Supreme Court, U.S.
FILED

10-671 NOV 22 2010

OFFICE OF THE CLERK

No.

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

PETITION FOR WRIT OF CERTIORARI

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

November 22, 2010

Blank Page

QUESTION PRESENTED

Whether, notwithstanding *Granholm v. Heald*, 544 U.S. 460 (2005), the Twenty-first Amendment overrides the Commerce Clause and allows States to discriminate against out-of-state businesses in the sale of alcoholic beverages.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Wine Country Gift Baskets.com is wholly owned by a privately held company, Houdini, Inc., and no publicly held corporation owns 10% or more of the latter's stock.

Petitioner K&L Wine Merchants is wholly owned by a privately held company, BBCK Enterprises, Inc., and no publicly held corporation owns 10% or more of the latter's stock.

Petitioner Beverages & More, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 DISCLOSURE STATEMENT ii

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 4

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 4

STATEMENT OF THE CASE 8

A. Background 8

B. Proceedings Below 9

REASON FOR GRANTING THE WRIT 11

The Twenty-First Amendment Does Not Override The Commerce Clause And Allow States To Discriminate Against Out-Of-State Businesses In The Sale Of Alcoholic Beverages. 11

CONCLUSION 21

APPENDIX CONTENTS

Original Fifth Circuit opinion,
January 26, 2010 ..... 1a

Amended Fifth Circuit opinion,
July 22, 2010
(additions from original opinion marked by shading,
deletions marked by ~~strikeout~~ 26a

Fifth Circuit order denying rehearing *en banc*,
August 24, 2010 ..... 53a

District court opinion,
October 16, 2009 ..... 55a

TABLE OF AUTHORITIES

Page(s)

Cases

Arnold's Wines, Inc. v. Boyle,
571 F.3d 185 (2d Cir. 2009) ..... *passim*

Brimmer v. Rebman,
138 U.S. 78 (1891) 19

Brooks v. Vassar,
462 F.3d 341 (4th Cir. 2006) 13

C&A Carbone, Inc. v. Town of Clarkstown, N.Y.,
511 U.S. 383 (1994) 15

Cooper v. McBeath,
11 F.3d 547 (5th Cir. 1994) 8

Dean Milk Co. v. City of Madison,
340 U.S. 349 (1951) 18

Dickerson v. Bailey,
336 F.3d 388 (5th Cir. 2003) 9

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.,
504 U.S. 353 (1992) 18

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

North Dakota v. United States,
495 U.S. 423 (1990) 12

Scott v. Donald,
165 U.S. 58 (1897) 18

Southern Wine & Spirits of Tex., Inc. v. Steen,
486 F. Supp. 2d 626 (W.D. Tex. 2007) 9

Tiernan v. Rinker,
102 U.S. 123 (1880) 18

Walling v. Michigan,
116 U.S. 446 (1886) 18

Constitution, Statutes, and Rules

28 U.S.C. § 1254(1) 4

Cal. Bus. & Prof. Code § 23661.2 13

Idaho Code § 23-1309A 13

La. Rev. Stat. § 26:359 13

Mo. Rev. Stat. § 311.462 13

N.H. Rev. Stat. § 178:27 13

N.M. Stat. § 60-7A-3 13

Or. Rev. Stat. § 471.282 13

Tex. Alco. Bev. Code § 6.03(a) 5

Tex. Alco. Bev. Code § 6.03(i) 5, 8, 14

Tex. Alco. Bev. Code § 22.03(a) 6, 9, 18

Tex. Alco. Bev. Code § 24.03 ..... 6, 9, 18

Tex. Alco. Bev. Code § 54.12 ..... 7, 9, 18

Tex. Alco. Bev. Code § 102.01 ..... 8, 14

Tex. Alco. Bev. Code § 102.01(a) 7

Tex. Alco. Bev. Code § 107.05(a) 7

Tex. Alco. Bev. Code § 107.07(f) 7, 18

Tex. Alco. Bev. Code § 109.53 7

U.S. Const. art. I § 8 cl. 3 ..... *passim*

U.S. Const. amend. XXI ..... *passim*

Va. Code § 4.1-209.1 13

W. Va. Code § 60-8-6 13

Wyo. Stat. § 12-2-204 13

Other Authorities

Federal Trade Commission,
Possible Anticompetitive Barriers to E-Commerce: Wine (July 2003) 3, 8, 14, 20

Blank Page

INTRODUCTION

For decades, the cornerstone of this Court's Commerce Clause jurisprudence has been the principle that "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (internal quotation omitted). "This rule is essential to the foundations of the Union": if States were free to yield to the natural tendency to protect their own businesses from out-of-state competition, the Nation as a whole would experience "economic Balkanization" and "a proliferation of trade zones." *Id.* Thus, "State laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity." *Id.* at 476 (internal quotation omitted).

