Nos. 03-1116 and 03-1120

IN THE

Supreme Court of the United States

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

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE
WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the DKT Liberty Project was founded to promote civil liberties – including economic liberties – against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of civil and economic liberties that threaten the reservation of power to the citizenry that underlies our constitutional system.

The protectionist and discriminatory state laws at issue in this case implicate fundamental constitutional guarantees against government overreaching. The Liberty Project submits this brief to provide a full discussion of the historical context and original understanding of Section 2 of the 21st Amendment, which demonstrates that the Amendment did not give states the unprecedented power to discriminate against the citizens and products of other states.

SUMMARY OF ARGUMENT

Section 2 of the 21st Amendment provides:

> 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. As its language indicates, Section 2 gives constitutional sanction and effect to state laws regulating transportation or importation of alcohol by prohibiting the violation of those state laws. Petitioners and their supporting state *amici* concede, however, that Section 2

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[1] This brief is filed with the consent of the parties, as indicated by letters filed with the Court. No party authored this brief in whole or in part and no one, other than *amicus curiae* or its counsel, monetarily contributed to the preparation or submission of this brief.

does *not* give effect to *all* such state laws, regardless of the constitutional validity they would otherwise have. Mich. Pet. Br. 31; Mich. Wholesalers Ass'n Pet. Br. 14; Ohio Amicus Br. 9. For example, Section 2 does not allow states to discriminate on the basis of race or gender by banning importation by black but not white persons, or by men but not women. Petitioners nonetheless claim that Section 2 does allow overt protectionist discrimination in favor of in-state products and against out-of-state products.

Whatever merit Petitioners' argument might have, it cannot rely on the *text* of Section 2, which in no way distinguishes between the validity of state laws that discriminate on the basis of state origin and those that discriminate on the basis of race or gender or violate other constitutional proscriptions. In truth, Petitioners' position is based not on the Amendment's text, but on a historical premise: that Section 2 was intended to override the Commerce Clause, but not other constitutional provisions.

The legal history is clear, however, that Section 2 was intended to override the then-prevalent understanding of the Commerce Clause only insofar as the Section allows states to regulate importation and transportation of alcohol through *evenhanded* police laws. Section 2 does not trump the virtually *per se* Commerce Clause rule that prevents states from *discriminating* against out-of-state products or against interstate commerce generally.

The text of Section 2 was based directly on the language of the pre-Prohibition Webb-Kenyon Act. Indeed, Petitioners concede that the purpose of Section 2 was to write the rule of Webb-Kenyon into the Constitution. *See infra* at 22. But when the 21st Amendment was ratified, it was well-established that the Webb-Kenyon Act and its precursor, the Wilson Act, allowed enforcement only of evenhanded state police laws regulating or prohibiting alcohol, not

discriminatory or protectionist laws. Section 2 enshrined that rule in the Constitution, but did not give the states new and unprecedented powers to discriminate.

In the 19th century, prior to passage of the Wilson and Webb-Kenyon Acts, this Court held that states had plenary authority under their police powers to regulate alcohol use and distribution, but that state laws enacted pursuant to that plenary police power nonetheless could not – without congressional authorization – reach interstate commerce in alcohol, because the Commerce Clause committed regulation of interstate commerce exclusively to Congress. In addition, the Court broadly construed interstate commerce to encompass not only the transportation and importation of alcoholic beverages (or other articles of commerce), but also their resale in the "original package." Thus, even when a state passed a comprehensive, nondiscriminatory prohibition law banning all alcohol sales, a merchant was still free to set up shop to import alcohol from out of state and resell it in state in its original package. Interstate commerce and out-of-state products were thereby *favored* over domestic commerce and products, because the former were *absolutely* beyond state regulation, even under evenhanded police laws. That rendered state-level prohibition meaningless as a practical matter.

The Wilson Act was Congress's first attempt to remedy this situation by leveling the playing field and allowing states to regulate imported alcohol on the same terms as the domestic product. The Wilson Act allowed states to enforce their police laws against imported alcohol once it was received by the in-state consignee. Hence, resale of the imported product in state, even when still in the original package, became subject to state regulation. The Wilson Act's constitutionality was hotly contested, however, on the ground that the Act represented an unconstitutional

delegation to the states of Congress's exclusive commerce power. Rejecting that argument, this Court reaffirmed the established principle that Congress could not delegate its commerce power, but held that the Wilson Act was not such a delegation insofar as it permitted states to enforce their evenhanded police laws to imported alcohol. The Court reasoned that the Wilson Act did not delegate Congress's commerce power, but instead merely took the interstate-commerce immunity to state regulation away from imported alcohol, thereby allowing the states' preexisting police powers to reach those imports.

