No. 03-1274

IN THE
Supreme Court of the United States

JUANITA SWEDENBURG, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR STATE OF NEW YORK RESPONDENTS

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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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STATEMENT OF THE CASE

A. The Regulation of Alcohol in New York State

Since the repeal of Prohibition, New York has closely regulated the importation, distribution, and sale of alcoholic beverages. Like many other states, New York employs a three-tiered system for the distribution of alcohol. The fundamental feature of this scheme is that all alcohol intended for distribution and use within the state must pass through the hands of at least one state-licensed entity. *See* N.Y. Alcoholic Beverage Control Law ("ABC") § 100(1) (McKinney's 2000 & Supp. 2004).

1. New York's licensing scheme advances the purposes of the Twenty-First Amendment in several important ways. First, it enables the State to carefully control who may manufacture, distribute, or sell alcoholic beverages. The rigorous application process set forth in the ABC Law ensures that licenses will be issued only to persons of good character and for businesses and premises that will serve the public interest. The New York State Liquor Authority ("SLA" or "Authority"), which enforces the ABC Law, must "carefully evaluate the character, fitness, experience, maturity and financial responsibility of each [license] applicant." 9 N.Y.C.R.R. § 48.7 (2004). Local publication of applications ensures public participation in this process. ABC § 110-a. A licensee must be at least twenty-one years of age and a U.S. citizen or lawful permanent resident, and a person convicted of a felony or certain misdemeanors is prohibited from holding a license. ABC § 126(1), (2), (3). In considering applications, the SLA may take into account the location of the premises and may limit the number of licenses granted in order to strengthen profitability and promote compliance with state law – a mechanism identified and widely employed

after the repeal of Prohibition to this end. *See* ABC §§ 2, 64(6-a)(a); *see also* Leonard V. Harrison & Elizabeth Laine, *After Repeal: A Study of Liquor Control Administration* 95-96 (1936); Randolph W. Childs, *Making Repeal Work* 253 (1947); *1954 Rep. of the Activities of the State Liquor Authority* 11-13; *In re Hanson v. State Liquor Auth.*, 430 N.Y.S.2d 395, 396-97 (App. Div.), *aff'd* 53 N.Y.2d 693, 421 N.E.2d 504 (1981) (upholding licensing determination based on profitability assessment).

Second, restricting traffic in alcohol to licensed entities enables New York to comprehensively regulate their activities. These restrictions include the familiar prohibition of sales to minors and limitations on business hours. ABC §§ 65, 105(14), 106(5). The State also regulates financial relationships among manufacturers, wholesalers, and retailers, and in particular prohibits a "tied house," in which a manufacturer or a wholesaler holds a financial interest in a retailer – a corporate structure considered a major cause of excessive alcohol consumption before Prohibition. *See* ABC §§ 101, 105(16)&(17), 106(13)&(14); Aff. of Thomas G. McKeon ("McKeon Aff.") ¶¶ 26-34 (J.A. 152-55); *After Repeal* 97-99.

Additionally, New York regulates the manner in which manufacturers, wholesalers, and retailers may price goods and make sales. New York requires that every brand of alcohol be registered with the SLA, and that no alcohol be sold without a label displaying the brand name. ABC § 107-a. Liquor and wine manufacturers and wholesalers must file price schedules with the SLA and may not price-discriminate among purchasers. ABC § 101-b(2)&(3). The ABC Law also restricts where retail establishments may be located; how they may price, peddle, and market alcoholic beverages, including

by prohibiting practices like house-to-house sales and unlimited drink offers; and what other businesses they may engage in. ABC §§ 63(4), 102(4)&(5), 105(3)&(10), 117-a. Additionally, the law makes it considerably easier to sell wine or beer than hard liquor. *See* ABC §§ 54 (license for grocery stores to sell beer), 54-a (license for grocery stores to sell beer and wine), 105-a (sale of beer on Sundays). Finally, excise and sales taxes are levied on all alcohol sold within the State, and licensees must keep various records related to the excise tax. *See* N.Y. Tax Law art. 18, §§ 420-445 (excise tax); 20 N.Y.C.R.R. §§ 60.1 *et seq*. (2004) (excise tax); N.Y. Tax Law § 1105(a)&(d) (sales tax).

2. New York's licensing system is essential to the States' ability to supervise the manufacture, distribution, and sale of alcoholic beverages and to enforce its regulations governing these activities. Efficient enforcement is critical given the number of businesses that traffic in alcohol and the substantial task of overseeing these entities. In 2000, there were 47,751 active licenses. During that year, the SLA issued 5,310 investigation orders and imposed 4,193 penalties, of which 2,025 were for sales to minors. *2000 State Liquor Authority Ann. Rep.* 7, 11, 14 (2d Cir. J.A. 1574, 1578, 1581).

The requirement that all entities manufacturing, distributing or selling alcoholic beverages be licensed allows enforcement authorities to effectively monitor their activities. Licensing ensures that the SLA knows the identities and locations of all industry participants. Licensees must maintain adequate books and records on premises and make them available for inspection, *see* ABC §§ 103(7) (manufacturers), 104(10) (wholesalers), 105(15) (retailers for off-premise consumption), 106(12) (retailers for on-premise consumption), a requirement which aids the SLA in tracking

the distribution of alcohol and identifying and addressing unlawful diversion. Additionally, the SLA may inspect any premises where alcoholic beverages are manufactured or sold, *see* ABC § 18(4), and local law enforcement agencies assist the SLA in monitoring licensees by inspecting premises and reporting arrests or convictions for certain unlawful activities occurring at licensed premises, *see* ABC §§ 106(15), 106-a; McKeon Aff. ¶ 23 (J.A. 151); *1948 Ann. Rep. of the State Liquor Authority* 7-10.

License revocation is perhaps the SLA's most powerful administrative penalty.[1] Persons who have had alcoholic beverage licenses revoked, or who have been convicted of a violation of the ABC Law, are forbidden to hold a license for two years. ABC § 126(5). In addition, under New York law a license is confined to a particular premises, ABC § 111, and the SLA may, for a period of two years, deny a license to operate at a premises where a license has previously been revoked, ABC § 113(1); *see also* ABC §§ 64(6-a)(e), 106(1). Where revocation results from sale to a minor, an application to operate in the same premises must be denied for two years unless the new applicant acquired the premises through an arms-length transaction. ABC § 113(2). The SLA may also refuse to renew a license if local law enforcement

1. Disciplinary penalties the SLA is authorized to impose include license revocation, cancellation, or suspension, and the imposition of a civil money penalty of up to $10,000 for most retail licensees, with greater civil money penalties provided for manufacturers and wholesalers. ABC § 17(3). Violations can result in a full or partial forfeiture of the penal bond required of all licensees in the amount established by Rule 9 of the Rules of the State Liquor Authority. ABC § 112; 9 N.Y.C.R.R. § 81.3 (2004). Most violations of the ABC Law are also misdemeanors subject to criminal prosecution. ABC § 130(3).

officials have reported the existence of unlawful activities at a particular premises. *See In re Rose Garden Rest. Corp. v. Hostetter*, 300 N.Y.S.2d 948, 951-52 (App. Div. 1969); *Oval Bar & Rest. v. Bruckman*, 30 N.Y.S.2d 394, 396 (Sup. Ct. 1941). In the year 2000, the SLA revoked 93 licenses, cancelled 292 licenses, and suspended 186 licenses. *2000 State Liquor Authority Ann. Rep.* 14 (2d Cir. J.A. 1581).

3. Petitioners' objections to New York's regulatory scheme revolve around three elements of the ABC Law: the requirement that all alcoholic beverages imported into the State pass through the hands of a licensed entity (§ 102(1)(c)&(d)); the authorization for any licensed winery – whether in-state or out-of-state – to ship directly to consumers (§ 77(2)); and the requirement that all licensed wineries have an in-state presence (§ 3(37)).

