No. 10-671

IN THE

Supreme Court of the United States

WINE COUNTRY GIFT BASKETS.COM, K&L WINE MERCHANTS, BEVERAGES & MORE, INC., DAVID L. TAPP, RONALD L. PARRISH, JEFFREY R. DAVIS,

Petitioners,

v.

JOHN T. STEEN, JR. GAIL MADDEN, JOSE CUEVAS, JR., ALLEN STEEN, GLAZER'S WHOLESALE DRUG COMPANY, INC., REPUBLIC BEVERAGE CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR GLAZER'S WHOLESALE DRUG COMPANY, INC. AND REPUBLIC BEVERAGE CO.

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QUESTION PRESENTED

In *Granholm v. Heald*, 544 U.S. 460 (2005), this Court held that the dormant Commerce Clause prohibits discrimination against out-of-state alcohol producers and products. In so doing, *Granholm* drew a distinction between producers and products, on the one hand, and distributors or retailers of alcohol, on the other. Specifically, the majority in *Granholm* reaffirmed, and the dissent agreed, that the Twenty-first Amendment shields from dormant Commerce Clause scrutiny state laws that channel the distribution of alcohol exclusively through in-state wholesalers and in-state retailers, such as the three-tier system used by Texas and numerous other states.

The question presented is whether, contrary to the unanimous view of the courts of appeals and the laws of 49 States, the dormant Commerce Clause prohibits state laws that limit the distribution of alcohol to in-state wholesalers and in-state retailers.

RULE 29.6 STATEMENT

Respondents Glazer's Wholesale Drug Company, Inc. and Republic Beverage Co. are private corporations. No publicly held company owns 10% or more of either corporation's stock.

Texas government officials John T. Steen, Jr., Gail Madden, Jose Cuevas, Jr., and Allen Steen were also defendants in the court of appeals and are Respondents in this Court.

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INTRODUCTION

The petition contends that this Court's decision in *Granholm v. Heald*, 544 U.S. 460 (2005), interprets the dormant Commerce Clause to forbid states from channeling the distribution of alcohol exclusively through in-state wholesalers and retailers. It did no such thing. To the contrary, the Court drew a sharp distinction between producers and products, on the one hand, and distributors and retailers of alcohol, on the other. The Court unanimously agreed that the Twenty-first Amendment immunizes from dormant Commerce Clause scrutiny state laws that channel the distribution of alcohol through in-state wholesalers and in-state retailers, such as the three-tier system used by Texas and numerous other states.

Petitioners do not question, or ask this Court to revisit, *Granholm*. They argue only that state laws such as those challenged here are invalid under *Granholm*, and that any argument to the contrary misconstrues this Court's ruling. At most, this issue warrants further percolation and is unworthy of the Court's consideration at this time. After all, not a single federal court of appeals to date has agreed with the petition's interpretation of *Granholm*. To the contrary, the Second and Fifth Circuits have both unanimously rejected this interpretation, and instead construed *Granholm* specifically to *authorize* such laws. What's more, Petitioners do not contest that their interpretation of *Granholm*, if adopted, would nullify the laws of virtually every State in the Union.

The Court should deny the petition and await further percolation of this issue in other federal

courts of appeals before even contemplating such a dramatic disruption to the industry. After all, if Petitioners are indeed correct about their interpretation of *Granholm*, a division of circuits will emerge soon enough, and the Court can consider the worthiness of a certiorari petition properly presenting that issue at that time.[1]

STATEMENT

1. As is true in every State in the country, in Texas, alcohol manufacture, distribution, and sales are subject to restrictions peculiar to the industry. These restrictions have deep historical roots, and stem from a "prevailing view . . . that [alcohol] 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." *Arnold's Wines v. Boyle*, 571 F.3d 185, 198 (2d Cir. 2009) (Calabresi, J., concurring). When the constitutional prohibition on alcohol was lifted by the Twenty-first Amendment, the authority of States over alcohol was given constitutional grounding. *See* U.S. Const. amend. XXI, § 2 ("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