Although subtle, the distinction drawn by the Court between an impermissible delegation of the commerce power and a permissible elimination of immunity from state police laws had enormous practical significance: it meant that states could subject imports only to traditional police regulation, which does *not* include the power to *discriminate* against out-of-state products. Thus, in the landmark case of *Scott v. Donald*, 165 U.S. 58 (1897), the Court held that the Wilson Act does not allow a state to enforce a law that discriminates against imports in favor of in-state products, precisely because protectionist and discriminatory state laws are not encompassed within the states' police power. The Court unanimously reiterated that holding in *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898), explaining that discrimination against out-of-state products is "not a police law, in the correct sense of those words," *id.* at 450; *see also id.* at 462 (Shiras, J., dissenting) (agreeing that discrimination by state is not a "bona fide exercise of its police power").

The Webb-Kenyon Act extended the Wilson Act to cover not only the resale of imported alcohol in the original package, but also the acts of transporting and importing such alcohol into the state in the first instance. But the Webb-Kenyon Act did not – and could not – alter the rule of *Scott*

and *Vance* that removal of the interstate commerce immunity from alcohol imports still allowed enforcement only of evenhanded state laws, because discriminatory regulations are not bona fide police laws. Indeed, this Court expressly held that the power exercised by Congress in the Webb-Kenyon Act was identical to that behind the Wilson Act, the only difference being that Webb-Kenyon allows evenhanded state regulation at an earlier point in the course of importation. The legislative history of Webb-Kenyon confirms that construction and is replete with explanations that the purpose of the law was to subject imports to the *same* police regulations that apply to domestic alcohol. And, adhering to this Court's rulings in *Scott* and *Vance*, the South Carolina Supreme Court held that the Webb-Kenyon Act, like the Wilson Act, does not permit enforcement of state laws that discriminate against out-of-state products. In contrast, we are unaware of *any* case upholding a discriminatory state law under either the Wilson or the Webb-Kenyon Act.

The 18th Amendment destroyed the balance struck by Webb-Kenyon by both nationalizing and constitutionalizing a subject that had been left to state police regulation. When that experiment failed, the purpose of the 21st Amendment was not simply to end Prohibition, but to restore the prior balance of authority established by the Webb-Kenyon Act. But the framers of the 21st Amendment understood that a future Congress could repeal a statute such as Webb-Kenyon, and dissenting opinions from this Court precluded certainty about the statute's constitutionality. If Webb-Kenyon were repealed or struck down in the future, imported alcohol would again become immune from *all* state police regulations, and dry states could no longer be dry. To prevent that from occurring, the text of the Webb-Kenyon Act, edited to remove excess verbiage, was included in the 21st Amendment as Section 2.

That constitutionalization of the rule did not alter its scope in any way, and certainly did not authorize unprecedented discrimination against out-of-state products. When the 21st Amendment was ratified, the rule was well established that states could not pass or enforce laws discriminating against imported alcohol, even after the imports lost their interstate-commerce immunity to state regulation. State laws that discriminate against goods imported from other states are *per se* invalid, and always have been. Section 2 did not change that rule, but simply gave constitutional assurance that otherwise valid state laws could reach imports on the same terms as domestic products.

ARGUMENT

The History of the 21st Amendment Demonstrates That Section 2 Permits States to Regulate Imported Alcohol Pursuant to Evenhanded Laws, Not to Discriminate Against Out-of-State Products.

A. Before Section 2, the Commerce Clause Barred States from *All* Regulation of Alcohol Importation or Resale in the Original Package, Gutting State Prohibition Laws.

The 21st Amendment was adopted in 1933, before the fundamental changes in Commerce Clause doctrine that began during the New Deal. At that time, a century of decisions from this Court, stretching back to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), treated the spheres of state and federal regulation as absolutely separate and mutually exclusive. The states but not the federal government could regulate their own domestic affairs under the police power, whereas the federal government but not the states could regulate interstate commerce. While the borderline between these spheres was sometimes obscure,

once established it could not be crossed. As the Court explained in 1891:

> [I]t is not to be doubted that the power to make the ordinary regulations of police remains with the individual states, and cannot be assumed by the national government . . . . The power of congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is also exclusive.

Wilkerson v. Rahrer, 140 U.S. 545, 555 (1891). In the absence of congressional regulation, interstate commerce was deemed to be free and unregulated by the states as well:

> The constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as congress might impose restraint. Therefore it has been determined that the failure of congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states.

Id.

Accordingly, once a subject was determined to be "interstate commerce," it was wholly outside the reach of state regulation, absent congressional action. Interstate commerce was, moreover, expansively defined to include not only the interstate sale and shipment of goods, but also the resale of imports within a state so long as they remained in their "original package." *See, e.g., Leisy v. Hardin*, 135 U.S. 100, 110-11, 122 (1890); *Vance*, 170 U.S. at 444-45.

As a result, the Commerce Clause barred state regulation of commerce in alcoholic beverages in at least three distinct ways:

> (a) Beyond dispute, the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, . . . *provided . . . that the regulations do not operate a discrimination* against the rights of residents or citizens of other states of the Union.
>
> (b) Equally well established is the proposition that the *right to send liquors from one state into another, and the act of sending the same*, is interstate commerce, the regulation whereof has been committed by the constitution of the United States to congress, and hence that a state law which denies such a right . . . is in conflict with the constitution of the United States.
>
> (c) It is also certain that the settled doctrine is that the power to ship merchandise from one state into another carries with it, as an incident, *the right in the receiver of the goods to sell them in the original packages*, any state regulation to the contrary notwithstanding . . . .