In this case, however, the Fifth Circuit upheld a Texas law that facially discriminates between in-state and out-of-state businesses: in-state retailers may remotely sell and directly ship alcoholic beverages to in-state consumers, but out-of-state retailers may not. Thus, a liquor store in Pasadena, Texas, may take an order for a case of wine over the telephone and ship it by Federal Express to a household in Houston, but an identical store in Pasadena, California, may not. The Fifth Circuit did not identify any compelling justification for such differential treatment. Rather, the court held that the Twenty-first Amendment, which repealed Prohibition, categorically immunized the Texas law from Commerce Clause scrutiny.

That holding cannot be squared with this Court's landmark decision in *Granholm*, which confirmed that the Twenty-first Amendment "does not supersede other provisions of the Constitution," including the Commerce Clause. *Id.* at 486. In particular, the Amendment "restored to the States the powers they had" before Prohibition, but "did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." *Id.* at 484-85. "Allowing States to discriminate against out-of-state wine invites a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Id.* at 473 (internal quotation omitted).

The Fifth Circuit—echoing an earlier decision by the Second Circuit, *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009)—has now turned *Granholm* upside down. Rather than construing *Granholm* as a *prohibition of* discrimination, these courts have interpreted that decision as a *license for* discrimination. Under this view, the relevant constitutional analysis under *Granholm* starts and ends with the proposition that a three-tier system of alcohol distribution (which separates producers from wholesalers from retailers) is "unquestionably legitimate" under the Twenty-first Amendment. After deeming discrimination between in-state and out-of-state retailers inherent in a three-tier system, these courts held that the Twenty-first Amendment categorically insulates such discrimination from Commerce Clause scrutiny, and purported to distinguish *Granholm* as limited to forbidding discrimination against out-of-state *producers*, not out-of-state *retailers*.

Such a distinction has no basis in law or logic. *Granholm*'s teaching could scarcely be more clear: "If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." 544 U.S. at 493. There is no inconsistency whatsoever between a three-tier system, on the one hand, and direct shipping by out-of-state businesses (whether producers or retailers) on the other. *See* FTC, *Possible Anticompetitive Barriers to E-Commerce: Wine* 7 (July 2003) (FTC Report), available at *http://www.ftc.gov/os/2003/07/winereport2.pdf* (last visited on November 18, 2010) ("Direct shipping refers to wineries *or retailers* shipping wine directly to consumers outside the three-tier system, usually to their home or work via a package delivery company ....") (emphasis added).

Granholm sought to end "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 this case shows that the war rages on—the battlefield has simply shifted from producers to retailers. And this case, like *Arnold's Wines*, shows that the lower courts do not know how to interpret and apply *Granholm*. *See, e.g.*, *Arnold's Wines*, 571 F.3d at 192-93 (Calabresi, J., concurring) (asserting that current jurisprudence "leaves lower courts at a loss in seeking to figure out what the Twenty-first Amendment means"). The time has come for this Court to clear up the confusion and end this festering interstate trade war for once and for all. Accordingly, this Court should grant the petition and reverse the decision below.

OPINIONS BELOW

The Fifth Circuit's initial opinion, subsequently withdrawn, is reported at 595 F.3d 249, and reprinted in the Appendix ("App.") at 1-25a. The Fifth Circuit's subsequent substitute opinion, issued upon denial of petitioners' initial petition for rehearing *en banc*, is reported at 612 F.3d 809, and reprinted at App. 26-52a. The Fifth Circuit's unreported order denying petitioners' subsequent petition for rehearing *en banc* is reprinted at App. 53-54a. The district court's opinion is reported at 530 F. Supp. 2d 848, and reprinted at App. 55-106a.

JURISDICTION

The Fifth Circuit denied a timely petition for rehearing *en banc* on August 24, 2010. App. 53a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause provides:

> The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.

