No. __-____

IN THE
Supreme Court of the United States

TEXAS PACKAGE STORES ASSOCIATION, INC.,
Petitioner,

v.

FINE WINE & SPIRITS OF NORTH TEXAS, L.L.C. AND SOUTHERN WINE AND SPIRITS OF TEXAS, INC.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Twenty-first Amendment grants each State the power to regulate the importation and sale of alcohol within its borders. *See* U.S. Const. amend. XXI, § 2. Most States have long done so "through [a] three-tier system" of producers, wholesalers, and retailers that this Court has recognized is "'unquestionably legitimate.'" *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion)). Although States may not favor in-state producers or products over their out-of-state counterparts, "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.*

The question presented is:

May a State condition access to the wholesale or retail tier of its three-tier alcohol distribution system on in-state residency or physical presence, as the Second and Eighth Circuits have concluded, or are such requirements unconstitutional, as the Fifth Circuit held below?

PARTIES TO THE PROCEEDINGS

Petitioner Texas Package Stores Association, Inc. was the intervenor-defendant in the district court and the appellant in the court of appeals.

Fine Wine & Spirits of North Texas, L.L.C. and Southern Wine and Spirits of Texas, Inc. were the intervenor-plaintiffs in the district court and the appellees in the court of appeals.

In the original proceedings that took place in the early 1990s, Steve Cooper and Richard L. Wilson were the plaintiffs; the Texas Alcoholic Beverage Commission and W.S. McBeath, its Administrator, were the defendants; and the Licensed Beverage Distributors Association, Inc. and the Wholesale Beer Distributors of Texas, Inc. were (like petitioner) intervenor-defendants. None participated in the more recent proceedings below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Texas Package Stores Association, Inc. states the following:

Texas Package Stores Association, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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Texas Package Stores Association, Inc. ("TPSA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

This case concerns the constitutionality of state alcohol regulations that date back to the ratification of the Twenty-first Amendment. Shortly after the repeal of Prohibition, many States chose to channel alcohol distribution through a three-tier system of producers, wholesalers, and retailers, and to condition a business's access to the wholesale and retail tiers on some form of in-state residency, citizenship, physical presence, or a combination of the three. Many States retain similar rules today, having found that those requirements facilitate cooperation with law enforcement and encourage accountability to the community.

The courts of appeals openly disagree about whether such requirements are constitutional under prevailing dormant Commerce Clause jurisprudence. The weight of circuit authority understands this Court's decision in *Granholm v. Heald*, 544 U.S. 460 (2005), to have "dr[awn] a bright line between the producer tier and the rest of the system." *Southern Wine & Spirits of Am., Inc. v. Division of Alcohol & Tobacco Control*, 731 F.3d 799, 810 (8th Cir. 2013) (Colloton, J.). Under this view, if a State's "'three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers, [a court] need not analyze the regulation further under Commerce Clause principles.'" *Id.* (quoting *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009)). But the Fifth Circuit below considered and expressly rejected that reading of

Granholm and held Texas's residency requirements unconstitutional.

The Fifth Circuit's decision threatens numerous state laws that *Granholm* expressly sought to protect. All nine Justices in that case agreed that such requirements, which enjoy an unbroken historical pedigree and ample support from present-day alcohol-control officials, are constitutional. Given the prevalence of those state laws, which many States rely upon to ensure community accountability and to achieve important law enforcement purposes, the Court's review is urgently needed. The confusion introduced by the Fifth Circuit's error warrants this Court's review now.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-26a) is reported at 820 F.3d 730. The order of the district court (App. 27a-34a) is not reported.

JURISDICTION

The court of appeals entered its judgment on April 21, 2016. On July 14, 2016, Justice Thomas extended the time for filing a certiorari petition to and including August 19, 2016. App. 45a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause, the Privileges and Immunities Clause, the Twenty-first Amendment, and relevant provisions of the Texas Alcoholic Beverage Code are set forth at App. 35a-44a.