Vance, 170 U.S. at 444-45 (emphasis added).

Thus, the requirement that states regulate evenhandedly and not "discriminat[e] against the rights of residents or citizens of other states" was then, as it is now, an absolute limitation on the states' plenary or police powers (paragraph (a) above). *See also, e.g., Walling v. Michigan*, 116 U.S. 446, 460 (1886) (observing that the "police power . . . would be a perfect justification" of a tax on alcohol "if it did not discriminate against the citizens and products of other states"); *McDermott v. Wisconsin*, 228 U.S. 115, 132 (1913)

("it is . . . well settled that the state may not, under the guise of exercising its police power or otherwise, . . . discriminate against interstate commerce").

In addition, however, the Commerce Clause also gave *favored* treatment to interstate transactions by absolutely immunizing them from the very same state laws that applied to wholly domestic matters. And that immunity from state regulation extended not only to sales and importation across state lines (paragraph (b) above), but also to subsequent sales of imports within the state itself, so long as the imported products remained in their original packages (paragraph (c)).

Leisy v. Hardin, 135 U.S. 100 (1890), exemplifies how that then-established understanding of the Commerce Clause effectively nullified state prohibition laws. At issue in *Leisy* was an Iowa law that absolutely prohibited all sales of alcoholic beverages, whether domestic or imported. *Id.* at 124.[2] The Court nonetheless held that the Iowa law could not, without congressional authorization, be enforced against non-residents who imported alcohol from neighboring states and resold it in Iowa in its original packages. *Id.* at 124-25. As the facts in *Leisy* itself vividly attest, that immunity from state regulation allowed importers to set up shops in the nominally dry state for the sale of imported alcohol in its original package, rendering the state's prohibition law a dead letter.

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[2] The Iowa law – like most of the other state regulations discussed in this brief – contained exceptions for non-beverage alcohol sold for sacramental, chemical, or medicinal purposes. In the case of sales for medicinal purposes, the exception applied only to licensed pharmacists who were Iowa citizens. 135 U.S. at 124. However, that discriminatory element of the law was not at issue in *Leisy*, because the out-of-state plaintiffs sought to sell imported alcohol as a beverage, not for medicinal purposes, and the Iowa law absolutely banned the sale of beverage alcohol by citizens and non-citizens alike.

B. The Wilson Act Took Away the Immunity of Original Package Sales from State Police Regulation, But Did Not and Could Not Give States a New Power to Discriminate Against Imported Alcohol.

Five months after *Leisy* was decided, Congress reacted by passing the Wilson Act, which provides:

> That all . . . intoxicating liquors . . . transported into any State or Territory . . . shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such . . . liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

26 Stat. 313, ch. 728 (1890), *codified at* 27 U.S.C. § 121.

The Wilson Act was subject to almost immediate attack as an unconstitutional delegation of congressional power. *See Wilkerson v. Rahrer*, 140 U.S. 545 (1891). The day after the Act's passage, a non-resident was arrested for selling imported alcohol in its original package in Kansas, in violation of that state's general prohibition law, which "applied to the sale of all intoxicating liquors whether imported or not." *Id.* at 564. The Court in *Rahrer* began with and reaffirmed the well-established premise "that congress can neither delegate its own powers, nor enlarge those of a state." *Id.* at 560. The Court nonetheless upheld the Wilson Act's constitutionality on the ground that "congress ha[d] not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws." *Id.* at 561. Instead, the Court found,

Congress had removed a barrier to the enforcement of otherwise valid and nondiscriminatory "laws of the state . . . passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not." *Id.* at 564. The Wilson Act simply "provide[s] that certain designated subjects of interstate commerce shall be governed by a rule which divests them as of that character at an earlier period of time than would otherwise be the case." *Id.* at 562. Thus:

> Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition . . . .

Id. at 564. By divesting imported alcohol of its character as interstate commerce, Congress eliminated its immunity from state regulation, thereby allowing the same police laws that applied to domestic alcohol to take effect.

In *Scott v. Donald*, 165 U.S. 58 (1897), the Court made explicit what was implicit in the rationale of *Rahrer*: the Wilson Act did not permit states to enforce protectionist laws that discriminated against imported alcohol in favor of domestic products. The Court explained:

> The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid; or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the state cannot, under the [Wilson Act], establish a system which, in effect, discriminates between interstate and domestic commerce . . . .

Id. at 100. Under the Wilson Act, "equality or uniformity of treatment under state laws was intended," so that the Act "was not intended to confer upon any state the power to discriminate injuriously against the products of any other state." *Id.* Thus,

> when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other states; . . . such legislation is void as . . . an unjust preference of the products of the enacting state as against similar products of the other states.