U.S. Const. art. I § 8 cl. 3.

The Twenty-first Amendment provides:

> **Section 1.** The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> **Section 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 hereby prohibited.
>
> **Section 3.** This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

U.S. Const. amend. XXI.

The Texas Alcoholic Beverage Code provides in relevant part:

> It is the public policy of this state and a purpose of this section to require that, except as provided in Subsection (k) of this section or otherwise in this code, a permit or license may not be issued to a person who was not a citizen of this state for a one-year period preceding the date of the filing of the person's application for a license or permit.

Tex. Alco. Bev. Code § 6.03(a).

> It is also the public policy of this state and a purpose of this section to maintain and enforce the three-tier system (strict separation between the manufacturing, wholesaling, and retailing levels of the industry) and thereby to prevent the creation or maintenance of a "tied house" as described and prohibited in Section 102.01 of this code.

Tex. Alco. Bev. Code § 6.03(i).

> The holder of a package store permit or wine only package store permit issued for a location within a city or town or within two miles of the

> corporate limits of a city or town, who also holds a local cartage permit, may make deliveries of and collections for alcoholic beverages off the premises in areas where the sale of the beverages is legal. The permittee must travel by the most direct route and may make deliveries and collections only within the county or the city or town or within two miles of its corporate limits, and only in response to bona fide orders placed by the customer, either in person at the premises, in writing, by mail, or by telegraph or telephone. This section shall not be construed as preventing a holder of a package store permit or wine only package store permit from delivering alcoholic beverages to the holder of a carrier's permit for transportation to persons who have placed bona fide orders and who are located in an area that the holder of a package store permit or wine only package store permit, who also holds a local cartage permit, is authorized to directly deliver to under this section. The holder of a package store permit or wine only package store permit may also deliver alcoholic beverages to the holder of a carrier's permit for transportation outside of this state in response to bona fide orders placed by persons authorized to purchase the beverages.

Tex. Alco. Bev. Code § 22.03(a).

> The holder of a wine only package store permit may make deliveries to and collections from customers as provided in Section 22.03 of this code.

Tex. Alco. Bev. Code § 24.03.

> Any person who does not hold an out-of-state winery direct shipper's permit who sells and ships alcohol from outside of Texas to an ultimate consumer in Texas commits on first offense a Class B misdemeanor, on second offense a Class A misdemeanor, and on third offense a state jail felony.

Tex. Alco. Bev. Code § 54.12.

> In this section, "tied house" means any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels, that is, between a manufacturer and a wholesaler or retailer, or between a wholesaler and a retailer ....

Tex. Alco. Bev. Code § 102.01(a).

> No person may import liquor into the state and deliver it to a person not authorized to import it.

Tex. Alco. Bev. Code § 107.05(a).

> Except as provided by Chapter 54, any person in the business of selling alcoholic beverages in another state or country who ships or causes to be shipped any alcoholic beverage directly to any Texas resident under this section is in violation of this code.

Tex. Alco. Bev. Code § 107.07(f).

> No person who has not been a citizen of Texas for a period of one year immediately preceding the filing of his application therefor shall be eligible to receive a permit under this code.

Tex. Alco. Bev. Code § 109.53.

STATEMENT OF THE CASE

A. Background

Like many other States, Texas has established a three-tier system governing the distribution of alcoholic beverages to prevent vertical integration by producers, wholesalers, and retailers. *See generally* Tex. Alco. Bev. Code § 6.03(i) ("It is ... the public policy of this state and a purpose of this section to maintain and enforce the three-tier system (strict separation between the manufacturing, wholesaling, and retailing levels of the industry) and thereby to prevent the creation or maintenance of a 'tied house' as described and prohibited in Section 102.01 of this code."); *id.* § 102.01 ("'[T]ied house' means any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels, that is, between a manufacturer and a wholesaler or retailer, or between a wholesaler and a retailer ....."). As these provisions make clear, the key point of a three-tier system is to ensure separate ownership of alcohol producers, wholesalers, and retailers. *See* FTC Report 5-7.