STATEMENT OF THE CASE

A. Background

1. The Texas Alcoholic Beverage Code generally requires the owners of businesses that seek to sell alcohol to retail customers to have lived in Texas for at least one year. *See* Tex. Alco. Bev. Code Ann. § 6.03(a), (g), (k). It bars any "person who has not been a citizen of Texas for a period of one year immediately preceding the filing of his application" for an alcoholic-beverage permit from receiving one, and it prohibits a corporation from securing most permits unless "at least 51 percent of [its stock] is owned at all times by citizens who have resided within the state for a period of one year." *Id.* § 109.53.[1] The Texas Alcoholic Beverage Commission ("the Commission") may withhold or cancel permits based on these requirements. *See id.* §§ 11.46(a)(11), 11.61(b)(19). Any holder of a permit to operate a "package store" (essentially, a retail liquor business, *see id.* § 22.01) "who shall be injured in his business or property by another package store permittee by reason of anything prohibited [by the residency requirement] may institute suit in any district court . . . to require enforcement by injunctive procedures." *Id.* § 109.53. And the Code further provides that "it shall be the duty of the attorney general, when any such violation [of the Code] is called to his attention, to file a suit for such cancellation in a district court of Travis County." *Id.*

2. Decades ago, residents of other States sued the Commission's Administrator, asserting that Texas's

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[1] For simplicity, the TPSA adopts the Texas Legislature's convention and refers to these requirements as residency requirements. *See* Tex. Alco. Bev. Code Ann. § 6.03(g).

one-year residency requirement violates the dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Privileges and Immunities Clause, *id.* art. IV, § 2, cl. 1.[2] Petitioner TPSA, which represents the interests of Texas package-store permittees, intervened to defend the law alongside the State, as did two other industry organizations. The district court agreed with the plaintiffs and enjoined enforcement of Texas's residency requirement. *Wilson v. McBeath*, Civ. No. A-90-CA-736, 1991 WL 540043 (W.D. Tex. June 13, 1991).

The Fifth Circuit affirmed on a narrower basis. Without reaching the Privileges and Immunities Clause question, it concluded that Texas's requirements violated the dormant Commerce Clause. *Cooper*, 11 F.3d at 555-56 & n.10. It stated that these requirements were protectionist in effect and that Texas could, therefore, salvage them only if it could shoulder the "towering" burden of showing that they furthered "'a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* at 553 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988), and citing *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). The court further concluded, under then-prevailing precedent, that the Twenty-first Amendment did not save the law because the Texas residency requirement did not relate to the Amendment's "core concerns" or "'central purpose'" — that is, "'to combat the perceived evils of

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[2] When that case began, Texas law required three years of residency. But, while the case was pending, Texas changed the law to the one-year requirement in place today. *See Cooper v. McBeath*, 11 F.3d 547, 549-50 (5th Cir. 1994).

an unrestricted traffic in alcoholic beverages.'" *Id.* at 555 (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984)).

3. More than a decade later, this Court decided *Granholm*. There, the Court held unconstitutional state statutes that allowed in-state wineries to sell wine directly to in-state consumers while functionally preventing out-of-state wineries from doing the same. *See* 544 U.S. at 465-66. But it imposed an important limitation on that principle: the Court did not apply the "core concerns" test but instead distinguished the producer tier, on the one hand, from the wholesale and retail tiers, on the other. It underscored that "'[t]he 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*.'" *Id.* at 488 (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)) (emphasis added). It explained that "States may . . . funnel sales through the three-tier system," which it called "'unquestionably legitimate.'" *Id.* at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion)). It acknowledged — for the first time in a majority opinion — that a State could constitutionally "'require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.'" *Id.* (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)). And it declared that "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.*

B. Proceedings Below

1. In 2014, the TPSA returned to the district court in *Cooper* and asked it to dissolve the permanent injunction against enforcement of the Texas residency requirement in light of *Granholm*. *See* Fed. R. Civ. P. 60(b). *Cooper*, the TPSA argued, is no longer consistent with federal law because, as the Eighth Circuit had explained in rejecting a challenge to a similar residency requirement, "*Cooper* predated *Granholm*, and its placement of a 'towering' burden on a State to justify a three-tier regulation that does not discriminate against out-of-state products or producers, cannot be reconciled with the deference" that *Granholm* now demands. *Southern Wine*, 731 F.3d at 812 (quoting *Cooper*, 11 F.3d at 553) (citation omitted). The Eighth Circuit, the TPSA pointed out, had read *Granholm* to "dr[a]w a bright line between the producer tier and the rest of the system" and concluded that, if a State's "'three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers, [a court] need not analyze the regulation further under Commerce Clause principles.'" *Id.* at 810 (quoting *Arnold's Wines*, 571 F.3d at 191). For the same reasons, the TPSA sought relief from the permanent injunction.