Id. at 101. Applying this construction of the Act, the Court struck down the South Carolina law at issue in *Scott*, because the law discriminated against sales of imported alcohol in the original package in favor of domestic alcohol. *Id.* at 99.

The Court unanimously reaffirmed *Scott*'s holding the next year in *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898). As the majority opinion explained:

> [A]lthough the [Wilson Act] authorizes a state law to attach to an original package so as to prevent its sale, it did not contemplate and sanction the operation of a state law which injuriously discriminated against the products of other states, and which *in consequence of such discrimination, was not a police law, in the correct sense of those words.*

Id. at 449-50 (emphasis added). In complete agreement on this point, the dissent in *Vance* likewise explained that a state alcohol regulation is not "a bona fide exercise of [a state's] police power," and thus is not effective under the Wilson Act, unless it applies "with equal effect as to such liquor whether imported or of domestic manufacture." *Id.* at 462 (Shiras, J., dissenting). The majority and dissent disagreed

about the application of this antidiscrimination principle in the particular case before the Court, with the majority upholding the South Carolina law as it applied to original package sales on the ground that it had been amended since *Scott* to eliminate discrimination against imports. *See id.* at 443 (finding that statute "does not contain those clauses in the previous statute which were held to operate as a discrimination"). Despite this disagreement concerning application, not a single Justice disputed that a law that discriminates is not a valid exercise of the state's police power, and thus could not be enforced under the Wilson Act.

On the same day it decided *Vance*, a sharply divided Court also gave the Wilson Act a narrowing construction in *Rhodes v. Iowa*, 170 U.S. 412 (1898). *Rhodes* held that imported alcohol did not "arrive" in a state for purposes of the Wilson Act until it had been received by the in-state consignee, which meant that even a nondiscriminatory police law could not be applied during the importation and transportation of alcohol until delivery to the consignee. *Id.* at 426. The Court reasoned that importation and interstate transportation are core aspects of interstate commerce, whereas resale of imports in the original package is merely an incident of such commerce. *Id.* at 424. The Court therefore required a clear statement from Congress before the immunity of interstate commerce would be removed from transportation and importation as well as from resale in the original package. *Id.* (requiring "the clearest implication"); *see also id.* at 423 (observing that had that been Congress's intent, "such purpose would have been easy of expression"). Accordingly, the Court held that Iowa's evenhanded law concerning transportation of alcohol within the state could not be applied to a imported shipment until transportation was completed by delivery to the in-state consignee. *Id.* at 426; *see also id.* at 418-19 (observing that Iowa law applied

both to transportation originating within and outside the state).[3]

C. The Webb-Kenyon Act Extended the Wilson Act So That Evenhanded State Regulation Could Reach Importation and Interstate Transportation of Alcohol, But the Act Did Not Create a New Power to Discriminate Against Imports.

The clear statement demanded by the Court in *Rhodes* was supplied by Congress in 1913 though the Webb-Kenyon Act, which provides:

> That the shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State, Territory, or District of the United States . . . into any other State, Territory, or District . . . which . . . intoxicating liquor is intended . . . 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 . . . is hereby prohibited.

37 Stat. 699-700, ch. 90 (1913), *codified at* 27 U.S.C. § 122.

Read in historical context, the plain effect of the Webb-Kenyon Act is to extend the rule of the Wilson Act so that state police laws could reach importation and transportation

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[3] *See also Vance*, 170 U.S. at 451-57 (upholding evenhanded state law as it applied to resale of imported alcohol in original package, but following *Rhodes* in holding that another evenhanded provision could not be enforced against interstate shipper); *Adam Express Co. v. Kentucky*, 214 U.S. 218 (1909) (following *Rhodes* in holding that evenhanded law barring knowing transportation of alcohol to inebriate could not be enforced against interstate shipper); *Louisville & Nashville R.R. Co. v. F.W. Cook Brewing Co.*, 223 U.S. 70 (1912) (following *Rhodes* and holding that evenhanded law barring transportation of alcohol to consignee in dry county could not be enforced against interstate shipper).

of alcohol *before* delivery to the in-state consignee. Equally clear, the Webb-Kenyon Act, like the Wilson Act, only gives effect to evenhanded state laws, not laws that discriminate against interstate commerce. When Webb-Kenyon was enacted, it was well established that Congress could not delegate its commerce power, but could only "remove[] an impediment to the enforcement of . . . state laws" "passed in the exercise of [the state's] police powers." *Rahrer*, 140 U.S. at 564. That Congress intended to do just that through Webb-Kenyon is confirmed by its title: "An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases." 37 Stat. 699. But divesting imports of their interstate character could not have empowered states to enforce protectionist laws discriminating against imports, because it had long been established that discriminatory laws are not proper or bona fide police laws in the first place. *Supra* at 8, 11-13. Thus, by prohibiting "shipment or transportation . . . in violation of any law of such state," the Webb-Kenyon Act plainly means any *valid* police law, not an invalid discriminatory one. In 1913, no one reading the Act's language against the background of this Court's decisions would have understood its text in any other way.

