No.

In the Supreme Court of the United States

PETER BROOKS, DAVID T. GIES, PATRICIA CLEMMER PETERS, ROBIN B. HEATWOLE, DRY COMAL CREEK VINEYARDS, HOOD RIVER VINEYARDS, AND SCHNEIDER LIQUOR COMPANY, INC.,

Petitioners,

v.

ESTHER H. VASSAR, Chairman, Virginia Department of Alcoholic Beverage Control; PAMELA O'BERRY EVANS, Commissioner, Virginia Department of Alcoholic Beverage Control; SUSAN R. SWECKER, Commissioner, Virginia Department of Alcoholic Beverage Control; AND VIRGINIA WINE WHOLESALERS ASS'N, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAN KAHAN
GIOVANNA SHAY
Yale Law School
Supreme Court Advocacy Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Additional Counsel Listed On Inside Cover

DANIEL R. ORTIZ
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903

MATTHEW S. HALE
45 Rivermont Drive
Newport News, VA 23601

QUESTION PRESENTED

In *Granholm* v. *Heald*, 544 U.S. 460, 466 (2005), the Court struck down state statutes that allowed in-state wineries to sell wine directly to consumers but made direct sales "impractical from an economic standpoint" for out-of-state wineries. The Court held that those laws discriminated against interstate commerce and were "neither authorized nor permitted by the Twenty-first Amendment." *Ibid.* The questions in this case are:

1. Whether Virginia impermissibly discriminates against interstate commerce when it allows residents virtually unrestricted access to certain alcoholic beverages sold by Virginia retailers but severely curtails residents' access to the same products sold by out-of-state retailers.

2. Whether the "market participant exception" to the dormant Commerce Clause authorized Virginia to sell only wine produced in-state at State-owned retail liquor stores that have a state-mandated monopoly on the sale of hard liquor in the State.

RULE 29.6 STATEMENT

None of petitioners has a parent company and no publicly held company owns 10% or more of the stock of any of the petitioners.

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OPINIONS BELOW

The opinion of the Fourth Circuit (App., *infra*, 1a-39a) is reported at 462 F.3d 341; an earlier opinion is reported *sub nom. Bolick* v. *Danielson* at 330 F.3d 274. The decision of the district court and report of the magistrate (App., *infra*, 40a-98a) are unreported; an earlier decision is reported *sub nom. Bolick* v. *Roberts* at 199 F. Supp. 2d 397.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2006. On December 1, 2006, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to February 8, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Commerce Clause and the Twenty-First Amendment to the United States Constitution, and of Virginia Code §§ 4.1-100, 4.1-119, 4.1-310, and 4.1-311 are reprinted in the appendix to this petition at 99a-100a.

STATEMENT

This case concerns two provisions of Virginia law that discriminate against interstate commerce. The first provides that a Virginia resident may purchase and transport for personal use within the State *unlimited* quantities of wine and beer that were purchased in-state, but may transport for personal use within Virginia only a *single* gallon of wine or beer that was purchased out-of-state. The manifest effect of this provision is both to place out-of-state retailers at a severe competitive disadvantage and effectively to exclude Virginia residents from participation in the interstate retail wine market. This Court invalidated very similar state laws in *Granholm* v. *Heald*, 544 U.S. 460 (2005), holding unconstitutional regulations that made it "economically impractical" for out-of-state wineries to sell wine directly to in-state customers. A divided panel of the Fourth Circuit nevertheless upheld the

Virginia provision at issue in this case because it believed that the Twenty-First Amendment allows states to require that all alcohol consumed in-state be purchased domestically.

The second provision concerns Virginia's state-owned "ABC stores." The State has given these stores a monopoly on the sale of hard liquor in Virginia. The stores also sell wine – but only "farm wine" produced in Virginia. As a consequence, Virginia residents who want to purchase liquor and wine at a single location *must* purchase Virginia wine. Although the Fourth Circuit acknowledged that this regime discriminates against out-of-state wineries and that the ABC stores monopolize the liquor market, it held the provision constitutional under the market-participant exception to the Commerce Clause.

Both aspects of the Fourth Circuit's holding warrant this Court's attention. The first element of the decision below upheld a state law that makes it impossible for out-of-state wine and beer retailers to compete for the business of Virginia residents, while effectively keeping Virginians from crossing state lines to make their purchases. This holding misstates compelling constitutional policy and is flatly inconsistent with *Granholm*. The Fourth Circuit's market-participant decision, meanwhile, allows a state to leverage regulatory control over a market into a competitive advantage for domestic businesses. Because these rulings reflect a misunderstanding of principles announced by this Court, contribute to confusion in very important areas of the law that touch on essential state regulatory authority, and – not least – uphold unconstitutional state laws of considerable significance, review by this Court is warranted.

1. Virginia tightly controls all alcoholic beverages intended for sale and distribution in the State. Virginia requires most wine or beer sold or distributed within the state to pass through a three-tier system of producers, wholesalers, and

retailers.[1] State law permits Virginia residents to purchase and transport unlimited amounts of wine and beer from in-state retailers.[2] Virginians also may produce and consume unlimited amounts of wine and beer at home without a license if it is for personal or family use. See *id.* § 4.1-200(6). In contrast, Virginia residents may import or transport for personal use no more than *one gallon* (or four liters) of wine, beer, or liquor purchased out-of-state. *Id.* § 4.1-310, -311 (the "personal import limit").

The State's strictest controls apply to hard liquor, which producers may sell or transport only to the Alcoholic Beverage Control ("ABC") Board. See Va. Code Ann. § 4.1-206(1). All liquor imports must go to the ABC Board or to licensed distilleries. See *id.* § 4.1-310(A). The ABC Board also operates "ABC stores," which are virtually the only places in Virginia that people may lawfully buy liquor to drink off-site. See *id.* §§ 4.1-103, -119, -206, -303. The State permits ABC stores to sell only one type of wine: Virginia "farm wine." See *id.* § 4.1-119 (the "ABC stores restric-

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[1] The three-tier system is "a separation between manufacturing interests, wholesale interests and retail interests in the production and distribution of alcoholic beverages." Va. Code Ann. § 4.1-215(C). Market participants must choose one level: production, wholesale, or retail. Within Virginia, wine or beer producers may sell and ship only to wine or beer wholesalers; wine or beer wholesalers may sell and ship only to wine or beer retailers; and wine or beer retailers may sell and ship only to customers. See *id.* §§ 4.1-207, -208, -302, -310. All wine or beer imports (except for limited direct shipments to customers) must go to wine or beer wholesalers. See *id.* §§ 4.1-207, -208, -112.1, -310. Narrow exceptions to the three-tier system that are not relevant here are outlined in section 4.1-215(B) of the Virginia Code.

