No. 16–242

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

BRIEF IN OPPOSITION FOR RESPONDENT FINE WINE & SPIRITS OF NORTH TEXAS, L.L.C.

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QUESTIONS PRESENTED

Petitioner's proposed Question Presented is not addressed by the holding below, and in any case cannot be decided by this Court, because this Court lacks subject matter jurisdiction. The actual questions presented are:

1. Whether Texas state law confers Article III standing on a private, third-party trade association seeking to challenge a 25-year-old injunction that restrains a government entity no longer involved in this action, and that does not restrain any private party in any way; and

2. Whether the court below correctly decided that Petitioner was not entitled to relief under Rule 60(b) because it failed to show a significant change in decisional law.

RULE 29.6 STATEMENT

Respondent Fine Wine & Spirits of North Texas, L.L.C., has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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BRIEF IN OPPOSITION

Respondent Fine Wine & Spirits of North Texas, L.L.C., respectfully submits this brief in opposition to the petition for a writ of certiorari filed by the Texas Package Stores Association, Inc.

OPINIONS BELOW

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

JURISDICTION

This Court lacks jurisdiction. As set out below, Petitioner, a private party, does not possess Article III standing to challenge an injunction that prohibits only state authorities from enforcing state law. This Court thus cannot address the proposed question Petitioner asks it to resolve.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, sec. 2 of the U.S. Constitution provides, in relevant part, that: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the laws of the United States . . . ."

The Commerce Clause, the Privileges and Immunities Clause, the Twenty-first Amendment, and relevant provisions of the Texas Alcoholic Beverage Code are set forth in the petition for a writ of certiorari. *See* Pet. App. 35a–44a.

STATEMENT

In this lawsuit, Petitioner, Texas Package Stores Association, Inc., attempts to use Federal Rule of Civil Procedure 60(b) to overturn a 25-year-old permanent injunction entered against the Texas Alcoholic Beverage Commission ("Commission"). The Court of Appeals for the Fifth Circuit approved that injunction over two decades ago. The Commission has long since acquiesced to it, and does not challenge it today. Neither the Commission nor the Attorney General of Texas participated in the proceedings initiated by Petitioner below. And the injunction neither applies to nor restrains Petitioner's members. Those facts are fatal to Petitioner's standing.

1. The injunction Petitioner improperly seeks to relitigate was forged long ago, in litigation involving parties that bear no connection at all to the current lawsuit. *See Cooper* v. *McBeath*, 11 F.3d 547, 549 (5th Cir. 1994). How the injunction came about illustrates why Petitioner lacks standing to challenge it.

In 1990, Richard Wilson and Steve Cooper—who have no involvement in the current lawsuit—set out to buy a nightclub in San Antonio, Texas. Wilson was from Florida, and Cooper was from Tennessee. Together, they formed a Tennessee company called Bexar County Enterprises ("BCE"). BCE bought a significant percentage of the stock of the company that owned the nightclub, K.S. Enterprises, Inc., and later transferred that stock to Wilson and Cooper.

K.S. Enterprises held a mixed beverage permit issued by the Commission. But when Wilson and Cooper acquired the K.S. Enterprises shares, the

Commission deemed them *per se* ineligible under Texas law to hold a liquor permit because they were not Texas residents. The Commission reached that conclusion based on Section 109.53 of the Texas Alcoholic Beverage Code ("Code"), which provided at that time that "[n]o person who has not been a citizen of Texas for a period of three years immediately preceding the filing of his application therefor shall be eligible to receive a permit under this code." 11 F.3d at 549 (citing Tex. Alco. Bev. Code § 109.53 (Vernon 1992)).

Wilson and Cooper sued in federal court, claiming that the Code violated both the Privileges and Immunities Clause of Article IV, and the dormant Commerce Clause of Article I. *Ibid*. While that lawsuit was pending, Texas amended the Code, changing the three-year residency requirement to a one-year requirement. *Id*. at 550.

