NOS. 14-1499, 14-1524

In the
Supreme Court of the United States

DIRECTV, LLC AND DISH NETWORK L.L.C.,
PETITIONERS,
v.
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF REVENUE,
RESPONDENT.

DIRECTV, INC., AND ECHOSTAR SATELLITE L.L.C.,
N/K/A DISH NETWORK L.L.C.,
PETITIONERS,
v.
RICHARD H. ROBERTS,
COMMISSIONER OF REVENUE, STATE OF TENNESSEE,
RESPONDENT.

On Petitions for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts and the Tennessee Court of Appeals

BRIEF OF NATIONAL ASSOCIATION OF WINE RETAILERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The National Association of Wine Retailers ("NAWR") is a nonprofit trade association that represents the interests of wine retailers and the consumers they serve across the United States. Its membership is broad, spanning classic brick-and-mortar wine merchants, Internet-based wine retailers, wine cataloguers, auction retailers, mass-market merchants, and wine lovers who support and patronize these respective types of retailers. In a number of states, including Massachusetts, NAWR's members have been targeted by discriminatory tax and regulatory measures similar to the unequal pay-TV tax scheme that DirecTV and DISH Network have challenged here.

NAWR is committed to the principle that national markets—whether they involve wine, pay-TV, or anything else—should not be distorted by parochial state legislation that operates to the disadvantage of businesses that produce their products in other states or deliver them to consumers without using local infrastructure. Residents of Massachusetts, Tennessee, and every other state should be free to choose among the options available in the national market without being encumbered by

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[*] Counsel for all parties received 10-day notice as required by Rule 37.2(a). Counsel for respondents consented to the filing of this brief, and petitioners have filed blanket consent letters with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than NAWR and its counsel, made a monetary contribution to the preparation or submission of this brief.

protectionist regulatory or tax burdens. Massachusetts' and Tennessee's unequal pay-TV tax laws are fundamentally at odds with the Commerce Clause, and allowing such laws to stand directly threatens the interests of NAWR's members and the interests of millions of other businesses and consumers across the country.

NAWR supports these petitions because they raise an important, recurring question concerning the proper application of this Court's dormant Commerce Clause jurisprudence. The Court's precedents have recognized the need to protect against anti-consumer, anti-competitive state laws that, whether openly and obviously or through artifice and subterfuge, unfairly benefit in-state interests at the expense of out-of-state competitors. Unfortunately, lower courts have not always faithfully applied this Court's precedents. Like the decisions issued by the Tennessee Court of Appeals and the Supreme Judicial Court of Massachusetts at issue in these petitions, many courts have failed to undertake the meaningful analysis this Court's precedents demand and have instead held that state laws that have the purpose or effect of favoring in-state entities and disfavoring out-of-state competitors do not count as "discriminatory" merely because the in-state and out-of-state entities are regulated differently or do business in superficially different ways.

These cases together present a clean vehicle for the Court to resolve an entrenched split among the lower courts regarding the analysis required when assessing the constitutionality of state laws that

benefit in-state interests at the expense of consumers and out-of-state competition.

INTRODUCTION AND SUMMARY OF ARGUMENT

To ensure that state legislation does not "deprive citizens of their right to have access to the markets of other States on equal terms," *Granholm v. Heald*, 544 U.S. 460, 473 (2005), this Court's precedents require a two-step inquiry when determining whether a state law violates the Commerce Clause: At step one, the court must determine whether the law discriminates against interstate commerce facially, in purpose, or in practical effect by treating similarly situated in-state and out-of-state entities differently. If so, the court proceeds to step two and applies heightened scrutiny to determine whether the state can justify the discrimination. *See id.* at 489; *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986).

