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 SOUTHERN GLAZER'S WINE AND SPIRITS OF TEXAS II, LLC

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit properly held that this Court's decision in *Granholm* v. *Heald*, 544 U.S. 460 (2005), did not constitute a significant change in decisional law sufficient to reopen a final judgment under Federal Rule of Civil Procedure 60(b)(5).

2. Whether a trade association not bound by an injunction against the government has Article III standing to move to dissolve the injunction.

CORPORATE DISCLOSURE STATEMENT

Effective July 1, 2016, Respondent Southern Wine and Spirits of Texas, Inc. changed its name and entity type to Southern Glazer's Wine and Spirits of Texas II, LLC. Southern Glazer's Wine and Spirits of Texas II, LLC identifies Southern Glazer's Wine and Spirits, LLC as a parent company of Southern Glazer's Wine and Spirits of Texas II, LLC. SWS Holdings, Inc. is a privately held corporation that is a parent company of Southern Glazer's Wine and Spirits, LLC.

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INTRODUCTION

The Fifth Circuit first decided this case 25 years ago, when it enjoined the Texas Alcoholic Beverage Commission (the "Commission") from enforcing a statutory restriction on liquor retailers. The original plaintiffs are no longer in the picture. The State of Texas likewise gave up its defense of the statute years ago. All that is left are three industry members who intervened in the dispute. In 2014, one of those, Petitioner here, moved for relief from the decades-old injunction under Federal Rule of Civil Procedure 60(b)(5). The Fifth Circuit denied the

motion, holding that Petitioner had failed to demonstrate sufficient changed circumstances for Rule 60(b) relief.

That is the sole decision underlying this petition for certiorari. Although one might be forgiven for thinking otherwise after reading the petition, this case involves only the Fifth Circuit's unremarkable decision to let sleeping dogs lie.

For that reason, this case does not create the circuit split that Petitioner purports to identify. The petition describes a split between the Second and Eighth (and possibly Fourth) Circuits, on the one hand, and the Fifth Circuit here, on the other. It asserts that those courts have divided over the proper interpretation of this Court's decision in *Granholm* v. *Heald*, 544 U.S. 460 (2005). But that assertion ignores the idiosyncratic procedural posture of the decision below. Because Petitioner filed a Rule 60(b)(5) motion, it was not permitted "to challenge the legal conclusions on which [the] prior judgment or order rest[ed]." *Horne* v. *Flores*, 557 U.S. 433, 447 (2009). Instead, it was tasked with showing that *Granholm* constituted a significant change in the governing law. *Id.* The Fifth Circuit correctly held that Petitioner did not make that showing.

No other court has considered the same Rule 60(b)(5) question. The petition cites three cases involving *direct attacks* on liquor regulations, not attempts to dissolve a pre-*Granholm* injunction. And two of those cases are further distinguishable because they did not involve the type of liquor regulation at issue here. The claimed circuit split is nonexistent or, at the very most, a shallow 1-1.

Even had there been a true circuit split, several vehicle problems would impede this Court's review. *First*, Petitioner does not have Article III standing to challenge the District Court's injunction against the Commission. Because Petitioner is not bound by the injunction it seeks to challenge, a favorable judgment would not redress any injury to it. *Second*, this Court's review of the question presented would not be outcome-determinative, as the Fifth Circuit also denied the Rule 60(b)(5) motion on Privileges and Immunities Clause grounds. Petitioner has forfeited any attempt to challenge that alternative holding by failing to challenge it below. *Third*, the unusual procedural posture and the Commission's choice not to participate mean that the State of Texas will not be defending its own (long-enjoined) statute. The State's absence is a telling indicator of this case's practical importance.

All told, there is no shortage of legal and prudential reasons why the Court's review is unwarranted in this oddity of an appeal. The petition should be denied.