On cross-motions for summary judgment, the district court agreed with the plaintiffs that the residency requirements of the Code violated both clauses of the Constitution, and entered a permanent injunction against their enforcement *by the Commission*. *Ibid*. Specifically, the district court granted "Plaintiffs' Application for a Permanent Injunction." *Wilson* v. *McBeath*, No. Civ. A-90-ca-736, 1991 WL 540043, at *11 (W.D. Tex. June 13, 1991), *aff'd*, 11 F.3d 547 (5th Cir. 1994). And that application sought "an injunction permanently forbidding [Commissioner] McBEATH, his agents and employees from enforcing [the residency requirements]." *See* Fine Wine C.A. Supplemental Authorities (FRAP 28j) App. B at 11, No. 14-51343 Docket entry (5th Cir. Jan. 19, 2016). Nothing in the injunction pro-

hibits *anyone* other than the Commission from doing *anything*.

The Commission, along with various intervenors (including Petitioner here), appealed to the Fifth Circuit. In 1994, the Fifth Circuit declared the Code's residency requirement unconstitutional under the Commerce Clause.[1] That requirement, the court held, violates the "Commerce Clause's insistence on nondiscrimination" because it erected a "statutory barrier" against "non-residents who wish to obtain mixed beverage permits." 11 F.3d at 555. The court affirmed the district court's order, without any modification to the injunction. *Id*. at 556. That injunction now has been in place since 1991—and numerous businesses that are owned by non-Texas residents, including the Respondents, have been granted alcoholic beverage permits under the Code.

2. Twenty years later, Petitioner went to the same district court that decided *Cooper* and moved, under Rule 60(b), to dissolve the permanent injunction entered in that case. Petitioner claimed that dicta contained within this Court's 2005 decision in *Granholm* v. *Heald*, 544 U.S. 460 (2005), presaged a major change in Commerce Clause jurisprudence that cast doubt on the propriety of the initial injunction. Pet. App. 5a. Even though the injunction was predicated both on the Commerce Clause and the Privileges and Immunities Clause, Petitioner's challenge addressed only the Commerce Clause. It failed to "address[] the Court's original holding that the in-

[1] The court did not address the Privileges and Immunities Clause. 11 F.3d at 556 n.10.

state residency requirement violated the Privileges and Immunities Clause of the United States Constitution." Pet. App. 29a.

The district court denied the Rule 60(b) motion, determining that it lacked subject matter jurisdiction. After laying out the elements of Article III standing, the court noted that Petitioner does not have standing based on any injury to the organization itself. Pet. App. 31a. It then applied the test set out in *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), to conclude that Petitioner also lacks associational standing. It reasoned that "TPSA has not alleged, nor has it presented any evidence to suggest, that even a single one of its members has been or stands to be harmed by the Court's injunction in this case." Pet. App. 32a. And in any case, Petitioner failed to demonstrate that lifting the injunction would redress any perceived harm suffered by its members. Pet. App. 33a. The court thus concluded that it lacked subject matter jurisdiction, and dismissed the case.

The Fifth Circuit unanimously agreed that Petitioner cannot prevail in its effort to lift the injunction, but it split on the reasoning. The majority declared that Petitioner did have standing, but could not prevail on the merits of its claim. Pet. App. 2a. Judge Jones dissented, arguing that Petitioner had no standing, and that the district court therefore correctly had determined that it lacked subject matter jurisdiction. Pet. App. 22a–26a. She demonstrated that Petitioner cannot show how a favorable judgment would redress its alleged injury and, therefore, that Petitioner cannot satisfy the redressability

prong of *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

REASONS FOR DENYING THE PETITION

This case is not a proper vehicle for addressing the question that Petitioner seeks to present because Petitioner lacks Article III standing to press its claims. The courts below therefore lacked subject matter jurisdiction, and this Court lacks jurisdiction for the same reason. Moreover, while the question presented has prompted some disagreement in the lower courts, the contrasting views are woefully underdeveloped. And the court of appeals majority correctly decided that this Court's decision in *Granholm* did not constitute the unspoken sea change in Commerce Clause jurisprudence for which Petitioner contends.

