No. ________

In The
Supreme Court of the United States

JUANITA SWEDENBURG, in her own capacity, JUANITA SWEDENBURG, as proprietor of SWEDENBURG WINERY, a Virginia partnership; DAVID LUCAS, in his own capacity, DAVID LUCAS, as proprietor of THE LUCAS WINERY, a California sole proprietorship; PATRICK G. FITZGERALD, CORTES DeRUSSY, and ROBIN BROOKS,

Petitioners,

v.

EDWARD D. KELLY, Chairman of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; LAWRENCE J. GEDDA, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; JOSEPH ZARRIELLO, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; CHARMER INDUSTRIES, INC.; PREMIER BEVERAGE COMPANY LLC; PEERLESS IMPORTERS, INC.; LOCAL 2D OF THE ALLIED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION; EBER BROTHERS WINE AND LIQUOR CORP.; METROPOLITAN PACKAGE STORE ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does New York's discriminatory and protectionist prohibition against direct interstate shipment of wine to consumers violate the Commerce Clause of the U.S. Constitution; and if so, is it "saved" by the 21st Amendment?

2. Does New York's discriminatory and protectionist prohibition against direct interstate shipment of wine to consumers violate the Privileges and Immunities Clause of the U.S. Constitution?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs below, are Juanita Swedenburg, in her own capacity and as proprietor of Swedenburg Winery; David Lucas, in his own capacity and as proprietor of the Lucas Winery; Patrick G. Fitzgerald; Cortes DeRussy; and Robin Brooks.

Respondents who were defendants below are Edward F. Kelly, Chairman of the New York State Liquor Authority; and Lawrence J. Gedda and Joseph Zariello, Commissioners of the New York State Liquor Authority; sued in their official capacities.

Respondents who were defendant-intervenors below are Charmer Industries, Inc.; Premier Beverage Company LLC; Peerless Importers Inc.; Local 2d of the Allied Food and Commercial Workers International Union; Eber Brothers Wine and Liquor Corp.; and the Metropolitan Package Store Association, Inc.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

None of the petitioners is a corporation.

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OPINIONS BELOW

The decision of which review is sought is reported at *Swedenburg v. Kelly*, slip. op., Nos. 02-9511, 03-7089 (2d Cir. February 12, 2004) and republished in the Appendix at 1a. The decision of the district court granting petitioners' motion for summary judgment is reported at 232 F. Supp.2d 135 (S.D.N.Y. 2002) (App. 34a). The district court's remedy is unpublished (App. 72a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 2003. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Commerce Clause, U.S. Const., art. I, §8, cl. 3 (App. 74a); the 21st Amendment (App. 74a); and the Privileges and Immunities Clause, U.S. Const., art. IV, §2 (App. 74a). Statutes involved include the Wilson Act, 27 U.S.C. §121 (App. 75a); the Webb-Kenyon Act, 27 U.S.C. §122 (App. 75a); the 21st Amendment Enforcement Act, 27 U.S.C. §122a (App. 76a); N.Y. Alco. Bev. Cont. Law §§102(1)(a), (c), and (d) (App. 80a); §§3(12-a), 76(4), 76(5), 76-a(6)(d), 99-b(1)(k), 105(9), and 130(1) (App. 86a-100a); and N.Y. C.L.S. Penal §10.00(4) (App. 101a).

STATEMENT

Petitioners are two small, family-run wineries in Virginia and California, respectively, and three New York consumers who would like to purchase their wines. For most alcoholic beverages, New York maintains a mandatory "three-tier" distribution system: producer to wholesaler to retailer to consumer. New York Alco. Bev. Cont. Law §102(1)(c) provides in relevant part that "No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." Violation of the law is a criminal offense. N.Y. C.L.S. Penal §10.00(4) (App. 101a).

No license is available to out-of-state producers to traffic in alcoholic beverages, *House of York v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970); see also Jt. App. 699[1]; so that plaintiff wineries may distribute their products to New York consumers only if a licensed New York liquor wholesaler distributes their products. However, New York wineries enjoy the ability to sell and deliver wine directly to consumers through a number of provisions adopted over the years by the state legislature.[2] Most relevant to the instant case, N.Y. Alco. Bev. Cont. Law §§3(12-a) and

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[1] References to "Jt. App." are from the Joint Appendix submitted by the parties to the Court of Appeals.

[2] See, e.g., NY Alco. Bev. Cont. Law §76(4) (New York wineries can obtain retail licenses to sell "New York state labeled wines"); §76(2)(a) (New York wineries may conduct tastings of New York state labeled wines); §77(5) (New York wineries may sell New York state labeled wines on Sundays); §77(4)(b)(4) (New York wineries may sell the New York state labeled wines of other New York wineries); §76(5) (New York wineries may make deliveries on behalf of other New York wineries).

76-a(6)(d) (App. 80a and 94a) permit in-state farm wineries to distribute wine made from New York grapes directly to consumers through hired delivery mechanisms. Commercial wineries may obtain a retail license to sell New York wines under §76(4) (App. 88a), and then may deliver wine directly to consumers in vehicles owned or operated by a winery or hired through a registered trucking company pursuant to §105(9) (App. 98a). Those exemptions were enacted expressly to benefit New York wineries (Jt. App. 293, 299-301), see also (App. 54a-55a); and neither is available to out-of-state wineries.