STATEMENT

A. Texas's Alcoholic Beverage Code

In 1977, Texas enacted the Texas Alcoholic Beverage Code. Acts 1977, 65th Leg., p. 526, ch. 194, § 1. The Code adopts a three-tier distribution system for the sale of alcoholic beverages. Pet. App. 2a. The first tier consists of producers, such as distillers and wineries. They distribute their products to the second tier of state-licensed wholesalers. Those wholesalers, in turn, sell to the third tier of state-licensed retailers. Retailers sell alcohol to the ultimate consumers.

In addition to requiring wholesalers and retailers to be licensed in-state, the Code imposes a *durational*-residency requirement on individuals seeking liquor permits: "No person who has not been a citizen of Texas for a period of one year immediately preceding the filing of his application therefor shall be eligible to receive a permit under this code." Tex. Alco. Bev. Code Ann. § 109.53. For corporations, at least 51% of the corporation's stock must be owned "by citizens who have resided within the state for a period of one year and who possess the qualifications required of other applicants for permits." *Id.* The Code contains a grandfather clause that excludes businesses operating prior to 1935. *Id.*

B. Merits Proceedings Below

In 1990, Richard Wilson and Steve Cooper tried to acquire a San Antonio nightclub called Baby Dolls. Pet. App. 2a, 4a. Baby Dolls was operated in Texas by a Texas corporation, which held a mixed-beverage permit. *Cooper* v. *McBeath*, 11 F.3d 547, 549 (5th Cir. 1994). Wilson was a resident of Florida and Cooper a resident of Tennessee. *Id.* Their purchase of the Texas corporation was stymied when the Commission determined that the corporation would be ineligible to hold a liquor permit if its controlling shareholders were no longer Texas residents. *Id.*

Wilson and Cooper sued W.S. McBeath, the then-administrator of the Commission, to enjoin enforcement of the Code's durational-residency requirement. *See Wilson* v. *McBeath*, No. A-90-CA-736, 1991 WL 540043 (W.D. Tex. June 13, 1991). They argued that the relevant provisions of the Code violate the Constitution's Commerce Clause and Privileges and Immunities Clause by discriminating against out-of-

state residents. *Id.* at *1. The Texas Package Stores Association ("TPSA")—Petitioner here—intervened as defendant. *Id.*

The District Court held that the Code's durational-residency requirement violated both the Commerce Clause and the Privileges and Immunities Clause. *Id.* at *5, *10. It enjoined the Commission from enforcing the relevant provisions. *Id.* at *11.

In 1994, the Fifth Circuit affirmed. *Cooper*, 11 F.3d 547. In assessing the dormant Commerce Clause's interaction with the Twenty-first Amendment, the Fifth Circuit concluded that "the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.* at 555 (quoting *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 275 (1984)). The court further held that because the Commission's asserted state interest "in facilitating background checks" fell outside the "core concerns underlying the Twenty-first Amendment," the durational-residency requirement could not stand. *Id.* And the Fifth Circuit noted that it did not need to reach the District Court's alternative Privileges and Immunities Clause holding. *Id.* at 556 n.10.

That is where things stood for 20 years.

C. Rule 60(b)(5) Proceedings Below

In 2014, Petitioner moved under Federal Rule of Civil Procedure 60(b)(5) for relief from the injunction entered against the Commission. Pet. App. 5a. It argued that this Court's 2005 decision in *Granholm* represented a significant change in decisional law that rendered the injunction's continuing operation inequitable. The Commission (the original defendant) did not join the motion. *Id.* Nor did Wilson and Cooper (the original plaintiffs) file a response. *Id.*

Instead, two out-of-state corporations, Respondents here, intervened as plaintiffs. *Id.* at 5a-6a.

The District Court indicated that it was "not convinced" that there was sufficient new law for Rule 60(b) purposes. *Id.* at 28a. It also suggested that any effect *Granholm* might have on the Commerce Clause analysis would be insufficient to reopen the judgment, as Petitioner had failed to challenge the alternative Privileges and Immunities Clause holding. *Id.* at 29a. Rather than ruling on the merits, though, it held that Petitioner lacked standing to seek Rule 60(b) relief. *Id.* at 32a.

