 2009 to state that "[t]he overall purposes . . . are to promote temperance, create orderly markets, and aid in the collection of taxes").

B. Durational residency requirements promote the state interest in accountability, oversight, and control.

Reinforcing their broad interest in structuring orderly liquor markets, States also have an acute practical interest in maintaining accountability, oversight, and control over the retail sale of alcohol. *See* Tenn. Code § 57-3-204(b)(4) ("[I]t 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."); *Myers v. Holshouser*, 214 S.E.2d 630, 634 (N.C. Ct. App. 1975) ("There is a peculiar need for an administrative body to provide close surveillance and regulation of the liquor industry because of the numerous and complex problems that arise . . . .").

The States' ability to monitor retail sales is critical because, unlike for producers and manufacturers, *see Granholm*, 544 U.S. at 490, there is no meaningful federal regulatory backstop at the retailer tier. *See, e.g.*, 95th Ill. Gen. Assem., Senate Proceedings, Aug. 7, 2007, at 4 (statement of Sen. Silverstein) (noting that in addition to purchasing from wholesalers that are not licensed in Illinois, out-of-state retailers "are not subject to federal regulation"). Although the Federal Alcohol Administration Act of 1935 requires permits for importers, wholesalers, and producers, it does not require them for retailers. *See* 27 U.S.C. § 203(b), (c) (governing production of wine, distilling of spirits, and wholesaling). The previous special tax for retailers was repealed a decade ago, and retailers now are only required to register with the Alcohol and Tobacco Trade and Tax Bureau. *See* Alcohol & Tobacco Tax & Trade Bureau, Alcohol Dealer Registration Form, https://tinyurl.com/ycrtwyac. The federal government has thus ceded this regulatory responsibility to the States, which are in any event better positioned to oversee the final link in the distribution chain and the actual sale of liquor to their residents.

States' comprehensive regulation of the retail sale of liquor takes several forms. First, and most fundamental, States regulate and monitor how sales are made to consumers. *See Arnold's Wines*, 571 F.3d at 188. Under their respective state schemes, retailers may sell only to individuals who are qualified to purchase alcohol, during the time allotted, and in the manner dictated by statute. Preventing the sale of alcoholic beverages to underage persons, for example, is a time-consuming but imperative endeavor for state regulators. *See State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 838 (Mo. Ct. App. 2000); 90th Ill. Gen. Assem., House of Rep. Proceedings, Mar. 25, 1998, at 143 (statement of Rep. Hoffman) (States seek to "have some kind of control over [the retailer] to ensure that [it] is actually selling it to a person who is 21 years of age or older"). Retailers must also restrict their sales to the hours allowed for dispensation, *see, e.g.*, Ind. Code § 7.1-3-1-14, and to those who are not already intoxicated, *see id.* § 7.1-5-10-15.

Second, States inspect retailers' premises, books, and records to ensure compliance with their laws. *See Arnold's Wines*, 571 F.3d at 188; Tenn. Code § 57-3-204(b)(4) (legislative statement of intent that "the commission is authorized and instructed to prescribe such inspection, reporting, and educational programs as it shall deem necessary or appropriate to ensure the laws, rules, and regulations governing such licenses are observed"). In New York, for example, the "State Liquor Authority may inspect any premises where alcoholic beverages are manufactured, stored, or sold, as well as the books and records kept on such premises." *Arnold's Wines*, 571 F.3d at 188. And in Missouri, inspections may include not only books and records, but also the alcohol being sold to the retailer's consumers. When an out-of-state retailer attempted to sell products to Missouri residents, a Missouri court upheld the fine and injunction against it, explaining that "[a] primary purpose of Missouri's licensing requirements for those who sell alcoholic beverages is to provide the Division with a concrete method for inspecting, testing and approving beers before they are offered for sale in Missouri" to ensure that they are safe and sold only to those who are of age. *Beer Nuts, Ltd.*, 29 S.W.3d at 838; *see also Pennsylvania State Police Bureau of Liquor Control Enf't v. Progress Fire Co. Home Ass'n*, 55 A.3d 1270, 1274 (Pa. Commw. Ct. 2012) (state agency authorized to "enter a licensed premises without a warrant to conduct a full routine inspection" and then to "issue citations for any violations" of "any laws of this Commonwealth relating to liquor").