The decisions below distort this two-step analysis and undermine the constitutional values it protects by allowing superficial, irrelevant differences between in-state and out-of-state entities to defeat a finding of discrimination at step one—and thus allowing states to avoid *any* scrutiny of their justifications at step two. As the petitions explain, in determining whether entities are similarly situated for Commerce Clause purposes, this Court has always focused on whether the entities are in direct competition, not on whether their businesses are

identical in every respect. *See* Pet. for Cert. in No. 14-1499 ("Mass. Pet.") 27–32; Pet. for Cert. in No. 14-1524 ("Tenn. Pet.") 24–26. Innovative competitors' businesses are by definition not identical to those of the incumbents they challenge. That is how innovation works—and how consumers across the Nation benefit from having access to innovative businesses across the Nation. If left uncorrected, the decisions below threaten to transform the Commerce Clause from a fundamental bulwark against protectionist state legislation into an easily evaded formality.

The petitions thus present an important question that has broad implications for businesses and consumers across the Nation, including NAWR and its members. States face strong temptations to enact laws that have the purpose or effect of discriminating against out-of-state competitors, and it is all too easy to dress up those protectionist measures in the guise of facially neutral regulations. Too often, states give in to these temptations. This growing problem is powerfully illustrated by a number of decisions issued after *Granholm* that are of particular significance to wine retailers and consumers. Although some courts have complied with this Court's precedents, other courts have embraced the misguided approach taken in the decisions below by permitting thinly veiled state protectionism to escape meaningful judicial scrutiny.

The division and confusion among the lower courts described in the petitions confirms that this Court's intervention is needed. The Court should grant review to protect our national markets and to

reaffirm that the Commerce Clause's prohibition on unjustified discrimination against interstate commerce must be respected, not circumvented. Although the decisions below relied on differences in how *federal* law regulates cable and satellite providers, the courts' reasoning would apply equally to *state* regulatory regimes. Under the Massachusetts and Tennessee approaches, a state could enact a regulatory regime that treats competitors differently, and then invoke that same regime to avoid Commerce Clause scrutiny on the ground that the disfavored out-of-state competitors are differently situated. But that would be using discrimination to avoid any need to justify discrimination. If states can get around the Commerce Clause that easily, the temptation to favor in-state interests will be difficult indeed to resist.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the conflict between the decisions below and the precedents of this Court and those of other circuits and state high courts. In addition, the Court should grant review to reinforce the important principle that the Commerce Clause prohibits discrimination in whatever form against interstate commerce, including state legislation that in operative effect is a means of discriminating in favor of local interests and against out-of-state competitors. The petitions raise an important, recurring question that has wide applicability not only to the markets for pay-TV services in Massachusetts and Tennessee, but also to other markets across the Nation, including the national market for wine.

I. The Decisions Below Allow States To Circumvent Important Commerce Clause Protections.

The principles recognized in this Court's dormant Commerce Clause jurisprudence have deep roots stretching back to the founding of the Republic. The Framers recognized that the states would always have strong incentives to favor local economic interests to the detriment of the national Union. *See* Ltr. J. Madison to T. Jefferson (Oct. 24, 1787), *in James Madison: Writings* 146 (Jack N. Rakove, ed. 1999) (the Constitution "supposes the disposition" on the part of the states "which will evade" constitutional limitations by "an infinitude of legislative expedients"). The Commerce Clause's anti-discrimination rule was then and remains now "essential to the foundations of the Union." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). It "was considered the more important" aspect of the Commerce Clause "by the 'father of the Constitution,' James Madison." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994). And it "'reflects a central concern'" that "'in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" *Granholm*, 544 U.S. at 472 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)).

To be meaningful, any provision prohibiting discrimination must be accompanied by a vital, enforceable anti-circumvention principle. This Court has thus long interpreted the Commerce Clause to

prohibit the states from discriminating against interstate commerce through artful legislation, rejecting approaches that would limit the Commerce Clause's protections to "the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison, Wisc.*, 340 U.S. 349, 354 (1951). Instead, the Court has looked behind a state law's purported veneer of neutrality, stating time and again that a "finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992) (citation omitted) (quoting *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984)); *see also, e.g.*, *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 394 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 361–63 (1992); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350–53 (1977).