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1 As addressed in Section C, *infra*, this case is also a uniquely bad vehicle to review the question presented, because the Fifth Circuit identified a narrower ground for rejecting Petitioners' challenge. As detailed below, the court of appeals observed that Texas "has not discriminated among retailers" merely by authorizing in-state retailers to make *local* deliveries. Pet. App. 47a. Accordingly, even a favorable judgment for Petitioners on the question presented would not alter the judgment of the court of appeals.

hereby prohibited."). As this Court reaffirmed in *Granholm v. Heald*, "'[t]he Twenty-first Amendment grants the States *virtually complete control* over . . . how to structure the liquor distribution system.'" 544 U.S. 460, 488 (2005) (emphasis added) (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

In an "'unquestionably legitimate'" exercise of this constitutional authority, Texas, like virtually every State, maintains a three-tier system of alcohol distribution. *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality)); *see also* Tex. Alco. Bev. Code Ann. § 6.03(i). Such systems require "that liquor pass through a licensed in-state wholesaler" before being sold by an in-state retailer to the ultimate consumer. *Granholm*, 544 U.S. at 518 (Thomas, J., dissenting); *see also id.* at 469, 489 (majority opinion) (noting Michigan's requirement that sales be through "in-state wholesalers" and "in-state retailers," and emphasizing that "States may . . . funnel sales through the three-tier system").

2. Petitioners are out-of-state wine retailers and Texas wine consumers who brought suit against several Texas state officials (the "State Defendants") in federal district court to challenge certain aspects of Texas' three-tier system and of its alcohol regulatory scheme more generally. In the only of these claims pressed before this Court, Petitioners challenged Texas' law authorizing certain in-state retailers to deliver or ship alcoholic beverages directly to consumers within the county in which the retailer is located. Out-of-state retailers, in contrast, may not directly ship or deliver alcohol to consumers anywhere in Texas. Petitioners contended that this

distinction was unconstitutional discrimination under the dormant Commerce Clause. Respondents Glazer's Wholesale Drug Company, Inc. and Republic Beverage Company (collectively, "Intervenor Defendants"), licensed in-state wholesalers of alcoholic beverages, intervened to defend the statutes.

On appeal from the District Court's invalidation of the challenged provision, the Fifth Circuit reversed. It first noted that this Court's decision in *Granholm*, which all parties agree governs this case, invalidated "direct shipping" laws that discriminated against out-of-state *producers*, not *retailers*. Pet. App. 34a-35a. In contrast to the states whose laws were struck down in *Granholm*, "Texas grants in-state and out-of-state wineries the same rights." Pet. App. 43a (citing Tex. Alco. Bev. Code Ann. §§ 54.01-54.12).

In considering "what else," other than discrimination against producers, "is invalid under the Supreme Court's *Granholm* reasoning," the Court of Appeals observed that the three-tier system "has been given constitutional approval." Pet. App. 44a; *see also Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432). "The discrimination that would be questionable, then, is that which is not inherent in the three-tier system itself." Pet. App. 44a. In identifying such discrimination, the court noted that "a beginning premise is that wholesalers and retailers may be required to be within the State." *Id.* at 48a. It then upheld in-county deliveries, such as those permitted by Texas law, as "a constitutionally benign incident of an acceptable three-tier system." *Id.*

The court denied Petitioners' subsequent petition for rehearing *en banc*.

REASONS FOR DENYING THE PETITION

A. There Is No Split Among the Courts of Appeals, as Petitioners Do Not Dispute

The petition paints the decision of the court of appeals as "turn[ing] *Granholm* upside down," and asserts that it is "high time for this Court to clear up the manifest confusion in this area." Pet. 2, 20.