Similarly, Illinois recently increased the penalties for retailers seeking to bypass the three-tier system by purchasing alcohol from neighboring States. *See* Megan Noe, *New Law Cracking Down on Modern-day Bootlegging*, WQAD8 (Dec. 13, 2016, 7:58 PM), https://wqad.com/2016/12/13/new-law-cracking-down-on-modern-day-bootlegging/. The ability to inspect retailers' premises is essential for enforcement of these rules. And the ability to test the alcohol served at on-premises retailers was critical to the success of a 2013 operation by New Jersey's liquor regulators dubbed "Operation Swill." *See Operation Swill: TGI Fridays Fined $500,000 for Switching Booze*, The Post Standard (Jul. 31, 2013), https://tinyurl.com/yap82vzt. Operation Swill uncovered that more than two dozen establishments were passing off and serving cheap alcohol, rubbing alcohol, or dirty water to customers as premium liquor brands. *Ibid.*

Third, States oversee the financial relationships among the various levels of the three-tier system. *See Arnold's Wines*, 571 F.3d at 188; *California Beer Wholesalers Ass'n, Inc. v. Alcoholic Bev.*, 487 P. 2d 745, 748 (Cal. 1971). As discussed *supra* Section I.A., many States implemented three-tier systems after ratification of the Twenty-first Amendment to better regulate liquor distribution. Those States must be able to oversee the financial relationships among the tiers, with an eye toward preventing vertical integration and the re-emergence of a tied house arrangement. *See Schwegmann Giant Super Markets v. Edwards*, 552 So. 2d 1241, 1246–47 (La. Ct. App. 1989) (describing how the "evils" of the tied house system could come to pass again if, for example, one of the monopolistic breweries sought to "use credit and other anticompetitive tools to exclude competitors from retail outlets"). Accordingly, New York's laws, for instance, explicitly prohibit return to a tied house system by preventing vertical integration and otherwise regulating the gifts or services that may be exchanged between the tiers. *See* N.Y. Alco. Bev. Cont. Law §§ 101(1)(a), (c), 106(13). State oversight of these relationships also benefits smaller retailers by alleviating any improper "pressures exerted by larger manufacturing or wholesale interests" attempting to "dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques." *California Beer Wholesalers Ass'n, Inc.*, 487 P. 2d at 748 (internal citation omitted).

When actual or threatened violations occur on any of these matters, States must be able to engage in effective enforcement, which is far easier when the owners live in the State. *See Granholm*, 544 U.S. at 523 (Thomas, J., dissenting) ("presence ensures accountability") (internal quotation marks and alterations omitted); *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013) ("The legislature logically could conclude that in-state residency facilitates law enforcement against wholesalers, because it is easier to pursue in-state owners, directors, and officers than to enforce against their out-of-state counterparts."). This connection between residency and the state interest in effective oversight has been recognized since the early days of the three-tier system. *See, e.g.*, *Francis v. Fitzpatrick*, 30 A.2d 552, 555 (Conn. 1943) ("The beneficial effect of the statute as related to the requirements concerning residence . . . is likewise apparent, in view of the probable aid to supervision and control afforded thereby.").

These same principles apply equally to pre-enforcement matters, where a simple conversation between the regulator and an in-state resident could prevent violations from arising. And nowhere is prompt and vigorous enforcement more important than at the retail tier, which is responsible for the safe and orderly dispensation of alcohol to consumers. *See Craig v. Boren*, 429 U.S. 190, 215 (1976) (Stewart, J., concurring) (noting a State's undisputed "broad power under the Twenty-first Amendment to control the dispensation of alcoholic beverages within its borders").

C. Durational residency requirements serve the state interest in guaranteeing that alcohol retailers have a stake in the local community.

States also have an interest in ensuring that alcohol purveyors are known by the community and have a demonstrated stake in that community's well-being. *See* Pet. App. 50a–51a (Sutton, J., dissenting). This interest is related to the core state interest of promoting temperance, an interest that is best addressed at the state and local level. *See Arnold's Wines, Inc.*, 571 F.3d at 188. It is owners who make the important managerial decisions that have the potential to affect the public health, and it is owners who must be eventually held liable if those decisions go wrong. An absentee owner without a relationship to the local community is less likely to be invested in the community's well-being. As Judge Sutton put it, "[t]he only way to know a community is to live there." Pet. App. 50a (Sutton, J., dissenting).