[2] They also may transport three gallons of hard liquor purchased in-state. *Id.* § 4.1-311

tion"). Farm wine is made in Virginia on farms with active vineyards or from Virginia grapes. *Id.* § 4.1-100.

Under this regime, a resident of Roslyn, Virginia may purchase and bring home for personal use a case – or many cases – of wine or beer at any Virginia retailer. But that resident may *not* cross Key Bridge into the District of Columbia and purchase for personal use at home an equivalent amount of wine or beer. That is so even if making wine purchases in Georgetown would be more economical or convenient for the Roslyn resident than doing so at a Virginia retailer.

2. Petitioners are four Virginia consumers, two non-Virginia vineyards, and a non-Virginia retailer. In 2004, they challenged Virginia's personal import limit and its ABC stores restriction under the dormant Commerce Clause.[3] The district court invalidated both provisions. App., *infra*, 40a-98a.

The magistrate to whom the case was referred concluded that the personal import limit "cannot be viewed as serving any legitimate core concern of the Twenty-First Amendment unless, of course, one concludes that transportation of unlimited quantities of alcoholic beverages acquired within Virginia necessarily has less potential for intemperance or other

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[3] Before bringing this suit in 2004, the plaintiffs challenged five provisions of the Virginia Code, all of which the district court struck down. See *Bolick* v. *Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 1999) (mem. op.); *id.* at add. (report and recommendation of magistrate judge filed July 7, 2001). After the Virginia legislature amended several of the provisions involved, the Fourth Circuit remanded. See *Bolick* v. *Danielson*, 330 F.3d 274 (2003). The plaintiffs amended their complaint accordingly, and the district court again struck down all five provisions. App., *infra*, 40a-98a. After the Court's decision in *Granholm*, the Virginia legislature repealed three of those provisions. See H.B. 610, 2006 Gen. Assem., Reg. Sess. (Va. 2006); App., *infra*, 9a. The two remaining provisions are the subject of this petition.

abuse than that acquired 'over the state line.'" *Id.* at 89a. The district court adopted the magistrate's recommendations, finding facial discrimination against interstate commerce in the differential treatment accorded out-of-state alcohol: "[A] plain reading of the statutes together demonstrate that * * * a consumer is limited in the amount of alcoholic beverages obtained out-of-state that he or she may transport into Virginia while a consumer * * * may acquire and transport an unlimited amount of alcohol within the state." *Id.* at 52a. The district court concluded that Virginia had articulated no purpose for this discrimination other than economic protectionism. Legitimate local purposes could include the Twenty-First Amendment's "core concerns of temperance, orderly market conditions, and collection of revenue" (*ibid.*); the Virginia scheme served none of them. See also *id.* at 53a ("The Magistrate Judge found that, other than economic protectionism, Virginia advanced no explanation that allows consumers to purchase and transport unlimited quantities of alcohol within the state, but limits that which they can purchase and import from out-of-state.").

The district court also struck down the ABC stores restriction, which allows ABC stores to sell Virginia but not out-of-state farm wine. Virginia did not deny that the ABC stores restriction discriminated against out-of-state wines, but instead justified the discrimination under the Commerce Clause "market participant exception." The court found, however, that Virginia is "both a regulator and a competitor which prevents the application of the market participant exception." *Bolick* v. *Roberts*, 199 F. Supp. 2d 397, 448 (E.D. Va. 2002); see App., *infra*, 56a. The court dismissed the State's argument that its roles as regulator and competitor could be separated. 199 F. Supp. 2d at 414 (citing *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 277 (1988)).

3. A divided panel of the Fourth Circuit reversed with respect to both statutes. App., *infra*, 1a-39a. The majority, in part IIIC of its decision (*id.* at 21a-23a), held the personal

import limit constitutional under the Twenty-First Amendment as part of Virginia's "import regulation" scheme. Petitioners had argued that the personal import limit discriminates against interstate commerce because it both denies Virginians equal access to out-of-state alcoholic beverages sold at retail and disadvantages out-of-state retailers. See *id*. at 13a. The majority, however, regarded those effects as immaterial. Instead, the majority held that "the Personal Import [Limit] is justified as an appropriate regulation under the Twenty-first Amendment that is not denied legitimacy by being 'economic protectionism,' as was condemned by the holdings of *Granholm* and *Bacchus* [*Imports, Ltd.*, v. *Dias*, 468 U.S. 263 (1984)]." *Id.* at 21a. That is so, the majority reasoned, because it is "part of Virginia's import regulation," and the State's "interest in * * * regulating the importation, transportation, and use of wine in Virginia is protected by the Twenty-first Amendment." *Id*. at 22a-23a.

Writing only for himself in Part IIIB of the opinion (App., *infra*, 18a-21a), Judge Niemeyer also opined that the personal import limit is not actually discriminatory at all:

> Virginia's ABC Act authorizes the purchase of *unlimited* quantities of alcoholic beverages out-of-state, which then may be imported into the State *through the three-tier structure*. And it is only the purchases of unlimited amounts through the three-tier structure, not through the one-gallon/four-liter exception to the structure, that may be compared with the unlimited amounts that may be purchased in state from retailers.

Id. at 20a. In addition, Judge Niemeyer made the point that consumers may purchase as much wine or beer as they wish from out-of-state retailers, so long as they bring back no more than one gallon for consumption in Virginia. *Ibid.* Judge Traxler, the other member of the majority below, did not join these portions of Judge Niemeyer's opinion. See *id*. at 34a.

The majority also upheld the ABC stores restriction. App., *infra*, 23a-32a. It acknowledged that Virginia's decision to sell only locally produced wines in state-owned stores "discriminates against out-of-state wines" (*id*. at 23a), but held that the restriction fell within the market participant exception to the dormant Commerce Clause. As the majority saw it, the dormant Commerce Clause prohibits states from using "'exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens.'" *Id.* at 24a (quoting *College Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999)). If a state participates in a market and uses its resources to favor local products, the majority went on, that favoritism escapes invalidation under the dormant Commerce Clause. The majority concluded by holding that the fact that Virginia both participates in *and* regulates the alcoholic beverages market "is not sufficient to preclude its status as a market participant." *Id.* at 29a. Although the majority acknowledged that this Court's precedents "stand for the proposition that a State may engage as a competitor in a free and open market," it dismissed petitioners' claim because "[t]here is no evidence that consumers face any impediment to purchasing wines of their preference at fair market prices." *Id.* at 30a.