That contemporaneous understanding of the words of Webb-Kenyon is confirmed by the legislative debates concerning it. Senator Kenyon introduced the bill with a lengthy account of this Court's decisions on the subject, 49 Cong. Rec. 765-69 (1912), and emphasized that under those decisions "an article may be taken out of commerce by Congress" and "that by such legislation Congress does not delegate the power to regulate commerce . . . , or . . . enlarge the police power of the States, or grant a power not possessed by them." *Id.* at 767.

Consistent with that understanding, other supporters of the bill repeatedly characterized it as subjecting imports to

the very same police laws that apply to domestic alcohol. As Senator Thornton explained:

> This bill permits the States to exercise the same police power over liquor shipped into its territory from another State that it could exercise over it if the shipment originated within its territory . . . .

49 Cong. Rec. 2912 (1913). Senator Webb likewise stated:

> We simply ask for equal justice. . . . We simply ask you "to deprive liquors intended for unlawful purposes of interstate commerce character, and let us deal with such imported liquors as we would with liquors of domestic production intended for the same unlawful purposes."

Id. at 2912-13. Senator Stone made exactly the same point:

> The pending bill . . . would in effect merely strip these particular commodities of their character as articles of interstate commerce, and thus withdraw from them the protection the Federal law now throws over them against the law and police regulations of the State. It 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.

Id. at 2917.

Equally telling are the arguments put forward by the opponents of the bill. They contended at great length and with great vehemence that regardless of the labels used, the bill sought to effect an unconstitutional delegation to the states of Congress's power to regulate interstate commerce. They maintained that interstate transportation – unlike the original-package sales covered by the Wilson Act – is a core aspect of interstate commerce within the meaning of the

Constitution, and that Congress was powerless to alter the constitutional division of powers simply by declaring that core interstate commerce is something else. *E.g., id.* at 2909-11 (Sen. Sutherland); *id.* at 2899-2903 (Sen. Pomerene). Yet, except for a single passing reference, the opponents never suggested that the bill was unconstitutional for the additional and far more compelling reason that it purported to authorize protectionist laws discriminating against out-of-state products.[4] Given this Court's established doctrine that discrimination against imports is inherently invalid and not a proper object of state police laws, surely the bill's erudite critics would have placed very heavy emphasis on that additional constitutional infirmity if such a reading had even been imaginable. If ever there was a case of "the dog that did not bark," this is it. *E.g., Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).[5]

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[4] The passing reference to the possibility of discrimination was made by Senator Root in the course of arguing that the bill was "not giving up the regulation and allowing police law to take its place. It is handing over the power of regulation to the State . . . ." *Id.* at 2915. That merely drives home the point, however, that Congress could not have authorized the states to discriminate against imports except by delegation of Congress's own power to regulate interstate commerce, something that all agreed this Court's precedents forbade.

[5] Nor is there merit to the Wholesaler Petitioners' contention that the Webb-Kenyon Act authorizes discrimination by negative implication because the law as enacted includes only the first and not the second section of the original proposed Senate bill, which Petitioners claim would have expressly outlawed discrimination. Mich. Wholesalers Ass'n Pet. Br. 24. The record is clear that, with respect to the first and section sections of the original bill, the Senators saw the "purpose sought to be accomplished by each of these sections [as] *precisely the same*, namely, to allow the State jurisdiction over intoxicating liquors to attach upon the instant that such liquors . . . cross the boundary lines of the State," but that "section 2 does directly what section 1 does indirectly." 49 Cong. Rec. at 2903-04 (Sen. Sutherland) (emphasis added). The proposed second section was therefore seen by friends and foes alike as being *more*

Subsequent judicial decisions confirm that the Webb-Kenyon Act merely extended the Wilson Act so that state jurisdiction attaches at an earlier stage when imports crossed the border, without giving states an unprecedented and constitutionally dubious power to discriminate against imports. In *James Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917), a divided Court upheld the constitutionality of Webb-Kenyon as it applied to a nondiscriminatory West Virginia prohibition law that "forbade the shipment into or transportation of liquor in the state, whether from inside or out." *Id.* at 321; *see also id.* at 318 (state law barred "all shipments . . . whether from within

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vulnerable than the first section to constitutional attack as a *direct* delegation of power to the states. *E.g.*, *id.* at 830 (Sen. Kenyon) ("The first section takes certain liquor out of commerce and the second section seems to recognize it as being in," thereby creating objection that second section would be direct delegation to states of power over interstate commerce rather than removal of immunity); *id.* at 2914 (Sen. Root) (stating with respect to second section that "the friends of the bill have practically conceded that it is not constitutional"); *id.* at 2919 (Sen. Borah) (stating that he could not vote for second section "entertaining the view which I do as to its unconstitutionality" but that "in regard to the first section . . . I think . . . it is not subject to the inhibition of the Constitution"). Plainly, the Senators' unanimous evaluation of the two sections' comparative constitutional vulnerabilities would have been exactly the opposite – the first section would have been more objectionable than the second – if they had entertained any notion that the former actually allowed discrimination while the latter did not. There is not one hint of that in the legislative debates. Ultimately, the sponsors of the Senate bill moved to strike the second section simply because it had not been part of the bill already passed by the House, "in the hope [that the bill] will more likely become a law than if we send the Senate bill to the House as a separate and independent measure, couched in different language from that which is employed in the House bill." *Id.* at 2918 (Sen. Gallinger). In short, the deletion of section 2 from the original Senate bill cannot in any way support the negative inference that the remaining section that was passed into law was somehow intended to authorize discrimination.