States have employed many techniques in recognition of the importance of a connection between liquor retailers and the local community. As one example, they sometimes require a local liquor permit licensing body to examine the reputation or character of the license applicant. *See, e.g.*, *PR Pub. LLC v. Iowa Alcoholic Beverages Div.*, 847 N.W.2d 613 (Iowa Ct. App. 2014) (discussing Iowa's licensure regime). These requirements promote the States' interest in evaluating the moral character of those permitted to sell a product that poses significant risks to the public health. *See Brown Distrib. Co., Inc. v. Oklahoma Alcoholic Beverage Control Bd.*, 597 P.2d 324, 327 (Okla. 1979).

Other States, like New York, consider local characteristics before granting an on-premises license, *see* N.Y. Alco. Bev. Cont. Law § 64(6-a), and have established a mechanism by which municipalities may "express an opinion for or against the granting of [an] application" for a liquor license, *id.* § 110-b(5). In New York City, a community board established pursuant to the city charter reviews these applications. *Id.* § 110-b(2)(b); N.Y. City Charter ch. 70 § 2800(a). In the rest of the State, the clerk of the village, town, or city receives notification and may provide his or her opinion on every application submitted for its locality. N.Y. Alco. Bev. Cont. Law §§ 110-b(2)(a), (5); *see also* Neb. Rev. Stat. Ann. § 53-131(2) (local governing body may submit recommendations for licensure).

These systems reflect the reality that the effects of excessive alcohol consumption, crime associated with the liquor market, and the dangers of illegally manufactured alcohol are felt first and most strongly in the local community. *See, e.g.*, *Leisy*, 135 U.S. at 123 (recognizing "the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks") (internal quotation marks omitted). As Judge Calabresi has explained, when the Twenty-first Amendment was ratified "the prevailing view of alcohol was that it was a unique product that posed unusual dangers, both directly as an intoxicant, and indirectly, as a stream of commerce that generated corruption and crime. It was therefore left to individual states to decide, in light of their own local values, needs, and experiences, how to contend with that product." *Arnold's Wines*, 571 F.3d at 198 (Calabresi, J., concurring).

The need to foster a sense of responsibility for local conditions is especially acute when it comes to alcohol retailers, whether liquor store owners or tavern operators, for they are the final step in the path from the manufacturer to the consumer. *See* Pet. App. 50a (Sutton, J., dissenting) ("Because they form the final link in the distribution chain, retailers are closest to the local risks that come with selling alcohol, such as drunk driving, domestic abuse, and underage drinking.") (internal quotation marks and alterations omitted); *S. Wine & Spirits*, 731 F.3d at 811 (referring to the local risks of drunk driving, domestic abuse, and underage drinking). As Judge Sutton reasoned, "[r]equiring individual retailers to reside in one place for a sustained, two-year period ensures that they will be knowledgeable about the community's needs and committed to its welfare." Pet. App. 50a (Sutton, J., dissenting).

II. States have adopted a wide variety of retail licensing systems, nearly all of which require residency.

With these interests in mind, the States have established comprehensive regulatory systems for the importation and distribution of alcohol to their residents. These systems, though built on the shared principles articulated above, are tailored to suit the particular needs of each State, whether large or small, rural or urban, alcohol-exporting or alcohol-importing. *See* N.Y. Alco. Bev. Cont. Law § 2 (States are best able to determine "whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages," and on what terms); Fosdick & Scott, *Toward Liquor Control*, ch. 1 (lesson of Prohibition was that "it was a mistake to regard the United States as a single community in which a uniform policy of liquor control could be enforced").

The vast majority of States have enacted some form of a control or three-tier system, both of which typically impose residency or in-state presence requirements on retailers. For control States, the retailer is either a state agency or an agent of the State, and thus necessarily resides in-state and maintains its operations there. *See* Nat'l Alcohol Beverage Control Ass'n, Control State Directory and Info, https://tinyurl.com/y8mjvg8j; *see also, e.g.*, N.H. Rev. Stat. Ann. §§ 177:1, 177:9, 177:16; Utah Code Ann. §§ 32B-2-202(1), 32B-2-501.

Although it was common for States to fully control the distribution chain in the years immediately following Prohibition, many control States have since determined that their needs are better served in other ways and have transitioned to a partial control system, in which they control only certain aspects of the distribution chain. *See, e.g.*, *Ass'n of Washington Spirits & Wine Distrib. v. Washington State Liquor Control Bd.*, 340 P.3d 849, 851 (Wash. 2015) (partial control following 2011 voter referendum). In Virginia, for example, state stores remain the sole retailers of spirits, but beer and wine may be sold by private retailers that have resided in Virginia for at least a year. *See* Va. Code Ann. §§ 4.1-119, 207, 208, 222(B); *see also* Iowa Code Ann. §§ 123.22, 123.24 (modified control State); Mont. Code Ann. §§ 16-1-103, 16-1-106(2), 16-1-303(2) (modified control system over wholesalers and retailers); 47 Pa. Cons. Stat. §§ 3-301, 4-403 (state-run liquor and beer retailers, but limited retail allowed at some licensed restaurants, hotels, and grocery and convenience stores).