I. THIS CASE IS AN EXCEPTIONALLY POOR VEHICLE FOR ADDRESSING THE QUESTION PETITIONER SEEKS TO PRESENT.

This Court should deny certiorari because it lacks jurisdiction. The district court correctly determined that Petitioner lacks standing to bring this challenge to the permanent injunction entered in 1991. This Court thus cannot resolve Petitioner's proposed question presented. The only way Petitioner could have standing is by demonstrating that Texas law confers on it a right to sue the State, or the Commission, for failing to seek to dissolve the injunction, but Petitioner brought no such claim. Moreover, Petitioner did not even advance below the argument that it had such a right to sue the State, and it cannot undo that waiver here. And, in any

case, it is not the province of this Court to resolve such a thorny question of state law.

Two other foundational problems further preclude this Court from resolving Petitioner's question presented. First, a favorable decision from this Court cannot bring about Petitioner's requested relief: the lifting of the injunction. As both courts below recognized, Petitioner made a tactical decision to challenge only one—not both—bases for the injunction. So even if this Court decided the Commerce Clause question in Petitioner's favor, the injunction would still stand based on the Privileges and Immunities Clause. Petitioner has never challenged the district court's injunction based on this alternative ground, and it cannot do so now for the first time.

Finally, the ruling below really did not decide the question Petitioner seeks to present. The decision below narrowly held that *Granholm* did not represent a change in decisional law sufficient to trigger relief under Rule 60(b). This Court should await a decision that squarely addresses the question Petitioner asks this Court to resolve, and not in the context of a belated challenge to a long-standing injunction against the enforcement of a state law to which the relevant state parties have acquiesced.

A. Petitioner Lacks Standing, and This Court Thus Lacks Jurisdiction.

Simply stated, a party cannot challenge an injunction that does not apply to that party. *See*, *e.g.*, *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2662 (2013) (intervenor-defendants lacked standing to challenge injunction where "the District Court had not ordered

them to do or refrain from doing anything"). "[I]t is not enough that the party invoking the power of the court have a keen interest in the issue." *Id*. at 2659.

That principle applies to a defendant-intervenor, like Petitioner, that seeks relief from a judgment under Federal Rule of Civil Procedure 60(b). *See*, *e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 445 (2009). Here, Petitioner seeks to overturn an injunction that does not apply to Petitioner or its members and, thus, lacks standing for at least two reasons. First, as Judge Jones explained below, Petitioner's injury is not redressable. Second, Petitioner does not have authority to litigate on behalf of a state entity that has acquiesced to the injunction and has expressed no desire to see it overturned.

1. It is a bedrock principle of standing that the injury at issue must be redressable. That is, the court must have the power to grant some form of relief that will in fact redress the asserted injury. *Lujan*, 504 U.S. at 560–61. It must be "likely"—not "speculative"—that a favorable decision will redress the injury. *Ibid*. (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

That principle led the Seventh Circuit to dismiss a functionally identical appeal for lack of subject matter jurisdiction. In *Kendall–Jackson Winery, Ltd.* v. *Branson*, the district court enjoined a state alcoholic beverage commission from enforcing a state alcohol statute because the statute violated the dormant Commerce Clause. 212 F.3d 995, 996 (7th Cir. 2000). The commission then decided to acquiesce in the injunction. *Id*. at 996–97. So the industry defendants that economically benefited from the

statute, and were thus economically harmed by the injunction, appealed on their own. *Ibid*.

The Seventh Circuit held that the industry defendants could not appeal. In doing so, the court expressly acknowledged that the industry defendants did indeed suffer real economic injury due to the injunction, just as Petitioner alleges here on behalf of its Texas-owned members. *See id*. at 998 ("The distributors emphasize that the injunctions injure them, by depriving them of the benefits of the Commission's orders. That much is indisputable."). But the court nevertheless adhered to the principle that it cannot overturn an injunction against the state, when the state itself did not challenge it. As Judge Easterbrook put it:

> The critical question is this: when a district judge enters an order creating obligations only for Defendant A, may the court of appeals alter the judgment on appeal by Defendant B when obligations imposed on A indirectly affect B? The distributors have not located any decision by the Supreme Court giving an affirmative answer, which would be incompatible with *Diamond* [v. *Charles*, 476 U.S. 54 (1986),] and *Princeton* [*University* v. *Schmid*, 455 U.S. 100 (1982)].