A majority of the Fifth Circuit reversed the District Court's jurisdictional holding and denied the motion on its merits instead. The court acknowledged that a district court has discretion under Rule 60(b)(5) to "relieve a party or its legal representative from a final judgment" if "applying it prospectively is no longer equitable." *Id.* at 15a. Among other things, relief may be appropriate where a party demonstrates a "significant change" in decisional law. *Id.* at 16a (quoting *Agostini* v. *Felton*, 521 U.S. 203, 215 (1997)). The court considered whether *Granholm* was in fact "a significant change in decisional law warranting relief from the injunction under Rule 60(b)(5)." *Id.* It concluded that *Granholm* "was not." *Id.*

The Fifth Circuit adopted the second rationale identified by the District Court as well: Petitioner's failure to challenge the original holding that Texas's durational-residency requirement violates the Privileges and Immunities Clause. *Id.* at 21a. Because Petitioner bore the burden of demonstrating its entitlement to relief, its failure to carry that burden

on the Privileges and Immunities issue provided an independent basis to deny the Rule 60(b)(5) motion. *Id.*

Judge Jones dissented on jurisdictional grounds. *Id.* at 22a-26a. She, too, would have rejected the Rule 60(b)(5) motion. But, like the District Court, she would have held that Petitioner lacked Article III standing. She explained that "only the State was bound by the *Cooper* injunction not to enforce the residency requirement, and TPSA was *not* so bound." *Id.* at 24a. As a result, the Commission's failure to participate meant that "TPSA's indirect injury from the injunction is not redressable by this court because any judgment in TPSA's favor cannot remove the injunction against the Commissioner." *Id.* at 26a.

This petition followed.

ARGUMENT

Petitioner's question presented does not merit this Court's review. The petition strives mightily to portray the decision below as answering a constitutional question and creating a circuit split. *See, e.g.*, Pet. 8. But the procedural posture shows otherwise. In 2016, the Court of Appeals made the rather mundane decision to reject a request to reopen a 1994 injunction on the basis of dicta in a 2005 opinion of this Court. That decision does not conflict with the decision of any other court, and it comes with a host of vehicle problems that counsel against granting review.

I. THE FIFTH CIRCUIT'S DECISION DOES NOT CREATE A CIRCUIT SPLIT.

The petition attempts to manufacture a split between the Fifth Circuit's decision below and decisions of the Second and Eighth (and possibly Fourth) Circuits. It argues that those courts have divided over the question that Petitioner believes is presented here: whether a State may apply residency requirements to the wholesale and retail tiers of a three-tier alcohol distribution system. Pet. i. For several reasons, that framing is wrong.

1. Most notably, this case's procedural posture means that it does not actually address the question that Petitioner has proposed. The Fifth Circuit did not "invalidat[e] a state law" or "creat[e] a split among the courts of appeals" on a constitutional question. Pet. 8. Rather, the "key question" that the Fifth Circuit identified "is whether [*Granholm*] was a significant change in decisional law warranting relief from the injunction under Rule 60(b)(5)." Pet. App. 16a. The petition identifies no other court that has asked that question—let alone answered it differently.

As this Court has explained, the scope of relief under Rule 60(b)(5) is narrow. In particular, "Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests." *Horne*, 557 U.S. at 447. It instead gives district courts the limited authorization to reexamine a judgment when a moving party demonstrates that "changed circumstances warrant relief." *Id.* If the claimed change consists of a new legal decision, the moving party must demonstrate that the new decision has "so undermined" the previously governing

rules that they are "no longer good law." *Agostini*, 521 U.S. at 217-218; *see id.* at 239 (requiring "a bona fide, significant change in subsequent law").