The Commission did not join in this motion, and the original plaintiffs did not respond to it. "Two out-of-state corporations — Fine Wine & Spirits of North Texas, L.L.C. ('Fine Wine'), and Southern Wine and Spirits of Texas, Inc. ('Southern Wine') — moved to intervene as plaintiffs." App. 5a-6a. After granting their motion to intervene, the district court concluded that the case was moot and that the TPSA lacked standing to seek relief from the injunction.

2. The majority of the Fifth Circuit disagreed with those holdings, but it went on to deny the TPSA's request on the merits. It "expressly decline[d] to follow [the Eighth Circuit's decision in] *Southern Wine*," App. 20a, holding instead that "state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor. . . . Distinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system." App. 21a (citing *Wine Country Gift Baskets.com v. Steen,* 612 F.3d 809, 821 (5th Cir. 2010)). And, the majority concluded, residency requirements that apply to owners of businesses operating at the wholesale and retail tiers are not among those aspects. *Id.* The court also faulted the TPSA for declining to address the district court's conclusion that the injunction had been justified on the separate ground that Texas's residency requirements violate the Privileges and Immunities Clause. App. 21a-22a.

Judge Jones dissented from the majority's holding that the TPSA had standing to seek relief from the original injunction. In her view, the TPSA lacked standing because the State itself did not challenge the injunction. App. 26a (Jones, J., dissenting). She did not reach the merits.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS DISAGREE OVER WHETHER A STATE MAY CONDITION ALCOHOL WHOLESALERS' AND RETAILERS' LICENSES ON STATE REQUIREMENTS CONCERNING RESIDENCY OR PHYSICAL PRESENCE

The decision below conflicts with the reading of *Granholm v. Heald*, 544 U.S. 460 (2005), that prevails outside of the Fifth Circuit. In the Second and Eighth Circuits, a court confronting a law that conditions access to the wholesale or retail tier of a State's liquor market on prescribed in-state contacts but treats in- and out-of-state alcohol producers and products identically "'need not analyze the regulation further under Commerce Clause principles.'" *Southern Wine & Spirits of Am., Inc. v. Division of Alcohol & Tobacco Control*, 731 F.3d 799, 810 (8th Cir. 2013) (quoting *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009)). The Fifth Circuit clearly rejected that view, creating a split among the courts of appeals by invalidating a state law that would be upheld elsewhere. This Court should grant the petition to clear up the confusion the Fifth Circuit has introduced.

A. The Balance Of Circuit Authority Outside The Fifth Circuit Holds That A State May Condition Alcohol Wholesalers' Or Retailers' Licenses On State Residency Requirements

1. *Second Circuit.* In *Arnold's Wines*, the Second Circuit rejected a challenge to New York statutes that permitted only those wine retailers licensed by and present in the State to ship directly to consumers. That court understood *Granholm* and the dormant

Commerce Clause to bar state alcohol laws only if they "create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers." 571 F.3d at 190. The *Arnold's Wines* court observed that, "because in-state retailers make up the third tier in New York's three-tier regulatory system," to challenge the in-state requirement is, in effect, to mount "a frontal attack on the constitutionality of the three-tier system" that *Granholm* had endorsed. *Id.* at 190-91. And, it added, such a requirement is not a protectionist measure, but instead a benign effort to "'combat[] the perceived evils of an unrestricted traffic in liquor.'" *Id.* at 191 (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984)). In sum, the Second Circuit has concluded that, if a State's "three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers," the dormant Commerce Clause inquiry is at an end. *Id.*

Judge Calabresi concurred in full, writing separately to emphasize that lower courts must "look to the bulk of cases decided by the Supreme Court and read with special care its latest decision — at the moment, *Granholm*." *Id.* at 200-01 (Calabresi, J., concurring).