or without the state"). The Court observed that though the Wilson Act allowed states to regulate sales in the original package *after* receipt in state, "the right to receive liquor was not affected by the Wilson Act" and so had remained beyond the reach of state police laws. *Id.* at 323. Given this history, the Court construed Webb-Kenyon as simply extending the Wilson Act's rule to imports prior to receipt, as well as after:

> Reading the Webb-Kenyon Law in the light . . . thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws . . . .

Id. at 323-24.

Hence, as the Webb-Kenyon Act simply "took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law," *id.* at 325, "[t]he argument as to delegation to the states rests upon a mere misconception." *Id.* at 326. The Court therefore concluded:

> As the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought to play in the other, we are unable to understand upon what principle we could hold that the one was not a [constitutional] regulation without holding that the other had the same infirmity . . . .

Id. at 330.

Although *James Clark* did not directly present or address the question of discrimination against imports, its rationale makes clear that discrimination is no more permissible under the Webb-Kenyon Act than under the Wilson Act. The later law was but the extension of the earlier, enacted pursuant to the identical power, so that it applied to imports from the moment they crossed the border. Neither statute was an unconstitutional delegation of the commerce power, because both merely removed an immunity from otherwise lawful state police regulation. In short, under the Webb-Kenyon Act as under the Wilson Act, "evidently equality or uniformity of treatment under state laws was intended." *Scott*, 165 U.S. at 100.

Exactly that was the conclusion reached in the only case we have found that directly addressed the enforceability of a discriminatory state law under the Webb-Kenyon Act. *See Brennan v. Southern Express Co.*, 90 S.E. 402 (S.C. 1916). That case concerned South Carolina's alcohol regulations, which had also been at issue in both *Scott* and *Vance*. *Brennan* addressed the validity of the state's laws at two different times: an earlier period in which the state overtly discriminated against imports in favor of domestic sales, and a later period in which that discrimination had been replaced by evenhanded regulation. *Id.* at 403-04. Anticipating this Court's decision a few months later in *James Clark*, the South Carolina court upheld the enforceability of the later, *evenhanded* state law under Webb-Kenyon. Specifically, the court rejected the argument that under Webb-Kenyon a state law could not forbid importation unless it also prohibited use, explaining:

> If absolute prohibition does not offend the Constitution, by what power of reasoning can it be asserted that the lesser exertion of power in a measure of restriction and regulation does, *provided, of*

> *course, it be equal and uniform in application and operation.*

Id. at 406 (emphasis added); *accord James Clark*, 242 U.S. at 324-25 (reaching same conclusion).

The validity of the state law when it discriminated against imports was quite another matter. The South Carolina court reasoned that the question had been squarely decided in *Scott*, and that the subsequent enactment of the Webb-Kenyon Act did not change the result. 90 S.E. at 403-04.

> [F]or, while that act does divest intoxicating liquors . . . of their interstate character and withdraw from them the protection of interstate commerce, it evidently contemplated the violation of only *valid* state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states . . . .

Id. at 404 (emphasis added) (observing also that "the same thing was said in Scott v. Donald of the Wilson Act . . . , by which Congress made liquors shipped into a state subject to its laws after delivery thereof to the consignee. The principle there decided was reaffirmed in *Vance* . . .").

That was where the law stood when the 18th Amendment was ratified in 1919.

D. After Prohibition, Section 2 Restored and Constitutionalized the States' Power Under Webb-Kenyon to Regulate Imported Alcohol, But Did Not Create a New Power to Discriminate.

The balance struck by the Webb-Kenyon Act was violently disrupted by the 18th Amendment, which nationalized and constitutionalized a matter that had until then been committed to the states: police laws regulating

alcohol. That radical departure from historical practice was a notorious failure. As Senator Wagner explained, arguing for repeal:

> [T]he question which has troubled the American people since the eighteenth amendment was added to the Constitution was not at all concerned with liquor. It was a question of government; how to *restore* the constitutional balance of power and authority in our Federal system which had been upset by national prohibition.

76 Cong. Rec. 4144 (emphasis added).

Accordingly, the repeal of the 18th Amendment did not simply supplant nationwide prohibition with nationwide free-trade in alcohol. Instead, it sought to restore the balance in federal and state power that had prevailed before 1919. That purpose is reflected in the language of Section 2 itself, which is directly based upon the language of the Webb-Kenyon Act.[6] Indeed, as Petitioners concede, Section 2 wrote the Webb-Kenyon Act into the Constitution, thereby permanently restoring the scope of state power as it existed immediately prior to Prohibition. Mich. Wholesalers Ass'n Pet. Br. 16; *see also* Mich. Pet. Br. 38.

