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 CO., INC.,
REPUBLIC BEVERAGE CO.,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

JAMES F. BASILE
TRACY K. GENESEN
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104

KENNETH W. STARR
336 Guittard Avenue
Waco, TX 76706

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

Additional Counsel on Signature Block

February 1, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution, Statutes, and Rules

Other Authorities

INTRODUCTION

The brief in opposition only confirms that the issue here is whether the lower courts will be allowed to overrule *Granholm v. Heald*, 544 U.S. 460 (2005). That landmark case holds that the Twenty-first Amendment does not override the Commerce Clause, and therefore does not allow States to discriminate against interstate commerce in the sale of alcoholic beverages. *See id.* at 486. The States had no such right to discriminate before Prohibition, *Granholm* explains, and gained no such right in the Twenty-first Amendment. *See id.* at 484-85. In a nutshell, a statute's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Id.* at 488 (internal quotation omitted).

Both the Second and Fifth Circuits have held, and respondents now insist, that *Granholm* gave its "express blessing" to state laws that discriminate against out-of-state retailers in the sale of alcoholic beverages. Opp. 12. According to these courts and respondents, *Granholm* interprets the Twenty-first Amendment to categorically immunize such discrimination from Commerce Clause scrutiny.

It is hard to imagine a more stark distortion of one of this Court's precedents. *Granholm*'s holding that the Twenty-first Amendment does *not* trump the Commerce Clause has been transformed into a holding that the Twenty-first Amendment *does* trump the Commerce Clause. The *Granholm* Court thought it was ending "an ongoing, low-level trade war" between States over the remote sale and direct shipping of wine and other alcoholic beverages, 544

U.S. at 473, but the Second and Fifth Circuits have now given that war their express blessing.

Respondents insist, however, that review is unwarranted because "there is no split among the courts of appeals." Opp. 5 (capitalization modified). That argument misses the point. A circuit split is not an end in itself. Rather, a circuit split serves as a red flag that this Court's guidance is warranted on a particular issue. Here, the lower courts' manifest confusion on the scope of *Granholm* underscores the need for such guidance. *See, e.g.*, *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (opinion of Niemeyer, J.) (interpreting *Granholm* to bless discrimination against out-of-state retailers); *id.* at 361 (Traxler, J., concurring in part and concurring in the judgment) (refusing to join this portion of Judge Niemeyer's opinion); *id.* at 361-63 (Goodwin, J., dissenting) (rejecting this portion of Judge Niemeyer's opinion); Pet. App. 41a (describing *Siesta Vill. Mkt. v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008)); Pet. App. 77-91a (upholding petitioners' constitutional challenge).

Indeed, Judge Calabresi concurred in *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009), to cry out for guidance on this score. In his view, *Granholm* "leaves lower courts in a difficult situation" in which they know that "the general direction of Supreme Court jurisprudence has been toward prohibiting any discriminatory state regulation," but do not know "how far or how fast [to] move along that vector." *Id.* at 200-01; *see also id.* at 192 (*Granholm* "leaves lower courts at a loss in seeking to figure out what the Twenty-first Amendment means"); *id.* at 200 (*Granholm* "leave[s]

state legislatures and lower federal courts with no firm understanding of what the law actually is"); *id.* (lower courts "left to try to guess at the currently applicable rule"); *id.* ("To the student and teacher of the law, it appears clear that the meaning of the Twenty-First Amendment is changing. But it is difficult to know just how much the Supreme Court wants that amendment to evolve."). In effect, Judge Calabresi threw up his hands and urged the lower courts to give *Granholm* its narrowest possible interpretation "unless and until" this Court revisits this area: "If the Supreme Court wishes further to meld the Twenty-First Amendment into the broad constitutional landscape, so be it." *Id.* at 201.

This Court should take up Judge Calabresi's challenge, and reaffirm that it meant what it said in *Granholm*: the Twenty-first Amendment "does not supersede other provisions of the Constitution," including the Commerce Clause, and thus does not "give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." 544 U.S. at 484-86. Regardless of whether this Court's approach to the Twenty-first Amendment has "evolve[d]" over the years, *Arnold's Wines*, 571 F.3d at 200 (Calabresi, J., concurring), *Granholm* sets forth the law of the land. Because the Second and Fifth Circuits have turned that decision on its head, and thereby blessed an interstate trade war "destructive of the very purpose of the Commerce Clause," *Granholm*, 544 U.S. at 473, this Court's review is warranted. "This Court has a duty to defend the integrity of its precedents." *Alderman v. United States*, 131 S. Ct. 700, 702 (2011) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari).