2. *Eighth Circuit.* The Eighth Circuit reached a similar conclusion in *Southern Wine*. There, it rejected an out-of-state liquor wholesaler's challenge to a Missouri law requiring the directors, officers, and a supermajority of shareholders of liquor wholesalers that operated in the State to have resided within it for three years. 731 F.3d at 802-03. The court explained that this "requirement defines the extent of in-state presence required to qualify as a

wholesaler in the three-tier system" and "does not discriminate against out-of-state liquor products or producers." *Id.* at 809-10. Citing this Court's endorsement in *Granholm* of a hypothetical state regulation requiring "'that all liquor sold for use in the State be purchased from a licensed in-state wholesaler,'" 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 447 (1990) (Scalia, J., concurring in the judgment)), the Eighth Circuit held that "States have flexibility to define the requisite degree of 'in-state' presence to include" residency requirements like Missouri's. 731 F.3d at 810. Echoing the Second Circuit, the Eighth Circuit read *Granholm* to "dr[a]w a bright line between the producer tier and the rest of the system" and require only that a State's three-tier system treat all alcohol products (whatever their origins) and producers (whatever their locations) the same. *Id.* (citing *Arnold's Wines*, 571 F.3d at 191).

The Eighth Circuit also rejected the view that the Twenty-first Amendment insulates from dormant Commerce Clause scrutiny only those state requirements that are "inherent" in or "integral" to a three-tier system. *Id.* It explained that "[t]here is no archetypal three-tier system from which the 'integral' or 'inherent' elements of that system may be gleaned. States have discretion," the Eighth Circuit held, "to establish their own versions of the three-tier system" that are immune from dormant Commerce Clause challenge as long as they do not discriminate between in-state producers or products and out-of-state producers or products. *Id.* And the court observed that, because *Granholm* cited residency requirements for wholesalers "in connection with the very sentence affirming that 'the three-tier system itself is unques-

tionably legitimate,'" *id.* (quoting *Granholm*, 544 U.S. at 489), such a requirement must, in any case, "be 'integral' to the three-tier system under *Granholm*," *id.*

3. *Fourth Circuit.* Both *Southern Wine* and *Arnold's Wines* drew on the Fourth Circuit's opinion in *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006). There, the court rejected a challenge to a Virginia law that allowed individuals to bring only a small quantity of alcohol for personal consumption into the State while permitting consumers to purchase an unlimited amount of alcohol from Virginia retailers. A majority of the Fourth Circuit concluded that the Twenty-first Amendment allowed Virginia to adopt that limitation on personal imports because "[u]nder no economic construct could such a provision be considered economic protectionism of local industry. To the contrary, it actually amounts to disadvantage local wineries whose wine may only be purchased through retailers." *Id.* at 355. Judge Niemeyer (who authored the majority opinion but wrote only for himself on this point) also rejected the argument for another, more fundamental reason: "an argument that compares the status of an in-state retailer with an out-of-state retailer . . . is nothing different than an argument challenging the three-tier system itself" and one that is, therefore, "foreclosed by the Twenty-first Amendment and . . . *Granholm*." *Id.* at 352 (opinion of Niemeyer, J.). Judge Traxler, in a one-sentence opinion, concurred in all but this portion of Judge Niemeyer's analysis and in the judgment. *Id.* at 361 (Traxler, J., concurring in part and concurring in the judgment).

District Judge Goodwin, sitting by designation, dissented in part. He read *Granholm* to "requir[e]

[courts] to apply the same dormant Commerce Clause analysis to discriminatory liquor laws that [they] apply to other discriminatory laws." *Id.* (Goodwin, J., concurring and dissenting). And, in his view, that analysis condemned Virginia's personal-import limitation because it "prevent[ed] Virginians from having meaningful access to the markets of other States." *Id.* at 362.

Although no later Fourth Circuit decision has addressed Judge Niemeyer's analysis, it informed both the Second Circuit in *Arnold's Wines*, 571 F.3d at 190 (citing this portion of *Brooks*), and the Eighth Circuit in *Southern Wine*, 731 F.3d at 810 (same).