Petitioners challenge only the first of these requirements, sections 102(1)(c) and (d). *See* Compl. ¶¶ A, B (J.A. 33); Stipulation of the Parties dated Mar. 28, 2001 (2d Cir., JA. 1201-09). These provisions, which apply to "importation or distribution for commercial purposes, for personal use, or otherwise," prohibit persons and common carriers from shipping alcohol into New York State "unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." ABC § 102(1)(c), (d), (e). Many other states similarly restrict the shipment of alcoholic beverages. *See* Brief of Amici Curiae Ohio *et al.* ("Ohio Br.") at 13 (No. 03-1116).

While petitioners maintain that this requirement dates from 1970, *see* Pet. Br. at 3, 19, in fact it was included in the 1934 enactment of the ABC Law, which prohibited the

importation of "liquors and/or wines" into the State "unless the same shall be consigned to a person duly licensed hereunder," whether such alcohol was "intended for personal use, as well as otherwise." Act of May 10, 1934, ch. 478, § 102(1)(c), (d), (e), 1934 N.Y. Laws 1079, 1103-04 (hereinafter "1934 ABC") (2d Cir. J.A. 3662-63). Until 1964, the SLA construed this language to prohibit direct shipment from unlicensed out-of-state businesses to in-state consumers. That year, the New York Court of Appeals ruled that sections 102(1)(c) and (d) were "directed not at a shipment to a person who has purchased liquor for his own personal use but solely at shipments to those who are engaged in the liquor business and have purchased the alcoholic beverages outside the State for resale." *Essenfeld Bros., Inc. v. Hostetter*, 14 N.Y.2d 47, 52-53, 197 N.E.2d 535, 537 (1964). The 1970 amendments to sections 102(1)(c) and (d) that petitioners reference were enacted in response to *Essenfeld* and were intended to restore the SLA's long-standing interpretation of those provisions. *See infra* at 35-36.

The second provision, section 77(2), authorizes licensed wineries to ship their products directly to New York consumers. Licenses are available both to wineries located within the State and to out-of-state wineries that maintain an in-state presence. *See* ABC § 3(37). Section 77(2) provides that for a $125 annual fee, a winery licensee can obtain a certificate "authorizing such winery to sell wine at retail in sealed containers . . . to a householder for consumption in his home." While this section does not explicitly authorize wineries to ship to householders, its legislative history, which dates back to 1934, clearly indicates that intent, and the SLA

has consistently so interpreted the provision.[2] Accordingly, a licensed New York winery, regardless of whether it is an in-state or out-of-state business, may ship wines directly to consumers.

The third provision, section 3(37), requires that a licensed winery maintain an in-state presence. Petitioners do not claim to have applied for a winery license, and neither the SLA nor the New York courts have had occasion to interpret this requirement. *See* McKeon Aff. ¶ 43 (J.A. 159-60).[3] The statute requires only that an

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2. The 1934 ABC Law permitted wineries to sell wine at retail for a $100 fee, as long as the wine was "delivered to a house-holder for consumption in his home." 1934 ABC § 77 at 1096-97 (2d Cir. J.A. 3655-56). As a result of amendments in 1944 and 1946, section 77 eventually provided for two separate permits, each costing $100; section 77(2) allowed on-premises retail sales, while section 77(3) allowed off-premises retail sales by delivery or shipment. Act of Apr. 14, 1944, ch. 796, 1944 N.Y. Laws 1758, 1758-59; Act of Apr. 8, 1946, ch. 572, 1944 N.Y. Laws 1215, 1216. In 1977, the legislature repealed section 77(3)'s separate provision for retail sales by delivery or shipment, Act of Aug. 9, 1977, ch. 602, § 77(2), 1977 McKinney's N.Y. Laws 876, 877, in order "to consolidate [the] two . . . fees into a single $125 fee," Mem. of the State Exec. Dep't, ch. 602, *reprinted in* 1977 McKinney's N.Y. Laws 2382.

3. The option for an out-of-state winery to obtain a New York license is readily discernable from the face of § 3(37) and has long been recognized within the industry. *See* Letter from John B. Walsh to Mario M. Cuomo, Governor (July 11, 1984), *reprinted in* Bill Jacket for ch. 501 (1984), at 24 (arguing that because "the definition of 'winery' in the Alcoholic Beverage Control Law includes anyone that manufactures wine in the United States with a branch office in New York State, any winery such as Gallo or Inglebrook could be a wholesaler of New York labelled wines, as well as their own wine").

out-of-state winery (1) maintain "a branch factory, office or storeroom" in New York State, and (2) receive shipments of wine "consigned to a United States government bonded winery, warehouse or storeroom located within the state." ABC § 3(37). On its face, section 3(37) does not require that the in-state premises be occupied exclusively by the licensee, be fully staffed, or meet any of the other criteria alleged by the petitioners. *Cf.* Pet. Br. at 5, 21 n.15, 28. Petitioners' characterization of this provision is based entirely on a 1953 SLA bulletin that described the requirements for out-of-state wholesalers, not wineries. It might be that section 3(37) could be satisfied, for example, by jointly leasing an office with other out-of-state wineries and by sub-leasing space in a bonded warehouse in New York State.

B. Proceedings Below

1. District Court

Petitioners, two proprietors of out-of-state wineries and three New York State residents who consume wine, filed suit against the Chairman and Commissioners of the New York State Liquor Authority on February 3, 2000, requesting that the court declare ABC Law sections 102(1)(a), (c), and (d) facially unconstitutional. Compl. ¶¶ 4-9, A (J.A. 24-25, 33). They maintained that these provisions violated the dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, by preventing the wineries from shipping directly to the New York consumers and the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, by abridging the wineries' economic liberty, and that section 102(1)(a) violated the First Amendment, U.S. Const. amend. I, by prohibiting out-of-state merchants from soliciting orders for alcohol. Compl. ¶¶ 38, 46, 54 (J.A. 30, 32, 33).

On November 12, 2002, the district court granted petitioners' motion for summary judgment and declared that sections 102(1)(c) and (d) violated the dormant Commerce Clause. Pet. App. 34a, 53a. The district court found the ABC Law discriminatory on its face under traditional dormant Commerce Clause analysis and therefore "a per se violation of the Commerce Clause." *Id*. at 57a. The court then reasoned that the statute was not "saved" because "viable" regulatory alternatives were available to the State, and concluded that it violated the Commerce Clause. *Id*. at 57a-58a. The district court further held that section 102(1)(a) prohibited solicitation of lawful acts and therefore violated the First Amendment. *Id*. at 67a-68a. It did not reach petitioners' Privileges and Immunities Clause claim. *Id*. at 67a.

2. Court of Appeals

The Second Circuit reversed, holding that sections 102(1)(c) and (d) do not violate the Commerce Clause. *Id*. at 1a, 29a. Recognizing that "both the Twenty-First Amendment and the Commerce Clause are parts of the same constitution" and should be considered "each in the light of the other," *id*. at 13a (internal quotations omitted), the Second Circuit observed that this Court has "consistently recognized only that, under section 2, a state may regulate the importation of alcohol for distribution and use within its borders, but may not intrude upon federal authority to regulate *beyond* the state's borders or to preserve fundamental rights," *id*. at 17a (emphasis in original). It concluded that the ABC Law "falls squarely within the ambit of section 2's grant of authority," since "[t]he statutory scheme regulates only the importation and distribution of alcohol in New York." *Id*. at 25a.

With respect to this Court's holding in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), that state laws which constitute "mere economic protectionism" fall outside the Twenty-First Amendment's scope, the Second Circuit found "no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests," Pet. App. 25a. Wine importers and in-state sellers alike "must either utilize the three-tier system or obtain a physical presence from which the state can monitor and control the flow of alcohol." *Id*. at 26a. The court further concluded that this physical presence requirement "is aimed at . . . regulatory interests directly tied to the importation and transportation of alcohol for use in New York," *id*. at 27a, because "presence ensures accountability," *id*. at 25a.