As the Court explained long ago, the Commerce Clause, "by its own force, prohibits discrimination against interstate commerce, whatever its form or method," and this prohibition applies whenever "state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state." *S.C. Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185–86 (1938). More recently, this Court reaffirmed that bedrock anti-circumvention principle in *Granholm*, striking down

state statutes regulating wine shipment. The Court saw through the states' attempts to portray the laws as neutral licensing requirements and held that the laws were discriminatory because they were "an indirect way of subjecting out-of-state wineries, but not local ones," to regulatory burdens. *Granholm*, 544 U.S. at 474. The laws were therefore subject to the burden of justification and careful judicial scrutiny that applies to state laws that discriminate against interstate commerce.

To enforce the Commerce Clause and protect against circumvention, this Court has fashioned a two-step inquiry. At step one, "there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). If the out-of-state and in-state companies do not compete, there is no need for further analysis. But because the relevant question at step one is simply "whether competition exists," *Bacchus Imps.*, 468 U.S. at 269, and—as in these cases—it is often obvious that it does, this step "has more often than not itself remained dormant in this Court's opinions." *Gen. Motors Corp.*, 519 U.S. at 298–99. If the companies do compete, then treating the in-state company more favorably than its out-of-state competitor may very well be discrimination against out-of-state commerce. The burden thus properly shifts to the state to justify, under heightened scrutiny, its disparate treatment of out-of-state competitors. *See, e.g.*, *Or. Waste Sys., Inc.*, 511 U.S. at 99.

These steps are separate for good reason. The state's justification for treating out-of-state interests

differently is critical at step two, which is about whether the state can justify what otherwise appears to be discrimination against out-of-state commerce, but has nothing to do with step one, which is about whether there is a need for Commerce Clause analysis in the first place. Companies that operate differently and sell different products may nonetheless be direct competitors. *Cf.*, *e.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394–95 (1956) (rejecting the argument that "only physically identical products" are "part of the market," and holding that the relevant inquiry is whether "commodities [are] reasonably interchangeable by consumers"). Discrimination between direct competitors is the concern of the Commerce Clause when it has the purpose or effect of privileging in-state businesses. So a threshold finding that in-state and out-of-state businesses compete with each other triggers the need for review under the Commerce Clause. And this Court has long held that Commerce Clause review must be searching, with heightened scrutiny of the state's purported justification for the differential treatment. *E.g.*, *New Energy Co. of Ind.*, 486 U.S. at 274–75.

The courts below effectively collapsed this two-step inquiry into a single, entirely unstructured step. Rather than focus on whether petitioners compete with in-state cable companies—it is plain that they do, and that should have brought the courts promptly to step two to evaluate the states' justification for treating these direct competitors differently—the courts indulged in a freewheeling analysis of whether the in-state and out-of-state businesses operate differently and are subject to different regulatory

regimes such that they "look" different "enough" for the state to treat them differently. In effect, the courts applied rational-basis review when this Court's precedents require heightened scrutiny, with a threshold screen to ensure that putting the state to its burden under heightened scrutiny makes sense.

The lower courts have made this mistake before. Last month, this Court struck down an ordinance that discriminated between "[i]deological," "[p]olitical," and "[t]emporary [d]irectional" signs. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2224–25 (2015). The Court concluded first that the sign code was "content based on its face" and thus subject to strict scrutiny and second that the law failed strict scrutiny. *Id.* at 2227. In the process, the Court went out of its way to fault the lower court for considering the state's justifications as part of what was supposed to be the initial inquiry into whether the law was content-based. The Court explained that the court of appeals' "analysis skips the crucial first step in the content-neutrality analysis" and admonished that courts must "consider[] whether a law is content neutral on its face *before* turning to the law's justification or purpose." *Id.* at 2228.

The lower courts' error here is equally apparent, and equally serious. The mere existence of differences in federal regulations or differences in the ways the entities do business cannot operate at step one to obviate *any* inquiry into the state's justifications for the differential treatment. After all, the whole point of innovation is to do things differently—and better or cheaper—to attract consumers. Allowing states to prefer in-state

businesses without meaningful scrutiny whenever they can point to a difference in business model between the preferred in-state businesses and the out-of-state competitors is to abandon the ideal of a national market free from discrimination against interstate commerce.