But the courts of appeals have exhibited no confusion about what *Granholm* does and does not prohibit. To the contrary, the few courts of appeals that have addressed the issue to date are in complete harmony over its meaning. *Granholm* prohibits discrimination between in-state and out-of-state producers or products, particularly insofar as that discrimination exempts in-state producers or products from a State-mandated three-tier system of alcohol distribution. *See, e.g.*, *Freeman v. Corzine*, Nos. 08-3268 & 08-3302, 2010 U.S. App. LEXIS 25694 (3d Cir. Dec. 17, 2010); *Arnold's Wines*, 571 F.3d at 190; Pet. App. 35a; *see also Anheuser-Busch, Inc. v. Schnorf*, No. 10-cv-1601, 2010 U.S. Dist. LEXIS 91732, at *36-38 (N.D. Ill. Sept. 3, 2010). But state laws that merely channel the distribution of alcohol (whether in-state or out-of-state) through in-state wholesalers and in-state retailers, including three-tier systems, continue to be authorized under the express terms of the Twenty-first Amendment and various acts of Congress, and are untouched by *Granholm*.

Accordingly, the petition fails on its own terms. If the petition is right, and it turns out that lower courts are indeed "confused" over the proper meaning of *Granholm*, a split of authority will eventually emerge – and the Court can consider a proper peti-

tion for certiorari at that time. But unless and until that happens, the issue is unworthy of this Court's consideration, and the petition should be denied.

1. As Petitioners acknowledge, their complaint is nearly identical to a challenge raised to New York law and rejected by the Second Circuit. Pet. 2 (citing *Arnold's Wines*, 571 F.3d 185). As here, that case involved a state law under which in-state "retailers, but not out-of-state retailers, may deliver liquor directly to New York residents." *Arnold's Wines*, 571 F.3d at 188. New York law, like Texas law and unlike the statutes at issue in *Granholm*, made "no distinction between liquor produced in New York and liquor produced out of the state: both may be shipped directly to New York consumers by licensed in-state retailers." *Id.* at 190; *see also* Pet. App. 43a ("Texas grants in-state and out-of-state wineries the same rights.").

The Second Circuit rejected the plaintiffs' argument that differential treatment of in-state and out-of-state *retailers* warrants the same condemnation as differential treatment of in-state and out-of-state *producers*. First, the court concluded that by challenging New York's requirement that wholesalers and retailers be present in and licensed by the state, the plaintiffs effectively challenged the three-tier system itself. *Arnold's Wines*, 571 F.3d at 190-91; *cf. Granholm*, 544 U.S. at 469 (describing Michigan's three-tier system as limiting wholesaler and retailer participation to licensed in-state entities). Because the three-tier system has been repeatedly blessed by this Court, the panel declined to undo it under the guise of the dormant Commerce Clause. *Granholm*, 544 U.S. at 489; *Arnold's Wines*, 571 F.3d at 190-91.

Second, *Arnold's Wines* noted that the challenged law, unlike the laws at issue in *Granholm*, did not "create[] specific exceptions to the states' three-tier systems favoring in-state producers." 571 F.3d at 191. To the contrary, "[a]lcohol sold by in-state retailers directly to consumer in New York has *already passed through* the first two tiers – producer and wholesaler – and been taxed and regulated accordingly." *Id.* (emphasis added). As a result, "New York's laws evenhandedly regulate the importation and distribution of liquor within the state," and do not violate the dormant Commerce Clause. *Id.* at 192.

Judge Calabresi, who joined the majority opinion, also wrote separately to note that, under *Granholm*, courts "can only come out one way." *Arnold's Wines*, 571 F.3d at 201 (Calabresi, J., concurring). A contrary decision, he concluded, would "require us to ignore too much of the background jurisprudence and to extend the trend well beyond *Granholm* while ignoring some of its most specific language." *Id.*

2. No other court of appeals has even addressed a provision similar to the ones at issue in the instant case and in *Arnold's Wines*, much less created a split with the Fifth and Second Circuits. The most analogous other case – *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006) – is fully consistent with *Arnold's Wines* and the decision below, confirming the absence of any confusion whatsoever among the courts of appeals.