Unlike many other States, Texas has long used its Alcoholic Beverage Code and three-tier system to discriminate against out-of-state businesses. In 1994, the Fifth Circuit invalidated the Code's durational residency and citizenship requirements for retailers, characterizing them as "parochial statutes" that "amount to simple economic protectionism." *Cooper v. McBeath*, 11 F.3d 547, 548 (5th Cir. 1994). In 2003, the Fifth Circuit invalidated the Code's provisions allowing sales and direct shipping by in-state, but not out-of-state,

wineries, *see Dickerson v. Bailey*, 336 F.3d 388, 409 (5th Cir. 2003), thereby foreshadowing this Court's subsequent decision in *Granholm*. And in 2007, a district court invalidated the Code's durational residency and citizenship requirements for wholesalers of alcoholic beverages, *Southern Wine & Spirits of Tex., Inc. v. Steen*, 486 F. Supp. 2d 626, 633 (W.D. Tex. 2007)—a decision the State did not even appeal.

In the wake of *Dickerson*, Texas amended the Code to allow out-of-state *producers* of wine to remotely sell and directly ship to Texas consumers, but expressly prohibited out-of-state *retailers* of wines and other alcoholic beverages from doing the same. *See* Tex. Alco. Bev. Code § 54.12. Under the latter provision, it is a crime (indeed, after two offenses, a felony) for any out-of-state retailer to remotely sell and directly ship alcoholic beverages to *any* Texas consumers. *See id.* In sharp contrast, the Code allows in-state retailers to remotely sell and directly ship wine and other alcoholic beverages to Texas consumers in the same county. *See id.* § 22.03(a); *see also id.* § 24.03.

B. Proceedings Below

Petitioners are out-of-state wine retailers who wish to remotely sell and directly ship wine to Texas consumers, and Texas consumers who wish to buy wine from such retailers. They brought this lawsuit in 2006 challenging the constitutionality of the Texas Alcoholic Beverage Code insofar as it discriminates between in-state and out-of-state retailers with respect to the remote sale and direct shipment of wine. The complaint sought both declaratory and injunctive relief from the official respondents here,

the members of the Texas Alcoholic Beverage Commission. Two in-state wholesalers, the private respondents here, thereafter intervened to defend the constitutionality of the challenged Code provisions.

The district court (Fitzwater, C.J., N.D. Tex.) granted petitioners' motion for summary judgment, holding that the provisions of the Texas Alcoholic Beverage Code that allow in-state, but not out-of-state, retailers to remotely sell and directly ship wine to Texas consumers violate the Commerce Clause. App. 77-91a. The court held that these provisions facially discriminate against the out-of-state retailers and that the State had failed to show that such discrimination advanced a legitimate state interest that could not be adequately served by reasonable nondiscriminatory alternatives. *See id.* The district court, however, gave petitioners no real remedy for that constitutional violation, holding that out-of-state retailers must purchase any wine remotely sold and directly shipped to Texas consumers from Texas wholesalers. App. 92-105a. Both sides appealed.

The Fifth Circuit reversed the district court's decision that the challenged provisions of the Texas Code violate the Commerce Clause. App. 1-25a. The appellate court held that this case is governed by the Twenty-first Amendment, not the Commerce Clause. According to the Fifth Circuit, the Twenty-first Amendment legitimizes the three-tier system, and discrimination between in-state and out-of-state retailers is an "inherent" part of that system, and thus cannot violate the Commerce Clause. App. 17-23a. Because the Fifth Circuit concluded that the

challenged provisions did not violate the Federal Constitution, the court did not reach the issue of remedy. App. 6a, 7a.

Petitioners sought rehearing *en banc*. Several months later, the panel denied the petition, but issued a revised opinion. App. 26-52a. The Fifth Circuit denied a subsequent petition for rehearing *en banc*, App. 53-54a, and this petition follows.

REASON FOR GRANTING THE WRIT

The Twenty-First Amendment Does Not Override The Commerce Clause And Allow States To Discriminate Against Out-Of-State Businesses In The Sale Of Alcoholic Beverages.

This petition presents the question whether this Court meant what it said in *Granholm*: the Twenty-first Amendment "does not supersede other provisions of the Constitution," including the Commerce Clause. 544 U.S. at 486. The lesson of *Granholm* is that the Twenty-first Amendment does not displace the rule that "the Commerce Clause *prevent[s] States from discriminating against* imported liquor." *Id.* at 476.

