

GRANTED

Nos. 03-1116 & 03-1120 & 03-1274

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IN THE
Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

JUANITA SWEDENBURG, *et al.*,
Petitioners,

v.

EDWARD D. KELLY, *et al.*,
Respondents.

**On Writs of Certiorari to the
United States Courts of Appeals
for the Sixth and Second Circuits**

**BRIEF FOR THE WINE AND SPIRITS
WHOLESALEERS OF AMERICA, NATIONAL
ASSOCIATION OF BEVERAGE IMPORTERS,
AMERICAN BEVERAGE LICENSEES, THE
PRESIDENTS' FORUM OF THE BEVERAGE
ALCOHOL INDUSTRY, AND THE ASSOCIATED
FOOD DEALERS OF MICHIGAN AS *AMICI CURIAE*
SUPPORTING PETITIONERS IN NOS. 03-1116 & 1120
AND RESPONDENTS IN NO. 03-1274**

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

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INTEREST OF AMICI CURIAE

Wine and Spirits Wholesalers of America, Inc., founded in 1943, is a national trade organization representing more than 370 licensed wine and spirits wholesaler companies in 44 States, the District of Columbia, and Puerto Rico that hold state licenses to act as wine and/or spirits wholesalers. The National Association of Beverage Importers, Inc. is a national trade association that represents the interests of beer, wine, and spirits importers. American Beverage Licensees, Inc. is an association representing the interests of beer, wine, and spirits retailers. The Presidents' Forum of the Beverage Alcohol Industry is a trade association that provides a forum for members' chief executives to respond to issues affecting the beverage alcohol industry. The Associated Food Dealers of Michigan, Inc. provides services to businesses engaged in distribution of food and other products. *Amici* and their members play significant roles in the distribution of alcoholic beverages under state licensing systems. *Amici* thus have a direct interest in the proper resolution of these cases, which involve challenges to those longstanding systems.¹

STATEMENT

Like all States, Michigan and New York exercise strict control over the sale of alcohol within their borders. As part of their regulatory programs, each State restricts who may make retail sales to its citizens. Under Michigan law, "consumers must purchase alcoholic beverages from licensed retailers." Pet. App. (03-1116) at 5a. Licensed in-state winemakers are likewise permitted to sell at retail, although they may do so only with respect to their own products. *Id.* at 6a. Out-of-state retailers and wineries are not permitted to sell directly to Michigan consumers. *Id.* at 6a.

¹ The parties have consented to the filing of this brief. No party authored this brief in whole or in part, and no person except *amici* and their members made a monetary contribution to the preparation or submission of this brief. See S. Ct. R. 37.6.

The New York retail system is similar in most, though not all, respects. New York law provides that no one may sell alcoholic beverages at retail “without obtaining the appropriate license” N.Y. Alco. Bev. Cont. Law § 100(1), quoted in Pet. App. (03-1274) at 6a. The law further provides that “[n]o 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” *id.* § 102(1)(c), quoted in Pet. App. (03-1274) at 6a, effectively barring direct sales to consumers by out-of-state vendors. Licensed wineries with an in-state physical presence may sell directly to consumers. *See* Pet. App. (03-1274) at 7a-8a. Wineries that do not meet that condition may not.

Plaintiffs challenged the regulatory systems in both States on the ground that, by prohibiting direct sales from unlicensed out-of-state wineries, the States impermissibly discriminated against interstate commerce. The Sixth Circuit upheld the challenge to Michigan’s law, rejecting the idea “that a state’s ‘virtually complete control’ [see *North Dakota v. United States*, 495 U.S. 423, 431 (1990) (plurality opinion)] (internal quotation marks omitted)] over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests.” Pet. App. (03-1116) at 12a. The Second Circuit took a different view with respect to the New York law. After reviewing this Court’s decisions addressing the interplay between the Commerce Clause and Section 2 of the Twenty-first Amendment, the court of appeals concluded that “New York’s regulatory regime falls squarely within the ambit of Section 2’s grant of authority.” Pet. App. (03-1274) at 25a. The court found that the provisions limiting the privilege of direct selling to licensed in-state entities “serv[e] valid regulatory interests,” *id.* at 25a, “allow[ing] the state to monitor the distribution and sale of alcoholic beverages by permitting such distribution and sale only through state-licensed entities supervised by, and accountable to, the [State Liquor Authority].” *Id.* at 25a.