Indeed, under the decisions below, a state could circumvent the Commerce Clause by enacting regulatory regimes that treat in-state and out-of-state entities differently so that the state then can point, at step one, to the resulting differences in regulatory treatment or mode of operation to stop the court ever reaching step two. Such bootstrapping would allow the existence of differential treatment to justify differential treatment—or, more precisely, to excuse the state from even needing to try to justify the differential treatment. Accordingly, any differential treatment must be evaluated at *step two*, where a court must carefully examine the state's arguments to ensure that they are not a mere pretext for local protectionism.

If not corrected, the lower courts' misguided approaches provide a roadmap for states to circumvent the Commerce Clause and to discriminate with impunity against out-of-state economic interests by crafting protectionist laws around superficial differences. Under the approach of the courts below, the court need only wave a hand in the direction of "the nuances of the divergence between the ways in which the cable and satellite companies are treated, examined in light of the differences between the ways in which these two types of company do business," Mass. Pet. App. 25a,

to cut short its inquiry before ever requiring the state to justify its differential treatment. If the decisions below are left standing, states will invoke them to justify all manner of discrimination in favor of local, brick-and-mortar businesses, which almost always "do business" in "differen[t] . . . ways," *id.*, than their out-of-state competitors. The decisions below, in short, have extended an open invitation to the states to circumvent the Commerce Clause's anti-discrimination rule. This Court should grant certiorari and protect our national economy by revoking that invitation.

II. The Question Presented Is Broadly Important And A Source Of Division And Confusion Among The Lower Courts.

The Court should also grant review because the problem of state circumvention transcends the pay-TV market and the particular circumstances of this case. The approach of the courts below is typical, for example, of several circuit court decisions in the alcoholic beverage context that—despite the clear teaching of *Granholm*—have continued to permit state protectionism under the guise of purportedly neutral statutes linked to otherwise legitimate licensing regimes. These cases illustrate the confusion among the lower courts and the unfortunate trend of courts abdicating their constitutional duty to protect interstate commerce from unjustified, discriminatory state measures.

In *Granholm*, this Court held that although the Twenty-First Amendment allows states to regulate alcoholic beverages, state laws in this area must still comply with the Commerce Clause—that is, they

must "treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. The Court concluded that states could not "regulate the direct shipment of wine on terms that discriminate in favor of in-state producers." *Id.* at 476. Although *Granholm* did not question the legitimacy of the traditional "three-tier system" itself, in which states require alcoholic beverages to pass from producers (*e.g.*, wineries) to licensed wholesalers to retailers before being sold to consumers, it emphasized that the three-tier system is not a license for states to discriminate against interstate commerce. *Id.* at 489. In short, in the wine market, as in any other market, states may not afford preferential treatment to in-state entities over their out-of-state competitors.

In the wake of *Granholm*, however, many states have tried to do just that by relieving in-state entities, but not their out-of-state competitors, from burdens and inefficiencies imposed by the three-tier system. These burdens can be severe, particularly for small-scale wine producers, many of whose wines are produced in insufficient quantity, or lack sufficient consumer demand, to attract wholesaler representation. *See id.* at 467. The lower courts have responded inconsistently to these attempts at circumvention, and the resulting case law shows profound division on the proper application of the Commerce Clause and the limits on states' ability to discriminate in favor of local interests.