The inclusion of Section 2 in the Amendment repealing Prohibition was thought necessary to ensure that the states

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[6] *Compare* U.S. Const. amend. XXI, § 2 ("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"), *with* 37 Stat. 699-700 ("That the shipment or transportation . . . of any . . . intoxicating liquor . . . from one State, Territory, or District of the United States . . . into any other State, Territory, or District . . . which . . . intoxicating liquor is intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State, Territory, or District . . . is hereby prohibited").

would have the power to enforce their local alcohol policies and, in particular, that the dry states could remain dry. As one congressman explained, Section 2 would "aid and protect the so-called dry States in permitting them to exclude, if their citizens so wish, all liquor traffic in their domains." 76 Cong. Rec. 4526 (1933) (Rep. Herney).[7]

To be sure, the states could already exercise that power under the Webb-Kenyon Act. But that statutory measure was deemed to be inadequate assurance for the dry states, for two reasons: it could be repealed by a simple act of Congress, and it could be held unconstitutional by this Court. Senator Borah drove those points home in an eloquent plea for the inclusion of Section 2 in the Amendment. He reminded the Senate that the constitutionality of Webb-Kenyon had been sustained by a divided Court in *James Clark*, and that many eminent jurists – including President (later Chief Justice) Taft, Senator Elihu Root, and Senator (later Justice) Sutherland – had all argued against the law's constitutionality. 76 Cong. Rec. 4170. Moreover, as soon as the Act was sustained in *James Clark*, a campaign had been waged to repeal it in Congress, or to challenge it again in this Court. *Id.* Senator Borah therefore warned that, without Section 2,

> we are turning the dry States over for protection to a law which is still of doubtful constitutionality and

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[7] *See also id.* at 4171 (Sen. Wagner) (stating no objection to Section 2 "if the dry States want additional assurance that they will be protected . . ."); *id.* at 4517 (Rep. McLeod) (describing Section 2 as "the added section of protection for dry States"); *id.* at 4518 (Rep. Robinson) ("Section 2 attempts to protect dry States"); *id.* at 4159 (Rep. Garber) ("[Section 2], it is claimed, will protect the dry States"); *id.* at 4523 (Rep. McSwain) ("[I]f 36 States should act in favor of ratifying this proposed amendment, then, undoubtedly, each and every State in the Union could be just as dry as its own laws make it . . .").

> which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it. [In addition,] we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law

Id.

Senator Borah then turned to describing what would happen if Webb-Kenyon were repealed or struck down. He recalled that after this Court's decision in *Leisy v. Hardin*, "[t]he States . . . were powerless to protect themselves against the importation of liquor into the States" *Id.* at 4171 (adding that "[t]here never was any real chance for the dry States to enforce their laws after the decision which was made in the case of Leisy against Hardin[]"). He then summed up the devastating effects of nullifying "the right of the States, in the exercise of the police powers, to control the liquor traffic within the States," and concluded:

> All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed [other Senators have] seen fit to recognize the justice and fairness to the states of incorporating it permanently in the Constitution of the United States.

Id. at 4172.

Exactly the same understanding of Section 2 as incorporating Webb-Kenyon in the Constitution is demonstrated by Senator Blaine's report of the views of the Judiciary Committee in proposing the Section. He began by reviewing the Wilson and Webb-Kenyon Acts, through which "Congress itself regulated interstate commerce to the

point of removing all immunities of liquor in interstate commerce." *Id.* at 4140.[8] But, Senator Blaine observed,

> [i]n the case of Clark against Maryland Railway Co. there was a divided opinion [sustaining the Webb-Kenyon Act]. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, 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.

Id. at 4141.

In short, Section 2 was understood by all as incorporating the Webb-Kenyon Act directly into the Constitution, thereby permanently restoring the states' ability to enforce their police laws against imported and domestic alcohol alike. That is consistent with the very language of Section 2, taken directly from Webb-Kenyon itself. Like Section 1 of the Amendment repealing Prohibition, Section 2 both restored the status quo ante and permanently enshrined it in the Constitution.

That understanding of the language and purpose of Section 2 is also consistent with the Senate's decision to strike the original proposed resolution's Section 3. Section 3 would have given Congress a completely novel police power, concurrent with the states, "to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138. Unlike Section 2, which sought to restore the balance of state and federal powers by

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[8] The quoted words actually came from Senator Wagner, after which Senator Blaine said, "I thank the Senator. I think he has given the correct statement of the doctrine." *Id.*

constitutionalizing the Webb-Kenyon Act, Section 3 would have continued the flaws of Prohibition by giving Congress a power it never had before 1919. As Senator Wagner explained:

> I am in sympathy with that purpose [of preventing the return of the saloon]; but the suggested method of accomplishing it – the proposal that it shall continue to be the responsibility of the Federal Government – is all wrong. It flies in the face of reason and experience. If the Federal Government failed to discharge that responsibility under the all-embracing prohibition of the eighteenth amendment, what folly is it which prompts anyone to believe that it can discharge it under the milder language of the pending resolution?