Having rejected petitioners' dormant Commerce Clause challenge, the Second Circuit held that New York's law did not violate the Privileges and Immunities Clause because it operated without regard to residency and did not confer advantages on New York residents that were unavailable to nonresidents. *Id*. at 29a-30a. Additionally, the court affirmed the ruling that section 102(1)(a) violated the First Amendment. *Id*. at 33a. (Neither party challenges this aspect of the Second Circuit's ruling.)

On May 24, 2003, this Court granted certiorari in this case (No. 03-1274) and consolidated it with two other petitions for certiorari (Nos. 03-1120, 03-1116) seeking review of the Sixth Circuit's decision in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), invalidating Michigan's similar regulatory structure.

SUMMARY OF ARGUMENT

The plain language of both the Twenty-First Amendment and the Webb-Kenyon Act grant states virtually unfettered authority to regulate the importation of alcoholic beverages for delivery or use within their borders. The legislative history and historical context of these provisions makes clear that they were intended to shield state regulation from the impediments otherwise posed by the dormant Commerce Clause.

This Court has repeatedly affirmed that while the Twenty-First Amendment does not permit states to ignore other provisions of the Constitution, it does exempt rational state regulation of alcohol importation from the operation of the dormant Commerce Clause. Petitioners, relying primarily on *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), suggest that the Amendment has little, if any, impact on the states' authority to regulate alcohol. But *Bacchus* addressed only an exemption for local liquor producers that was enacted exclusively for protectionist reasons; it says nothing about state regulations that actually are animated by and promote the legitimate purposes recognized by the Twenty-First Amendment. It does not call into question the constitutionality of regulatory schemes that ensure accountability and compliance with the law by channeling traffic in alcohol through licensed businesses.

The provisions of the ABC Law challenged by petitioners are not just reasonable, but are essential to promoting temperance and an orderly market in alcohol, and to collecting applicable taxes. New York requires that all alcoholic beverages intended for distribution and use within the State pass through the hands of a licensee with an in-state presence. It has done so because channeling the flow of alcohol in this way allows the State to effectively monitor alcohol distribution and enforce its liquor laws. While petitioners complain that the State's restrictions on

direct shipment impose additional costs on out-of-state businesses, this Court has repeatedly upheld laws directed at out-of-state alcohol purveyors as necessary to ensuring compliance with the state's regulatory regime. New York's laws are thus well within the authority granted by the Twenty-First Amendment and are fully constitutional.

ARGUMENT

POINT I

THE TWENTY-FIRST AMENDMENT AND THE WEBB-KENYON ACT EMPOWER THE STATES TO ENACT REASONABLE REGULATIONS GOVERNING THE TRANSPORTATION AND IMPORTATION OF ALCOHOL WITHOUT RUNNING AFOUL OF THE DORMANT COMMERCE CLAUSE

The plain texts of both the Twenty-First Amendment and the Webb-Kenyon Act foreclose petitioners' challenge to New York's laws governing the direct shipment of alcoholic beverages. As this Court has repeatedly observed, the Twenty-First Amendment expressly gives states virtually plenary power to regulate the "transportation or importation" of alcohol into their borders for "delivery or use therein." U.S. Const. amend. XXI, § 2. That is exactly the activity governed by New York's requirement that all wineries, whether in-state or out-of-state, obtain a license and maintain an in-state presence in order to ship their wines directly to New York consumers. Similarly, by enacting the Webb-Kenyon Act, Act of Mar. 1, 1913, ch. 90, 37 Stat. 699 (codified as amended at 27 U.S.C. § 122 (2004)), which explicitly authorizes the states to regulate the shipment of alcohol into their borders, Congress has nullified the restrictions of the dormant Commerce Clause that would otherwise apply to state

regulation of trade in alcohol. Legislative history confirms an expansive view of the authority that these provisions confer upon the states.

The decisions of this Court affirm that the Twenty-First Amendment exempts state regulation of the importation of alcoholic beverages from operation of the dormant Commerce Clause. While the Twenty-First Amendment does not authorize states to violate other provisions of the Constitution, the Court has consistently upheld any regulation that rationally furthers the states' broad interests in channeling the flow of alcohol within their borders.

A. The Plain Texts of the Twenty-First Amendment and the Webb-Kenyon Act Grant Each State Unfettered Authority to Regulate the Importation of Alcoholic Beverages for Use Within Its Borders

1. The Twenty-First Amendment

Section Two of the Twenty-First Amendment provides that:

> The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2. The text explicitly and unambiguously authorizes a state to bar alcohol importation that does not conform to its scheme for regulating distribution and sale of alcohol. As this Court has held, "the language of the Amendment is clear." *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 63-64 (1936). "The words

used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it proscribes." *Id.* at 62.

Nothing in the text of the Twenty-First Amendment subjects this broad grant of power to the constraints otherwise imposed on state regulation of other products by the dormant Commerce Clause. In light of the repeated invalidation of state laws governing alcohol importation before Prohibition, and the clear intent of Congress to safeguard those regulations against further challenge, *see infra* at 20-22, Congress surely would have made such a restriction explicit had it intended to limit state authority in such a manner. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says . . . what it means and means . . . what it says.").

2. The Webb-Kenyon Act

In 1913, in response to a series of this Court's decisions invalidating state regulation of the transportation and importation of alcohol, Congress enacted the Webb-Kenyon Act. It provides in pertinent part that:

> The shipment or transportation, in any manner or by any means whatsoever, of . . . intoxicating liquor of any kind from one State, Territory, or District of the United States . . . into any other State, Territory, or District of the United States . . . intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory,

> or District of the United States . . . is hereby prohibited.

37 Stat. at 699-700. In 1935, after passage of the Twenty-First Amendment, Congress reenacted the Webb-Kenyon Act, Act of Aug. 27, 1935, ch. 740, § 202(b), 49 Stat. 872, 877-78, in response to concerns that the enactment of other statutes in conjunction with repeal could be misconstrued as having implicitly overruled Webb-Kenyon. *See* Ralph L. Wiser & Richard L. Arledge, Note, *Does the Repeal Amendment Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislating on Intoxicating Liquors in Interstate Commerce?*, 7 Geo. Wash. L. Rev. 402, 407 (1938-1939).[4]

Congress's power to authorize state laws that would otherwise violate the dormant Commerce Clause has been affirmed by this Court for over a century. *See In re Rahrer*, 140 U.S. 545, 562 (1891) (upholding Wilson Act because Congress may "provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character"); *see also South Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984) ("Congress may redefine the distribution of power over interstate commerce by permitting the states to regulate the commerce in a manner which would otherwise not be permissible.") (internal quotations omitted); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434-35 (1946) (affirmative Commerce Clause's

4. By reenacting Webb-Kenyon without change, Congress clearly intended to reaffirm the broad understanding of the Act articulated by this Court in *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 323-25 (1917), as exempting state regulation of alcohol importation from the restraints of the dormant Commerce Clause. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

"plenary scope enables Congress not only to promote but also to prohibit interstate commerce"). Where Congress provides such authority, state regulation of interstate commerce is "invulnerable to a Commerce Clause challenge" – even where such regulation is "discriminatory" with respect to out-of-state firms. *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653, 654 (1981). Indeed, once Congress has acted, the Commerce Clause is no longer dormant, and "courts are not free to review state . . . regulations under the dormant Commerce Clause." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

B. The Purpose of the Twenty-First Amendment and the Webb-Kenyon Act Was to Exempt State Regulations Governing Importation of Alcoholic Beverages From the Ordinary Operation of the Dormant Commerce Clause

Not only are the plain texts of the Twenty-First Amendment and the Webb-Kenyon Act unambiguous, but their historical context confirms that they were intended to allow states to enact importation restrictions free from the strictures of the dormant Commerce Clause. In the decades preceding the enactment of Webb-Kenyon, states had sought to control the distribution of alcohol within their borders, either by becoming "dry" states, or by remaining "wet" but restricting sales and channeling distribution through licensed entities to ensure regulatory compliance. These attempts, however, were repeatedly thwarted by judicial invalidation of state laws under the dormant Commerce Clause. The statutory and constitutional grants of authority embodied in Webb-Kenyon and the Twenty-First Amendment represent efforts to end this tug-of-war by affirming the right of states

to regulate alcohol importation and distribution. While petitioners imply that the language of both provisions is simply hortatory in light of the dormant Commerce Clause, *see* Pet. Br. at 12-24, 32-34, the history of those provisions proves otherwise.