ARGUMENT

I. The Decision Below Conflicts With *Granholm*.

Respondents' basic contention is that *Granholm* draws a "sharp distinction" between *producers* and *retailers* of alcoholic beverages, prohibiting discrimination against the former while blessing discrimination against the latter. Opp. 1. Even cursory review of *Granholm* refutes that contention.

Rather, *Granholm* unequivocally holds that the Twenty-first Amendment does not save discriminatory state legislation otherwise barred by the Commerce Clause. *See* 544 U.S. at 476-89. The decision details the history of the Twenty-First Amendment at great length, and concludes that the Amendment merely "restored to the States the powers they had" before Prohibition, which did not include "the authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Id.* at 484-85; *see also id.* at 487-88 (interpreting prior caselaw to "foreclose[] any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny").

Naturally, in applying its non-discrimination rule to the facts at hand, *Granholm* refers to "wine producers," *id.* at 493, since they were the ones who challenged the discriminatory state laws at issue in that case. But *Granholm* draws no distinction between producers and retailers, just as it draws no distinction between wine and other alcoholic beverages. The Fifth Circuit's assertion that *Granholm* does not apply here because "'Texas grants in-state and out-of-state *wineries* the same

rights,'" Opp. 4, 6, 12 (quoting Pet. App. 43a; emphasis added), is a *reductio ad absurdum* of that decision.

Respondents' position cannot be squared with *Granholm*. If *Granholm* is correct that the Twenty-first Amendment gives the States no power to enact discriminatory legislation that otherwise would violate the Commerce Clause, *see* 544 U.S. at 484-85, then respondents are wrong that the Twenty-first Amendment gives the States precisely such power, *see* Opp. 12. It is as simple as that: *Granholm* says that the Twenty-first Amendment does *not* immunize any discriminatory laws from Commerce Clause scrutiny, while respondents say that the Twenty-first Amendment *does* immunize the discriminatory laws at issue here from Commerce Clause scrutiny. Respondents cannot have it both ways: if the Twenty-first Amendment does not alter the non-discrimination principle of the Commerce Clause, respondents cannot rely on the Twenty-first Amendment to defend discrimination.

Indeed, respondents' alleged distinction between producers and retailers makes no sense, given that producers are acting as retailers when they remotely sell and directly ship wine to consumers in other States. Thus, "when a California winery sells and ships wine to a consumer, it does so not under its producer's license, but under its license as a retailer in California." Specialty Wine Retailers' *Amicus* Br. 3. Whether a producer decides to ship its products itself or through a retailer is immaterial: the Commerce Clause protects interstate *commerce*, not interstate *production*. That is why, as *Granholm* emphasized, "States may not enact laws that burden

out-of-state producers *or shippers* simply to give a competitive advantage to in-state businesses." 544 U.S. at 472 (emphasis added). It is telling that respondents are unable to cite a single case in which this Court has drawn a distinction under the Commerce Clause between producers and retailers. To the contrary, this Court has long invalidated under the Commerce Clause laws that discriminate against out-of-state retailers. *See, e.g.*, *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940).

Respondents' assertion that *Granholm* "conclu[ded]" that "the nondiscrimination principle of the dormant Commerce Clause would apply to the *production*, but not to the *distribution*, of alcohol," Opp. 12 (emphasis added), is thus baseless. Rather, the lesson of *Granholm* is clear: "the Commerce Clause prevent[s] States from discriminating against imported liquor." 544 U.S. at 476; *see also id.* at 493 ("If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.").

II. The Non-Discrimination Principle Of The Commerce Clause Does Not Conflict With The Three-Tier System.

Respondents argue that *Granholm* blessed discrimination against out-of-state retailers by blessing the three-tier system through which most States regulate the distribution of alcoholic beverages. *See*, *e.g.*, Opp. 1, 3, 5, 11. The premise of this argument is that such discrimination is "'inherent in the three-tier system,'" *id.* at 4 (quoting Pet. App. 44a), so that a challenge to such discrimination is "a frontal attack on the constitutionality of the three-tier system itself," *Arnold's Wines*, 571 F.3d at 190.