Here, however, the Fifth Circuit upheld a facially discriminatory state law without conducting *any analysis whatsoever* under the Commerce Clause. While acknowledging that "[t]he dormant Commerce Clause applies" to interstate commerce in alcoholic beverages, the court insisted that in this context the Clause "applies differently than it does to products *whose regulation is not authorized by a specific* constitutional amendment." App. 47a.

But the court did not apply the Commerce Clause "differently" in this case; it did not apply the

Commerce Clause *at all*. The court sought to justify this approach by invoking *Granholm*'s observation that "the three-tier system is 'unquestionably legitimate.'" 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). That observation, the Fifth Circuit declared, means that "the foundation on which we build is that Texas may have a three-tier system." App. 44a; *see also* App. 49a ("*Granholm* told us that the three tiers are legitimate under the Twenty-first Amendment."); App. 44a ("Th[e] [three-tier] system has been given constitutional approval. The discrimination that would be questionable ... is that which is not inherent in the three-tier system itself. If *Granholm*'s legitimizing of the tiers is to have meaning, it must at least mean that."); *id.* (characterizing this "legitimizing" of the three-tier system as a "caveat" to the principle that the Commerce Clause prevents States from discriminating against out-of-state businesses).

Having thus made the legitimacy of the three-tier system the starting point for the inquiry, the Fifth Circuit proceeded to declare—without analysis—that discrimination between in-state and out-of-state retailers of alcoholic beverages is "an inherent aspect" of such a system and thus necessarily constitutional. App. 49a; *see also* App. 48a ("When analyzing whether a State's alcoholic beverage regulation discriminates under the dormant Commerce Clause, a beginning premise is that ... retailers may be required to be within the State."); App. 47a ("Because of *Granholm* and its approval of a three-tier system, we know that Texas may authorize its in-state, permit-holding retailers to make sales and may prohibit out-of-state retailers

from doing the same."); App. 50a ("[P]hysical location ... is a critical component of the three-tier system."); *see also Arnold's Wines*, 571 F.3d at 190 (characterizing challenge to New York law that discriminated against out-of-state retailers as "a frontal attack on the constitutionality of the three-tier system itself"); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (opinion of Niemeyer, J.) (same); *but see 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).

The assumption that discrimination against out-of-state retailers of alcoholic beverages is "inherent" in a three-tier system is baseless. There is no reason why a State with a three-tier system must limit retail sales of alcoholic beverages to in-state businesses. To the contrary, many States with three-tier systems have adopted legislation that specifically allows 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, e.g.*, Cal. Bus. & Prof. Code § 23661.2; Idaho Code § 23-1309A; La. Rev. Stat. § 26:359; Mo. Rev. Stat. § 311.462; N.H. Rev. Stat. § 178:27; N.M. Stat. § 60-7A-3; Or. Rev. Stat. § 471.282; Va. Code § 4.1-209.1; W. Va. Code § 60-8-6; Wyo. Stat. § 12-2-204. Indeed, a Task Force of the National Conference of State Legislatures has endorsed a Model Direct Shipping Bill, cited with approval in *Granholm*, *see* 544 U.S. at 491-92, that establishes a template for state statutes allowing nondiscriminatory remote sales and direct shipping by out-of-state retailers. These statutes and the Model Bill refute the

assumption of the Fifth and Second Circuits that discrimination between in-state and out-of-state retailers is "inherent" in a three-tier system, App. 49a, 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.

In other words, a three-tier system can accommodate remote sales and direct shipping by out-of-state alcohol *retailers* just as easily as remote sales and direct shipping by out-of-state alcohol *producers*. A three-tier system, after all, focuses on the *ownership* of businesses, not the *location* of businesses. As the Texas Alcoholic Beverage Code itself makes clear, the system seeks to prevent a "tied house," *i.e.*, "any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels." Tex. Alco. Bev. Code § 102.01; *see also id.* § 6.03(i). There is no reason to suppose that this Court was referring to anything more than such separation of ownership by noting in *Granholm* that a three-tier system is "unquestionably legitimate." 544 U.S. at 489 (internal quotation omitted); *see also id.* at 488 ("The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and *how to structure the liquor distribution system*.") (emphasis added; internal quotation omitted). Indeed, *Granholm* drew its definition of a three-tier system from an FTC report that endorsed direct shipment of wine by both out-of-state wineries *and retailers* without suggesting any inconsistency with a three-tier system. *See id.* at 466 (citing FTC Report 5-7).