1. When states in the nineteenth century sought to regulate the distribution and sale of alcoholic beverages, alcohol purveyors challenged these laws under the dormant Commerce Clause. The first of these cases to reach this Court were the *License Cases*, 46 U.S. (5 How.) 504 (1847), which involved challenges to laws in Massachusetts, Rhode Island and New Hampshire requiring a license to sell alcohol. The Court uniformly rejected these attacks, recognizing that states had broad authority to regulate traffic in alcohol within their borders "free from implied Commerce Clause impediments." *Craig v. Boren*, 429 U.S. 190, 205 (1972) (describing the *License Cases*). In 1887, a broad view of state authority to regulate or prohibit entirely the manufacture and sale of alcohol was again upheld, this time against a due process challenge. *Mugler v. Kansas*, 123 U.S. 623 (1887).

Just one year later, however, this Court invalidated an Iowa statute that required a permit to import alcohol into the state, on the ground that the dormant Commerce Clause prohibited state regulation of alcoholic beverages until physically delivered in the state. *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465 (1888). In response, Iowa passed a new statute, this time restricting the distribution and sale of alcohol as soon as it entered the state. This Court invalidated the second law as well, holding that any restriction on alcohol importation was an impermissible restraint on interstate commerce, so long as the alcohol remained in its original packaging. *Leisy v. Hardin*, 135 U.S.

100, 124-25 (1890). As a result, states were effectively stripped of their ability to control the distribution and sale of alcohol. Whatever restrictions states might place on domestic products could easily be evaded by importing alcoholic beverages directly to consumers in their original packages.

Congress immediately moved to close this loophole by enacting the Wilson Act, which provided that the states could regulate alcohol "upon arrival" in the state, regardless of whether it remained in its original package. Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (presently codified at 27 U.S.C. § 121 (2004)).[5] This Court upheld this exercise by Congress of its affirmative Commerce Clause power in *In re Rahrer*, 140 U.S. at 562. But soon thereafter, it significantly narrowed the Wilson Act's scope, holding that alcohol would not be deemed to have "arrived" in a state until received by the consignee. *Rhodes v. Iowa*, 170 U.S. 412, 421-23 (1898). Once again, state laws that channeled or prohibited

5. Petitioners point to the Wilson Act's directive that liquor transported into a state be "subject to the operation and effect of the laws of such State . . . to the same extent and in the same manner as though such liquids or liquors had been produced in such State," 27 U.S.C. § 121, as supporting their argument that New York cannot impose its license requirement on out-of-state wineries. Pet. Br. at 32. But New York's law is in complete accord with the Wilson Act, since it requires that both in-state and out-of-state wineries obtain licenses and maintain an in-state presence before they can directly ship wine to consumers. In any event, the Wilson Act's legislative history confirms that its mandate of equal regulation was motivated by concern about the advantage enjoyed by out-of-state vendors who had been able to elude state regulations. *See* 21 Cong. Rec. 5325-26 (1890) (statement of Sen. George). That same concern motivated enactment of sections 3(37) and 102(1)(c) and (d) of the ABC Law. *See infra* at 35-37.

importation could be avoided by shipping alcohol directly to consumers.

In 1913, Congress again acted to restore the states' ability to regulate alcohol and passed the Webb-Kenyon Act. Entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases," 37 Stat. at 699, Webb-Kenyon was directly aimed at eliminating the dormant Commerce Clause impediments that had frustrated state regulation of alcoholic beverages. As one of its sponsors stated, "[t]his bill is intended to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a State"; it "might well be styled a local-option act to give the various States the power to control liquor traffic as to them may seem best. It would remove the shackles of interstate-commerce law from the action of the States." 49 Cong. Rec. 2805 (1913) (statement of Rep. Webb).

In enacting Webb-Kenyon, Congress considered and rejected a provision that would have exempted from state regulation the direct shipment of alcohol to consumers for personal use. *See id*. at 2789 (proposed amendment of Rep. Blackmon). The provision's opponents observed that it would undercut the objective of the Act by "compel[ling] the States to allow . . . people to receive . . . liquor, although their own citizens are not permitted to sell it to such persons." *Id*. at 2807 (statement of Rep. Webb); *see also id*. (personal-use amendment would leave states "powerless to prohibit what every State now prohibits, viz., the reception of liquor by a minor under the age of 16 years").

In 1917, a divided Court affirmed the constitutionality of the Webb-Kenyon Act. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917). The Court confirmed

that Webb-Kenyon divested alcohol of its interstate character for purposes of state regulation of the shipment or transportation of alcohol into its borders. *Id*. at 321-25; *see also McCormick & Co. v. Brown*, 286 U.S. 131, 141 (1932) (Webb-Kenyon's "intended application [was] to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the States' valid prohibitions" against alcoholic beverages.). The Court further held that Congress had permissibly exercised its affirmative commerce power in enacting the statute, rather than delegating it to the states. *Clark*, 242 U.S. at 326.

2. With ratification of the Eighteenth Amendment, U.S. Const. amend. XVIII, in 1919, regulation of alcohol shifted away from the states, as the federal government took the lead in enforcing Prohibition. But giving the federal government this responsibility proved to be a complete failure, as graft, corruption and bootlegging spread. *See* Edward Behr, *Prohibition: Thirteen Years that Changed America* 83-89, 161-73 (1996).

The failure of federal control prompted the repeal of Prohibition and restoration of state control over traffic in alcohol, through the passage of the Twenty-First Amendment in 1933. Section One of the Amendment expressly repealed Prohibition. Section Two prohibited the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors in violation of the laws thereof." U.S. Const. amend. XXI, § 2.

Congress's decision to model Section Two closely on the Webb-Kenyon Act demonstrates its intent to incorporate and constitutionalize the authority that Webb-Kenyon had conferred upon the states. As Senator Blaine, House manager

of the Joint Resolution proposing the Amendment, observed, because of the Court's "divided opinion" upholding Webb-Kenyon, "it is proposed to write permanently into the Constitution a prohibition along that line." 76 Cong. Rec. 4141 (1933); *see also id.* at 4170 (statement of Sen. Borah) (Webb-Kenyon alone was insufficient to protect state regulation of alcohol because "[t]he Webb-Kenyon Act was sustained . . . by a divided court," and "[t]he President . . . vetoed it on the ground that it was unconstitutional"). By permanently removing the dormant Commerce Clause limitations that had interfered with state regulation of alcohol importation in the past, Congress could protect state power from future erosion by a subsequent Congress or the Courts. *See Craig*, 429 U.S. at 205-06 ("The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes.") (footnote omitted).

Legislative debates over the original version of the Amendment confirm this intent. As introduced in the Senate, the Amendment included a third section that gave Congress "concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138. This provision, however, was rejected out of a concern that it would undermine the broad regulatory authority given to the states in Section Two. As Senator Blaine explained:

> The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States. . . . My view therefore is that section 3

> is inconsistent with section 2 and . . . ought to be taken out of the resolution.