In *Brooks*, the plaintiffs brought a dormant Commerce Clause challenge to a state law permitting consumers to "personally carry into Virginia no more than one gallon (or four liters) of alcoholic bev-

erages for personal consumption." *Brooks*, 462 F.3d at 345 (Op. of Niemeyer, J.). In upholding the challenged statute, Judge Niemeyer explained that the clear import of the plaintiffs' claim was that the statute advantaged in-state *retailers* (the only in-state entities selling directly to consumers) over out-of-state retailers. *Id.* at 352. He then rejected any "argument that compares the status of an in-state retailer with an out-of-state retailer – or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart – [a]s nothing different than an argument challenging the three-tier system itself." *Id.*[2]

3. An issue that has been addressed in the opinions of, at most, three courts of appeals, and given rise to no conflict whatsoever, is a poor candidate for this Court's limited docket. As addressed *infra* Part B, the unanimous view is no surprise; *Granholm* clearly protects the laws at issue here.

But even if Petitioners were correct that the holdings of the courts of appeals "cannot be squared" with *Granholm*, this Court's review would still be unwarranted. Pet. 2. If *Granholm* requires it, other courts of appeals will, in time, adopt Petitioners' position and create a split. For now, however, no such split exists. *Granholm* was decided less than six years ago; further percolation will give Petitioners, and those sharing their interests, an opportunity to persuade the courts of appeals of their perspective.

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[2] The majority of the panel upheld the challenged statute. Judge Niemeyer reached this broader question in a portion of the majority opinion not joined by the other panel members.

The importance of obtaining substantial lower court development before considering the constitutionality of laws which prohibit direct shipping to consumers by out-of-state retailers is only heightened by the ubiquity of such laws. In the court of appeals, the State Defendants filed as an exhibit to their reply brief a chart, summarizing in great detail the relevant laws governing alcoholic beverage sales and imports in all fifty states. Based on the research underlying that chart, the State Defendants concluded that all 48 continental states, as well as Hawaii and the District of Columbia, have adopted a three-tier system or other laws "that favor[] both wholesalers and retailers who have established a retail outlet or distribution center somewhere in the State over their counterparts who have not." Reply Br. of State Defendants 16. Moreover, the State Defendants concluded that 28 states permit direct shipping by retailers to consumers, but that 21 of those states require the retailer to first establish a retail outlet in the state. *Id.* at 16-17. Even in the remaining seven states, the State Defendants stated that "out-of-state retailers are still dramatically disfavored with respect to in-store sales." *Id.* at 17.

The prevalence of the challenged laws, while not guaranteeing their constitutionality, does counsel in favor of responding cautiously to Petitioners' invitation to overturn the unanimous view of the courts of appeals that they raise no constitutional problem. Waiting until more courts of appeals have had the opportunity to determine whether, in fact, *Granholm* is subject to the reading Petitioners would give it before considering granting review is a proper exercise of this caution.

B. The Decision Below Does Not Conflict With *Granholm* or Any Other Opinion of This Court

Though Petitioners cite a handful of general dormant Commerce Clause cases, their core allegation is that the decision of the court of appeals "cannot be squared with this Court's landmark decision in *Granholm*."[3] Pet. 2. But review of *Granholm* confirms that the interpretations of that case by the courts of appeals are not only *consistent* with each other, but are also *correct*.[4]

1. In *Granholm*, out-of-state producers of wine challenged Michigan and New York laws that allowed all wineries to sell alcohol through the States' ordinary three-tier distribution system, but allowed only in-state wineries to ship wine directly to con-

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[3] *Amicus* Specialty Wine Retailers also claims that the decision of the court of appeals conflicts with *Healy v. Beer Institute*, 491 U.S. 324 (1989), which purportedly expands the reach of the dormant Commerce Clause beyond producers to sellers of alcoholic beverages. Specialty Wine Retailers Br. 12-14. But *Healy* addressed a statute that directly burdened interstate commerce, by regulating the prices charged by both in-state and out-of-state brewers that participated in the interstate market. 491 U.S. at 341. The present case does not impose any such burden on participation in interstate commerce, and Petitioners do not contend otherwise.