Judge Goodwin disagreed with the majority's analysis on both counts. App., *infra*, 34a-39a. As to the personal import limit, he found that "[t]he law tilts the market in favor of in-state retailers by preventing Virginians from having meaningful access to the markets of other States." *Id*. at 35a-36a. Although he recognized that Virginia residents may purchase as much wine or beer out-of-state as they wish, "[i]n reality, * * * because Virginians may not carry more than a gallon of what they buy into Virginia, they are denied access to other States' markets on equal terms with other consumers. * * * Such access requires not only that a consumer be able to purchase a product, but also that the consumer be able to use it. By preventing importation into Virginia, the Personal Import

[Limit] impedes interstate commerce."[4] It thus "favors in-state economic interests over out-of-state interests." *Id*. at 36a.

Judge Goodwin also concluded that the personal import limit could not be saved on the theory that it is the only means of advancing a legitimate local purpose. Pointing to the district court's findings, he noted that the interests advanced by Virginia – facilitating tax collection and controlling bootleg liquor – "may be adequately served by reasonable nondiscriminatory alternatives." App., *infra*, 37a-38a.

Regarding the ABC stores restriction, Judge Goodwin reasoned that the relevant market was not wine alone, but rather alcoholic beverages more generally:

> A consumer's demand for purchasing both a bottle of liquor *and* a bottle of wine *at the same time* may be satisfied *only* in ABC Stores. The relevant market is not the market for wine, but the market for *wine and liquor*.

App., *infra*, 38a (emphasis in original). Because Virginia undoubtedly monopolized *that* market, Judge Goodwin concluded that "the market participant exception cannot justify the ABC Stores Restriction." *Ibid*.

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[4] Judge Goodwin offered this example: "Mr. Smith lives in Bristol, Virginia, a town on the Virginia/Tennessee border. He wants to purchase a 12-pack of beer. The closest place he can buy beer is just across West State Street in Tennessee. The closest store in Virginia is nearly twice as far from Mr. Smith's house. The Personal Import [Limit] deprives Mr. Smith of meaningful access to the conveniently located Tennessee retailer because it is located across the state line. To buy more than one gallon of beer (128 ounces), Mr. Smith must go to a Virginia store. Mr. Smith presumably could go to Tennessee and buy a 12-pack (approximately 144 ounces), but would have to either discard or drink two of the beers before crossing the street back into Virginia." App., *infra*, 36a.

REASONS FOR GRANTING THE PETITION

Both aspects of the Fourth Circuit's holding frustrate important constitutional policies. Virginia's personal import limit is the sort of unequivocal discrimination against interstate commerce that this Court has long condemned: it stops the flow of goods at the state border, insulates local business from competition, and excludes state residents from the interstate market. The Twenty-First Amendment was never intended to validate a law of this kind. Its purpose was to let "dry" states stay dry, not permit "wet" states to create captive markets for in-state alcohol businesses. The Fourth Circuit's contrary conclusion guts the holding of *Granholm* and creates confusion in an important area of the law that *Granholm* sought to clarify.

The court of appeals' market-participant holding distorts the meaning of that doctrine, turning what had been a shield that allows states to compete in the market on even terms into a sword that they may use to obtain a competitive advantage. As described by this Court, the market-participant rule applies when a state enters the competitive arena with private actors. The Fourth Circuit, however, allowed Virginia to leverage an exercise of its *regulatory* authority into a regime that benefits local businesses at the expense of their out-of-state competitors. This holding, too, departs from principles announced by this Court and foments confusion on a recurring issue of considerable significance. The Court accordingly should grant review on both questions presented here.

I. THE DECISION BELOW UPHOLDING THE PERSONAL IMPORT LIMIT IS INCONSISTENT WITH *GRANHOLM* AND MISSTATES CONSTITUTIONAL POLICY

A. The Fourth Circuit Erred By Upholding A State Law That Works Facial Discrimination Against Interstate Commerce

1. Under the Commerce Clause, facially discriminatory state laws are per se invalid

At the outset, Virginia's personal use limit plainly discriminates against, and impedes the flow of, interstate commerce in a manner that ordinarily is unconstitutional. The Court has held repeatedly that one of the most important functions of the Commerce Clause is precluding states from "depriv[ing] citizens of their right to have access to the markets of other States on equal terms." *Granholm*, 544 U.S. at 473. "Our system, fostered by the Commerce Clause, is that * * * every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 539 (1949). See, *e.g.*, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623 (1978) ("The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism."). Accordingly, state laws that discriminate facially against interstate commerce run afoul of "a virtually *per se* rule of invalidity." *Philadelphia*, 437 U.S. at 624.

The personal use limit is just such a law. The Virginia scheme permits Virginia residents to purchase from Virginia retailers, and take home for personal use, unlimited quantities of wine and beer. See Va. Code Ann. § 4.1-311(A)(1). If they purchase wine or beer from an out-of-state retailer, however, they may return with no more than one gallon. See *id.* §§ 4.1-310(E), -311(B). The Virginia scheme abruptly halts the flow of alcohol at the Virginia state line while leaving the flow of

alcohol within the State entirely untouched. The personal import limit is thus the quintessential discriminatory "law that overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia*, 437 U.S. at 624. As such, it is "the clearest example" of discriminatory state legislation. *Ibid*.

In fact, the Virginia law works a double discrimination. First, it deprives Virginia residents of equal access to other states' markets in the plainest sense. To be sure, Virginians are not formally prohibited from *purchasing* more than a gallon of alcohol from out-of-state retailers. But the Commerce Clause is concerned with practical economic reality and "eschew[s] formalism" (*West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994)) and, as Judge Goodwin explained, "[i]n reality, * * * because Virginians may not carry more than a gallon of what they buy into Virginia, they are denied access to other States' markets on equal terms with other consumers." App., *infra*, 36a. The Virginia rule therefore is impermissible because it denies "access to the markets of other States on equal terms." *Granholm*, 544 U.S. at 473.