B. The Fifth Circuit Rejects The Prevailing View Of *Granholm* And Bars States From Requiring The Owners Of Wholesalers And Retailers To Reside Within The State

In the decision below, the Fifth Circuit "expressly decline[d]" to follow the Eighth Circuit's decision in *Southern Wine* and instead read *Granholm* to provide that "[s]tate regulations *of the producer tier* 'are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.'" App. 20a-21a (quoting *Granholm,* 544 U.S. at 489) (emphasis added). "But," the Fifth Circuit continued, "state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor." App. 21a. Although "states may impose a physical-residency requirement on retailers and wholesalers of alcoholic beverages despite the fact that the residency requirements favor in-state over out-of-state businesses," the Fifth Circuit held, they may not "impose a durational-residency requirement

on the *owners* of alcoholic beverage retailers and wholesalers. Distinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system." *Id.* (citing *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 818, 821 (5th Cir. 2010); *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994)).

The Fifth Circuit's view of *Granholm* is also irreconcilable with the Second Circuit's decision in *Arnold's Wines*. Although the Fifth Circuit did not address a physical-presence requirement like that which the Second Circuit confronted, the Fifth Circuit's holding plainly conflicts with the Second Circuit's view that, to survive scrutiny under the dormant Commerce Clause, a State's three-tier system need only "treat[] in-state and out-of-state liquor the same," without "discriminat[ing] against out-of-state products or producers." 571 F.3d at 191.

II. THE FIFTH CIRCUIT'S DECISION CONTRADICTS *GRANHOLM*

This case also warrants review because the decision below misreads *Granholm* and undermines the States' constitutionally protected authority to regulate the transport and sale of alcohol within their borders. In *Granholm*, this Court emphasized that "States may . . . funnel sales through the three-tier system," which the Court has called "'unquestionably legitimate.'" 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality opinion)). The Court also acknowledged that a State could constitutionally "'require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.'" *Id.* (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)). It declared, as well, that "State policies are protected under the Twenty-

first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.* That passage confirms that each State is free to impose residency requirements on its wholesalers and retailers as long as it does not discriminate against out-of-state producers or products.

The four dissenting Justices in *Granholm* — who would have permitted States to discriminate in favor of in-state producers and products — interpreted the majority opinion the same way. They likewise understood the majority to recognize that licensing regimes that "requir[e] in-state residency or physical presence as a condition of obtaining licenses" are "within the ambit of the Twenty-first Amendment." *Id.* at 518 (Thomas, J., dissenting); *see also id.* at 520 ("The Court . . . concedes that a State could have a discriminatory licensing or monopoly scheme."); *id.* at 521-22 (characterizing the Court as "conce[ding] that the Twenty-first Amendment allowed States to require all liquor traffic to pass through in-state wholesalers and retailers"); *id.* at 523-24 (similar).

The Court declined to disagree with the dissent on that point. That decision provides further evidence that States may, without running afoul of the dormant Commerce Clause, require alcohol retailers and wholesalers to have a specified degree of contact with the communities they serve. That position derives from longstanding historical practice. Soon after the Twenty-first Amendment's adoption, at least 20 States conditioned the issuance of a wholesaler or retailer license on the applicant's residency, physical presence, citizenship, or some combination of the three. *See id.* at 518 n.6 (Thomas, J., dissenting) (collecting statutes). That long history continues

today, as a great many States impose requirements similar to the Texas statute.[3]

These requirements reflect the States' judgment, confirmed by long experience, that the wholesale and retail tiers of the alcohol trade benefit from close contact with the community and law enforcement. As the Attorneys General of seven States, including Texas, explained in an *amicus* brief in *Southern Wine*: "'State officials can better enforce their regulations by inspecting the premises and attaching the property of in-state entities; presence ensures accountability.' To ensure accountability, facilitate taxation, and make distributors within easy reach of the state's enforcement arm, some states have adopted residency requirements" that, though they operate "with various degrees of strictness," pursue that same goal. Brief of the Attorneys General of Arkansas, Delaware, Mississippi, Nebraska, South Dakota, Texas, and West Virginia as Amici Curiae in Support of Appellees and for Affirmance of the District Court at 4, *Southern Wine*, 731 F.3d 799 (8th Cir. filed Dec. 7, 2012) (No. 12-2502), 2012 WL 6563279 (quoting *Granholm*, 544 U.S. at 523-24 (Thomas, J., dissenting)) (citation omitted). The same logic applies to the owners of retail businesses: States may reasonably assume that the owners of in-state retailers, no