The only way for an out-of-state winery to ship wine to New York consumers would be to establish a New York winery, which requires it to obtain a New York commercial winery license, maintain a staffed branch office and warehouse in New York, secure a retailer license, and then use its own or registered vehicles to deliver to "householders" only for use in their own premises under §77(2) (see Jt. App. 1564-1565). Thomas G. McKeon, general counsel for the New York State Liquor Authority, attests that no out-of-state winery has even attempted to navigate that system (Jt. App. 1564). Even were an out-of-state winery to have sufficient resources to open a New York winery, it would have none of the advantages available to farm wineries or the opportunities set forth in note 2, *supra*.

Before 1970, there were some opportunities for out-of-state wineries to ship directly to New York consumers, but the legislature closed those loopholes. "The law was enacted . . . to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages. . . ." *House of York*, 322 F. Supp. at 533.

Plaintiffs filed this lawsuit in 1999, challenging §§102(1)(c) and (d) as applied to prohibit direct interstate wine shipments as a violation of the Commerce Clause and Privileges and Immunities Clause.[3] After considering an extensive record and the parties' cross-motions for summary judgment, the district court found the ban unconstitutional under the Commerce Clause. Applying *Bacchus Imports v. Diaz*, 468 U.S. 263 (1984), the court applied a two-part constitutional inquiry. First, the court concluded that under the Commerce Clause, the state's differential direct shipment rules, under which "out-of-state wineries must consign their products to a (three-tier) wholesaler, [while] in-state wineries do not" (App. 53a), triggered Commerce Clause scrutiny. "That the New York direct shipping ban on out-of-state wine burdens interstate commerce and is discriminatory (on its face) is clear from the very wording (let alone the impact) of the exemptions favoring in-state wineries" (App. 53a). Not only does the system "provide an impermissible economic benefit and (protection) to only in-state interests," there exist "nondiscriminatory alternatives available to serve the state's interests" (App. 54a). The court found the effort and expense for an out-of-state winery to obtain a New York commercial winery license and to maintain separate facilities in the state to be "unreasonable" (App. 55a). As a result, the court concluded that the "ban on the direct shipment to New York of out-of-state wine is *not* 'evenhanded' and

[3] Plaintiffs also challenged the advertising ban under §102(1)(a) as a violation of the First Amendment. Both the district court and court of appeals invalidated that provision.

constitutes a per se violation of the Commerce Clause." (App. 57a (emphasis in original)).

The court then turned to the state's 21st Amendment defense, and found that "[t]he State has not established that its legitimate goals" of temperance and tax revenue "cannot be accomplished in a nondiscriminatory manner" (App. 64a). Because the court reached its conclusion under the Commerce Clause, it did not reach the Privileges and Immunities claim (App. 66a-67a). The court enjoined defendants from prohibiting out-of-state wineries from shipping wine to consumers on the same terms and conditions as New York wineries (App. 72a-73a).

The Second Circuit reversed. Though the court acknowledged that the district court had "rel[ied] on the method of analysis utilized by a number of other federal courts in similar challenges" (App. 9a), it proceeded to apply a different analysis "that only one other circuit court has employed" (App. 13a). Specifically, the court declined to engage in a "two-tier" analysis in which the statute is assessed separately under the Commerce Clause and the 21st Amendment (App. 12a), but rather it considered "the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause" (App. 13a). The court found that "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state" (App. 25a). Although "fully recogniz[ing] that the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol" (App. 26a), here the state's aim was to "ensure accountability" in

the context of alcohol (App. 27a), and therefore was within the state's 21st Amendment powers. Likewise, the scheme did not violate the Privileges and Immunities Clause because it "operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents" (App. 29a).

REASONS FOR GRANTING THE WRIT

The Court should grant the petition because the case satisfies the criteria set forth in S. Ct. R. 10(a) and (c). The decision below has contributed to a growing split of authority on an issue of great public importance. In doing so, it has decided the issue in a way that conflicts with relevant decisions of this Court. The only way to resolve the split and to reassert the authority of this Court's governing precedents is to grant the petition.

I. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE TO PRODUCERS AND CONSUMERS, GOING TO THE HEART OF INTERESTS PROTECTED BY THE COMMERCE CLAUSE.