That premise is manifestly incorrect. As petitioners and their *amici* have noted, and respondents do not contest, at least ten States with three-tier systems specifically allow out-of-state retailers to remotely sell and directly ship wine and/or other alcoholic beverages on the same terms as in-state retailers. *See* Pet. 13 (citing statutes); Specialty Wine Retailers' *Amicus* Br. 15 & n.9 (same). Indeed, the Model Direct Shipping Bill, cited with approval in *Granholm*, *see* 544 U.S. at 491-92, establishes a template for such non-discriminatory statutes. Discrimination against out-of-state retailers with respect to direct shipping, thus, is by no means an "inherent" part of a three-tier system. There is no conflict whatsoever between such a system and the non-discrimination principle of the Commerce Clause.

Respondents try to dismiss this point by characterizing non-discriminatory direct shipping laws as "exceptions" to the three-tier system, and arguing that "the fact that such exceptions are *permitted* does not mean that they are *constitutionally required*." Opp. 14-15 (emphasis in original). That response misses the point. As noted above, the very premise of the decision below (as well as the Second Circuit's decision in *Arnold's Wines*) is that discrimination against out-of-state retailers is "inherent" in the three-tier system, so that when *Granholm* reaffirmed the validity of such a system, it necessarily affirmed the legitimacy of such discrimination. If, as it turns out, discrimination against out-of-state retailers is *not* inherent in a three-tier system, it follows that *Granholm* did not bless such laws—and the constitutional analysis of the Second and Fifth Circuits crumbles.

Indeed, that straightforward point refutes much of the opposition brief. Respondents characterize this lawsuit as a challenge to the legitimacy of the three-tier system itself, which is why they assert that petitioners' position, if adopted, "would nullify the laws of virtually every State in the Union," and result in "dramatic disruption to the industry." Opp. 1, 2; *see also id.* at 9 (same). That assertion is incorrect: petitioners do not challenge the legitimacy of the three-tier system itself, but merely the operation of that system in a way that violates the anti-discrimination principle of the Commerce Clause. The three-tier system may be "ubiquit[ous]," Opp. 9, but so too (until now) is the free flow of interstate commerce in our federal republic.

The legitimacy of the three-tier system, in other words, does not immunize the *operation* of such a system from challenges under the Commerce Clause. To the contrary, this Court has upheld a Commerce Clause challenge to a three-tier system that operated in a way that discriminated against interstate commerce. *See Healy v. Beer Inst.*, 491 U.S. 324, 326-27 & n.2, 340-41 (1989). Respondents try to distinguish *Healy* as involving "a statute that directly burdened interstate commerce," Opp. 10 n.3, but that case specifically invalidated the statute on the ground that it *discriminated* against interstate commerce, *see* 491 U.S. at 340-41, as well as on the ground that it directly burdened interstate commerce, *see id.* at 335-40. The fact that a State may operate its three-tier system to discriminate against interstate commerce, as here and in *Healy*, does not doom the three-tier system itself, but only the discrimination.

The alleged threat to the three-tier system here, just as in *Granholm*, is thus a bogeyman. Indeed, wholesalers and a majority of States argued strenuously in *Granholm* that allowing remote sales and direct shipping by out-of-state wineries would undermine the three-tier system. *See*, *e.g.*, *Amicus* Br. of Ohio and 32 other States, *Granholm v. Heald*, No. 03-1116, 2004 WL 1743941 (July 29, 2004), at 1, 19-21. Under this view, the three-tier system requires that all liquor be sold to consumers by a licensed in-state entity subject to the State's enforcement and tax authority. *Granholm*, however, rejected the notion that the three-tier system trumps the non-discrimination principle of the Commerce Clause. Thus, while "the three-tier system itself is unquestionably legitimate," the "discriminatory" operation of such a system "eliminates the immunity afforded by the Twenty-first Amendment." 544 U.S. at 488-89 (internal quotations omitted).