Ibid. As Judge Easterbrook concluded, the state commission's failure to appeal leaves it "bound by the injunction[] no matter what happens on the distributors' appeals, so it is not clear what point the distributors' appeals can serve." *Id*. at 997.

It is precisely because the Commission has not asked the courts to overturn the injunction at issue

here that neither the district court nor this Court can redress any economic injuries that the injunction may inflict upon Petitioner or its members. That basic failure of redressability has led this Court and countless others to recognize that they lack jurisdiction over appeals of this kind, when an interested party seeks to overturn an injunction entered against another party that has not joined in the appeal. *Id.* at 998.[2]

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[2] *See also Hollingsworth*, 133 S. Ct. at 2662 (intervenor-defendants lacked standing to challenge injunction where "the District Court had not ordered them to do or refrain from doing anything"); *K.C. ex rel. Africa H.* v. *Shipman*, 716 F.3d 107, 116–17 (4th Cir. 2013) (noting "redressability problem:—"where 'codefendants are held liable below, and one appeals and one does not'"—because the court under those circumstances is "powerless to provide the very relief that [appellant] needs") (quoting 9 James W.M. Moore et al., *Moore's Federal Practice* ¶ 204.11[4], at 4-54 to -55 (2d ed. 1980)); *Cabral* v. *City of Evansville*, 759 F.3d 639, 643 (7th Cir. 2014) (noting "redressability problem" because "Evansville is not a party before us," yet "Evansville is the only party that is expressly bound by the injunction"); *Sea Shore Corp.* v. *Sullivan*, 158 F.3d 51, 58 (1st Cir. 1998) (noting "redressability problem" where "redress for the [defendant-intervenor's] alleged injury depends not only upon a reversal of the district court's decision, but also upon a state agency's decision to enforce a law after declining to appeal its invalidation"); *In re Lothian Oil, Inc.*, 531 F. App'x 428, 436 (5th Cir. 2013) ("With the exception of Ezrasons, Inc.—which was enjoined by the bankruptcy court—none of the named individuals and entities is mentioned in the bankruptcy court's injunction order or contempt judgment. Anti–Lothian only responds with vague and conclusory allegations of injury. We find these insufficient to show that the listed Appellants/Cross–Appellees, with the exception of Ezrasons, Inc., have standing."); *Additive Controls & Measurement Sys., Inc.* v. *Flowdata, Inc.*, 65 F.3d 187 (Fed. Cir. 1995) (unpublished table disposi-

2. As this Court held just three years ago in *Hollingsworth*: "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here." 133 S. Ct. at 2668. All nine Justices agreed that a private intervenor has no standing to challenge an injunction against the state under the circumstances that case presented. This case is no different, and the *Hollingsworth* decision presents an additional reason why this Court lacks jurisdiction.

The principles underlying *Hollingsworth* are straightforward: "[T]he power to create and enforce a legal code . . . is one of the quintessential functions of a State. Because the State alone is entitled to create a legal code, only the State has . . . [a] direct stake . . . in defending the standards embodied in that code." *Diamond*, 476 U.S. at 65 (internal citation and quotation marks omitted). Federal courts have dutifully enforced those principles, denying standing to private parties that lack express legal authority to litigate on behalf of the state. *See*, *e.g.*, *Associated Builders & Contractors* v. *Perry*, 16 F.3d 688, 691–93 (6th Cir. 1994) ("We find that *Diamond* . . . is controlling here, and that, under the reasoning of that case, NECA lacks standing to prosecute this appeal. . . . Absent an appeal by the State, Diamond could not continue the litigation because, even if the

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[Footnote continued from previous page]

tion) ("Because Adcon's motion sought relief from an injunction that was not directed toward it, Adcon did not have standing to seek to dissolve and dismiss the injunction and does not have standing to seek review of such injunction here.").

challenged law ultimately were held to be constitutional, Diamond could not compel the State to enforce it . . . . Because NECA cannot . . . compel the State to enforce a law which it has chosen to abandon, NECA cannot demonstrate the kind of interest necessary to confer standing to prosecute this appeal."); *Greenbaum* v. *Bailey*, 781 F.3d 1240, 1243–44 (10th Cir. 2015); *Sea Shore Corp.* v. *Sullivan*, 158 F.3d 51, 58–59 (1st Cir. 1998).