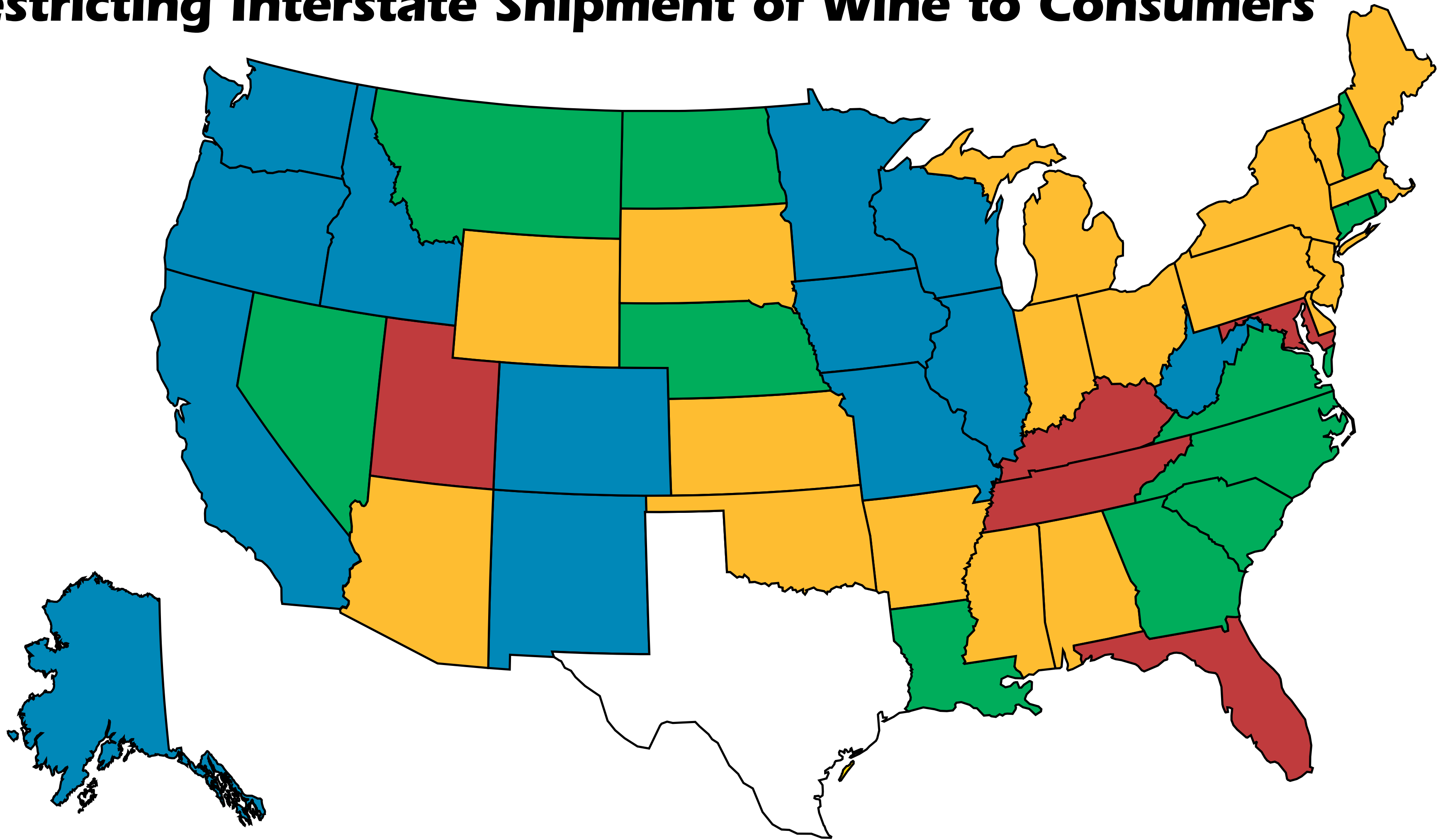
As this Court declared in *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824), "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." The precious individual rights protected by the Commerce Clause, and by its sister protection of entrepreneurial freedom, the Privileges and Immunities Clause, are essential to our functioning as a nation. As the Court stated in *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949),

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation. . . . Likewise, every consumer may look to the free competition from every producing area in the Nation. . . . Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

The petitioners in this case are two farmers and three consumers who humbly ask this Court to make good on that guarantee by removing a discriminatory and parochial trade barrier supported below and here by the state and a quartet of multi-billion dollar oligopolists.

The problem Mrs. Swedenburg and her fellow petitioners face is shared by producers and consumers across the United States. As the map on the next page illustrates, about half the states forbid the direct interstate shipment of wine to consumers, while the other half allow it (usually with a license requirement). Several of the states that prohibit direct interstate shipments, like New York, allow in-state wineries to ship directly to consumers. Even among the free-trade states, about a dozen are "reciprocity" states, allowing direct shipments only from states that themselves allow it. Some of the states that prohibit direct interstate shipments make it a felony. The resulting map depicts precisely the picture of "economic Balkanization" that the Commerce Clause was designed to prevent. *Hughes v. Okla.*, 441 U.S. 322, 325 (1979).

Restricting Interstate Shipment of Wine to Consumers



Free States (Modest Restrictions)

Trade Barrier States

Reciprocal Shipping Allowed Among These States

Trade Barrier States Felony Enforcement

Soon to Change to Green or Blue

Source: Institute for Justice 2003: www.ij.org

The effect of those trade barriers has been magnified by recent industry trends and technological innovations. The number of American wineries has increased exponentially to the point where there now are more than 2500 wineries in 49 states. In 1998, the top 25 wineries sold 82.7 percent of all wine, with the remaining wineries dividing the remainder. Most of the wineries outside the top 25 are family-run enterprises producing fewer than 5,000 cases annually (Jt. App. 184, 3535). At the same time, the wholesaler industry has contracted severely (Jt. App. 185-86, 279-86). The declining number of wholesalers can accommodate only a fraction of the growing number of wines produced each year (Jt. App. 190, 3534-35). For the vast majority of small wineries shut out of that process, direct shipping is the only viable option; and trade barriers like the challenged New York scheme effectively foreclose market access to thousands of wineries and wines (Jt. App. 201-02). See generally Shanker, "Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment," 85 *Va. L. Rev.* 353 (1999).