In its 1994 opinion, the Fifth Circuit assessed the Texas durational-residency requirement by balancing the federal Commerce Clause interests against the States' Twenty-first Amendment interests. *See Cooper*, 11 F.3d at 555. Relying on this Court's decisions in *Bacchus*, 468 U.S. 263, and *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), it held that the Twenty-first Amendment shields discriminatory liquor laws only where the state interests asserted are closely tied to the Amendment's purpose. *Cooper*, 11 F.3d at 555. That was not true of the durational-residency requirement, which the State had argued facilitates background checks on permit applicants. *Id.*

A decade later, this Court decided *Granholm*. In *Granholm*, it held that state laws permitting in-state producers to ship wine directly to in-state consumers, while denying out-of-state producers the same opportunity, impermissibly discriminated against interstate commerce. *See* 544 U.S. at 472-475. Such laws were not saved by the Twenty-first Amendment; the "Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Id.* at 484-485. The Court thus reaffirmed the rule from *Bacchus* and *Capital Cities* that the Twenty-first Amendment does not override "the nondiscrimination principle of the Commerce Clause." *Id.* at 487. It noted, however, that its holding was limited to *producers*. *Id.* at 489. The three-tier system itself remained "unquestionably legitimate." *Id.* (citation omitted). It added 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.*

The question that the Fifth Circuit faced below was whether this Court's *Granholm* decision had *significantly changed the governing law* on the Twenty-first Amendment. The Fifth Circuit reasonably "answer[ed] in the negative." Pet. App. 18a. It explained that *Granholm* "did not expressly alter the standard for reviewing Commerce Clause challenges to state alcohol regulations"; that *Granholm* refused to overrule *Bacchus*; and that *Granholm*'s comments about the three-tier system were dicta. *Id.* at 18a-19a.

As the petition points out (Pet. 9-11), the Eighth Circuit recently affirmed a State's durational-residency requirement, relying in part on the *Granholm* dicta. *See S. Wine & Spirits of Am.* v. *Div. of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013). But that case concerned a direct attack on a liquor law, not an attempt to dissolve a previously entered injunction. The Eighth Circuit described *Granholm* not as a significant change in the law but as the latest in an approach marked by "a case-by-case balancing of interests that defies ready predictability." *Id.* at 809. In fact, the Eighth Circuit appeared to *agree* that the relevant paragraph in *Granholm* was only dicta. *See id.* Had that case arrived in the same procedural posture as this one, the Eighth Circuit may well have come to the same conclusion as the Fifth Circuit below. As a result, there is no split on the narrow Rule 60(b)(5) question that this case actually presents.

It might be that the Eighth Circuit's decision in *Southern Wine* conflicts with the Fifth Circuit's 1994

decision in *Cooper*. *See S. Wine*, 731 F.3d at 812. That 1994 decision, however, is not the basis for this petition. And the decision that *is* the basis for this petition neither created nor perpetuated a split with the Eighth Circuit. It simply enforced this Court's command that "Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests." *Horne*, 557 U.S. at 447.

2. Procedural posture aside, there is at most a shallow 1-1 split between the Fifth Circuit and the Eighth Circuit about the constitutionality of durational-residency requirements. The petition suggests that the Second and Fourth Circuits have also weighed in. *See* Pet. 8-9, 11-12 (citing *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185 (2d Cir. 2009), and *Brooks* v. *Vassar*, 462 F.3d 341 (4th Cir. 2006)). Neither of the two cases it cites, however, involved durational-residency requirements like Texas's. That factual difference matters.

In *Arnold's Wines*, the Second Circuit considered a challenge to New York's licensing requirements, which required out-of-state producers to ship to state-licensed wholesalers rather than directly to consumers. 571 F.3d at 187. The Second Circuit rejected the challengers' arguments as "a frontal attack on the constitutionality of the three-tier system"—the very system that *Granholm* had endorsed. *Id.* at 190. But the court said nothing about durational-residency requirements like Texas's. As the Fifth Circuit noted here, such requirements are *not* "an inherent aspect of the three-tier system." Pet. App. 21a. A State may well require that alcohol be funneled through in-state wholesalers or retailers. That does not mean it may similarly require that those in-state wholesalers or retailers have lived in

the State for a certain period of time. *Arnold's Wines* answered the first question; this case (the 1994 edition) answered the second.