These principles make this Petition easy to deny. The Commission has long since acquiesced to the injunction. It has continued for decades to grant liquor licenses to individuals and business entities (such as Respondents) that do not satisfy the outmoded Texas residency requirements of the Code. The Commission is not a party here; in fact, it declined to take part in the proceedings below. The Attorney General of Texas did not enter an appearance to challenge the injunction or defend the residency requirements of the Code. And the injunction entered in 1991 does not apply to Petitioner. So Petitioner lacks standing to challenge it, and this Court lacks jurisdiction to consider this matter further.[3]

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[3] Even if Petitioner could ultimately show that it possesses Article III standing, that showing would come at great cost to the Court's consideration of Petitioner's proposed merits question. The Petition previews the looming jurisdictional battle that will follow certiorari; it spends considerable space arguing that Petitioner has standing. *See* Pet. 17–19. For the reasons set out above, its arguments are wrong, and in any case, they are sure to distract both the parties' briefing and this Court's ultimate resolution of the separate constitutional question that Petitioner would like this Court to answer.

B. The Court Below Resolved the Standing Question Based on a State-Law Argument Petitioner Waived.

As Judge Jones noted in dissent below, the only way Petitioner could possibly have standing to challenge the injunction would be if Texas state law conferred on Petitioner or its members a private right of action against the regulatory authority. Pet. App. 25a. Texas has no such law, and so Petitioner cannot maintain standing. In any case, whether Texas law does or does not confer such a right on holders of liquor licenses is a question of state law that falls outside the province of this Court. And Petitioner never argued below that state law provided it or its members a cause of action *against the Commission*—meaning its only avenue to demonstrate standing is an argument that it forfeited. These fundamental procedural defects further warrant a denial of certiorari.

In *Kendall–Jackson*, the court noted in dicta that certain regulations can be enforced by private-party suits "to the extent a statute or regulation creates a private right of action." 212 F.3d at 998. Seizing on that language, the majority below concluded that Petitioner has standing to challenge the injunction because the Code allows "[a]ny package store permittee" to sue for injury caused by "another package store permittee" and to seek enforcement of the Code's requirements. Pet. App. 14a (citing Tex. Alco. Bev. Code § 109.53). That provision, according to the majority, relieved any redressability problem, because "TPSA's members, which are all package store permittees, have a private right of action and may appeal an injunction of the residency require-

ment even if the Commission does not appeal." Pet. App. 14a.

That analysis of the applicable Code provisions is wrong, as Judge Jones ably demonstrated in dissent. Section 109.53 of the Code allows suits between *competitors*; it does not waive sovereign immunity "to allow a permittee to sue the Commission for affirmative enforcement of state law (or to appeal the continuation of the instant injunction)." Pet. App. 25a. Judge Jones noted that Texas law requires "a clear legislative statement to effectuate a waiver of state sovereign immunity," and since Section 109.53 lacks such a statement, it cannot fit within the *Kendall–Jackson* exception. Pet. App. 25a. Notably, the majority below offered no direct answer to Judge Jones's point. Nor does the Petition.

To be sure, if Section 109.53 provided Petitioner's members a private right of action *against the Commission*, then perhaps the injunction (or more precisely the Commission's failure to challenge it) might give rise to a claim by Petitioner's affected members—a claim that never has been brought. But Section 109.53 establishes a private right of action against permittees—not the Commission. This commonsense distinction is confirmed by *Kendall–Jackson*. "In dicta," *Kendall–Jackson* "speculated" that standing under these circumstances might exist "in cases when 'a statute creates a private right of action.'" *Cabral v. City of Evansville*, 759 F.3d 639, 644 (7th Cir. 2014) (quoting *Kendall–Jackson*, 212 F.3d at 998). "But a key element of that speculation is that the private party could bring a suit against the agency or governmental actor." *Ibid*. *Cabral* thus confirms that, as Judge Jones correctly demon-

strated, Section 109.53 does not confer standing on Petitioner.