That restraint of trade occurs at a time when the Internet has made possible unlimited personalized economic transactions that would allow wineries to sell to consumers who wish to purchase their wine regardless of location (Jt. App. 675-78). A staff report by the Federal Trade Commission, based on extensive hearings, found that "State bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003)[4]

[4] http://www.ftc.gov/os/2003/07/winereport2.pdf.

(hereafter FTC Report) at 3 and 14. The report found that such bans reduce consumer choice and increase prices. *Id.* at 3 and 16-25. It reported that the two dozen states that allow direct interstate shipments of wine successfully have fulfilled their legitimate regulatory objectives by constructing mechanisms to safeguard against underage access and, in some instances, to collect tax revenues. *Id.* at 4 and 26-39. But unless this Court reviews the decision below, the trade barriers that artificially constrict wine commerce in half the states will persist and the vast commercial promise of our technological era will be arrested.

II. THE CIRCUITS ARE PROFOUNDLY SPLIT IN MULTIPLE DIRECTIONS OVER THE APPROPRIATE ANALYTICAL FRAMEWORK FOR CASES AT THE INTERSECTION OF THE COMMERCE CLAUSE AND THE 21ST AMENDMENT.

A. The Circuit Split is Multifaceted, Growing, and Irreconcilable. In their petition for writ of *certiorari* in *Mich. Beer & Wine Wholesalers Ass'n v. Heald*, No. 03-1120 (filed February 4, 2004) at 6, the wholesaler petitioners aptly described the split in the circuits over the issues presented here as "import alcohol anarchy." The jurisprudential cacophony increased markedly with the decision below, which introduced a new, previously uncharted dimension to the conflicting decisions among the five circuit court decisions that preceded it.

As the chart on the next page illustrates, six circuit courts of appeals have confronted the precise question of whether states that maintain two different sets of rules for direct wine shipments – one for in-state wineries and a more onerous set for out-of-state wineries – have exceeded constitutional boundaries.

SPLIT IN AUTHORITY OVER DIRECT INTERSTATE SHIPMENT OF WINE						
Citation	*Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000)	*Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002)	*Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003)	*Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003)	*Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003)	*Swedenburg v. Kelly*, slip op. Nos. 02-9511, 03-7089 (2nd Cir. February 12, 2004)
Two sets of rules for in-state and out-of-state direct wine shipments?	Yes: State permits "local wineries, but not [out-of-state] wineries..to ship directly" (at 851).	Yes (at 1106-07)	Yes (at 515)	Yes (at 393)	Yes (at 521)	Yes (at 22-23)
Two sets of rules = facial discrimination?	No, because state "insists that every drop of liquor pass through its three-tiered system and be subjected to taxation" (at 853).	Yes (at 1109-11)	Yes (at 515)	Yes (at 397-400)	Yes (525)	No, because "wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state" (at 21).
Applicable precedent?	Various	*Bacchus* and *Milton S. Kronheim & Co. v. Dist. of Colum.*, 91 F.3d 193 (D.C. Cir. 1996) (at 1108)	*Bacchus* (at 513-15)	*Bacchus* is "the foundational case that established the modern jurisprudential framework for assessing state alcohol regulations under the Commerce Clause" (at 400).	*Bacchus* (at 524)	"We are hard-pressed to find any mandate from the Court directing us to utilize *Bacchus* as a template" (at 19 n.10).
Two-part Commerce Clause/21st Amendment scrutiny?	Unclear	Yes (at 1108)	Yes (at 514)	Yes (at 400)	Yes (at 524)	No (at 10)
Strict scrutiny under Commerce Clause?	Unclear	No: State's burden is "far less than..strict scrutiny" (at 1114, n.17)	Yes (at 515)	Yes (at 396)	Yes (at 524)	No
Least-restrictive alternative required?	No	No (at 1114, n.17)	Yes (at 515)	Yes (at 396)	Yes (at 524)	No
Result?	**Constitutional**	**Vacate decision dismissing claim and remand for analysis of state's defenses**	**Unconstitutional**	**Unconstitutional**	**Unconstitutional**	**Constitutional**
Remedy?			Alter state law to forbid direct in-state shipment of wine to consumers	Allow out-of-state wineries to ship on same terms as in-state wineries (at 407-10)		

Before the decision below, the clear weight of authority found that such discriminatory rules violated the Commerce Clause and were not "saved" by the 21st Amendment. We cannot improve upon the summary of the court below, and reproduce it at length:

> Four circuits have struck down the regulatory schemes in question, utilizing a two-step analytical framework, similar to that used by the district court here, in which the statute is first examined in the context of the dormant Commerce Clause. *Heald v. Engler*, 342 F.3d 517, 524 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388, 400 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506, 514 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104, 1008 (11th Cir. 2002). Under traditional dormant Commerce Clause analysis, a state regulation is unconstitutional if it "affects interstate commerce in a manner either that (i) discriminates against interstate commerce, or (ii) imposes burdens on interstate commerce that are incommensurate with putative local gains." . . . In each of the four circuit court cases, the regulatory scheme at issue was found to be facially discriminatory in violation of the dormant Commerce Clause. *Heald*, 342 F.3d at 525; *Dickerson*, 336 F.3d at 402-03; *Beskind*, 325 F.3d at 515; *Bainbridge*, 311 F.3d at 1109-11. Notwithstanding a finding that the regulatory scheme violates the dormant Commerce Clause, the statute can be "saved" by the Twenty-first Amendment in the second step, but *only if* it advances one of the Amendment's "core concerns." Under this two-tier analysis, none of the state statutes regulating the importation of alcohol were saved by the Twenty-first Amendment core concern examination. *See Heald*, 342 F.3d at 526-27; *Dickerson*, 336 F.3d at

> 403-07; *Beskind*, 325 F.3d at 516-17; *Bainbridge*, 311 F.3d at 1111-15.