Second, the personal import limit starkly discriminates against out-of-state retailers. *Granholm* struck down state laws that "allow[ed] in-state wineries to sell wine directly to consumers * * * but [prohibited] out-of-state wineries from doing so, or, at the least, [made] direct sales impractical from an economic standpoint." *Granholm*, 544 U.S. at 466. Virginia's personal import limit does just the same thing. By giving Virginia consumers compelling incentives to purchase wine and beer only in-state, the law grants in-state retailers "a competitive advantage" over retailers "located beyond the States' borders." *Ibid.* Such a disparity constitutes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" on its face. *Granholm*, 544 U.S. at 472 (citation omitted).[5]

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[5] Out-of-state retailers have no realistic way to access Virginia's market. Direct shipment from out-of-state retailers to Virginia con-

The majority below made no serious attempt to deny the discriminatory nature of the personal import limit. Its only effort in that regard was the suggestion that the provision "actually * * * disadvantage[s] local wineries whose wine may only be purchased through retailers." App., *infra*, 23a. But any such theoretical disadvantage to in-state wineries pales in comparison to the far greater benefits afforded local Virginia retailers. In any event, providing a benefit to interstate commerce in one area does not validate discrimination against interstate commerce in another. Cf. *Granholm*, 544 U.S. at 474 ("The suggestion of a limited exception for direct shipment from out-of-state wineries does nothing to eliminate the discriminatory nature of New York's regulations."). The majority below had nothing to say on this point.

2. The Twenty-First Amendment does not authorize the personal import limit

Despite this discrimination, the court below upheld the personal import limit, reasoning that the law is "part of Virginia's import regulation" and therefore "is protected by the Twenty-First Amendment." App., *infra*, 22a-23a. But this *ipse dixit* is insupportable. Applying the label "import regulation" does not wholly insulate a state alcohol regulation from Commerce Clause scrutiny. Precisely the same label was applied, with just as much justification, to the state laws invali-

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sumers is limited to two cases of wine and two cases of beer per customer per month, and even then the retailers must use ABC Board-approved common carriers and obtain written permission from the owner of each brand shipped. Va. Code Ann. § 4.1-112.1. Additionally, though out-of-state retailers may technically "import unlimited amounts of wine into the state through the three-tier structure" (App., *infra*, 20a), the retailers would be legally obligated to sell their products only to wholesalers, who would then resell to retailers. See Va. Code Ann. §§ 4.1-207, -208, -310(A). As in *Granholm*, "[t]hese two extra layers of overhead increase the cost of out-of-state" alcohol to in-state consumers. 544 U.S. at 474.

dated in *Granholm*. And while the Fourth Circuit majority declared that "under no economic construct could [the personal import limit] be considered economic protectionism of local industry" (*id*. at 23a), that simply is not so. As we have explained, Virginia law precludes effective competition by out-of-state retailers; just as in *Granholm*, "[t]he discriminatory character of the [state] system is obvious." 544 U.S. at 473. The decision below cannot be squared with *Granholm*'s analysis.

The Fourth Circuit's contrary conclusion was largely premised on its view that, under *Granholm*, "'it is unquestionably legitimate' for a State to bar the importation of alcoholic beverages or to 'funnel sales through the three-tier system.'" App., *infra*, 17a-18a (quoting *Granholm*, 544 U.S. at 489). But the suggestion that *any* limit on the transportation of alcohol across state lines is validated by the Twenty-First Amendment rests on a plain misreading both of *Granholm* and of the underlying constitutional policy. As Judge Goodwin noted below in dissent (*id*. at 37a), the majority omitted a crucial qualifier that appears in this Court's *Granholm* analysis: "A State *which chooses to ban the sale and consumption of alcohol altogether* could bar its importation." 544 U.S. at 488-489 (emphasis added). A ban on importation in such circumstances obviously does not discriminate because *no* purchase, transportation, or use in the state is lawful. But that principle provides no support to Virginia, which allows *unlimited* purchase, transportation, and use of alcohol – so long as it is acquired in-state.

In fact, the discrimination approved by the majority below cannot be squared with the purpose of the Twenty-First Amendment and its statutory predecessors. As recounted by the Court in *Granholm* (see 544 U.S. at 476-485), prior to 1890 the Commerce Clause was understood to leave states without the authority to regulate imported liquor "as long as it remained in its original package." *Granholm*, 544 U.S. at 478. Because this rule made it impossible for "dry" states to

preclude importation of alcoholic beverages, Congress enacted the Wilson Act, which empowered states to regulate imported alcohol "to the same extent and in the same manner" as domestic liquor. Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121). See *Granholm*, 544 U.S. at 478. And when the Court interpreted the Wilson Act as "authoriz[ing] States to regulate only the resale of imported liquor, not direct shipment to consumers for personal use" (*id*. at 480), Congress responded by "clos[ing] the direct shipment" loophole with the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122), which authorized states to regulate liquor imported for personal use. The Webb-Kenyon Act did *not*, however, authorize states to discriminate against out-of-state liquor; it required states to treat "in-state and out-of-state liquor on the same terms." *Granholm*, 544 U.S. at 481.[6] As the Court explained in *Granholm* (*id*. at 484), the Twenty-First Amendment adopted these standards as the constitutional rule.[7]

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[6] The Act's history makes that point clear. See 49 Cong. Rec. 4443 (1913) (statement of Rep. Stephens) (the Act gave "[e]ach State * * * the right to make its own laws on the subject of prohibition so long as there is no interference with interstate commerce"); 49 Cong. Rec. 2917 (1913) (statement of Sen. Stone) (Act would "merely put the shipper outside of Missouri or Iowa or Arkansas upon a level, that is upon terms of equality, so far as State law and regulation go, with the shipper within the State").

[7] The constitutional history establishes without a doubt that the overriding – and perhaps only – goal of the Amendment was to constitutionalize the Webb-Kenyon Act and thereby allow dry states to remain dry if they chose to do so. See, *e.g.*, 76 Cong. Rec. 4141 (1933) (statement of Sen. Blaine) ("to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line"); 76 Cong. Rec. 4171 (1933) (statement of Sen. Wagner) ("if the dry States want additional assurance

Of particular importance here, nothing in the Twenty-First Amendment gives states the authority to require that all alcoholic beverages consumed in the state be purchased in the state. To the contrary, the Amendment and its statutory predecessors were designed to allow dry states to stay dry; they were *not* intended to allow "wet" states to create captive alcohol markets that were insulated from interstate competition. Thus, the Webb-Kenyon Act "empowered States to forbid shipments of alcohol to consumers for personal use, *provided that the State treated in-state and out-of-state liquor on the same terms*." *Granholm*, 544 U.S. at 481 (emphasis added). The Act "was an attempt to eliminate the regulatory *advantage, i.e.*, its immunity characteristic," previously afforded to imported liquor. *Id*. at 482 (emphasis added). And Webb-Kenyon "readily can be construed as forbidding 'shipment or transportation' [of alcohol] only where it runs afoul of the State's generally applicable laws governing receipt, possession, sale, or use." *Ibid*.