Id. at 4143; *see also id.* at 4144 (remarks of Sen. Wagner) ("[Section Three] does not correct the central error of national prohibition. It does not restore to the States responsibility for their local liquor problems."); *id*. at 4177 (statement of then-Sen. Hugo Black) (Section Three "would take away from the State the right . . . to regulate or prohibit the sale of liquor . . . by giving that power to Congress.").

Following ratification of the Twenty-First Amendment, therefore, it was clear that the importation, distribution and sale of alcoholic beverages would be subject to strict local control and regulation.[6] The states' interest in temperance extended not only to the decision whether to be "dry" or "wet," but in those states that permitted its usage, also included the close regulation of where, when, and what type of alcohol was consumed. *See After Repeal* 60-70.

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6. The records of the state ratification conventions do not reveal any meaningful deliberation as to the scope of the Twenty-First Amendment. *See generally* Everett Somerville Brown, *Ratification of the Twenty-First Amendment to the Constitution of the United States: State Convention Records and Laws* (1938). Nonetheless, immediately after its passage, the states began to regulate alcohol sale and distribution, including in 26 states by establishing licensing systems. *See After Repeal* 231-248. Many states adopted in-state presence requirements more onerous than that imposed by New York. *See* Bertram M. Bernard, *Liquor Laws of the Forty-Eight States and District of Columbia* 25-26 (1949) (residency in state, and even in county and town, often required for retail license); Joint Comm. of the States to Study Alcoholic Beverage Laws, *Trade Barriers Affecting Interstate Commerce in Alcoholic Beverages* 26-33 (1952) (describing residency requirements in various jurisdictions).

For states that did not establish a monopoly over alcohol distribution, a licensing scheme became the centerpiece of state regulatory efforts.

The states' interest in ensuring an orderly market for alcohol sales was perhaps their most pressing concern immediately after repeal, since Prohibition had been marked by bootlegging and graft. *See Prohibition: Thirteen Years* 83-89, 161-73. Through comprehensive licensing requirements, states could promote order not only by determining who could legally sell alcohol, but also by controlling market forces that might otherwise lead to corruption and disorder. *See After Repeal* 96; *supra* at 1-2. Similarly, since "[t]he repeal of prohibition was brought about as much by the need for revenue as by the desire to eradicate the evils that grew out of that social experiment," *id.* at 173, the licensing schemes ensured that this interest was protected by facilitating tax collection. Those same concerns underlie the New York licensing restrictions at issue here.

C. This Court's Decisions Make Clear that the Twenty-First Amendment Permits States to Enact Any Reasonable Regulation Governing the Transportation and Importation of Alcohol

This Court has repeatedly affirmed that the authority conferred upon the states by the Twenty-First Amendment is virtually unfettered by the dormant Commerce Clause. In cases immediately following ratification of the Amendment, the Court held that the dormant Commerce Clause no longer restricted the right of states to ban or regulate importation of alcoholic beverages. None of these decisions has been overruled, and the legal principle they articulate requires the rejection of petitioners' challenge to New York's importation scheme.

While the Court has subsequently determined that the Twenty-First Amendment does not authorize states to violate other provisions of the Constitution or regulate alcohol trade outside their borders, neither of these concerns is presented by this case. Petitioners contend that New York's restrictions on direct shipment are nonetheless unconstitutional under *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). But extending *Bacchus* to invalidate New York's licensing requirement would require the Court to reverse course and treat alcohol as if it were any other product in commerce – thereby jettisoning the constitutional grant of authority conferred upon the states by Twenty-First Amendment. That outcome cannot be squared with any of this Court's other Twenty-First Amendment precedents.

1. This Court's early Twenty-First Amendment decisions confirmed the breadth of state authority to regulate alcohol and explained why the Amendment permitted states to treat imported alcohol differently from alcohol manufactured, distributed, and sold within the state's borders. Three years after ratification, in *Young's Market*, this Court upheld a California statute that imposed a license fee on beer importers, but not on wholesalers who sold domestic beer. 299 U.S. at 61. In rejecting an argument that the law was impermissibly discriminatory, the Court squarely held that states could regulate imported alcohol more stringently than domestic alcohol:

> The plaintiffs ask us to limit [the Twenty-First Amendment's] broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it

> permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

Id. at 62.

The following year, the Court again upheld a state statute that "clearly discriminate[d] in favor of liquor processed within the State." *Mahoney v. Joseph Triner Corp*., 304 U.S. 401, 403 (1938). At issue was a Minnesota statute that prohibited importation of alcoholic beverages containing greater than twenty-five percent alcohol, but permitted their sale if produced in state. *Id*. at 402. *Young's Market*, the Court observed, had settled that "discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic" by the states. *Id*. at 403.

One year later, the Court sustained a Michigan statute that discriminated against out-of-state alcohol by prohibiting Michigan vendors from selling out-of-state beer. *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939). The Court reiterated that "[s]ince the Twenty-First Amendment . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Id*. at 394. That same year, in *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939), the Court also upheld Kentucky's restriction on the export of whiskey produced in the state for delivery and consumption out-of-state. Again, it reaffirmed that "[t]he Twenty-First Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Id*. at 138 (internal citations omitted).

These decisions remain good law. Largely ignoring them, petitioners instead rely on traditional Commerce Clause jurisprudence, implying that the Twenty-First Amendment has somehow been so diminished that states now have no more leeway to regulate alcohol importation than they would have to restrict interstate commerce in any other product. But the purpose of the Twenty-First Amendment was to give trade in alcohol a constitutionally unique status. As this Court has observed, the Amendment "primarily created an exception to the normal operation of the Commerce Clause." *Craig*, 429 U.S. at 206.

2. To the extent petitioners acknowledge this Court's Twenty-First Amendment precedent, they rely on decisions indicating that states may not breach other constitutional provisions in the name of regulating alcohol importation. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Free Speech Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig*, 429 U.S. 190 (Equal Protection Clause); *Dep't of Revenue v. James Beam Distilling Co.*, 377 U.S. 341 (1964) (Export/Import Clause). These decisions, however, are not contrary to, but affirm the principle first articulated in *Young's Market*: "The States' regulatory power over this segment of commerce is . . . largely 'unfettered by the Commerce Clause.'" *44 Liquormart*, 517 U.S. at 514-15 (quoting *Ziffrin*, 308 U.S. at 138); *see also Grendel's Den*, 459 U.S. at 121-22; *Craig*, 429 U.S. at 205-06; *James Beam*, 377 U.S. at 344.

Petitioners also point to this Court's decisions holding that Congress may preempt state regulation of alcoholic beverages by exercising its own affirmative Commerce Clause power. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (invalidating

California wine-pricing program because it conflicted with the Sherman Antitrust Act); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (invalidating Oklahoma regulation of alcohol advertising by cable operators as preempted by FCC regulations); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating New York statute restricting sales of alcohol intended solely for use abroad because sales were permissible under federal law). But again, the Court's opinion in each of these cases affirms the principle that lies at the core of this case: "The 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." *Midcal*, 445 U.S. at 110; *see also Capital Cities*, 467 U.S. at 712; *Hostetter*, 377 U.S. at 330. And this case, unlike the preemption cases relied upon by petitioners, presents no conflict with federal law. Quite the opposite: Congress specifically sanctioned the states' regulation of alcohol importation when it passed the Webb-Kenyon Act.

Nor do this Court's decisions invalidating state laws that reach extraterritorial commerce help petitioners. In *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), and *Healy v. The Beer Institute*, 491 U.S. 324 (1989), the Court acknowledged that states have broad authority to regulate alcohol importation within their borders, but not to enact price control statutes that "directly control[led] commerce occurring wholly outside the boundaries of [the] State." *Healy*, 491 U.S. at 336; *see also Brown-Forman*, 476 U.S. at 582-84. The Court emphasized that this restriction on state authority served to protect the ability of other states to regulate pursuant to the Twenty-First Amendment. *See Brown-Forman*, 476 U.S. at 585. Petitioners do not contend that New York seeks to control

commerce wholly outside its boundaries, and thus cannot argue that New York's direct shipment provisions are constitutionally suspect under *Brown-Forman* or *Healy*.