[4] The constitutionality of Texas' system is even clearer under *Granholm* than a statutory scheme that, like the New York law at issue in *Arnold's Wines*, allows state-wide shipment by in-state retailers. As the Fifth Circuit held, Texas "has not discriminated among retailers" because Wine Country, which is not located in any county of Texas, "is not similarly situated to Texas retailers and cannot make a logical argument of discrimination." Pet. App. 47a.

sumers. *Granholm*, 544 U.S. at 466-67. By a 5-4 vote, the Court struck down the law favoring in-state wineries over out-of-state wineries. *Id.* at 476 ("Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state *producers*.") (emphasis added).

This holding, however, raised questions about the validity of three-tier systems themselves, which had long served to channel the distribution of alcohol exclusively through in-state wholesalers and in-state retailers. *See* 544 U.S. at 488-89. All nine justices agreed that such laws – including not only the three-tier system, but also state-controlled distribution regimes – would continue to be valid and untouched by the *Granholm* ruling. *Id.*; *id.* at 517 (Thomas, J., dissenting) ("the Twenty-first Amendment was designed to remove any doubt regarding whether state monopoly and licensing schemes violated the Commerce Clause, as the majority properly acknowledges"); *id.* at 488-89 ("'The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.'" (majority opinion) (alteration in original) (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in judgment))).

Petitioners attempt to recharacterize this passage in *Granholm* by contending that the Court's reference to the three-tier system concerns only laws that require separation between, and forbid joint ownership of, production, wholesale distribution, and retail sales – and not the exclusive use of in-state wholesalers and retailers. Pet. 13-15. But that is an implausible reading of *Granholm*, for the mere separation of these functions would not have been drawn into question by *Granholm*. The entire purpose of

this passage in *Granholm* is to address the issue of state laws that channel business activity through in-state rather than out-of-state entities. The majority's conclusion was simply that the nondiscrimination principle of the dormant Commerce Clause would apply to the production, but not to the distribution, of alcohol, in light of the text, history, and tradition of the Twenty-first Amendment. *Granholm*, 544 U.S. at 488-89.

This Court thus restated its conclusion in unambiguous terms: "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489.[5] Texas law does so, and is thus protected. *See* Pet. App. 43a ("Texas grants in-state and out-of-state wineries the same rights."); *see also Arnold's Wines*, 571 F.3d at 191. Contrary to Petitioners' argument, *Granholm*'s more general statements that the dormant Commerce Clause prohibits discrimination against out-of-state entities do not override this express blessing. *See* Pet. App. 47a ("The dormant Commerce Clause applies [to regulation of alcoholic beverages], but it applies differently than it does to products whose

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[5] In light of this unambiguous principle, Petitioners are plainly incorrect that the distinction drawn by the courts of appeals between producers and retailers with respect to permissible regulation "has no basis in law or logic." Pet. 3. *Granholm* repeatedly limited its analysis to discrimination against *producers* or *products*. *E.g., Granholm*, 544 U.S. at 472 ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States."); *id*. at 482-486 (noting that the Webb-Kenyon Act, the Wilson Act, and the Twenty-first Amendment did not authorize discrimination against "out-of-state goods" or "liquor produced out-of-state").

regulation is not authorized by a specific constitutional amendment.").[6]

2. The challenged Texas law not only complies with *Granholm*'s requirement of neutrality between in-state and out-of-state producers and products; it also is no more than a "constitutionally benign incident of an acceptable three-tier system." Pet. App. 48a; *see also Arnold's Wines*, 571 F.3d at 192 (prohibiting out-of-state retailers from shipping directly, even if in-state retailers are allowed to do so, is "an integral part of [a] three-tier system").