Even if Section 109.53 somehow applied to this proceeding, this Court should not wade into this complex question of Texas law. Whether the majority below correctly or incorrectly interpreted Section 109.53, and whether its interpretation was consistent with Texas law principles regarding waivers of sovereign immunity, are pure questions of state law. This Court "does not sit to review" such state-law questions. *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989). In other words, the only path by which the Petitioner might establish standing to challenge the injunction would lead this Court on a review of Texas statutes and sovereign immunity principles outside its purview.

Even worse, Petitioner never argued below that Texas law creates a cause of action it could have pursued *against the Commission*. And Petitioner certainly never filed such an action, even though it now appears to concede that any basis it might have to demonstrate standing lies within the provisions of Section 109.53. *See* Pet. 18–19. But Petitioner cannot now claim, for the first time, that Texas law creates the cause of action necessary to its standing, by authorizing it to sue the Commission. That argument is not only wrong, but also has been waived, as Respondent argued to the court below in a Rule 28(j) letter dated January 19, 2016, and during oral argument (and as Petitioner did not dispute below). The argument thus is not properly before this Court. *See Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1978 (2016) ("The Department failed to

raise this argument in the courts below, and we normally decline to entertain such forfeited arguments."); *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 398 (2015) ("Absent unusual circumstances—none of which is present here—we will not entertain arguments not made below.").

C. Petitioner Cannot Prevail Because It Never Challenged the Second Basis for the Injunction: the Privileges and Immunities Clause.

Even if Petitioner had standing, and even if it could show that *Granholm* silently presaged a fundamental change in Commerce Clause decisional law involving state-imposed residency requirements for the owners of businesses holding liquor licenses, it still cannot prevail because it has abandoned its burden of demonstrating that *both* bases for the permanent injunction are no longer valid. Although the district court in *Cooper* granted the injunction on the basis of both the Commerce Clause and the Privileges and Immunities Clause, Petitioner has attacked that decision only to the extent it was predicated on the Commerce Clause. Thus, even if its Commerce Clause arguments were correct (which they are not), Petitioner cannot satisfy the burden necessary to lift the injunction.

The court of appeals correctly recognized this fatal defect. It noted that Petitioner "failed to address the district court's holding that Texas's residency requirement violates the Privileges and Immunities Clause." Pet. App. 21a. That failure is dispositive. Petitioner bears the burden of showing that relief under Rule 60(b) is warranted; not only has it failed

to do so, but with respect to the alternative grounds supporting the injunction, it has *not even tried*. *See* Pet. App. 21a. Thus, any decision this Court were to reach on the merits of the Commerce Clause issue would simply be an advisory opinion, since it cannot lead to the relief Petitioner seeks.

Petitioner has no answer for this defect. Its Petition spends three paragraphs arguing that the Privileges and Immunities Clause never justified the original injunction. *See* Pet. 19–21. But even if those arguments were correct, it is far too late to offer them now. Petitioner does not acknowledge the fact that it waived its opportunity to litigate the Privileges and Immunities Clause issues by failing to raise them in the courts below. Even worse, by adopting this strategy Petitioner deprived the lower courts of any opportunity to address the relationship between *Granholm*'s dicta and the Privileges and Immunities Clause. This Court has said that it is a Court "of review, not of first view." *Cutter v. Wilkinson*, 544 U. S. 709, 718 n.7 (2005).

And even if Petitioner could overcome this additional procedural flaw, it cannot plausibly claim that the decision in *Granholm*, which at no point even *mentioned* the Privileges and Immunities Clause, constituted a sea change in the law of Privileges and Immunities sufficient to overturn a decades-old injunction. This Court in *Granholm* never addressed any aspect of Article IV of the Constitution. Whatever the contours of the "mutually reinforcing relationship" between the Privileges and Immunities Clause and the Commerce Clause, they remain distinct bodies of law, and what one proscribes, the other may allow. Indeed, as this Court has recognized,

"[t]he two Clauses have different aims and set different standards for state conduct." *United Bldg. & Const. Trades Council* v. *Mayor of Camden*, 465 U.S. 208, 220 (1984). *See also id.* at 221–22 (illustrating conduct that violates the Privileges and Immunities Clause but not the Commerce Clause). If this Court in *Granholm* truly meant to alter the settled Privileges and Immunities principles that led to the permanent injunction in 1991, it would have said so. In any case, this Court should wait for some lower court to address that question, before it tackles it in the first instance.