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[3] *See*, *e.g.*, Alaska Stat. Ann. § 04.11.430; Ark. Code Ann. §§ 3-4-606, 3-5-215; 235 Ill. Comp. Stat. Ann. 5/6-2(a); Iowa Code Ann. § 123.3(34)(c); La. Rev. Stat. Ann. § 26:80(A)(2); Me. Rev. Stat. Ann. tit. 28-A, § 1401(5); Md. Code Ann., Al. Bev. § 3-102; Mass. Gen. Laws Ann. ch. 138, §§ 15, 18; Mich. Comp. Laws Ann. § 436.1601; Miss. Code Ann. §§ 67-1-57(c), 67-3-19(a), 67-3-21; Neb. Rev. Stat. Ann. § 53-125(1); N.D. Cent. Code Ann. § 5-03-01(1); Okla. Stat. Ann. tit. 37, § 527(1); R.I. Gen. Laws Ann. § 3-5-10(a)(1); S.C. Code Ann. § 61-6-110(2); W. Va. Code Ann. § 11-16-8(a)(1); Wis. Stat. Ann. § 125.04(5)(a)(2).

less than the owners of in-state wholesalers, will be more responsive to local law enforcement when they live and work in the community, and thus "are more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-to-day in ballparks, churches, and service clubs." *Southern Wine*, 731 F.3d at 811.

The decision below did not consider the long history and pervasive practice among the States of similar regulations. Nor did it confront the reasons that justify treating liquor wholesalers and retailers differently based on where they or their owners are located or live.

The Fifth Circuit's decision instead rests on its misreading of the portion of *Granholm* on which this dispute turns. This Court devoted a paragraph to distinguishing the producer tier from the wholesaler and retailer tiers, punctuating it with a declaration that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489. The Fifth Circuit grafted onto that sentence a qualification that is absent from this Court's opinion: "State regulations *of the producer tier* 'are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.'" App. 20a-21a (quoting *Granholm,* 544 U.S. at 489) (emphasis added). *Granholm* simply did not say that. To hold otherwise ignores the Court's manifest purpose in *Granholm* to respect the States' prerogative to regulate the other tiers of the three-tier system, free of otherwise-applicable dormant Commerce Clause limits. *See* 544 U.S. at 488 (introducing this paragraph by saying: "The States argue that any decision

invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding.").

Nor did the Fifth Circuit identify any way to distinguish what it calls "an inherent aspect of the three-tier system" from other aspects of that system. App. 21a. It used this label without addressing — indeed, without acknowledging — the Eighth Circuit's view that such qualifiers are "unhelpful" because "[t]here is no archetypal three-tier system from which the 'integral' or 'inherent' elements of that system may be gleaned." *Southern Wine*, 731 F.3d at 810. The opinion below provides no guidance on what makes some requirements (but not others) "inherent" in the nature of a three-tier system. The Fifth Circuit's approach is, therefore, both unsupported by this Court's precedent and wholly unworkable.

III. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR THE COURT TO RESOLVE THE LOWER COURTS' CONFUSION

The time is right for the Court to resolve the conflict among the circuit courts. The issue is narrow and turns on the scope of a single paragraph in a single decision of this Court. Able jurists have acknowledged the split in authority and fully aired their contrary positions. Delay in resolving it will only lead to further confusion among the lower courts, at the expense of state sovereignty and legitimate enforcement prerogatives.

A. The Standing Issue Is No Impediment To This Court's Review

This case presents an excellent opportunity for the Court to resolve the question presented. The Fifth Circuit rightly rejected respondents' argument that

the TPSA lacks standing to bring the underlying Rule 60(b) motion: the TPSA has suffered an injury in fact in the form of increased economic competition from out-of-state businesses;[4] that injury stems from the injunction prohibiting Texas authorities from enforcing the Texas Alcoholic Beverage Code's residency requirement;[5] and it can be remedied by removing the injunction, which bars the TPSA's members from exercising their right under the statutory regime to enforce the residency requirement. *See* App. 7a-15a; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Diamond v. Charles*, 476 U.S. 54, 68 (1986).