Let there be no mistake what is going on here: this case is not about the legitimacy of the three-tier system, but about the efforts of politically favored interest groups to use that system as a fig-leaf for discrimination against interstate commerce. *See generally* Economists' *Amicus* Br. 12-16. States need not authorize in-state retailers to remotely sell and directly ship alcoholic beverages at all, but once they decide to do so, the Commerce Clause bars them from discriminating against out-of-state retailers. The obvious beneficiaries of such discrimination are in-state wholesalers, who also happen to be the staunchest defenders of such protectionist legislation. Indeed, it is telling that the respondent state officials have not even tried to defend Texas'

discriminatory laws in this Court, but have left that task to the respondent wholesalers.

III. This Case Squarely Presents The Question Whether The Twenty-First Amendment Allows States To Discriminate Against Out-Of-State Retailers Of Alcoholic Beverages.

Finally, respondents contend that "this case presents a uniquely poor vehicle for resolving the question presented" because the challenged Texas statutes allow in-state retailers to remotely sell and directly ship alcoholic beverages within the county in which they are located, not the entire State. Opp. 16; *see also id.* at 2 n.1, 10 n.4. According to respondents, this point provides "a separate and independent rationale" to support the judgment. Opp. 16. Again, respondents are wrong.

As noted in the petition, this Court has long held that a State "'may not avoid the strictures of the Commerce Clause'" by crafting protectionist legislation on a local or county-wide, rather than State-wide, basis. Pet. 18-19 (quoting *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 361 (1992)); *see also C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 391 (1994); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 & n.4 (1951); *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891). It is immaterial whether a State gives its own businesses a county-wide, as opposed to a state-wide, benefit—as long as the State gives its businesses a benefit that it denies to out-of-state businesses, it is by definition discriminating between in-state and out-of-state businesses. The Texas statutes at issue here discriminate on their

face against out-of-state retailers, which (in sharp contrast to in-state retailers) are barred from remotely selling and directly shipping wine or other alcoholic beverages *anywhere* in Texas. *See* Pet. App. 81-86a & n.17; *compare* Tex. Alco. Bev. Code §§ 22.03(a), 24.03 (allowing in-state retailers to remotely sell and directly ship wine and other alcoholic beverages to consumers anywhere within the same county) *with id.* §§ 54.12, 107.07(f) (prohibiting out-of-state retailers from remotely selling and directly shipping such beverages anywhere in Texas).

Indeed, this discrimination is particularly pronounced in a big State like Texas, where many counties are larger in terms of population or size than entire States. *See* Specialty Wine Retailers' *Amicus* Br. 7. That may explain why, as the Fifth Circuit noted, the Texas Solicitor General acknowledged below that "the geographical limits" in the Texas Alcoholic Beverage Code are "irrelevant" for present purposes, Pet. App. 20a, 46a, and the result in this case would be the same if in-state retailers could remotely sell and directly ship *anywhere* in the State.

Respondents nonetheless insist that out-of-state retailers are "'not similarly situated to Texas retailers and cannot make a logical argument of discrimination,'" Opp. 17 (quoting Pet. App. 47a), *without even addressing* the settled law described above. Rather, respondents simply parrot the Fifth Circuit's assertion that in-state retailers are "'making what conceptually are *local deliveries*.'" *Id.* (quoting Pet. App. 47a; emphasis modified).

Again, as explained in the petition, this case is not about "local deliveries" that can be performed only by a local retailer. *See* Pet. 19; *see also* Pet. App. 85-86a. Rather, this case is about remote sales and direct shipping, which can be performed equally well by in-state and out-of-state retailers thanks to the telephone, the Internet, UPS, FedEx, and other instrumentalities of modern interstate commerce.

Thus, the fact that the discriminatory benefit at issue here is county-wide, rather than state-wide, in scope does not provide a "separate and independent rationale" to support the judgment. Opp. 16. Under the Commerce Clause, "'actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred.'" Pet. App. 84a (quoting *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994)). That is why the Fifth Circuit did not, and could not, rest its holding on the scope of the Texas statutes. Rather, the Fifth Circuit was required to, and did, decide whether the Twenty-first Amendment allows States to discriminate against out-of-state retailers in the sale of alcoholic beverages. The Fifth Circuit decided that dispositive question incorrectly, and that question is now squarely presented for this Court's review.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant review.

Respectfully submitted,

JAMES F. BASILE
TRACY K. GENESEN
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104

KENNETH W. STARR
336 Guittard Avenue
Waco, TX 76706

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

STERLING W. STEVES
STERLING W. STEVES, P.C.
1406 Thomas Place
Fort Worth, TX 76107

February 1, 2011