Thus, it does not follow that a three-tier system requires differential treatment of out-of-state retailers. To the contrary, such differential treatment necessarily conflicts with the Commerce Clause, which creates a single *national* market and renders state lines invisible insofar as interstate commerce is concerned. *See, e.g.*, *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994). Or, as *Granholm* put it, "[t]he mere fact of nonresidence should not foreclose a [business] in one State from access to markets in other States." 544 U.S. at 472.

To interpret *Granholm*'s approval of the three-tier system as a blessing of differential treatment of in-state and out-of-state businesses is to attribute acute schizophrenia to that decision, which could hardly have been more emphatic in its condemnation of such differential treatment. *See id.* ("Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.") (internal quotation omitted); *id.* at 475 ("States cannot require an out-of-state firm to become a resident in order to compete on equal terms.") (internal quotation omitted).

To hold that the three-tier system trumps the Commerce Clause, moreover, is to elevate that system to quasi-constitutional status and open a new frontier of federal constitutional law: the definition of a "three-tier system." According to the Fifth Circuit, *Granholm* held that the Twenty-first Amendment allows each tier of the system "to do what producers,

wholesalers, and retailers do." App. 45a. But that requires a court to determine the scope of these various activities as a matter of federal constitutional law. Indeed, the Fifth Circuit explained that its task here was to "analyz[e] 'retailing' for Twenty-first Amendment purposes." App. 46a.

The Fifth Circuit, however, quickly "pull[ed] back from any effort to define the reach of a traditional three-tier retailer" as a matter of federal constitutional law. App. 46a. Instead, the court simply held that "what Texas has allowed here" is not "so substantially different from what retailing must include as not to be third-tier retailing at all." *Id.* The court characterized "over-the-counter sales" by in-state retailers as "*Granholm*-approved retailing," and asserted that the remote sales and direct shipping authorized by Texas law are sufficiently similar to such sales to fall within the scope of constitutionally approved "retailing." App. 47a. Thus, the court declared, the Texas laws at issue here pass federal constitutional muster because "[r]etailers are acting as retailers and making what conceptually are local deliveries." *Id.*; *see also* App. 48a ("We view local deliveries as a constitutionally benign incident of an acceptable three-tier system."). The court warned that "[a] State's right to authorize a variety of retail practices for alcoholic beverages free of dormant Commerce Clause barriers may not be limitless," App. 49a, but offered no guidance as to the scope of constitutionally sanctioned "retailing."

The Fifth Circuit's rapid descent into this quagmire underscores the fundamental infirmity of its approach. The three-tier system is a creature of

state law, not federal constitutional law. This Court's observation in *Granholm* that a three-tier system is "unquestionably legitimate," 544 U.S. at 489 (internal quotation omitted), was not an invitation for courts to invent a federal constitutional definition of a "three-tier system." There is no such thing as "'retailing' for Twenty-first Amendment purposes," App. 46a, because the Twenty-first Amendment does not refer to retailing—or, for that matter, to a three-tier system.

By starting and ending the federal constitutional analysis by reference to the legitimacy of the three-tier system, the Fifth Circuit (like the Second Circuit before it, *see Arnold's Wines*, 571 F.3d at 190-92), has condemned the district courts in those circuits to the impossible task of defining a legitimate three-tier system as a matter of federal constitutional law. *Cf. id.* at 192 (Calabresi, J., concurring) (noting that current jurisprudence "leaves lower courts at a loss in seeking to figure out what the Twenty-first Amendment means"); *id.* at 201 ("[W]hile the general direction of Supreme Court jurisprudence has been toward prohibiting any discriminatory state regulation, it is not for our court to say how far or how fast we should move along that vector.").

What makes this brave new world of Twenty-first Amendment jurisprudence particularly troubling is that *Granholm* specifically *rejected* the proposition that the Twenty-first Amendment "saves" any discrimination against interstate commerce otherwise prohibited by the Commerce Clause. *See* 544 U.S. at 476-89. As *Granholm* explained, the States were *never* authorized to discriminate against interstate commerce with respect to alcoholic

beverages, and the Twenty-first Amendment did not create any new right to do so. *See id.* at 477-83 (citing, *inter alia*, *Scott v. Donald*, 165 U.S. 58 (1897); *Walling v. Michigan*, 116 U.S. 446 (1886); *Tiernan v. Rinker*, 102 U.S. 123 (1880)). "The [Twenty-first] Amendment "did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." *Granholm*, 544 U.S. at 484-85. Thus, notwithstanding the Twenty-first Amendment, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm*, 544 U.S. at 487.