So too for the Fourth Circuit's decision in *Brooks*. The Fourth Circuit did not confront a durational-residency requirement. It considered two particular components of Virginia's three-tier system: an exception to import restrictions for small amounts of alcohol for personal consumption, and a rule that state-owned liquor stores must sell wine produced only at Virginia wineries. 462 F.3d at 345. The Fourth Circuit held that the personal-consumption rule was simply a *de minimis* exception to the three-tier system. *Id.* at 355. And it upheld the Virginia-winery rule under the market-participant doctrine. *Id.* at 357. Judge Niemeyer further suggested that he would limit the Commerce Clause inquiry to discrimination at the *producer* level, but he wrote for just himself on that point. *See id.* at 354. And neither Judge Niemeyer's separate opinion nor the court's opinion mentioned durational-residency requirements at all.

Indeed, the Fifth Circuit itself has embraced this very distinction between physical-residency requirements (for example, requiring that an alcohol retailer be incorporated in Texas) and durational-residency requirements (for example, requiring that an owner of such a corporation have lived in Texas for some period of time). In *Wine Country Gift Baskets.com* v. *Steen*, 612 F.3d 809, 821 (5th Cir. 2010), the Fifth Circuit explained that regulations concerning the "physical location of businesses" are "a critical component of the three-tier system" and are thus permissible under *Granholm*. The same could not be said of regulations concerning the "legal residence of

owners." *Id.* In the decision below, the Fifth Circuit reiterated that distinction. *See* Pet. App. 21a.

Because the Second and Fourth Circuits have not evaluated durational-residency requirements, and because physical-residency requirements are distinct under the Fifth Circuit's own reasoning, there is at most a split between the Fifth and Eighth Circuits. And, as explained, it is a split that a Rule 60(b)(5) denial does not truly implicate.

II. *GRANHOLM* DID NOT ANNOUNCE A SIGNIFICANT CHANGE IN DECISIONAL LAW.

For largely the same reasons, Petitioner is wrong that the Fifth Circuit's denial of Rule 60(b) relief is inconsistent with *Granholm*. Pet. 13-17. *Granholm* did not suggest that it was announcing a significant change in decisional law. To the contrary, it explained and followed "modern" Twenty-first Amendment jurisprudence in rejecting as unconstitutional the discriminatory treatment of out-of-state producers. *See* 544 U.S. at 486-488. In dicta, it also reaffirmed the "previously recognized" legitimacy of the three-tier system. *Id.* at 489.

Perhaps understandably, then, Petitioner never argues outright that *Granholm* effected "a bona fide, significant change" from the law that the Fifth Circuit applied in 1994. *Agostini*, 521 U.S. at 239; *see* Pet. 13-17. Nor does Petitioner cite any case in which a court has relied on dicta to grant relief under Rule 60(b)(5). Absent either showing, there is no conflict between this Court's decision in *Granholm* and the Fifth Circuit's denial of Rule 60(b) relief.

The many faults that Petitioner ascribes to the Fifth Circuit's analysis are thus beside the point. The petition argues, for example, that "[t]he 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." Pet. 16. That should come as no surprise. If this case had involved a direct attack on a liquor regulation, those considerations might have been appropriate. Given the procedural posture, though, the Fifth Circuit properly declined to conduct the full-scale merits inquiry that Petitioner demands. Rule 60(b) requires nothing more.

III. SEVERAL SERIOUS VEHICLE PROBLEMS WOULD IMPEDE THIS COURT'S REVIEW.

Even if the Fifth Circuit had directly confronted *Granholm* and had split with the Eighth Circuit, this case still would not merit review. On the one hand, there would be only a shallow 1-1 split. On the other hand, there would be several serious vehicle problems. Those vehicle problems mean that this Court likely cannot reach the merits; that even if it could reach the merits, its decision would not change the outcome below; and that even if it could change the outcome below, it would at most revive a long-enjoined statute that the State itself has not bothered to defend. The petition attempts to downplay those problems, but to no avail. Even viewed in its most promising light, this unusual case is not worth the Court's time.