(App. 12a (some citations omitted) (emphasis in original).)

The court below flatly rejected that analysis, declaring that "[w]e think this two-step approach is flawed because the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language" of the 21st Amendment (App. 12a-13a). Instead, the Second Circuit joined the Seventh Circuit, see *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied*, 532 U.S. 1002 (2001), in an inquiry that "considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause" (App. 12a). The different mode of analysis employed by the two sets of courts dictates the outcome, as both the Second and Seventh Circuits upheld bans of interstate direct wine shipping, in contrast to the Fourth, Fifth, Sixth, and 11th Circuits.

Those contradictory decisions and modes of constitutional analysis present a stark enough conflict among the circuits. But even the courts that reached similar results in some instances employed different legal frameworks or remedies, as the chart illustrates. For instance, while the Fourth, Fifth, and Sixth Circuits applied strict scrutiny under the Commerce Clause, see *Beskind*, 325 F.3d at 515; *Dickerson*, 336 F.3d at 396; *Heald*, 342 F.3d at 524; the 11th Circuit applied a standard it described as "far less than . . . strict scrutiny." *Bainbridge*, 311 F.3d at 1115. Moreover, while the Fourth and Fifth Circuits agreed that discriminatory direct shipment rules are unconstitutional, they ordered diametrically opposite remedies, with the Fourth Circuit holding that the exemptions for in-state

wineries should be stricken, *Beskind*, 325 F.3d at 517-20; while the Fifth Circuit ordered that the opportunity to direct-ship should be extended to out-of-state wineries. *Dickerson*, 336 F.3d at 397-400.

At least two other appellate court decisions dealing with similar issues also used different legal tests and reached differing outcomes. In *Milton S. Kronheim & Co., Inc. v. Dist. of Colum.*, 91 F.3d 193 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997), the D.C. Circuit affirmed a law forbidding the storage of alcoholic beverages outside the District, adopting a "mixed motive" analysis otherwise unknown in Commerce Clause jurisprudence before or since.[5] Compare *Quality Brands, Inc. v. Barry*, 715 F. Supp. 1138 (D.D.C. 1989), *aff'd*, 901 F.2d 1130 (D.C. Cir. 1990) (applying traditional Commerce Clause analysis in alcohol context). By contrast, in *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 63 P.3d 779 (Wash. 2003), the Washington Supreme Court struck down statutory distribution contract requirements from which in-state wineries were exempted, applying the same two-part analysis used by the Fourth, Fifth, Sixth, and 11th Circuits, while ordering the same extension of benefits remedy as the Fifth Circuit.

This discussion demonstrates that this is no simple or slight circuit split, if such a thing exists.[6] Rather, the split

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[5] The 11th Circuit crafted its legal standard by attempting to synthesize the holdings in *Bacchus* and *Kronheim*. *Bainbridge*, 311 F.3d at 1108.

[6] Indeed, the analysis of the court below conflicts not only with that of other courts, but of its own prior on-point precedent, which faithfully applied *Bacchus* and the traditional Commerce Clause 21st Amendment scrutiny it rejected below. See *Loretto Winery, Ltd. v.*

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is multidimensional and hopelessly irreconcilable, leading to wildly divergent results on identical issues. Moreover, the multiplicity of decisions in less than five years since the millennium indicates that these issues arise repeatedly, and indeed there are many more cases in the pipeline. Although a prevalent trend had been developing among the most recent decisions, the court below put an abrupt and jolting end to any prospect of jurisprudential harmony. The lower courts urgently need this Court's definitive guidance; and all of the wide range of interests affected – from producers and consumers of wine to state regulatory officials and even the middlemen seeking to protect their monopoly turf – need to know the applicable constitutional boundaries that apply to commerce in wine.

B. Any Effort to Harmonize the Cases Is Illusory. The court below made it clear that it was flatly rejecting the constitutional analysis applied by the Fourth, Fifth, Sixth, and 11th Circuits, pronouncing it "flawed" (App. 12a) and expressly adopting a different mode of analysis (App. 13a). Nonetheless, the court attempted to distinguish the contrary decisions by suggesting that "the statutes challenged in those cases were significantly different from the regulatory regime at issue here" (App. 13a, n.7).

Not so. The crux of the court's contention is that somehow the New York statute is nondiscriminatory, because supposedly "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state"

Gazzara, 601 F. Supp. 850 (S.D.N.Y.), *aff'd sub nom. Loretto Winery, Ltd. v. Duffy*, 761 F.2d 240 (2d Cir. 1985).