Treating in-state and out-of-state producers differently for purposes of direct shipments "allows in-state, but not out-of-state, wineries [*i.e.*, producers] to circumvent portions of the three-tier system." *Freeman*, 2010 U.S. App. LEXIS 25694, at *27. As such, it is not a valid part of such a system. *Id.*; *Arnold's Wines*, 571 F.3d at 190; Pet. App. 35a; *see also Granholm*, 544 U.S. at 489 (describing three-tier system as "'unquestionably legitimate'").

In contrast, a distinction between in-state and out-of-state retailers is fully consistent with a three-tier system. It *permits* those alcoholic beverages that

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[6] Application of background dormant Commerce Clause principles without change would pose precisely the danger that the States feared in *Granholm*. Specifically, the entire three-tier system, which is based on funneling alcoholic beverages through a separate in-state wholesaler and retailer, would be at risk of invalidation, despite this Court's explicit disavowal of any intention to cause this result. *Granholm*, 544 U.S. at 488; *see also id.* at 518 (Thomas, J., dissenting) ("[T]he three-tier system[,] [a]s the Court concedes . . . is within the ambit of the Twenty-first Amendment, even though [it] discriminates against out-of-state interests.").

have already passed through the state's three-tier system to be shipped directly to consumers, while *prohibiting* alcoholic beverages that have *not* passed through the in-state three-tier system from doing so.[7] *Arnold's Wines*, 571 F.3d at 191. This Court's sanctioning of three-tier systems would be hollow indeed if Texas were required to allow out-of-state retailers to circumvent the system in its entirety, while requiring in-state retailers to comply. *See* Pet. App. 44a; *see also Arnold's Wines*, 571 F.3d at 192 n.3.

Petitioners and their *amici* dispute the significance to the three-tier system of a prohibition on direct shipments by out-of-state retailers, noting that a handful of states have three-tier systems, yet permit such shipments. Pet. 12-13; Specialty Wine Retailers Br. 15 & n.9. Of course, there is nothing impermissible about a State's decision to exempt certain sales from their three-tier systems, so long as the exemptions do not themselves discriminate against out-of-state producers or products. But the fact that such exceptions are *permitted* does not

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[7] *Amicus* Specialty Wine Retailers contends that out-of-state retailers are still subject to a three-tier system; they are just subject to "the three-tier system of the home state of the shipping retailer." Specialty Wine Retailers Br. 16. A critical part of the three-tier system, however, is its requirement that wholesalers and retailers be in-state, which by definition cannot be recreated in another state.

In any event, States cannot directly or indirectly regulate the three-tier system in the retailer's home state, or even ensure that such systems remain in effect. *Healy*, 491 U.S. at 332-33. Accordingly, no State can rely on another State to implement the requirements associated with its own three-tier system.

mean that they are *constitutionally required*, or that the exceptions are "fully compatible with" – as opposed to a limited departure from – the State's three-tier scheme. Specialty Wine Retailers Br. 15.

3. Petitioners' *amici* attempt to bolster their *Granholm* arguments with the perceived policy advantages of Petitioners' position: widespread availability of as many alcoholic products as possible, at as low a price as possible. Specialty Wine Retailers Br. 1; Economists' Br. 12-23. But *amici*'s policy goals are not necessarily shared by the States, which have often sought exactly the opposite goals, namely decreasing or banning access to alcohol altogether. *Granholm*, 544 U.S. at 476; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 & n.14 (1996) (Op. of Stevens, J.). As this Court reaffirmed in *Granholm*, States retain the right "to ban the sale and consumption of alcohol altogether" and to "bar its importation . . . to make its laws effective." *Granholm*, 544 U.S. at 488-89. In short, "the aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for *controlling* liquor by regulating its transportation, importation, and use." *Id.* at 484 (emphasis added). The constitutionality of *restrictions* on alcohol use cannot be judged by their efficiency in *promoting* the use of alcohol.[8]

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[8] The *amici* Economists' Brief, in particular, expresses distaste for "state legislatures," which "systematically underrepresent[]" consumer interests. Economists Br. 12-17. But the Twenty-first Amendment put authority over alcohol squarely in the hands of the States; it did not leave to the judiciary the question of what entity would best protect the interests of consumers in regulating alcohol.