The Amendment and its statutory predecessors accordingly allow *dry* states to protect their policy by precluding transportation of alcohol into the state – even transportation for personal use. Their intent "'was to take from intoxicating liquor the protection of the interstate commerce laws in so far

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that they will be protected I shall have no objection"); 76 Cong. Rec. 4171 (1933) (statement of Sen. Robinson) ("I do not wish to ask the Senate to put itself in the position of denying any measure of protection to dry territory."); 76 Cong. Rec. 4172 (1933) (statement of Sen. Borah) ("[T]he eighteenth amendment would never have been adopted had it not been for the open, brazen, corrupt, persistent defiance of the laws of the dry States by the liquor interests outside those States"; "All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States.").

as necessary to deny them an advantage over the intoxicating liquors produced in the state into which they were brought.'" *Granholm*, 544 U.S. at 483 (citation omitted). And, in aid of enforcing state policy, the Amendment gives states control over *in-state* purchases and sales. But when a state *allows* consumption and purchases of unlimited amounts of alcohol from domestic sources, the Amendment does not allow the state to preclude the transportation of alcohol for personal use simply because it was acquired across state lines: the constitutional and statutory authority given the state "was 'intended to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a State or Territory *and intended to be used therein in violation of the law of such State or Territory*.'" *Granholm*, 544 U.S. at 508 (Thomas, J., dissenting) (quoting H.R. Rep. No. 1461, 62d Cong., 3 Sess. 1 (1913)) (emphasis added). But Virginia is not trying to stay dry or exclude alcohol whose use in the State is illegal; it is saving its alcohol market for its domestic retailers.

3. The personal import limit does not serve any legitimate Twenty-First Amendment purposes

Of course, even discriminatory state laws may be protected under the Twenty-first Amendment when they are the exclusive way to serve legitimate local purposes. See *Granholm*, 544 U.S. at 489. This Court has identified "promoting temperance, ensuring orderly market conditions, and raising revenue" as core state concerns that the Amendment protects. *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990). But those interests are not served by the personal use limit. Although the majority below thought it "readily apparent that the Personal Import [Limit] is not economic protectionism but part of Virginia's import regulation" (App., *infra*, 22a-23a), it did not identify *any* legitimate interest served by the provision. That approach cannot be reconciled with *Granholm*, which in precisely this context insisted on "the 'clear-

est showing' to justify discriminatory state regulation." 544 U.S. at 490 (citation omitted).

The Fourth Circuit's failure to offer any justification for the personal use limit was an especially glaring omission because the district court found that the rule "cannot be viewed as serving any legitimate core concern of the Twenty-first Amendment unless, of course, one concludes that transportation of unlimited quantities of alcoholic beverages acquired within Virginia necessarily has less potential for intemperance or other abuse than that acquired 'over the state line.'" App., *infra*, 89a; see also *id*. at 53a ("The Magistrate Judge found that, other than economic protectionism, Virginia advanced no explanation that allows consumers to purchase and transport unlimited quantities of alcohol within the state, but limits that which they can purchase and import from out-of-state."). Judge Goodwin agreed in dissent, rejecting Virginia's claim that the import limit "facilitates tax collection and * * * controls the importation of bootleg liquor" because "[b]oth of these interests may be adequately served by reasonable nondiscriminatory alternatives." *Id*. at 37a.

That conclusion plainly was correct. In a system that permits unlimited purchases of wine and beer at local retailers (and unlimited home production for personal use), the personal import limit could hardly be thought to promote temperance or orderly market conditions. And if Virginia believes that limits on transportation of alcohol serve those purposes, it could achieve its goals as (indeed, more) effectively with a nondiscriminatory rule. Indeed, Virginia imposes such limits on the transportation of hard liquor purchased in-state (although even these limits are themselves set at discriminatory levels). See Va. Code §§ 4.1-311(A)(2), 4.1-311(B) (three gallons for in-state purchases, one gallon for out-of-state purchases). See also Mass. Gen. Laws ch. 138, § 22 (imposing transportation limits on out-of-state and in-state liquor alike).

Similarly, the personal import limit does not advance any legitimate state interest in the raising of revenue. For Twenty-First Amendment purposes, the maximizing of revenue is not an end in itself; it is a legitimate purpose only to the extent that it "serve[s] as an aid in policing the liquor traffic." *State Bd. of Equalization* v. *Young's Market*, 299 U.S. 59, 63 (1936). See also *Carter* v. *Virginia*, 321 U.S. 131 (1944). The court below did not offer, and there does not appear to be any, reason to believe that discrimination against alcohol purchased out-of-state will provide any help at all in furthering Virginia's substantive alcohol regulations.

4. The alternative theory offered by the concurrence below cannot save the personal import limit

Writing for himself, Judge Niemeyer offered an alternative defense of the personal use limit: he dismissed the argument that Virginians have unequal access to out-of-state markets because it was, in his view, premised on an impermissible comparison between import regulations and sales regulations. He reasoned that "an import regulation is quite distinct and different from a *sales* regulation, and comparing in-state sales with importation cannot give rise to a legitimate comparison for determining discrimination." App., *infra*, 20a (emphasis in original). The Virginia scheme does not actually forbid or limit purchases from out-of-state retailers, he opined, so long as Virginia residents carry no more than one gallon back into Virginia. The State, Judge Niemeyer concluded, thus "places no restriction on the amount of wine a person may purchase, either inside or outside Virginia." *Ibid*.

Judge Niemeyer also suggested that "an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself." App., *infra*, 18a. Such a challenge

was foreclosed, Judge Niemeyer believed, by the Court's statement in *Granholm* that the three-tier system is "'unquestionably legitimate.'" *Ibid.*

This reasoning, however, offers no support for the personal use limit. *First*, it surely *is* legitimate to compare in-state and out-of-state *retailers*, just as the *Granholm* Court had no trouble comparing in-state and out-of-state *producers*. *Granholm* invalidated "differential treatment between in-state and out-of-state wineries" as "explicit discrimination against interstate commerce." 544 U.S. at 467. This Court's cases preclude any suggestion that comparing retailers is less legitimate than comparing producers: "For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid." *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 168, 202 (1994) (collecting cases); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 581 (1997).