True to the Framers' prediction, states have been creative and persistent in their attempts to circumvent the Commerce Clause, including in the wine market. For example, states have imposed

consumer import limitations, allowing in-state wineries to sell unlimited amounts of wine to the state's citizens but preventing consumers from leaving the state, visiting out-of-state wineries, and returning with an amount of wine over a certain cap (or any wine at all). *See, e.g.*, Va. Code Ann. § 4.1-310(E). States have required that transactions take place face-to-face at a winery before that winery may sell directly to consumers, which confers an obvious benefit on in-state wineries as compared to similarly situated wineries located outside the state. *See, e.g.*, Ariz. Rev. Stat. Ann. § 4-203.04(J)(1). And some laws favor small wineries over large ones. *See, e.g.*, *id.* Ariz. Rev. Stat. Ann. § 4-205.04(C)(7), (9). Because 98% of the Nation's wine is produced on the West Coast, the rest of the wine-producing states tend to host small wineries, so discrimination on the asserted basis of winery size is a ready fig leaf for states that want to protect local wineries at the expense of their out-of-state competitors.

Applying this Court's precedents, several courts have appropriately struck down these improper attempts to evade the Commerce Clause's essential protections. *See, e.g.*, *Freeman v. Corzine*, 629 F.3d 146, 160 (3d Cir. 2010) (striking down "one-gallon cap on the importation of out-of-state wine"); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 433 (6th Cir. 2008) (striking down state law exempting on-the-premises sales at small wineries from direct-shipment ban); *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1 (1st Cir. 2010); *see also Siesta Vill. Mkt., LLC v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008) (striking down a state law prohibiting direct shipping by retailers without an in-

state presence), *vacated as moot after state amended statute*, Order Dismissing Action, No. 06-13041 (July 17, 2009).

In *Family Winemakers*, for example, the First Circuit struck down a Massachusetts law that exempted wineries producing less than 30,000 gallons of wine from its direct shipment ban. 592 F.3d at 4. The state argued that the cap was non-discriminatory because it applied equally to in-state and out-of-state wineries, but the First Circuit saw through that pretext and recognized that the cap's effect was to "to change the competitive balance between in-state and out-of-state wineries in a way that benefits Massachusetts's wineries and significantly burdens out-of-state competitors." *Id.* at 5. In reaching that conclusion, the First Circuit found that large and small wineries were "similarly situated" for relevant purposes because they compete with each other, *id.* at 5, 10—the exact opposite of the Massachusetts and Tennessee courts' conclusions that differences in the ways in-state and out-of-state entities "do business" sufficed to take state laws outside of the realm of constitutional scrutiny. As the First Circuit explained, "the wine market is a single although differentiated market, and [the state law]'s two provisions operate on that market together." *Id.* at 13.

But not all courts have followed this same careful approach. In fact, the lower courts are deeply divided, with many courts allowing state schemes to avoid meaningful judicial scrutiny. *See, e.g.*, *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1227 (9th Cir. 2010) (upholding in-person requirements and

small-winery exemption from direct-shipment ban); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 30–31 (1st Cir. 2007) (rejecting challenge to Maine law requiring a face-to-face transaction before a winery may sell wine directly to customers); *Brooks v. Vassar*, 462 F.3d 341, 349 (4th Cir. 2006) (upholding a Virginia statute limiting the amount of alcohol that consumers could personally carry into the state for their own use). The different result reached in these cases is not a reflection of differences in the quality or kind of justification provided by the state at step two of the required analysis. To the contrary, in each case the court made a threshold determination that no scrutiny was required because superficial differences the states had created rendered in-state and out-of-state entities not similarly situated.

Indeed, in an important line of cases, several courts have allowed states to enact discriminatory direct-shipping laws that apply to wine *retailers*, even though *Granholm* held that states may not enact discriminatory direct-shipping laws that apply to *wineries*. In these cases, courts have concluded that the alleged discrimination did not violate the Commerce Clause because it was an incident of the legitimate three-tier regulatory scheme. *See, e.g.*, *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 819–20 (5th Cir. 2010); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009); *cf. S. Wine & Spirits of Am., Inc. v. Division of Alcohol & Tobacco Control*, 731 F.3d 799, 809–13 (8th Cir. 2013) (upholding law requiring liquor wholesalers to maintain residency in Missouri).