There can be no doubt that the provisions of the Texas Alcoholic Beverage Code at issue here violate that principle. As noted above, those provisions allow in-state retailers to remotely sell and directly ship wine and other alcoholic beverages to consumers anywhere within the same county, *see* Tex. Alco. Bev. Code §§ 22.03(a), 24.03, but prohibit out-of-state retailers from remotely selling and directly shipping such beverages *anywhere* in Texas, *see id.* §§ 54.12, 107.07(f).

The Fifth Circuit asserted that out-of-state retailers are not "similarly situated to Texas retailers and cannot make a logical argument of discrimination" because they are not present in any particular Texas county. App. 47a. As this Court has long held, however, a State "may not avoid the strictures of the Commerce Clause" by crafting economically protectionist legislation on a local or county-wide, rather than State-wide, basis. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of*

Natural Res., 504 U.S. 353, 361 (1992); *see also 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). As the district court recognized, out-of-state retailers are obviously in a worse position than in-state retailers because they cannot remotely sell and directly ship wine or other alcoholic beverages to *any* county in Texas. App. 81-86a & n.17. Indeed, the Texas Solicitor General acknowledged below that "the geographical limits" in the Texas Alcoholic Beverage Code are "irrelevant" for federal constitutional purposes, App. 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.

The Fifth Circuit thus missed the point by characterizing remote sales and direct shipping as mere "consumer-friendly practices" incidental to a retailer's in-state location, like carrying a customer's groceries from a store to a car. App. 49a. The key point here, as the district court recognized, is that the challenged provisions of the Texas Alcoholic Beverage Code do not involve over-the-counter transactions, but instead remote sales and direct shipping. App. 85-86a. But for those provisions, out-of-state retailers are just as capable as in-state retailers of carrying out such remote sales and direct shipping. *Id.* While a State need not allow the remote sale and direct shipping of alcoholic beverages at all, once it does so, it may not discriminate between in-state and out-of-state businesses. *See Granholm*, 544 U.S. at 488-89, 493; *see also* App. 85-86a.

The remote sale and direct shipment of wine and other alcoholic beverages is not only pure interstate

commerce, but also—as this Court underscored in *Granholm*—"an emerging and significant business." 544 U.S. at 467 (citing FTC Report 7, which does not distinguish between remote sales and direct shipping by producers and retailers). The explosive growth of the Internet in recent years offers consumers of wine and other alcoholic beverages (like any other consumer products) enhanced price competition and greater selection. *See* FTC Report 1, 16-22. As *Granholm* noted, however, "'[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine.'" 544 U.S. at 468 (quoting FTC Report 3).

Absent intervention by this Court, a substantial portion of the Nation—including the States of Texas and New York—will be prevented from reaping the benefits of the Commerce Clause as applied in *Granholm*. *See* 544 U.S. at 472-73. This case and *Arnold's Wines* have erected a distinction, hitherto unknown in this Court's jurisprudence, between discrimination against out-of-state *producers* (impermissible under *Granholm*) and discrimination against out-of-state *retailers* (allegedly permissible under the three-tier system). *See* App. 44-50a; *Arnold's Wines*, 571 F.3d at 190-92. That alleged distinction cannot be allowed to stand.

For all intents and purposes, after all, a producer engaged in remote sales and direct shipping (as in *Granholm*) is engaged in retailing. *See, e.g.*, FTC Report 7 (defining "direct shipping" as shipping by out-of-state "wineries *or retailers*") (emphasis added). If the three-tier system can accommodate remote sales and direct shipping by out-of-state producers, there is no reason why that system cannot

accommodate precisely the same activity by out-of-state retailers. It is high time for this Court to clear up the manifest confusion in this area, *see, e.g.*, *Arnold's Wines*, 571 F.3d at 193 (Calabresi, J., concurring), and to bring a definitive end to the ongoing interstate trade war over the remote sale and direct shipment of wine.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

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

Blank Page