76 Cong. Rec. 4145.[9]

Senator Blaine similarly criticized Section 3 for upsetting rather than restoring the pre-Prohibition balance. Because his remarks on this point have sometimes been misconstrued as evidence that Section 2 was intended to give states *unlimited* power to regulate alcohol, they are worth quoting at some length:

> I am now endeavoring to give my personal views [criticizing Section 3]. The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce

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[9] Similarly, numerous Senators criticized Section 3 because it would have perpetuated another novel aspect of the 18th Amendment: giving state and national governments "concurrent power" rather than maintaining separate spheres. *See* 76 Cong. Rec. 4143 (Sens. Blaine and Wagner); *id.* at 4145-46 (Sens. Walsh and Wagner); *id.* at 4155 (Sens. Walsh and Brookhart); *id.* at 4161-62 (Sens. Brookhart and Norris); *id.* at 4173 (Sens. Borah, Hastings, and Black).

> affecting intoxicating liquors which enter the confines of the States. The State under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. Thus the States are granted larger power in effect and are given greater protection, while under section 3 the proposal is to take away from the States the power that the States would have in the absence of the eighteenth amendment. My view therefore is that section 3 is inconsistent with section 2 . . . and that section 3 ought to be taken out of the resolution.

Id. at 4143.

Senator Blaine's overall point in this passage is that, by giving Congress police powers it never possessed pre-Prohibition, Section 3 is inconsistent with "[t]he purpose of section 2 . . . to *restore* to the States . . . absolute control." *Id.* (emphasis added). In this context, the phrase "absolute control" does not mean a power uncabined by any other constitutional constraints, but rather a power that is absolute in the sense that it is *independent of Congress*, not shared concurrently with Congress. And by "restor[ing]" the states' preexisting power "by constitutional amendment," the states are "granted larger power in effect and are given greater protection," in the sense that this power cannot be repealed by Congress or struck down by the judiciary. *Id.* In short, Senator Blaine's comments simply reflect the consensus that Section 2 simultaneously restored the status quo ante and made it more secure by writing Webb-Kenyon into the Constitution itself. Thus, while his "personal views" critical of Section 3 departed from the Judiciary Committee's, his statements concerning Section 2 were entirely consistent with the Committee's views, reported earlier by Senator Blaine himself, that Section 2 restored the pre-Prohibition balance under the Webb-Kenyon Act by "writ[ing] permanently into

could read Section 2 as giving states a new power to discriminate against the products of other states.

Accordingly, by prohibiting transportation or importation in violation of state laws, Section 2 "evidently contemplate[s] the violation of only *valid* state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states . . . ." *Brennan*, 90 S.E. at 404 (discussing Webb-Kenyon Act) (emphasis added). Under Section 2, as under the Wilson and Webb-Kenyon Acts,

> a [state] law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid; or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the state cannot . . . establish a system which, in effect, discriminates between interstate and domestic commerce . . . .

Scott, 165 U.S. at 100 (discussing Wilson Act).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals holding that the 21st Amendment does not authorize discriminatory or protectionist state laws, should be affirmed.

Respectfully submitted,

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the Constitution a prohibition along that line." *Id.* at 4141 (Sen. Blaine's report of Judiciary Committee views); *see supra* at 25-25 (discussing same).

Although less specifically focused on this issue, the views expressed at the states' ratifying conventions are also consistent with the overall theme that the 21st Amendment would restore the balance between federal and state authority that existed before Prohibition. For example, the President of the Kentucky convention argued that "in thus amending the Constitution we are not tearing down. We are doing a constructive work of restoration . . . ." *Ratification of the Twenty-First Amendment to the Constitution of the United States: State Convention Records and Laws* 169 (Edward Somerville Brown, ed. 2003). Similarly, a delegate at the Pennsylvania convention described the 21st Amendment as an "opportunity to reclaim for the Commonwealth of Pennsylvania the sovereignty . . . which was, I regret to say, abdicated in the early part of 1919." *Id.* at 355-56.

In sum, as the very language of Section 2 tracking the Webb-Kenyon Act makes clear, the Section permanently restored the power of the states under Webb-Kenyon to regulate alcohol imports on equal terms with the domestic product. By eliminating the absolute immunity from state regulation that such imports would otherwise have possessed absent congressional action, Section 2 substantially modified the rule that would otherwise have applied under the Commerce Clause, as it had been repeatedly interpreted by this Court. But this Court's prior cases made equally clear that eliminating the interstate commerce immunity for imported alcohol only allows the states to enforce otherwise valid state laws, such as evenhanded police regulations, and that protectionist or discriminatory state laws are inherently invalid. No one familiar with the legal history of this subject