(App. 25a). The court contends that situation is "unlike in other states" (App. 8a). Although respondents have made such assertions about the unavailability of such mechanisms in other states, never have they backed them up with citations to statutes in the relevant states establishing residency requirements. To the contrary, the states at issue in *Heald* (Michigan),[7] *Dickerson* (Texas), and *Bainbridge* (Florida) do *not* appear to have residency requirements,[8] so that like in New York, at least theoretically an out-of-state winery could open an in-state winery and avail itself of some direct shipment options.[9]

But that is beside the point, because even to the limited extent that out-of-state wineries can gain access to direct shipping opportunities within New York, *the rules are still overwhelmingly skewed against them*. New York's scheme is replete with exemptions for in-state wineries,[10] which were adopted for avowedly protectionist motives

[7] The court below cites *Heald*, 342 F.3d at 521, to the effect that "at present, there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents." The *Heald* court did not mean that Michigan imposes a residency requirement (it does not); but rather that an out-of-state winery cannot obtain a permit to ship directly to consumers in the state. That is exactly the situation here. *House of York*, 322 F. Supp. at 533 (no license exists for out-of-state wineries to ship into New York).

[8] Indeed, a residency requirement for alcohol licenses in Texas was struck down in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994).

[9] Even North Carolina (*Beskind*) authorizes the issuance of ABC permits to nonresidents so long as they have an agent in the state with power of attorney. N.C. Stats. §18B-900(2)(b).

[10] See note 2, *supra*, and accompanying text. Additionally, in 1995, the legislature overwhelmingly passed a law to permit direct interstate wine shipments. After a furious lobbying effort by liquor distributors, Governor Pataki vetoed the bill, citing concerns about the interests of in-state businesses and tax revenues (Jt. App. 477-536).

(App. 53a-54a).[11] The easiest and most common way for wineries to ship directly to consumers is by becoming a farm winery – a status that is *only available to New York wineries using New York grapes*. NY Alco. Bev. Cont. Law §§3(12-a) and 76-a(6)(d) (App. 86a and 94a). An out-of-state winery, by contrast, would have to open and staff a business office and a warehouse, and obtain winery, warehouse, and retail licenses in order to ship through authorized delivery methods to "householders" for consumption on the premises. §§3(37), 77(2) (see Jt. App. 1564-1565). That opportunity is at best theoretical, economically overwhelming for the small enterprises that comprise the vast majority of American wineries, and by no means substantially equivalent to the opportunities available to New York wineries. Little wonder then that "no out-of-state winery has applied for a license" under that system (Jt. App. 1564).[12]

[11] Indeed, the court below disagreed with other circuits even on the critical threshold issue of whether exemptions for in-state wineries constitutes discrimination. Texas, for instance, also strenuously asserted that it did not discriminate against out-of-state wineries, a contention that the Fifth Circuit rejected. "To paraphrase the Bard, that which we call discrimination by any other name would still smell as foul. . . . The numerous ways in which in-state wineries are exempt" demonstrates that the system "is neither evenhanded nor incidental. . . ." *Dickerson*, 336 F.3d at 398.

[12] Respondents make much of the fact that one of petitioners' witnesses, John Dyson, ships wine from his California winery through his winery in New York. The point is that Dyson maintains functioning wineries in *both* states, and produces New York as well as California wines (thereby qualifying his New York winery as a farm winery), and therefore can avail himself of the full range of direct shipping opportunities available to New York wineries without incurring additional expense (Jt. App. 3600-3602). Contrast that situation with petitioner Swedenburg, who owns and operates a small winery. The cost of

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In the same breath that it contends the system is nondiscriminatory, the court below admits that the added costs and burdens applicable to out-of-state wineries (which it euphemistically refers to as the "physical presence requirement") "could create substantial dormant Commerce Clause problems if this licensing system regulated a commodity other than alcohol" (App. 26a). As the court points out, such Commerce Clause concerns arise only when there is discrimination, which triggers a virtual per se rule of invalidity. See, e.g., *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). How then can the state's scheme constitute a per se violation of the Commerce Clause and *not* be discriminatory?

Regardless of how the court below characterizes it, and viewed even in the most charitable manner, New York plainly applies two sets of rules to direct shipping of wine to consumers, one applicable to in-state wineries and another, far more onerous set to out-of-state wineries. That, as the court below acknowledges, presents a classic Commerce Clause violation. The result reached below in contradiction to the weight of circuit authority is the product not of any meaningful dissimilarity between New York's regulatory scheme and those struck down in Michigan, Texas, and North Carolina, but rather of the court's misguided belief that the 21st Amendment provides a safe harbor for discriminatory, protectionist trade barriers.

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opening a staffed office and warehouse in New York would be prohibitive (Jt. App. 3564-3566). Multiply those burdens by 50 states and two thousand or so small wineries, and the Court can begin to fathom fully the devastating economic impact that the court's ruling below, if allowed to stand, would portend.

III. THE COURT BELOW REPUDIATED THIS COURT'S APPLICABLE FRAMEWORK AND HAS INTRODUCED A DANGEROUS NEW ELEMENT INTO COMMERCE CLAUSE JURISPRUDENCE.

In upholding a discriminatory trade barrier serving the ends of economic protectionism, the court expressly declined to apply the *only* recent precedent of this Court that balances the competing provisions of the Commerce Clause and the 21st Amendment in the absence of an affirmative exercise of congressional power to regulate commerce. "We are hard pressed to find any mandate from the Court directing us to utilize *Bacchus* as a template in analyzing the New York statute now before us" (App. 22a n.10).