3. Petitioners rely most heavily, and again in error, on *Bacchus*. In *Bacchus*, the Court invalidated Hawaii's alcohol excise tax, from which certain locally-produced liquors were exempt. The state offered no justification for the exemption other than "to promote a local industry," and in the lower courts the state expressly eschewed any reliance on interests arising from the Twenty-First Amendment to justify the regulation. *Id*. at 274 n.12.

Bacchus is an anomaly in this Court's Twenty-First Amendment jurisprudence. For the reasons identified by the dissenters, the majority's analysis is difficult to square with the Amendment's plain language. *See Bacchus*, 468 U.S. at 282 (Stevens, J., dissenting).

But the Court need not reach the question of whether *Bacchus* was decided correctly, since it is plainly distinguishable from this case on at least two grounds. First, the purpose of the *Bacchus* tax exemption was concededly "mere economic protectionism"; Hawaii "[did] not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment." *Id*. at 276. The challenged New York regulations, by contrast, were intended to, and in fact do, further New York's legitimate interest in ensuring the integrity of its regulatory scheme, which is itself designed to promote temperance, orderly market conditions, and effective tax collection. Second, because the tax at issue in *Bacchus* was collected at the point of sale, its nexus with the

"importation and transportation" of alcohol was less evident than that of New York's direct shipment regulations.[7]

4. Nor does *Bacchus* or any of this Court's other cases suggest that strict scrutiny applies to state regulation of alcohol importation. To the contrary, in *North Dakota v. United States*, 495 U.S. 423 (1990), decided several years after *Bacchus*, the Court cautioned that "[g]iven the special protection afforded to state liquor control policies by the Twenty-First Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *Id*. at 433. If the Twenty-First Amendment permits any substantive review of state liquor regulation, it is only to inquire whether such laws are reasonably related to the state interests protected by the Amendment. Through the Twenty-First Amendment and its statutory predecessor, the Webb-Kenyon Act, Congress conferred upon the states the full scope of authority over alcohol importation that Congress itself enjoys over other products in interstate commerce. Subjecting state regulations in this area to more stringent review than is applicable to other federal economic legislation would dilute that power. It would also undermine the purpose of constitutionalizing state control of alcohol importation in the first place – to prevent courts from second-guessing state decisions about how to channel the flow of alcohol across and within their borders. *See supra* at 17-22.

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7. As the Second Circuit held, *Bacchus* does not mandate a "two-part" analysis for analyzing the interplay of the Commerce Clause and the Twenty-First Amendment. *See* Pet. App. 22a n.10. In any event, it is of no real consequence whether this Court begins with an examination of the statute under the dormant Commerce Clause or under the Twenty-First Amendment, since New York's regulations are clearly within the scope of authority that the Amendment confers upon the States.

The proper standard of review, therefore, is exceedingly deferential. "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981). "[I]f there is any reasonably conceivable state of facts that could provide a rational basis for the classification," economic legislation must be upheld. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *see also id.* at 314-15 (motives of legislators in drawing legislative classifications "entirely irrelevant for constitutional purposes"); *Heller v. Doe*, 509 U.S. 312, 320 (1993) ("A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.").

POINT II

NEW YORK'S DIRECT SHIPMENT RESTRICTIONS ARE ESSENTIAL TO THE STATE'S EFFECTIVE ENFORCEMENT OF ITS LAWS GOVERNING ALCOHOL DISTRIBUTION AND USE AND THEREFORE ARE AUTHORIZED BY THE TWENTY-FIRST AMENDMENT

Petitioners challenge ABC Law sections 102(1)(c) and (d), which permit the shipment of alcoholic beverages into New York State only to a state-licensed entity. Also relevant to petitioners' challenge is ABC Law section 3(37), which requires that all wineries, including those located out-of-state, maintain an in-state presence in order to obtain a New York license.

These requirements directly advance the core concerns that animate Section Two of the Twenty-First Amendment: "promoting temperance and controlling the distribution of liquor, in addition to raising revenue." *North Dakota*, 496 U.S. at 436; *see also Ziffrin*, 308 U.S. at 134 (upholding restrictions that furthered purposes of "channeliz[ing] the traffic [in alcohol], minimiz[ing] the commonly attendant evils," and "facilitat[ing] the collection of revenue"). Unlike the protectionist measure invalidated in *Bacchus*, New York's regulations are reasonably related to a legitimate state end and are therefore entirely constitutional.

A. Restricting Direct Shipment to Licensed Entities With an In-State Presence Permits New York to Supervise Traffic in Alcohol and Enforce Its Liquor Laws

1. The overall purpose of New York's scheme for regulating alcohol importation and transportation is to "foste[r] and promot[e] temperance in [alcohol] consumption and respect for and obedience to law," as well as to promote "the protection, health, welfare and safety of the people of the state." ABC § 2. In furtherance of these goals, the ABC Law prohibits sales to minors and visibly intoxicated persons; it also structures the marketplace to favor sale of beer and wine over liquor, to prohibit aggressive or unsafe sales practices, and to restrict most sales for off-premises consumption to stores that engage in no other additional business. *See supra* at 2-3. The ABC Law also prohibits tied-house arrangements, requires non-discrimination among commercial purchasers, and authorizes the SLA to restrict the number of licenses. *Id*. Additionally, New York imposes an excise tax on all alcohol sold within its borders, which it collects at the wholesale level, as well as a sales tax. *Id*.

2. Like many other states, *see* Ohio Br. at 13, New York has concluded that direct shipment of alcoholic beverages into the State by unlicensed entities would significantly impede enforcement of its laws by creating an unregulated channel for the sale of alcohol. Accordingly, it requires that all alcohol sold for consumption within the State pass through the hands of least one licensed entity with an in-state presence. This rule is not only reasonable, but essential, for several reasons.

First, New York has reasonably concluded that it can efficiently monitor licensees only if they have an in-state presence. The ABC Law requires that licensees keep on the premises "books and records of all transactions involving the manufacture and sale" of alcoholic beverages. ABC § 103(7). It also authorizes the on-site inspection of any premises where alcoholic beverages are manufactured or sold. ABC § 18(4). This access to licensees' records and premises obviously makes it easier for the SLA to identify unlawful activities.The oversight enabled by these record-keeping and access rules is especially important for the prevention of sales to minors through direct shipment, which by its nature eliminates a face-to-face sale and thereby increases the risk that minors will be able to obtain alcohol through internet sales or otherwise.[8] *See* Aff. of Henry Wechsler ¶¶ 24-26 (J.A. 136-38); Decl. of Fredrick P. Schaffer ¶¶ 4-11, 17-52 (J.A. 164-67, 169-84); *see also* Brief Amicus Curiae of Michigan Ass'n of Secondary School Principals *et al.* at 10-22 (Nos. 03-1116, 03-1120); Ohio Br. at 23-24.

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8. The impact of an adverse ruling in this case would not be limited to fine wines, but would extend to other alcoholic beverages often consumed by minors, such as wine coolers and flavored vodkas.

While New York need not have explored other regulatory options for the scheme it has adopted to pass constitutional scrutiny, petitioners' suggested alternatives are in any event impractical. Petitioners propose adoption of a permit system that does not require an in-state presence. *See* Pet. Br. at 40 & n.28. Under that regime, New York would presumably send its inspectors nationwide to enforce its laws. That prospect would be prohibitively expensive as well as logistically impracticable, not in the least because the State relies on local law enforcement agencies to assist in monitoring and enforcing compliance with the ABC Law. *See supra* at 4. As for relegating enforcement to other states, New York has no control over their enforcement priorities and thus cannot ensure a prompt response to alleged unlawful activity. Additionally, the State has determined that effective control of the alcohol industry requires more than *post hoc* enforcement of those violations that happen to come to light.