Likewise, a significant number of States operating a three-tier system have chosen to require retailers to reside in-state, and often for a period of time prior to application. *See, e.g.*, Cal. Bus. & Prof. Code § 23961(c); Ga. Code Ann. § 3-4-23(a); Ind. Code. §§ 7.1-3-21-3, 7.1-3-21-5; Kan. Stat. Ann. § 41-311(b)(2); Ky. Rev. Stat. Ann. § 243.100(1)(f); La. Stat. Ann. § 26:80(A)(2); Md. Code Alco. Bev. § 4-109; Okla. Stat. tit. 37A, § 2-146; 47 Pa. Cons. Stat. § 4-403(b); Tenn. Code § 57-3-204(b)(2)(A); Va. Code Ann. § 4.1-222(B); Wis. Stat. Ann. § 125.04(5)(a)(2); Wyo. Stat. Ann. §§ 12-1-101(a), 12-4-103. The amount of time sufficient to obtain a license varies significantly among the States. Some, like South Carolina, are satisfied with 30 days of residency, *see* S.C. Code Ann. § 61-2-90; Wash. Rev. Code Ann. § 66.24.010(2)(a), while others require a period of several years, *see* Ind. Code. § 7.1-3-21-3 (five-year residency requirement); Okla. Stat. tit. 37A, § 2-146 (five-year residency requirement). These States, like Tennessee, have made the determination that long-term residents of the community should be the only ones dispensing liquor to their residents. *See* Tenn. Code Ann. § 57-3-204(b)(2)(A).

Other States have instead chosen to focus only on the present and future residency of the owners, disposing with the durational aspect of the requirement. In those systems, so long as the owner currently resides in the State, he or she may obtain a license. *See, e.g.*, Ariz. Rev. Stat. Ann. § 4-202(A); Ark. Code

Ann. § 3-5-215; 235 ILCS 5/6-2(1); Mass. Gen. Laws Ann. ch. 135, § 15; Me. Rev. Stat. Ann. tit. 28-A § 1201(5)(B); Miss. Code Ann. § 67-3-19(a); Mo. Rev. Stat. § 311.060(1); N.C. Gen. Stat. Ann. § 18B-900; Neb. Rev. Stat. Ann. §§ 53-125(1), (3); R.I. Gen. Laws Ann. § 3-5-10(a)(1).

Another variation on these regulations is an in-state presence requirement for retail operations. Unlike the residency requirement, which ties the liquor license to the individual, the in-state presence requirement ties the license to the premises where the alcohol is sold. *See, e.g.*, 235 ILCS 5/5-1(d), 5/6-2(a)(10a). In Illinois, for example, a corporate retailer, though not required to be a resident of the State, must have a retail storefront in the State. *Id.* 5/7-14. These requirements are not mutually exclusive, and some States have opted for both presence and residency requirements. *See also* Ky. Rev. Stat. Ann. § 243.100(1)(f), 243.230; 47 Pa. Cons. Stat. §§ 4-403(b), 5-511; Va. Code. Ann. §§ 4.1-203(A), 222(B); Wis. Stat. Ann. §§ 125.04(5)(a)(2), (9). In those States, licenses are tied both to the person and to the premises.

In addition to residency and presence requirements, States have found other ways to tailor their regulatory systems to their specific needs. Some States, for example, impose dual licensing schemes whereby a retailer needs a municipal and a state license to operate. In Illinois, for example, a retailer must first obtain a license from the "city, village, or county" where the retail premises are located as a prerequisite to state licensure. *See* 235 ILCS 5/7-1(6); *see also* Md. Code Alcoholic Bev. § 1-201. And in Georgia, wine and malt-beverage retailers must have a county or municipal license. Ga. Code. Ann. §§ 3-5-40, 3-6-40.

Yet another approach is for States to pair these residency or in-state presence requirements with corporate-form requirements, or a limitation on the number of licenses a person, corporation, or household may collect. The Oklahoma state constitution, for example, prohibits corporations and business trusts from holding retail package store licenses. Okla. Const. art. XXVIII-A, § 4; *see also* Kan. Stat. Ann. § 41-311(b)(6) (corporations ineligible for retailer licenses). In South Carolina, only one member of a household can hold a license, and there is a limit of three retail licenses per person. *See* S.C. Code Ann. §§ 61-6-130, 6-6-141. Rhode Island, for its part, will not issue certain licenses to a "chain store organization." R.I. Gen. Laws Ann. § 3-5-11(a).