Yet as the Fourth, Fifth, Sixth, and 11th Circuits – along with the Washington Supreme Court – have recognized, *Bacchus* provides precisely such a template when a court is faced with discriminatory trade barriers involving alcohol. Though the court below gives lip service to this Court's admonition that "'[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution'," and that it "considers each in light of the other, and in the context of the issues and interests at stake in any concrete case" (App. 13a, quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964), involving a prior New York alcohol trade barrier), the court went on to create a sweeping alcohol "exemption" (App. 13a) from the Commerce Clause that is utterly contrary to *Bacchus* and finds no support in caselaw. See, e.g., *Hostetter*, 377 U.S. at 331-32 (the notion that the 21st Amendment "has somehow operated to 'repeal' the Commerce Clause . . . [is] an absurd oversimplification").

In *Bacchus*, the Court confronted a Hawaii excise tax exemption for certain locally produced alcoholic beverages. The state raised the same defenses as respondents do here: that the statute advances legitimate state interests, it imposes no patent discrimination against interstate commerce, and the impact on interstate commerce is minimal. *Id.* 468 U.S. at 270. The Court agreed that the 21st Amendment provides broad state authority to regulate alcohol, but it declared that "one thing is certain: The central purpose of the [21st Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* at 276. The Court rejected the state's defenses, finding that "the legislation constitutes 'economic protectionism' in every sense of the phrase." *Id.* at 272. To the argument that the law was "saved" by the 21st Amendment, the Court responded that the amendment does not "empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization." *Id.* at 276.

The Court has reiterated that analytical framework in Commerce Clause cases involving alcohol where Congress has affirmatively spoken, demonstrating contrary to the opinion of the court below that the 21st Amendment does not carve out an exemption to the Commerce Clause. See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Calif. Retail Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Even the case relied upon most heavily by respondents, which did not involve the Commerce Clause, did not undermine the holding in *Bacchus* that discriminatory trade barriers receive no shelter from the 21st Amendment. *N.D. v. U.S.*, 495 U.S. 423, 444

(1990) (Scalia, J., concurring in the judgment) ("All agree in this case that state taxes or regulations that discriminate . . . are invalid"); see also *id.* at 448 ("That is not to say, of course, that the State may enact regulations that discriminate").

By dispatching the Commerce Clause with such ease, the court below was able to avoid such niceties as the application of strict scrutiny or the virtual per se rule of invalidity; a genuine search for economic protectionism; or the shifting of the burden to the state to justify its policies, including the absence of less-discriminatory alternatives; all of which are time-tested, bedrock principles of Commerce Clause jurisprudence. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *Hunt*, 432 U.S. at 353.

Instead, the Court below cursorily concluded that "we find no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests" (App. 25a). In so doing, the court completely ignored not only the strong inference of protectionism yielded by the presence of discrimination, see *Camps Newfound*, 520 U.S. at 581-82, but also the abundant evidence of economic protectionism in the record. Indeed, the district court in *House of York*, 322 F. Supp. at 533, found that a major purpose of the law was "to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages"; and the district court below observed that "the Defendants explicitly concede the exceptions [for in-state wineries] were intended to be explicitly protectionist" (App. 54a-55a). Hence, the case in that respect is exactly like *Bacchus*, 468 U.S. at 271, in which the state likewise conceded that the

exceptions were for the benefit of in-state economic interests.

And unlike the Court in *Bacchus*, the court below accepted at face value the state's defense, namely that "physical presence" is essential to accountability (App. 25a-29a).[13] Nor did it require the state to justify the burdens "in terms of . . . the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353. Had it done so, it would have found, based on the uncontroverted evidence presented by petitioners, that the states that allow direct interstate shipping have created mechanisms to ensure accountability, such as permits, remission of taxation, and protections against underage access; and that those mechanisms are achieving their goals. See, e.g., FTC Report at 3 and 26-39. The court below reasons that "[r]equiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless" (App. 28a). In reality, they don't have to: Congress recently adopted the 21st Amendment Enforcement Act, 27 U.S.C. §122a (App. 76a), which provides state attorneys general the authority to prosecute in their own federal courts violations of state alcohol laws against out-of-state producers.

[13] Indeed, even the Seventh Circuit in *Bridenbaugh*, 227 F.3d at 851, to which the court below purports to adhere, dismissed the state's defense of maintaining "orderly market conditions" as "a euphemism for reducing competition and facilitating tax collection" – precisely the objectives identified for the law by the district court in *House of York*, 322 F. Supp. at 533.

Finally, by embracing a "physical presence" requirement that obligates an out-of-state winery to become a New York winery, which requires it to establish and staff a business office and warehouse in order to conduct business on terms remotely approaching those available to in-state wineries, the court below introduced a poisonous concept into Commerce Clause jurisprudence.[14] If a state could avoid a Commerce Clause violation by declaring, as did the court below, that there is no discrimination because everyone is required to have a business facility here, it would render the Commerce Clause a dead letter. An individual or company can always, theoretically, move to or establish operations in another state in order to avail themselves of trade opportunities available to residents; but the point of the Commerce Clause is they shouldn't have to.[15] As this Court has declared, the Commerce Clause forbids states from requiring out-of-state firms "to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64,

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[14] The court below suggests that this concept is confined to "this unique area of commerce" (App. 26a); but in fact it builds upon another recent decision of the same court upholding a requirement of a "bricks and mortar" presence in the state in the context of direct sales of cigarettes. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2nd Cir. 2003).