The decisions below open the door for states to circumvent the Commerce Clause in similar ways. Although the Massachusetts and Tennessee courts relied on differences in federal regulations, the courts' reasoning would allow a *state* to create a licensing regime that treats in-state and out-of-state entities differently and then invoke that same regime to justify differential treatment. In other words, because the state has created a regulatory scheme that is valid in itself, participants within that regulatory scheme are differently situated from those who are either outside of, or play a different role within, that scheme. But simply because certain regulations of in-state entities are valid exercises of the state's police power does not mean that any resulting discrimination is exempt from meaningful scrutiny. If the law were otherwise, the state could map its own escape from the fundamental protections recognized in this Court's dormant Commerce Clause jurisprudence.

This approach is wrong in the wine market, and it is just as wrong in other markets. In few circumstances is discrimination against out-of-state competitors a necessary incident of a legitimate state regulatory scheme. For example, maintaining a three-tier system is fully compatible with allowing remote sales and direct shipments by out-of-state retailers, because the three-tier system of the home state of the shipping retailer remains operative with respect to that retailer. Direct-shipping permits issued by (say) Texas could be conditioned on a California retailer being in compliance with California law pertaining to authority to sell wine,

collection of taxes, and use of appropriate shipping measures to protect against underage access.

The "three-tier system *itself*" may be "unquestionably legitimate," *Granholm*, 544 U.S. at 489 (emphasis added; internal quotation marks omitted), but it does not follow that a state can design its three-tier system to discriminate against out-of-state interests. To the contrary, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Id*. at 487; *see also Siesta Vill.*, 596 F. Supp. 2d at 1039 (recognizing that while this Court "did state that the three-tier system was an appropriate use of state power, it did not approve of a system that discriminates against out-of-state interests"). As a result, if a state chooses to depart from a strict regime of (for example) requiring that all retail wine sales be face-to-face and allows retailers to ship wine to consumers, the state must do so in a way that does not have the purpose or effect of "favor[ing] in-state economic interests over out-of-state interests." *Granholm*, 544 U.S. at 487 (internal quotation marks omitted). The fact that in-state retailers, but not their out-of-state competitors, are part of the state's three-tier system does not transform such discrimination into something other than discrimination. To be sure, at step two of the Commerce Clause analysis, the state may attempt to justify that discrimination. But the state cannot make that discrimination disappear and avoid having to carry its proper burden of justification simply by linking the discrimination to a regulatory regime that is otherwise legitimate.

The decisions below invite just such circumvention. The Massachusetts court relied on "the nuances of the divergence between the ways in which" in-state and out-of-state entities "are treated, examined in light of the differences between the ways in which these two types of company do business." Mass. Pet. App. 25a. And the Tennessee court focused on "[t]he difference in regulatory treatment between satellite and cable." Tenn. Pet. App. 31a. Under that reasoning, a state could enact a licensing regime (like the three-tier system) that treats competitors differently and then invoke that same regime to avoid Commerce Clause scrutiny. If the state has a legitimate justification for such a regime—if such a regime is not a pretext for local protectionism—the state can demonstrate its justification at step two. The serious threat posed by the decisions below, and similar decisions in cases like *Wine Country Gift Baskets*, *Arnold's Wines*, and *Brooks*, is that they would allow states to cut off the inquiry at step one by the simple expedient of pointing to their own regulatory regimes as a reason to find that in-state and out-of-state interests are not similarly situated. That allows states to regulate their way out of the strictures of the Constitution.

The Court should step in to prevent this ongoing circumvention of the Commerce Clause. The Court should grant certiorari to reaffirm its precedents and provide much-needed guidance to the lower courts on the importance of not allowing states to shield discriminatory measures from meaningful judicial scrutiny. The Framers of our Constitution understood, and this Court has reaffirmed, that the anti-discrimination rule of the Commerce Clause is

"essential to the foundations of the Union." *Granholm*, 544 U.S. at 472. The Court should not permit that rule to be transformed into an easily evaded formality.

CONCLUSION

For these reasons, and the reasons set forth in the petitions for certiorari, the Court should grant the petitions.

Respectfully submitted.

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