Finally, certain States impose varying restrictions on the retail sale of different types of alcohol. Indiana, for instance, prohibits grocery stores, convenience stores, and drug stores from selling cold beer for carryout. *See* Ind. Code § 7.1-3-1-1.5(a)–(b); *see also*, *e.g.*, Conn. Gen. Stat. Ann. §§ 30-20, 30-36 (grocery stores may sell beer, whereas package stores and druggists may sell liquor and beer). Each of these systems, while differing in its details, is designed to ensure that retailers are selling safe liquor, distributed in a regulated market, to consumers. The systems, unlike the direct shipment bans invalidated in *Granholm*, do not discriminate against out-of-state *alcohol* or burden its interstate distribution; they focus instead on ensuring that liquor *retailers* are part of an orderly market, subject to control and oversight, and invested in the communities where they do business. And the diversity of these systems did not come about by accident—it is the intended result of the second section of the Twenty-first Amendment's express grant of authority to the States.

III. Regardless of the validity of durational residency requirements, in-state presence requirements do not offend the dormant Commerce Clause.

For the reasons given above, durational residency requirements serve important state interests and fit comfortably within the power reserved to the States by the Twenty-first Amendment. But even if Tennessee's durational residency requirement were held invalid, state regimes mandating in-state presence would remain permissible. These presence requirements take a variety of different forms, *see supra* pp. 25–26, but each ties the availability of a retail license to the premises where alcohol is sold. Under Illinois law, for instance, each retail license covers only one location within the State where alcoholic liquor is to be offered for sale at retail, but Illinois does not regulate the residency of the applicant corporation or partnership. *See* 235 ILCS 5/5-1(d), 5/6-2(a)(10a), 5/7-14; *see also* Ky. Rev. Stat. Ann. §§ 243.100(1)(f), 243.230; 47 Pa. Cons. Stat. §§ 4-403(b), 5-511; Va. Code. Ann. §§ 4.1-203(A), 222(B); Wis. Stat. Ann. §§ 125.04(5)(a)(2), (9).

These state regulations requiring that retailers maintain an in-state presence do not run afoul of the dormant Commerce Clause. The focus of in-state presence requirements is the in-state distribution of alcohol, which is undoubtedly a core interest under the Twenty-first Amendment. *See North Dakota*, 495

U.S. at 423. When retailers sell to consumers from an in-state location, States can oversee and verify that the alcohol has travelled through the proper channels—from the manufacturer, to the distributor's in-state warehouse, to the in-state retailer who sells to the consumer. *See Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 819, 821 (5th Cir. 2010).

Unlike the direct-shipping limitations at issue in *Granholm* that effectively precluded out-of-state products from entering those state markets, the in-state presence requirement does not discriminate against out-of-state producers or otherwise prevent them from participating in the state liquor market. 544 U.S. at 489. To the contrary, it permits the sale of all legal alcohol, so long as it is imported and distributed through authorized channels overseen by the State. *See Bridenbaugh*, 227 F.3d at 854 ("Wine originating in California, France, Australia, or Indiana passes through the same three tiers and is subjected to the same taxes. Where's the functional discrimination?").

Even the panel majority below recognized that these differences are important. According to the *Byrd* court, "requiring wholesalers and retailers to be in the state is permissible" because the "Twenty-first Amendment gives a state the power to oversee the alcoholic-beverages business," which includes regulating the distribution of alcoholic beverages in the State. Pet. App. 26a n.8, 27a.

In-state presence requirements promote the State interest in accountability and oversight discussed *supra* Section I.B, because "[s]tate officials can better enforce their regulations by inspecting the premises and attaching the property of in-state entities." *Granholm*, 544 U.S. at 523 (Thomas, J., dissenting). As a practical matter, a State cannot inspect the premises of retailers that operate out of state with anything like the effectiveness of its inspections of in-state retailers. States simply do not have the resources to send regulators to the premises of every out-of-state retailer selling liquor to their consumers, either prophylactically or after a complaint arises.

In light of the distinction between presence requirements and durational-residency requirements, even if this Court finds that durational residency requirements are invalid, it should reaffirm the viability of presence requirements for liquor retailers.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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