Second, as Judge Goodwin noted in dissent, though "[i]n theory" Virginians are "free to purchase the same amounts as other customers" out-of-state, "[i]n reality" being unable to bring so little of their purchase home denies them "access to other States' markets on equal terms with other consumers. * * * [Meaningful access] requires not only that a consumer be able to purchase a product, but also that the consumer be able to use it." App., *infra*, 36a. Judge Niemeyer's highly technical argument thus ignores the reality—that state law erects a practical barrier to Virginians buying their alcohol out-of-state—in favor of a formal distinction between "sales" and "imports." In doing so, he deviated markedly from this Court's modern Commerce Clause jurisprudence, which has steadfastly "eschewed formalism" in favor of "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery*, 512 U.S. at 201; see also, *e.g.*, *Trinova Corp.* v. *Mich. Dep't of Treasury*, 498 U.S. 358, 373 (1991) ("We seek to avoid formalism.").

Third, Judge Niemeyer apparently assumed that *any* three-tier system is "unquestionably legitimate." Although Judge Niemeyer is correct that states may implement a three-tier licensing system in the exercise of their authority under the Twenty-First Amendment, that Amendment "did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Granholm*, 544 U.S. at 484-85. States therefore may not enact discriminatory laws and then immunize them from Commerce Clause review by making them part of a "three-tier system." Judge Niemeyer's argument was rejected in *Granholm*, where "[t]he States argue[d] that any decision invalidating their direct shipment laws would call into question the constitutionality of the three-tier system." *Id.* at 488. The Court emphasized that the Twenty-First Amendment protects only three-tier systems that "treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489. States may have the authority to require separate licenses for producers, wholesalers, and retailers, but they may not use that authority – as does Virginia – to discriminate against interstate commerce.

B. The Constitutionality Of Virginia's Import Limit Raises Issues Of General Importance.

The constitutionality of the personal use limit involves a question of substantial importance that warrants this Court's review. At least thirty-three other states and the District of Columbia have similar discriminatory provisions, relics of the era after the repeal of Prohibition.[8] The Court took the

[8] Conn. Gen. Stat. § 12-436; Del. Code Ann. tit. 4, 716; Fla. Stat. ch. 562.15; Ga. Code Ann. § 3-3-8; Haw. Rev. Stat. § 281-33.1; Idaho Code § 23-610; 235 Ill. Comp. Stat. 5/1-3.16; Ind. Code § 7.1-5-11; Iowa Code § 123.22; Kan. Stat. Ann. § 41-501; Me. Rev. Stat. Ann. tit. 28-a, § 2076; Md. Code Ann. Tax-Gen., § 5-104; Mich. Comp. Laws § 436.1203(8)(a); Minn. Stat. § 297g.07; Mo. Rev. Stat. § 311.420; Mont. Code § 16-6-301; Neb. Rev. Stat. § 53-194.03; Nev. Rev. Stat. § 369.490; N.H. Rev. Stat. Ann. §

view at that time that the Twenty-First Amendment authorized discrimination against interstate commerce, and "unsurprisingly many States used the authority bestowed on them by the Court to expand trade barriers." *Granholm*, 544 U.S. at 485. This Court's "more recent cases" (*id.* at 486) changed that approach and struck down a number of protectionist alcohol regulations. See, e.g., *Healy* v. *The Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Authority*, 476 U.S. 573 (1986); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984). The Court should grant review here to bring clarity to the application of a principle that is of such substantial national importance.

Immediate review is particularly important because states are now restructuring their laws in the wake of *Granholm*. Several states, for example, have modified their statutes dealing with interstate shipment of wine, as did Virginia itself. See, *e.g.*, Kevin McCallum, *Historic Ruling on Wine Shipments Loses Some of Its Luster: Some Wineries Enjoy Access to New Markets Afforded by Top Court, While Others Soured by Rules, Fees*, The Press Democrat, May 16, 2006; Wine Institute, *United States Shipping Laws for Direct Shipping of Wine: State Shipping Laws*, http://wi.shipcompliant.com/Home.aspx (last visited Feb. 7, 2007). Washington State opened its market to out-of-state wineries on June 7, 2006. S.B. No. 6537, 59th Leg., Reg. Sess., (Wash. 2006), 2006 Wash. Legis. Serv. 49 (West). Maine is considering a bill, introduced on January 16, 2007, to allow out-of-state wineries to ship wine and malt liquor directly to Maine residents.

175:6; N.J. Stat. Ann. § 33:1-2; N.M. Stat. Ann. § 60-7A-3 (West); N.C. Gen. Stat. § 18B-402; N.D. Cent. Code § 5-01-16; Ohio Rev. Code § 4301.20; Okla. Stat. tit. 37, § 537; Or. Rev. Stat. § 471.405; 47 Penn. Cons. Stat. § 491(2); S.D. Codified Laws § 35-4-66; Tenn. Code §§ 57-3-401, 402; Tex. Alco. Bev. Code § 107.07; Vt. Stat. Ann. tit. 7, § 63; Wash. Rev. Code § 66.12.120; Wyo. Stat. Ann. § 12-3-101; D.C. Code § 25-7272

S. Paper No. 54, 123rd Leg., 1st Sess. (Me. 2007). Additional guidance from the Court now will be invaluable in keeping states from falling into (or failing to correct) constitutional error, and will prevent much future litigation.

Finally, and more generally, this Court has recognized its special role in policing state actions that disadvantage interstate commerce. Whether or not "the facts of this particular case, viewed in isolation, * * * appear to pose any threat to the health of the national economy,"

> history, including the history of commercial conflict that preceded the constitutional convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, provides the context in which each individual controversy must be judged. The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union. As Justice Cardozo recognized, to countenance discrimination of the sort that [Virginia's] statute represents would invite significant inroads on our "national solidarity."

Camps Newfound/Owatonna, 520 U.S. at 595 (quoting *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). In light of this important principle, the Court has acknowledged its "'duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'" *West Lynn Creamery*, 512 U.S. at 201 (quoting *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456 (1940)).

Here, the discriminatory impact is manifest. Because the decision below declined to remedy that discrimination, leaves the law in a state of considerable confusion, and addresses legal issues that are important and recurring, this Court should grant review.

II. THE ABC STORES RESTRICTION IMPERMISSIBLY LEVERAGES THE STATE'S REGULATORY AUTHORITY INTO A COMPETITIVE ADVANTAGE FOR LOCAL BUSINESS.