D. The Majority's Holding Below Turned Not on the Question Presented, but on Rule 60(b).

One additional procedural problem cautions against this Court's review: the decision below really did not decide Petitioner's question presented. The court of appeals framed this case and its holding simply and narrowly: "The key question is whether [*Granholm*] was a significant change in decisional law warranting relief from the injunction under Rule 60(b)(5). It was not." Pet. App. 16a. The court emphasized multiple times that its holding was limited to that narrow issue, noting that the procedural posture of this case "does not allow TPSA to relitigate the legal conclusions on which" *Cooper* rested. Pet. App. 17a–18a. Instead, the sole issue on appeal was whether "there has been a significant change in decisional law warranting relief from the injunction." Pet. App. 18a. And the court majority answered that straightforward question narrowly: *Granholm* "did not purport to change decisional law." Pet. App. 20a.

Petitioner pretends the court below held something else. It claims that the decision below held that it is unconstitutional for a state to "condition access to the wholesale or retail tier of its three-tier alcohol distribution system on in-state residency or physical presence." Pet. i. But as the foregoing discussion illustrates, the court below held no such thing.

The result is that if this Court grants review, it will be asked to decide the question presented in the first instance, and to do so in the context of a case where a complete factual record had not been developed. Petitioner filed a motion asking a court to undo an injunction entered and affirmed twenty years earlier. The plaintiffs who prevailed in the litigation decades ago did not respond to the motion. The Commission and the Texas Attorney General did not enter appearances in order to join in Petitioner's challenge to the injunction (or to oppose that challenge). Respondents intervened in order to ensure that the courts below were aware that the injunction remained of fundamental importance to those businesses that had been granted liquor licenses by the Commission in reliance upon the injunction. There was no trial or evidentiary hearing conducted on the purpose and effect of the Code provisions at issue, or on the operation of the licensing regime in Texas during the decades that the injunction has been in place. Because of these procedural irregularities, this Court simply is not equipped to address the question the Petitioner seeks to present on this record. *Cutter*, 544 U.S. at 718 n.7 ("[W]e are a court of review, not of first view.").

This is yet another reason why the Court should decline to wade into the procedural quagmire created by Petitioner's efforts to undo a long-standing injunction to which the relevant state parties have acquiesced, and upon which other interested parties have relied for decades.

II. THE COURT BELOW CORRECTLY DECIDED THAT *GRANHOLM* DID NOT CONSTITUTE A CHANGE IN DECISIONAL LAW SUFFICIENT TO MERIT RULE 60(b) RELIEF.

For the reasons set out above, numerous foundational problems—posed by the unusual manner in which this case has reached this Court—dictate that the Petition should be denied, and this Court should wait for some other case properly presenting the question Petitioner seeks to present. Each of those problems individually is reason enough to deny certiorari, but there is more. Even if Petitioner could overcome all of the procedural defects, the Court should allow for further development in the courts of appeals before revisiting *Granholm* and deciding whether dicta in that opinion foreshadowed a fundamental change in the way the federal courts should apply the dormant Commerce Clause in the context of challenges by prospective holders of state liquor licenses to discriminatory state residency requirements. Indeed, if this Court were to examine the merits, it would reach two conclusions: (1) any disagreement about *Granholm* is exceedingly shallow and underdeveloped, and (2) the majority below erred in its analysis of standing and jurisdiction, but its merits analysis was correct.