Second, New York has reasonably concluded that requiring businesses that traffic in alcohol to hold a license and maintain an in-state presence is a powerful deterrent to unlawful activities. License revocation exacts a substantial cost from its holder – an advantage recognized when the ABC Law was first enacted in 1934. *See Text of Mulrooney's Review of Year of Liquor*, N.Y. Times, Dec. 5, 1934, at 15 (revocation was "most effective" enforcement weapon); *1935 Rep. of the State Liquor Authority* 8 (power of revocation "most effective, and almost the only, check upon [unlawful sales]"), *quoted in After Repeal* 216. As a major 1933 study of state liquor control observed, the threat of revocation is more effective as an enforcement tool when linked to a physical presence. *See* Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 49 (1933) (revocation of premises license more effective than revocation of

individual license). Without the requirement of an in-state presence, an out-of-state winery that violates the ABC Law risks losing only the right to ship to its New York customers; a winery with an in-state presence risks having its New York location rendered inoperative as well.

Third, New York has reasonably concluded that an in-state presence ensures effective collection of its excise and sales taxes. A state's authority to require out-of-state vendors with no in-state physical presence to pay the state's excise, sales, or use taxes is subject to considerable uncertainty. *See Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Even with that authority, however, procedural hurdles such as personal jurisdiction and forum selection may complicate the collection of taxes from out-of-state businesses.[9] Nor can New York rely on self-reporting by out-of-state vendors. Widespread vendor noncompliance with federal reporting requirements for interstate cigarette sales demonstrates the need for direct oversight and enforcement powers in the case of alcohol. *See Internet Cigarette Sales: Limited Compliance and Enforcement of the Jenkins Act Results in Loss of State Revenue: Testimony Before House Comm. on the Judiciary*, 108th Cong., 1st Sess. (2003) (testimony of Paul L. Jones, Director of Homeland Security and Justice), *available*

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9. The Twenty-First Amendment Enforcement Act, 27 U.S.C. § 122a (2004), does not resolve these difficulties. It provides a federal forum for state attorneys general seeking to enjoin unlicensed vendors from violating state alcohol regulations. 27 U.S.C. § 122a(c)(1). Because it confines a state's remedy to injunctive relief, 27 U.S.C. § 122a(c)(3), it is unclear whether the law would permit the collection of taxes owed for unlicensed out-of-state sales. Nor does the Act necessarily address problems in obtaining personal jurisdiction over violators, particularly where internet sales are involved.

at http://www.gao.gov/new.items/d03714t.pdf; *see also* Aff. of Walter Hellerstein ¶ 18 (J.A. 68) (describing practical difficulties in collecting use taxes from individual purchasers).

B. New York's Direct Shipment Restrictions Are Not Impermissibly Protectionist or Discriminatory

Unable to refute this close nexus between the core purposes of the Twenty-First Amendment and New York's licensing requirement, petitioners claim that ABC Law sections 102(1)(c) and (d) are unconstitutional on the grounds that they were motivated by protectionist concerns and that they impermissibly discriminate against out-of-state wineries. *See* Pet. Br. at 11-13, 18-21, 24-27, 29. Neither argument is persuasive.

1. Sections 102(1)(c) and (d) bear no resemblance to the protectionist tax exemption invalidated in *Bacchus*. These provisions of the ABC Law directly regulate how alcohol may be imported into New York State, as opposed to imposing differential excise taxes on wholesale sales. *See* 468 U.S. at 265. And while Hawaii itself acknowledged that the sole purpose of its tax was to promote local industry, *id*. at 276, New York's laws were intended to advance purposes that are clearly legitimate under the Twenty-First Amendment, and as a practical matter, achieve this goal.

While very little legislative history survives from the 1934 enactment of the ABC Law, it is likely that sections 102(1)(c) and (d) were based on New York's experience with the use of direct shipment to evade regulatory oversight. In describing the history of New York's ban on direct

importation to non-licensees, the SLA's first Annual Report recounts that:

> At first, through permits of the Customs Department, individuals were permitted to import liquor from other countries. Investigation of the permits showed that some individuals were abusing this privilege and were importing hundreds of cases which were not for their personal use. This misuse of the privilege resulted in the cancellation of individual permits . . . to limit importations into the State of New York to people holding New York State liquor licenses.

1933-34 Rep. of the State Liquor Authority 10.[10] As for Section 3(37), its in-state presence requirement apparently was intended to extend the deterrent effects of license revocation beyond the person and to the premises where liquor was sold. *See supra* at 4.

With respect to the 1970 revisions of the ABC law, those amendments were intended to close a loophole that had briefly permitted out-of-state retailers to ship directly to New York consumers, and thereby avoid New York State taxes, license fees, and other regulations. *See House of York, Ltd. v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970); *see also*

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10. Early federal support existed for state restrictions of imports to license holders. *See* Fed. Alcohol Control Admin., *Code of Fair Competition for the Wine Industry*, art. V, § 10(a), at 7 (Dec. 1, 1934) (prohibiting wineries from selling wine to non-licensees, "if such a license is required of such person by State law," upon proper notice); Fed. Alcohol Control Admin., *Code of Fair Competition for the Alcoholic Beverages Importing Industry*, art V, § 7(a), at 4 (Aug. 1, 1934) (same for alcoholic beverage importers).

Mem. of State Exec. Dep't and State Dep't of Tax. and Fin., ch. 242, *reprinted in* 1970 McKinney's N.Y. Laws 2868, 2869 (describing express purpose of 1970 revisions as "control[ing] the importation of alcoholic beverages into the State" and "eliminat[ing] an unfair tax advantage to foreign and other out-of-state mail-order firms selling alcoholic beverages to New York residents"). Regulations like Section 3(37), which ensure that out-of-state suppliers comply with the rules governing importation of alcohol, are plainly permissible under the Twenty-First Amendment. *See, e.g.*, *North Dakota*, 495 U.S. at 432-33; *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 283-84 (1972); *Duckworth v. Arkansas*, 314 U.S. 390, 396 (1941).[11]

Nor does New York's in-state presence requirement discriminate against out-of-state businesses in violation of

11. Petitioners note that the 1970 amendment permitted persons to ship wine to themselves for personal use if they were out of the country for more than 48 hours, but not if they were in another state. *See* Pet. Br. at 3 & n.4. Any such distinction is irrelevant to this case, which concerns only the ability of wineries to ship to New York consumers, not the ability of New York consumers to ship to themselves from other states. Indeed, petitioner Cortes DeRussy admits that he has shipped wine to himself from California. Aff. of Cortes DeRussy ¶ 3 (2d. Cir. J.A. 100). In any event, the language appears to be an artifact of the 1970 Legislature's focus on foreign imports rather than imports from other states. *See* Mem. of State Exec. Dep't and State Dep't of Tax. and Fin., ch. 242, *reprinted in* 1970 McKinney's N.Y. Laws 2868. The New York Court of Appeals has interpreted the ABC law to permit a New York resident to personally transport alcohol into the State for personal use. *See People v. Ryan*, 274 N.Y. 149, 153-54, 8 N.E.2d 313, 315-16 (1937) (New York resident's transportation into the State of alcohol that he had purchased in Connecticut did not violate ABC law). The SLA has understood *Ryan* as authorizing a New York resident, while traveling in another state, to ship wine home for personal use.

the dormant Commerce Clause. First, the requirements for making direct shipments of wine to consumers are facially neutral. Contrary to petitioners' claims, *see* Pet. Br. at 5, 20, out-of-state wineries can obtain a New York winery license, which would enable them to ship directly to New York consumers. To do so they need only establish an in-state presence by maintaining "a branch factory, office or storeroom" in New York State and receiving shipments of wine "consigned to a United States government bonded winery, warehouse or storeroom located within the state." ABC § 3(37).