A. The Decision Below Misapplies This Court's Distinction Between "Market Regulators" And "Market Participants"

The Fourth Circuit's decision upholding the ABC stores restriction, another aspect of Virginia's discriminatory alcohol regime, also warrants review. Virginia law provides that only state-owned stores may sell liquor – and that those stores also may sell wine, but only wine produced in Virginia. The State thus has created a regulatory monopoly for itself in the sale of liquor and has leveraged that monopoly into a market advantage for Virginia wine producers. The decision upholding that concededly discriminatory statue under the market-participant exception to the Commerce Clause offers states an opportunity to engage in protectionist regulation, departs from principles announced by this Court, and adds confusion to an already murky area of the law.

1. The "market participant exception" allows a state to discriminate in favor of in-state interests when it is "acting as a market participant, rather than as a market regulator." *S.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 93 (1984) (plurality opinion). The doctrine protects states' ability to favor in-state business when they act "in the more general capacity of a market participant" as opposed to their "distinctive governmental capacity" as a regulator. *New Energy Co.* v. *Limbach*, 486 U.S. 269, 277 (1988). Thus understood, the doctrine permits states "to operate freely in the free market." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 437 (1980); see also *Limbach*, 486 U.S. at 277 (noting that exception protects "state participation in the free market"). States are not protected, by contrast, when they pass "regulatory measures impeding free private trade." *Reeves*, 447 U.S. at 437; see also

Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) (prohibiting application of the exception when "the State [has] interfered with the natural functioning of the interstate market").

The Court has looked for "exercises of governmental power (as opposed to the expenditure of state resources)" to determine whether states are acting as regulators rather than market participants. *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999); see also *Hughes*, 426 U.S. at 805 (upholding Maryland regulations that reduced "the flow of goods in interstate commerce" because the regulations affected the market by "bid[ding] up [the] price" but did not prevent private parties from participating in the market); *Reeves*, 447 U.S. 437, 440, 444 (1980) (finding that "South Dakota, as a seller of cement, unquestionably fits the 'market participant' label" because it did not otherwise regulate the market). Thus, to invoke the market participant exception, a state must show that it is "burdened with the same restrictions imposed on private market participants." *Reeves*, 447 U.S. at 439. Courts of appeals have interpreted this requirement to mean that a state is not a market participant if it acts in ways not available to private parties. See, *e.g.*, *Nat'l Solid Wastes Mgmt. Ass'n* v. *Daviess County*, 434 F.3d 898, 903 (6th Cir. 2006) ("[A] local government is engaged in market regulation * * * if it exercises governmental powers that are unavailable to private parties."); *SSC Corp.* v. *Town of Smithtown*, 66 F.3d 502, 512 (2d Cir. 1995) ("A state's actions constitute 'market participation' only if a private party could have engaged in the same actions.").

2. It would seem obvious that, so far as the ABC stores restriction is concerned, Virginia is not a market participant in the relevant sense because it has not subjected itself to "the same restrictions imposed on private market participants." *Reeves*, 448 U.S. at 439. It has distorted the market by creating a regime in which consumers who want to purchase all of their alcoholic beverages at one time or in one place *must*

purchase Virginia wine. There can be no denying this market distortion. Consider the example of a private Virginia hardware store. It might like to increase the sales of Acme hammers by requiring that all residents of the state who want to purchase their hammers and nails at once may buy only Acme hammers. But that sort of mandate is, of course, beyond the power of any private business to impose; if a private store imposes such a requirement on its customers, consumers of nails who prefer Apex hammers will simply take their business across the street. That sort of mandate, however, is just what Virginia accomplished in the ABC stores restriction when it effectively provided that Virginia residents who want to buy liquor and wine at the same time *must* purchase Virginia farm wine.

Moreover, the benefit conferred on Virginia wines by this regime is manifest. As Judge Goodwin noted, "[a] consumer's demand for purchasing a bottle of liquor *and* a bottle of wine *at the same time* may be satisfied *only* in ABC Stores." App., *infra*, 38a (emphasis in original). It necessarily is the case that a market structured in this way will increase sales of Virginia farm wine at the expense of competing out-of-state products. Consider our hardware store; no one can doubt that, if only one store in town were permitted to sell nails, it also would experience increased sales of screws, measuring tapes, and ladders as customers opted to buy related items simultaneously. Or consider the competitive pricing strategy of the "loss leader," in which discounts on one item lure consumers to a store where they also buy other items.[9] Virginia leverages its hard liquor monopoly in much the same way. But Virginia does not use a competitive pric-

[9] For an overview of the "loss leader" concept and its effectiveness as a marketing tool, see Rockney G. Walters & Scott B. MacKenzie, *A Structural Equations Analysis of the Impact of Price Promotions on Store Performance*, 25 J. MARKETING RES. 51 (1988).

ing strategy to draw customers to the ABC stores; instead, it uses its regulatory power to achieve the same advantage.

This sort of departure from ordinary market behavior on the part of the State cannot be reconciled with the rationale for the market-participant doctrine. The Court made just that point in *Wunnicke*, the leading decision on limits to the doctrine, where it invalidated a state requirement that timber taken from state lands be processed within the state prior to export. The controlling opinion made clear that the market-participant doctrine does not apply when the state gives itself an advantage unavailable to private participants in the market. The Court explained that ordinarily a purchaser of timber "retains the option" of deciding where to process the product, but in *Wunnicke* "the choice is made for him." 467 U.S. at 95 (plurality opinion). It noted that, "[i]n the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale." *Id*. at 96. And it emphasized that the state was "using its leverage in [one] market to exert a regulatory effect in [another] market." *Id*. at 98. Although the factual setting of this case is different, the governing principle is similar: Virginia is "leveraging" its monopoly power over liquor to affect the market for Virginia wine.

As a market regulator, and consistent with its powers under the Twenty-first Amendment, Virginia may exercise a monopoly over the sale of liquor in the State. As a market participant, it may choose to advantage Virginia farm wine at state-owned stores, provided that the market in which it operates is free. But it may not regulate to give itself a competitive advantage and then use that advantage to discriminate against interstate commerce. Such an interpretation would run counter to the "free market" principle that lies at the heart of the market participant exception and to the purpose of the Commerce Clause itself. See *White* v. *Mass. Council of Constr. Employers*, 460 U.S. 204, 218 (1983) (line between market participant and regulator should be drawn "with ref-

erence to the constitutional values giving rise to the market participant exemption itself.")