The State's decision not to challenge the injunction does not, as the dissenting judge below suggested, *see* App. 22a-26a (Jones, J., dissenting), deprive the TPSA of standing. The Code plainly gives the TPSA's members a right to vindicate their interest in enforcing the Code. They may sue to enforce the residency requirement directly, and they may also expressly trigger the duty of the attorney general to cancel any mixed-beverage permit held by a corporation in violation of that requirement. *See* Tex. Alco. Bev. Code Ann. § 109.53. But the injunction makes it practically impossible for the TPSA's members or the attorney general to sue to enforce the requirement. Accordingly, the court below properly concluded that, because the Code permits the TPSA's members to enforce the residency requirement, they (and the

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[4] *See*, *e.g.*, *Investment Co. Inst. v. Camp*, 401 U.S. 617, 620 (1971); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-54 (1970); *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010).

[5] *See*, *e.g.*, *Hollingsworth v. Harris*, 608 F.2d 1026, 1028 (5th Cir. 1979) (per curiam).

TPSA on their behalf) "may appeal an injunction" barring its enforcement. App. 14a-15a; *see also Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995, 998-99 (7th Cir. 2000) (recognizing that, where a state agency is not a party and is bound by an injunction, a private entity's injury could be redressable if "a statute creates a private right of action" allowing the intervenor to sue for the enforcement of the law at issue).

B. Respondents' Erroneous Other Contentions For Evading Review Lack Merit

The Fifth Circuit also correctly held that the case is not moot despite the absence of the original plaintiffs. First, Fine Wine and Southern Wine have intervened, "ensur[ing] that this proceeding involves an actual dispute between adverse litigants." App. 6a. And, second, the original "injunction continues to prohibit the Commission from enforcing Texas's residency requirement against not only the original plaintiffs but also all other out-of-state persons who possess or wish to acquire a Texas mixed-beverage permit or an interest in an entity with such a permit." App. 7a.

Neither does the fact that the district court's initial injunction rested on the Privileges and Immunities Clause as well as the dormant Commerce Clause present an obstacle to review. The Fifth Circuit affirmed that judgment only on the basis of the dormant Commerce Clause, *see Cooper*, 11 F.3d at 556 n.10, and it accordingly had no need to correct the district court's plainly erroneous alternative holding. The Privileges and Immunities Clause has never protected a "right" to sell liquor, *see generally Crowley v. Christensen*, 137 U.S. 86 (1890), or (which amounts to the same thing) a corollary "right" to seek

the State's permission to do so. *See also Steamers Serv. Co. v. Wright*, 505 S.W.2d 65, 68 (Mo. 1974) ("[T]he liquor business does not stand upon the same plane, in the eyes of the law, with other commercial occupations . . . and is thereby separated or removed from the natural rights, privileges, and immunities of the citizen.") (internal quotation marks omitted). And, in any event, the only parties now defending the injunction are corporations that (as non-"citizens") have long lacked any rights under the Privileges and Immunities Clause. *See*, *e.g.*, *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869), *overruled in part on other grounds by United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

Even if the Privileges and Immunities Clause protected these corporate plaintiffs' right to sell liquor (and it does not), the Clause still would not justify the injunction here under *Granholm*. Reflecting a "mutually reinforcing relationship . . . that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism," *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978) (footnote omitted), both the dormant Commerce Clause and the Privileges and Immunities Clause require courts to balance a State law's local benefits against the burdens it imposes on the Nation's economic unity. *Compare Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), *with Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). As *Granholm* teaches, the Twenty-first Amendment conclusively balances the local benefits and federal burdens of residency requirements that apply to liquor retailers and wholesalers. For the same liquor-control reasons that the Amendment "unquestionably legitimate[s]" a State's three-tier

system for dormant Commerce Clause purposes, *see Granholm*, 544 U.S. at 489, it also legitimates them for Privileges and Immunities Clause purposes. *See*, *e.g.*, *Southern Wine & Spirits of Am., Inc. v. Division of Alcohol & Tobacco Control*, No. 11-CV-04175-NKL, 2012 WL 1934408, at *5 (W.D. Mo. May 29, 2012) ("The privileges and immunities claimed by Plaintiffs are not protected on account of the Twenty-First Amendment's broad grant of power to the states . . . to implement three-tier liquor distribution systems which disparately affect non-resident wholesalers and retailers."), *aff'd*, *Southern Wine*, 731 F.3d 799. Accordingly, prospective application of the injunction, whether grounded in the dormant Commerce Clause or the Privileges and Immunities Clause, cannot be reconciled with *Granholm*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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