1. Any disagreement as to the proper reading of *Granholm* is thin. While Petitioner is correct that

the Fifth Circuit appears to read *Granholm*'s dicta differently from the Eighth Circuit, any disagreement is limited to those courts, and Petitioner does not seriously contend otherwise. That shallow split in authority does not require this Court's intervention.[4]

If the question Petitioner asks this Court to resolve truly is a matter of national importance crying out for definitive resolution, then the question will arise again. When it does, this Court will have ample opportunity to decide whether a state may, consistent with the Commerce Clause, condition alcohol permits for wholesalers and retailers on the in-state location of the shareholders' private homes. This Court should await one of those opportunities, where the question is presented in the context of a case in

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[4] Petitioner claims that the decision below conflicts with the Second Circuit's decision in *Arnold's Wines, Inc.* v. *Boyle*, but that assertion mischaracterizes the decision. 571 F.3d 185 (2d Cir. 2009). The New York law in *Arnold's Wines* imposed no residency requirement on the owners of entities in the three-tier system. *Id*. at 186. Instead, it prohibited out-of-state retailers from selling their products directly to New York residents, in the absence of an in-state business facility. *Id*. at 187. The court held simply that a state may permissibly require all liquor sold within its borders to pass through the state's three-tier regulatory system. *Id*. at 186. *Arnold's Wines* thus concerns a state's power to regulate the flow of alcohol into the state. *Id*. at 188 ("It is this distinction-that New York-licensed retailers, but not out-of-state retailers, may deliver liquor directly to New York residents-that Appellants challenge in this case."). That issue was not addressed in the decision below, which instead involved the legitimacy of an injunction precluding the state from denying liquor licenses to local businesses based solely on the out-of-state, private residence of the business owner. The personal residence of a business's owner has nothing to do with the flow of alcohol into a state.

which the issues are squarely presented by parties with standing and stakes in the outcome, and is framed by a complete record, rather than a case in which an association of locally owned retailers launched a Rule 60(b) challenge to an injunction that had been adhered to by the state Commission for decades.

2. Furthermore, although the majority below wrongly reached the merits, it correctly analyzed *Granholm* in resolving those merits. The majority concluded that explicit discrimination against individuals based on what state they live in violates the Commerce Clause, and that nothing in the Twenty-first Amendment or the decision in *Granholm* dictates a contrary result. Pet. App. 21a. Indeed, preventing that type of discrimination is among the dormant Commerce Clause's primary functions. Pet. App. 17a. Anti-discrimination is part of the fabric of our nation; it is one of the driving principles behind the Constitution itself. *E.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 581 (1997) (discrimination against non-state residents "is at the very core of activities forbidden by the dormant Commerce Clause"). Thus, on its face, any state law that blatantly and facially discriminates against non-citizens based on their personal residency must be stricken under the Commerce Clause, absent some other justification. *See ibid. See also Chem. Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 342 (1992) (facial discrimination against out-of-state commerce "is typically struck down without further inquiry").

There is no such justification here. Petitioner claims that the Twenty-first Amendment gives states

the right to impose requirements related not to the flow of alcohol into a state, but rather related to the personal residences of the shareholders of companies in the alcohol industry. The decision below rightly rejected that argument. Pet. App. 21a.

The court correctly noted that the Twenty-first Amendment allows states to "impose a physical-residency requirement on retailers and wholesalers of alcoholic beverages despite the fact that [such] residency requirements favor in-state over out-of-state businesses." Pet. App. 21a. But the Twenty-first Amendment does not "authorize states to impose a durational-residency requirement on the *owners* of alcoholic beverage retailers and wholesalers." Pet. App. 21a. (citing *Wine Country Gift Baskets.com* v. *Steen*, 612 F.3d 809, 821 (5th Cir. 2010)). That makes sense: The Twenty-first Amendment concerns itself with the flow of alcohol in and out of a state, not with where private individuals live. A state's interest in regulating the flow of alcohol within the state is hardly advanced by a requirement that focuses not on where the business is located, but on whether the majority of the owners of the business have private residences within the state. *See* Pet. App. 21a. Moreover, nothing in *Granholm* compels a different conclusion: to the contrary, that decision held that states may not discriminate in allowing direct sales by wine producers based solely on whether they are located within or outside the state. *E.g.*, *Granholm*, 544 U.S. at 489. *Granholm* is hardly a manifesto in support of discriminatory residency requirements.

CONCLUSION

Petitioner lacks standing to pursue its claim. As a result, the courts below lacked subject matter jurisdiction. So too does this Court. For these reasons, and the other reasons addressed herein, the Petition should be denied.

Respectfully submitted,

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