[15] In contrast, petitioners have no objection whatsoever to having to obtain a license, submitting to jurisdiction (although that is unnecessary in light of the 21st Amendment Enforcement Act), paying taxes, or abiding reasonable regulations imposed by the host state. Indeed, that is precisely the system employed by the more than two dozen states that allow direct interstate shipping. See, e.g., La. R.S. 26:359(B)(1); Nev. Rev. Stat. Ann. §369.462; and N.H. RSA 178:14a(V).

72 (1963).[16] The physical presence requirement – oppressive as it is here, and palpably unnecessary in light of less-burdensome alternatives – makes a mockery of the protections of the Commerce Clause.

If indeed the 21st Amendment was not designed to repeal, but only to modify, the precious liberties protected by the Commerce Clause, it is essential that this Court grant the petition and overturn the decision below, which eviscerates those protections.

IV. THIS CASE IS ESPECIALLY APPROPRIATE FOR REVIEW OF THIS ISSUE BECAUSE IT ALSO PRESENTS A CLAIM UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE.

Most of the challenges to discriminatory barriers to interstate direct wine shipments (including the Michigan case pending on a petition for writ of *certiorari*) have been fought exclusively on the terrain of the Commerce Clause and the 21st Amendment. This case presents a second claim that stands on its own as a basis for overturning the ruling below, but which also should help to inform the Court's decision on the Commerce Clause issue: that the discriminatory trade barrier violates the Privileges and Immunities Clause.

[16] The court's distinction between a "physical presence" and a "residency" requirement is a distinction without a difference. "Physical presence" in this context entails establishing an entirely separate business operation in New York, a fact that would render the facility a resident of New York.

Although the 21st Amendment limits somewhat the scope of the Commerce Clause, "it places no limits whatsoever on other constitutional provisions." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 515 (1996); cf. *Craig v. Boren*, 429 U.S. 190 (1976) (21st Amendment does not limit application of the equal protection clause). Hence while this case and others like it require the courts to assess the appropriate lines of demarcation between the Commerce Clause and 21st Amendment, no such analytical line-drawing is necessary with respect to the Privileges and Immunities Clause because it retains its full vitality.

The Commerce Clause and Privileges and Immunities Clause are "mutually reinforcing." *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978). While the Commerce Clause protects free trade among the states, the Privileges and Immunities Clause protects the vital individual rights that are bound up in such trade. "[T]he pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause." *United Bldg. & Constr. Trades Council of Camden Cty. v. Mayor and Council of City of Camden*, 465 U.S. 208, 219 (1984).

As this Court recognized in *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State."[17] That, of course, is precisely what

[17] Indeed, there does not even need to be an express provision identifying out-of-state citizenship as a basis for disparate treatment to proceed with a privileges and immunities claim. *Hillside Dairy Inc. v. Lyons*, 123 S. Ct. 2142, 2147 (2003). Here, the New York statutes are replete with overt preferences for New York wineries.

the state has deprived the winemaker plaintiffs of in this case.[18] Where such discrimination occurs, the judicial inquiry "must be concerned with whether [valid justifications] exist and whether the degree of discrimination bears a close relation to them." *Id.* Accord, *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274 (1985). Although the district court applied precisely such an analysis (under the Commerce Clause), the court of appeals did not.

The Privileges and Immunities analysis dictated by *Toomer* happens to dovetail nicely with the Commerce Clause analysis applied in *Bacchus*. That makes sense: however much the 21st Amendment may have narrowed the scope of the Commerce Clause, surely it could not do so in a manner that would trigger a violation of another constitutional protection. In a sentence, it would be fair to say that the 21st Amendment modifies the Commerce Clause to the extent that it provides states with wide latitude to order their alcohol importation and distribution structures; but not so far as to eviscerate the right of out-of-state entrepreneurs to operate on substantially equivalent terms with in-state business interests. For the Court to decide this issue without reference to the Privileges and

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[18] The court below makes quick work of the Privileges and Immunities Clause, asserting that "the statutory scheme operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents" (App. 29a). That is quite different from finding, as this Court required in *Toomer*, 334 U.S. at 396, that the state must provide such opportunities "on terms of substantial equality." Given that the burdens placed on out-of-state wineries are so heavy that the court below conceded they ordinarily might constitute a per se violation of the Commerce Clause (App. 26a), it seems clear that this claim deserved a bit more contemplation than the cursory and dismissive analysis provided below.

Immunities Clause could lead to multiple cases and erroneous line-drawing, such as was performed by the court below.

Another reason to address this issue in the context of both clauses is that some justices have expressed the belief that negative Commerce Clause jurisprudence is misguided, and that much of the rights protected under that clause were in fact intended to be protected by other clauses. See *Camps Newfound*, 520 U.S. at 609-39 (Thomas, J., dissenting). This case would provide an ideal vehicle for the Court to decide this important issue with the benefit of all relevant constitutional claims having been raised. Such an inquiry would serve not only the interests of judicial economy but the ends of justice.

CONCLUSION

For all the foregoing reasons, petitioners respectfully ask this honorable Court to grant the petition.

Respectfully submitted,

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