A. Petitioner Does Not Have Standing To Seek Rule 60(b) Relief.

The first vehicle problem is also the most glaring: Petitioner does not have standing to seek Rule 60(b) relief. *See* Pet. App. 7a-15a (discussing the standing issue); *id.* at 22a-26a (Jones, J., dissenting) (same). Because standing is jurisdictional, this Court must assure itself of Petitioner's standing before answering the question presented—and would not be able to answer the question presented at all because Petitioner does not have standing. *See FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (internal quotation marks and brackets omitted)).

To reiterate, the District Court originally granted an injunction against *the Commission*, not Petitioner. Yet the Commission was not a party to either Petitioner's Rule 60(b)(5) motion or its appeal. The Fifth Circuit divided over the question whether Petitioner has standing in these circumstances. The majority held that "there is no redressability problem where, as here, the intervenor can sue the state to enforce the law at issue." Pet. App. 14a; *see* Tex. Alco. Bev. Code Ann. § 109.53 (providing that "[a]ny package store permittee who shall be injured in his business or property by another package store permittee by reason of anything prohibited in [the residency requirements] may institute suit * * * to require enforcement"). The private right of action made all the difference.

As the dissent correctly pointed out, however, the question is not so simple. The general rule, Judge

Jones explained, is that only the defendant on whom obligations are imposed—here, the Commission—has standing to contest those obligations. *See* Pet. App. 23a (Jones, J., dissenting) (citing *Diamond* v. *Charles*, 476 U.S. 54, 64-65 (1986)). She agreed that there may be an exception where the State is bound by an injunction and the private party has a right of action *against the State*. *Id.* at 24a. But the private right of action here authorizes only "a suit to enforce the code's provisions *against another private party*"; it does not "allow a permittee to sue the Commission for affirmative enforcement of state law." *Id.* at 25a-26a (emphasis added). Given that, Judge Jones would have held that Petitioner's claimed injuries were not redressable "because any judgment in TPSA's favor cannot remove the injunction against the Commissioner." *Id.* at 26a.

The petition, unsurprisingly, tries to wave away the standing dispute. It echoes the majority's reasoning: Petitioner's injuries are redressable because its members have a private right to enforce the Code's residency requirements, and the "injunction makes it practically impossible" to do so. Pet. 18. But the petition uses the word "practically" for a reason. As Judge Jones pointed out, Petitioner is *not* in fact enjoined from exercising its right to sue to enforce the residency requirement in state court. Pet. App. 26a (Jones, J., dissenting). Petitioner, in other words, cannot attempt to dissolve an injunction that does not enjoin it from doing anything.

The Seventh Circuit case that the petition cites, *Kendall-Jackson Winery, Ltd.* v. *Branson*, 212 F.3d 995 (7th Cir. 2000), underscores the problem with Petitioner's redressability theory. *See* Pet. 19. In *Kendall-Jackson*, a state alcohol commission failed to

appeal an injunction issued against it. 212 F.3d at 996-997. Private litigants appealed the adverse decision, but the Seventh Circuit held that their injuries were not redressable. *See id.* at 998-999. As the petition correctly notes, the Seventh Circuit qualified its decision by observing that the situation might have been different if the statute had "create[d] a private right of action." *Id.* at 998; *see* Pet. 19. A later Seventh Circuit decision, however, clarified that "a key element of that speculation is that the private party could bring a suit *against the agency or governmental actor*." *Cabral* v. *City of Evansville, Ind.*, 759 F.3d 639, 644 (7th Cir. 2014). As Judge Jones's dissent explained, Section 109.53 of the Code does not create a private right of action against the Commission itself. *See* Pet. App. 25a-26a (Jones, J., dissenting).