In any event, *amici*'s policy concerns are no different in degree or kind than the policy concerns presented by every case arising under the dormant Commerce Clause. *See, e.g.*, *Granholm*, 544 U.S. at 472 (noting policy reasons underlying dormant Commerce Clause); Economists' Br. 16-17 (Court should be "vigilan[t] . . . to prevent interest-group motivated evasions of the dormant Commerce Clause"). Even if those concerns had resonance here, *amici* call for no more than error correction tied to the specific facts of this case. What's more, those concerns have no resonance here: Congress may immunize state laws from dormant Commerce Clause restrictions at any time, and it has done so here through the Twenty-first Amendment, Webb-Kenyon Act, and other laws, just as it has done in the insurance and other contexts. *See, e.g.*, *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174-75 (1985) (construing the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841, *et seq.*); *Liberty Mut. Ins. Co. v. La. Dep't of Ins.*, 62 F.3d 115, 118 (5th Cir. 1995) (construing the McCarran-Ferguson Act).

C. This Case Presents An Unusually Poor Vehicle To Address Direct Shipping Laws Which Favor In-State Retailers

There is an additional reason not to grant certiorari: This case presents a uniquely poor vehicle for resolving the question presented because the court of appeals provided a separate and independent rationale to support its conclusion.

When this suit was filed, Texas law allowed in-state retailers with appropriate permits to ship their alcoholic beverages statewide. Pet. App. 29a (citing Tex. Alco. Bev. Code Ann. § 22.03 (Vernon 2006) (amended Sept. 1, 2007)). But before the case was

decided by the District Court, the Texas Legislature amended the governing statute to limit "the boundaries of the area of permissible shipment from the entire State to basically the county in which retailer has a store." Pet. App. 30a (citing Tex. Alco. Bev. Code Ann. §§ 22.03 & 24.03 (Vernon 2009)).

The Fifth Circuit explained that Texas had not run afoul of *Granholm* by allowing in-state retailer deliveries. Pet. App. at 47a ("*Granholm* prohibited discrimination against out-of-state *products* or *producers*. Texas has not tripped over that bar by allowing in-state *retailer* deliveries."). It also noted, however, that it need not resolve whether the "statewide delivery version of the provision" required different analysis than the challenged Texas law. Pet. App. 46a ("We need not and do not reach the broader definitional issue."). Instead, the court of appeals relied in part on its conclusion that "sales are being made to proximate consumers, not those distant to the store. Retailers are acting as retailers and *making what conceptually are local deliveries*." *Id.* at 47a (emphasis added); *see also id.* at 48a ("We view local deliveries as a constitutionally benign incident of an acceptable three-tier system.").

Because in-state retailers are making a type of delivery that out-of-state retailers cannot make – *i.e.*, deliveries within the same Texas county in which the retailer is located – the court of appeals held that "Wine Country is not similarly situated to Texas retailers and cannot make a logical argument of discrimination." Pet. App. 47a; *id.* (Texas "also has not discriminated among retailers."). The court concluded that Wine Country's contrary argument reflected "illogic," as demonstrated by "the fact that the remedy being sought in this case – allowing out-

of-state retailers to ship anywhere in Texas because local retailers can deliver within their counties – would grant out-of-state retailers dramatically greater rights than Texas ones." Pet. App. 47a.

To be sure, Respondents believe that the Fifth Circuit properly interpreted *Granholm*. Its analysis is fully consistent with *Arnold's Wines*, and, in an appropriate case, the Fifth Circuit's reasoning would require it to approve even Texas' former statute. But the Fifth Circuit was able to rely here on the narrower alternative ground of upholding only the current authorization of county-wide deliveries. Accordingly, this Court's review would be improper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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