Even if this requirement imposes some costs on out-of-state wineries, this Court has repeatedly upheld statutes imposing just such burdens. In *Young's Market*, the Court held that a state law that imposed a separate license fee on firms that sold imported beer which was not imposed on wholesalers selling only domestically-produced beer, was within the powers accorded by the Amendment and did not violate the Commerce Clause. 299 U.S. at 62-63. In *Heublein*, the Court held that a state law requiring that out-of-state liquor manufacturers have a resident in-state representative comported with the dormant Commerce Clause, finding the requirement "reasonably related" to the state's purpose of reviewing the manufacturers' records and enforcing pricing restrictions. 409 U.S. at 282-83. Even more recently, the Court upheld a North Dakota statute that imposed labeling and reporting requirements on out-of-state businesses that shipped alcohol to military bases within the state, but not on in-state suppliers that sold to those same federal enclaves. *North Dakota*, 495 U.S. at 444. Because the requirements enabled the state "to record the volume of liquor shipped into the State and to identify those products which have not been distributed through the State's liquor distribution

system," they "unquestionably serve[d] valid state interests." *Id*. at 433.

New York's mandate that alcoholic beverages originating out-of-state pass through at least one licensed in-state entity serves the same interests, and is likewise constitutional. While this requirement might be considered impermissibly discriminatory if imposed on other products, differential burdens created by regulation of alcohol do not raise the same constitutional concerns. The Twenty-First Amendment shields state regulation of alcohol from dormant Commerce Clause challenges so that states may channel the flow of alcohol across and within their borders. To do so, states must be able to bring alcohol imported from out-of-state within their licensing scheme – an objective that squarely implicates the reasons for the Amendment's enactment. Indeed, under the precedents of this Court, New York could bar direct shipment from out-of-state wineries altogether.

2. Finally, petitioners claim that sections 102(1)(c) and (d) are impermissibly discriminatory because, in their view, in-state entities enjoy various exemptions to the rule that all alcohol must pass through the three-tier system. *See* Pet. Br. at 4, 27-28. In the first place, that assumption is incorrect; all alcoholic beverages distributed and sold in the State must pass through the hands of a licensed entity.

Nor do the provisions they cite confer any special direct shipment privileges on in-state wineries. For example, while farm winery licensees may ship directly to consumers, *see* ABC § 76-a(3),[12] all other wineries may do so as well,

12. Petitioners mistakenly state that such shipments are authorized by ABC Law § 76-a(6)(b) and (d). *See* Pet. Br. at 3-4, 28. (Cont'd)

including petitioners Swedenburg and Lucas Wineries, as long as they obtain a winery license and a certificate to ship, *see* ABC §§ 76, 77(2). As for sections 76(4) and 105(9), these provisions permit a winery to obtain a license to sell and deliver New York wine at retail for off-premises consumption, thereby enabling the winery to open a separate retail establishment in New York to market its wines. *See* Mem. of the State Exec. Dep't, ch. 600, *reprinted in* 1977 McKinney's N.Y. Laws 2381. But a winery does not need such a license to ship directly to New York consumers. Other provisions mentioned by petitioners – including authority to conduct tastings of New York wines, ABC § 76(2)(a), sell them at dinner theaters and state fairs, ABC §§ 76(4), 77(5), and contract with other wineries for FTD-type "wine by wire" sales, ABC § 76(5)– do not even concern direct shipment.

In any event, the few stray references to the promotion of New York's wine industry in the legislative history of the provisions referenced by petitioners cannot render the State's licensing scheme unconstitutional, since the challenged regulations rationally further its legitimate regulatory objectives under the Twenty-first Amendment. *See, e.g.*, *Beach*, 508 U.S. at 314-15 (legislators' motives irrelevant if any rational basis for classification exists).[13]

(Cont'd)

Section 76-a(6)(b) has nothing to do with shipment and section 76-a(6)(d) was enacted to permit farm wineries to ship to one another and engage in cooperative sales. *See* Mem. of William L. Parment, ch. 490, *reprinted in* 1993 N.Y.S. Leg. Ann. 354-56.

13. This Court declined to grant certiorari on petitioners' Privileges and Immunities Clause claim and should decline to review it now. In any event, as the Second Circuit held, New York's statutory scheme does not violate that clause. Pet. App. at 29a-30a.

POINT III

NEW YORK'S DIRECT SHIPMENT RESTRICTIONS COMPORT WITH THE DORMANT COMMERCE CLAUSE

1. Even if this Court concludes that, contrary to the authority granted by the Twenty-First Amendment, the dormant Commerce Clause still meaningfully constrains New York's authority to regulate alcohol importation, the challenged provisions still pass constitutional muster. In reviewing the State's direct shipment restrictions, a very deferential standard should apply to account for the unique constitutional protection accorded state regulation of alcoholic beverages – one that is at least as deferential as that set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1969).

Under the *Pike* balancing test, an even-handed statute that imposes an incidental burden on out-of-state businesses is constitutional if it serves a "legitimate local public interest" and the burden it imposes is not "clearly excessive in relation to the putative local benefits." *Id*. at 142. New York's requirements for obtaining a winery license, which in turn allows an entity to procure a permit to make direct shipments, satisfy this standard. First, they apply equally to in-state and out-of-state businesses. The requirements also directly further the State's legitimate interests in protecting the integrity of its alcohol distribution system and ensuring that licensees are within the reach of the State's enforcement and taxing agencies. Any burden on out-of-state businesses is incidental and not clearly excessive in relation to these local benefits, and the requirements are therefore constitutional. *Compare Carter v. Virginia*, 321 U.S. 131 (1944) (state routing,

bonding and records requirements for transporting alcohol through the state within the state's power, independently of the Twenty-First Amendment, and not in contravention of the dormant Commerce Clause); *Duckworth*, 314 U.S. 390 (upholding against Commerce Clause challenge, without considering the Twenty-First Amendment, state conviction for transporting alcohol through the state without a permit).

Indeed, New York's licensing and in-state presence requirements would survive even strict scrutiny. The State's interest in effective enforcement of the ABC Law constitutes a legitimate, non-protectionist reason for requiring an in-state presence. *Compare Maine v. Taylor*, 477 U.S. 131, 151-52 (1985). Any equally effective alternative – for example, sending New York officials to other states to inspect facilities, employment records, or sales receipts – would be so expensive and burdensome that it is for practical purposes unavailable. And while some states may use a permitting system, that approach provides neither the oversight nor the deterrence of New York's licensing scheme.

2. Should this Court find that New York's in-state presence requirement violates the dormant Commerce Clause, the appropriate remedy would be to strike only that portion of the ABC Law which permits licensed in-state wineries to sell and ship wine directly to consumers. A severability clause is included both in the ABC Law as a whole and the Session Law enacting the farm winery exemption. *See* ABC § 161; Act of July 26, 1993, ch. 490, § 24, *reprinted in* ABC § 76-a, 3 McKinney's Cons. Laws of N.Y. at 182 (2000); *see also* ABC § 160 (ABC Law "shall be so construed as to assure that the policy of the state and the intent and purpose thereof will be carried out"). Under New York law, an entire statute should not be invalidated "when

only portions of it are objectionable." *Nat'l Adver. Co. v. Niagara*, 942 F.2d 145, 148 (2d Cir. 1991). Were the court to invalidate sections 102(c) and (d), which restrict shipment of all alcoholic beverages to licensed entities, instead of those provisions which allow licensed wineries to ship directly to consumers, any unlicensed out-of-state entity would be permitted to make direct shipments of any type of alcohol into New York free from any oversight or supervision. That result would eviscerate the core of the State's enforcement regime.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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