For those reasons, the dissent was right: Petitioner does not have standing to seek Rule 60(b) relief. But at the very least, the substantial question regarding Petitioner's standing poses a serious obstacle to this Court's review. It would require the Court to evaluate an unusual jurisdictional question on which Petitioner did not seek certiorari. And, should the Court side with Judge Jones's dissent, it would preclude consideration of the question that the petition actually tries to present.

B. Any Decision On The Twenty-first Amendment Would Not Change The Outcome Below.

A second impediment to the Court's review is that any decision on the question presented will not affect the judgment below. The Fifth Circuit provided a clear alternative ground for denying Rule 60(b)

relief: Petitioner's "fail[ure] to address the district court's holding that Texas's residency requirement violates the Privileges and Immunities Clause." Pet. App. 21a. That means that—regardless of whatever this Court might say about the Commerce Clause and the Twenty-first Amendment—the Fifth Circuit properly rejected Petitioner's Rule 60(b)(5) motion.

The petition tries to dodge this conspicuous obstacle by attacking the District Court's 1991 Privileges and Immunities holding on its merits. It argues that the Privileges and Immunities Clause does not protect the right to sell liquor, that Respondents are corporations that cannot invoke the Clause, and that *Granholm*'s Twenty-first Amendment teachings apply in this context, too. Pet. 19-21. There are two problems with those arguments, apart from their substance. First, Petitioner argues only that the original District Court decision was wrong; it does not argue that there has been a significant change in decisional law since. It is unclear, for example, why the fact that the current Respondents are corporations (*see* Pet. 20) means that the injunction *issued in favor of Cooper and Wilson* is now inequitable. And Petitioner makes no attempt whatsoever to connect those dots, as Rule 60(b)(5) requires.

Second, even if the petition had identified appropriate grounds for Rule 60(b) relief on the Privileges and Immunities holding, it is far too late. The Fifth Circuit did not decide the merits of the Privileges and Immunities question. Instead, it held that Petitioner had "impermissibly attempted to shift the burden of proof to [Respondents]." Pet. App. 22a. Having failed to mount a sufficient challenge to the alternative Privileges and Immunities holding before the Fifth Circuit, Petitioner cannot do so for the first

time here. This Court is one of "review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it generally declines to consider questions that are not "pressed or passed upon below." *Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983).

The Fifth Circuit's alternative forfeiture holding fully supports its denial of Rule 60(b) relief. There is no compelling reason for this Court to consider the question presented here.

C. The State's Absence Diminishes The Case's Importance.

Finally, this case lacks the usual indicia of importance that justify the Court's review.

For starters, the Fifth Circuit's original decision in *Cooper* has been the status quo for over two decades. Petitioner claims that "review is urgently needed" (Pet. 2), but nothing about this case is urgent. Even after *Granholm* was decided in 2005, *nine years* passed before Petitioner filed its Rule 60(b)(5) motion arguing that *Granholm* had dramatically changed the legal landscape. Only after the Eighth Circuit's favorable *Southern Wine* decision in 2013 did Petitioner move into action. That delay militates against this Court's review. It also militates against Petitioner on the merits: It is a Herculean task to explain why a decades-old injunction is "no longer equitable" in light of a decade-old Supreme Court decision. Fed. R. Civ. P. 60(b)(5).

More to the point, the Commission's absence suggests that this particular case and this particular law are no longer important to the State itself. It is ultimately the *Commission* whose behavior is limited by the longstanding injunction, and the *Texas Legislature* whose Code goes unenforced. Yet the State is

nowhere to be found. In light of the State's decision not to participate in the Rule 60(b) proceedings, Petitioner's claim that the judgment below comes "at the expense of state sovereignty" (Pet. 17) rings hollow. The State is in the best position to defend state sovereignty and to articulate the state interests that justify its laws. The Court should await a case that the State deems worthy of its participation.

CONCLUSION

The petition for a writ of certiorari should be denied.

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OCTOBER 2016