SUMMARY OF ARGUMENT

The short answer to the question posed by this Court is no: the statutory scheme described in the question does not “violate the dormant Commerce Clause, in light of Sec. 2 of the 21st Amendment.” Whatever may be the ultimate boundaries of state authority under the Twenty-first Amendment, that authority necessarily includes—as it has for more than seven decades—the power to limit retail sales of alcohol by out-of-state vendors that are not subject to the full extent of state regulatory and taxing powers. That conclusion controls these cases. Plaintiff out-of-state wineries are not subject to the same regulatory oversight as licensed in-state sellers, and, like other out-of-state retail liquor vendors, they have no overriding constitutional right, under the Commerce Clause or any other provision, to disregard state regulatory prohibitions on making direct sales to state citizens.

I. The theory advanced by the plaintiffs—that, if a State permits in-state vendors to sell alcohol directly to consumers, it must allow out-of-state vendors to do so as well—contradicts more than 70 years of regulatory history under the Twenty-first Amendment. During that period virtually every State has required alcohol to be sold pursuant to either a state-monopoly system or a state-licensing system, under which retail sales to consumers (that is, sales for off-premises consumption) are made by in-state vendors. Those systems were implemented after the end of Prohibition precisely to ensure that States would be able to exert the greatest possible control, both as a legal and a practical matter, over those who sold alcohol to their citizens. Given the chaotic conditions that had prevailed prior to ratification of the Twenty-first Amendment, it would be historically anomalous to conclude that States, under compulsion of the dormant Commerce Clause, have been obligated all along to allow vendors across the Nation to sell alcohol directly to consumers within their borders.

Although plaintiffs seek to portray state restrictions on out-of-state consumer sales (of which the laws now at issue are an example) as nothing more than rank favoritism, those restrictions in fact serve important state interests. To begin with, they allow state and local officials to impose necessary limits on the number of vendors licensed to sell alcoholic beverages within the State and to conduct meaningful investigations, with direct community input, regarding who those vendors will be. Furthermore, the licensed vendors' in-state locations, and the importance to them of maintaining their state-granted licenses, give the States much greater power to enforce their laws regarding illegal sales, particularly sales to minors. Finally, the restriction on sales by out-of-state vendors provides concrete assurance that those privileged to sell alcohol actually collect and remit the taxes that the laws impose. That assurance is of critical importance to the States, whose support for the Twenty-first Amendment was prompted in large part by a need for enhanced tax revenues. See *L.V. Harrison & E. Laine, After Repeal* 173 (1936).

Plaintiffs attempt to sidestep these state interests, arguing that “temperance” is the only legitimate interest served by the Twenty-first Amendment. Because the laws here *do* serve to inhibit sales of alcohol—especially illegal sales to underage drinkers—the argument is beside the point. But it is also incorrect. As the history of post-Prohibition regulation clearly demonstrates, Section 2 of the Twenty-first Amendment not only allowed States to ban liquor sales entirely, it enabled so-called “wet” States to blunt the harmful influence of unsupervised sellers by establishing strict local control over the sale of alcohol. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984) (“core § 2 power” is power “to regulate the sale or use of liquor within its borders”) (emphasis added). Plaintiffs’ alternative vision of a nationwide retail liquor market with thousands of vendors free to

sell directly to consumers—a vision that would sound the death knell of the longstanding liquor distribution system—is flatly inconsistent with that objective.

II. Despite plaintiffs’ arguments to the contrary, the dormant Commerce Clause does not prevent States from instituting local control over alcohol sales. First of all, Congress has enacted the Webb-Kenyon Act, 27 U.S.C. §§ 121-22, which (in terms similar to the Twenty-first Amendment) grants broad authority to the States to limit the “shipment or transportation” of alcohol across their borders. That provision gives a federal imprimatur to state laws barring direct out-of-state liquor sales. Furthermore, Congress extended this authority at a time when it was well aware that States were seeking to control alcohol sales by restricting shipments from out-of-state vendors. Thus, even if the dormant Commerce Clause would otherwise cast doubt on the laws at issue here, Congress has effectively overridden its limitations with respect to this kind of state regulation. See generally *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946) (Congress may narrow effect of dormant Commerce Clause).

In any event, the Twenty-first Amendment itself limits the effect of the dormant Commerce Clause in these circumstances. Although the Court has rejected the proposition that “the Twenty-first Amendment . . . somehow operated to ‘repeal’ the Commerce Clause [with respect to regulation of alcohol],” *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), it has continued to recognize that, consistent with the original understanding, “[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.” *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). That principle is sufficient to decide these cases. Here, Michigan and New York have promulgated laws that are directed to the most fundamental