3. In holding to the contrary, the majority below did not actually deny that the combination of Virginia's liquor monopoly and the ABC stores restriction in fact increases sales of Virginia farm wine at the expense of out-of-state competitors.[10] Instead, the heart of its reasoning was its belief that "[t]hese are matters of convenience, not monopoly power." App., *infra*, 31a. But it is immaterial that consumers are not wholly deprived of choice if the state uses its regulatory authority to give itself an advantage in the market. The decisive point is that Virginia denies competitors a valuable market opportunity (offering both liquor and wine) that it monopolizes for itself. A retailer ordinarily "retains the option" of deciding which products to offer so as to obtain the best return, but in Virginia "the choice is made for him." *Wunnicke*, 467 U.S. at 95 (plurality opinion).[11]

The majority also went astray in its answer to Judge Goodwin's dissent. The majority complained that "there is no evidence in the record to support the dissent's single market theory in an economic sense," that "[t]he dissent cannot legitimately argue that * * * consumers demanding a bottle of whiskey or vodka will fulfill that demand by buying a bottle of wine," and that "[c]ommon sense compels the conclusion that there simply is no cross-elasticity of demand to justify

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[10] The majority did state that there is no evidence "[t]hat consumers face any impediment to purchasing wines of their preference at fair prices" (App., *infra*, 30a), but that is quite a different point; it says nothing about the positive competitive advantage conferred on Virginia farm wines.

[11] It also would be beside the point, even if true, that the impact on the market of the ABC stores restriction was not dramatic; the Court has "never recognized a 'de minimis' defense" to a facially discriminatory state law." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 333 & n.3 (1996).

concluding that there is a single market consisting of wine and liquor." App., *infra*, 31a. Even if this is so, however, it wholly misses the point. Whether or not they are substitutes for one another, wine, beer, and liquor surely are complements; many consumers purchase more than one type of alcoholic beverage and would prefer to do so at one time and in one place.[12] Judge Goodwin correctly noted that Virginia pushes all of those people to its ABC stores, where they may purchase only Virginia farm wines. The majority fails to respond at all to that point.

B. The Constitutionality Of Virginia's Discrimination Against Out-Of-State Wineries Raises Issues Of General Importance

The significant nature of the ruling below itself warrants review of the ABC stores holding. And the need for consideration by this Court is especially acute because the market-participant doctrine is one that is characterized by confusion and uncertainty. Indeed, *Wunnicke*, the Court's leading decision on the doctrine's limits, was itself a plurality opinion that recognized the "precise contours of the market-participant doctrine have yet to be established." 467 U.S. at 93 (plurality opinion).

It therefore is not surprising that the distinction between market participant and market regulator "is a fuzzy one that has perplexed courts and commentators alike." *Big Country Foods, Inc.* v. *Board of Educ. of Anchorage School Dist.*, 952 F.2d 1173, 1178 (9th Cir. 1992). See, *e.g.*, *Swin Resource Systems, Inc.* v. *Lycoming County*, 883 F.2d 245, 249 (3d Cir.

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[12] See generally Paul Samuelson, *Complementarity: An Essay on the 40th Anniversary of the Hicks-Allen Revolution in Demand Theory*, 12 J. Econ. Literature 1255, 1261 (1974)); Leff Smith, *For Some in the Area, That's A Real Holiday*, Washington Post, Jan. 1, 2007, at B1 (describing how D.C. metro residents—including Virginia suburbanites—travel to the District of Columbia to buy champagne and hard liquor for New Year's Eve parties).

1989) ("Application of the distinction between 'market participant' and 'market regulator' has, however, occasioned considerable dispute in the Supreme Court's jurisprudence."); *Shell Oil Co.* v. *Santa Monica*, 830 F.2d 1052, 1056 (9th Cir. 1987) ("[T]he key distinction between 'market regulator' and 'market participant' * * * though clearly defined in theory, has occasioned considerable dispute in application.") (internal citations omitted); 1 Laurence H. Tribe, *American Constitutional Law* 1091 (3d ed. 2000) ("Indeed, the line between market participation and market regulation, which was less than pellucid even in *Alexandria Scrap*, has if anything been further obscured since."); Barton B. Clark, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 616 (1993) ("Current doctrine offers little direction to courts that must apply the exception. The Supreme Court has not yet identified criteria which reliably identify when states are acting as market participants.") Karl Manheim, *New-Age Federalism and the Market Participant Doctrine*, 22 Ariz. St. L.J. 559 (1990); Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich.L.Rev. 395 (1989).[13]

This Court itself has in the past been unable to resolve market-participant questions. In *Western Oil & Gas Ass'n* v. *Cory*, 726 F.2d 1340, 1341 (9th Cir. 1984), *aff'd by an equally divided court*, 471 U.S. 81 (1985), an equally divided Court affirmed a decision by the Ninth Circuit invalidating a

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[13] Imprecision in the doctrine has led to conflicting outcomes on identical facts. Compare, *e.g.*, *W.C.M. Window Co., Inc.* v. *Bernardi*, 730 F.2d 486, 496 (7th Cir. 1984) (striking down state law requiring contractors on any public works project to hire only state laborers), with *Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903, 912 (3d Cir. 1990) (upholding similar state law); *Big Country Foods, Inc. v Board of Education of Anchorage School District*, 952 F.2d 1173, 1179 (9th Cir. 1992) (same).

state law that had some similarity to the one at issue here. In that case, California discriminated against interstate and foreign commerce in the rent it charged for pipelines that traversed state land. As here, the State tried to justify the discrimination as market activity, "maintain[ing] that [California] is merely one of many participants in the market competing for leases." *Id.* at 1342. But in contrast to the Fourth Circuit in this case, the Ninth Circuit rejected the State's argument, reasoning that, because California owned the land "in its sovereign capacity" and had "a complete monopoly over the sites," it exercised "control over the channels of interstate commerce." *Ibid.* This Court granted certiorari to address the market-participant issue, but instead divided evenly. A grant of review here would allow the Court to provide the guidance precluded by its division in *Western Oil & Gas Ass'n*.

In addition, although the importance of resolving confusion about the market participant doctrine transcends the Twenty-First Amendment context, review in this case would bring much-needed clarity in that area as well. Many states have state-run liquor stores. See, *e.g.*, Ala. Admin. Code r.20-X-4-.01; N.H. Rev. Stat. Ann. § 177:1; Utah Code Ann. § 32A-2-101; Wyo. Code Ann. § 12-2-301. As states seek to bring their laws in line with the Constitution after *Granholm*, guidance by this Court is essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN KAHAN
GIOVANNA SHAY
Yale Law School
Supreme Court Advocacy Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

DANIEL R. ORTIZ
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

MATTHEW S. HALE
45 Rivermont Drive
Newport News, VA 23601

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