

**COMPREHENSIVE ALCOHOL REGULATORY  
EFFECTIVENESS (CARE) ACT OF 2010**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**HOUSE OF REPRESENTATIVES**  
ONE HUNDRED ELEVENTH CONGRESS  
SECOND SESSION

ON

**H.R. 5034**

SEPTEMBER 29, 2010

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**COMPREHENSIVE ALCOHOL REGULATORY  
EFFECTIVENESS (CARE) ACT OF 2010**

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**WEDNESDAY, SEPTEMBER 29, 2010**

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 11:12 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Watt, Delahunt, Johnson, Quigley, Deutch, Gonzalez, Schiff, Maffei, Polis, Smith, Sensenbrenner, Coble, Goodlatte, Lungren, Issa, King, Poe, Chaffetz, Rooney, and Harper.

Staff present: (Majority) Danielle Brown (Counsel); Travis Chapman (Detail); Anant Raut, Counsel; Reuben Goetzl, Staff Assistant; (Minority) Stewart Jeffries, Counsel.

Mr. CONYERS. The Committee will come to order.

Good morning, colleagues—so good to see all of you. Only six Members here today—not much interest in this measure here, apparently.

We are hearing, today, the Comprehensive Alcohol Regulatory Effectiveness Act, H.R. 5034. And we are delighted to have Gary Miller, Edolphus Towns, Pete Defazio, George Radanovich, Bruce Braley. And we will start with Mike Thompson, of the 1st District of California.

Welcome to the Judiciary.

[The bill, H.R. 5034, follows:]

111TH CONGRESS  
2D SESSION

# H. R. 5034

To support State based alcohol regulation, to clarify evidentiary rules for alcohol matters, to ensure the collection of all alcohol taxes, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 15, 2010

Mr. DELAHUNT (for himself, Mr. COBLE, Mr. CHAFFETZ, and Mr. QUIGLEY) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To support State based alcohol regulation, to clarify evidentiary rules for alcohol matters, to ensure the collection of all alcohol taxes, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Comprehensive Alcohol  
5 Regulatory Effectiveness (CARE) Act of 2010”.

6 **SEC. 2. PURPOSE.**

7 It is the purpose of this Act to—

8 (1) recognize that alcohol is different from  
9 other consumer products and that it should be regu-

1       lated effectively by the States according to the laws  
2       thereof; and

3               (2) reaffirm and protect the primary authority  
4       of States to regulate alcoholic beverages.

5 **SEC. 3. SUPPORT FOR STATE ALCOHOL REGULATION.**

6       The Act entitled “An Act divesting intoxicating liq-  
7 uors of their interstate character in certain cases”, ap-  
8 proved March 1, 1913 (27 U.S.C. 122 et seq.), commonly  
9 known as the “Webb-Kenyon Act”, is amended by adding  
10 at the end the following:

11 **“SEC. 3. SUPPORT FOR STATE ALCOHOL REGULATION.**

12       “(a) DECLARATION OF POLICY.—It is the policy of  
13 Congress that each State or territory shall continue to  
14 have the primary authority to regulate alcoholic beverages.

15       “(b) CONSTRUCTION OF CONGRESSIONAL SI-  
16 LENCE.—Silence on the part of Congress shall not be con-  
17 strued to impose any barrier under clause 3 of section 8  
18 of article I of the Constitution (commonly referred to as  
19 the ‘Commerce Clause’) to the regulation by a State or  
20 territory of alcoholic beverages. However, State or terri-  
21 torial regulations may not facially discriminate, without  
22 justification, against out-of-state producers of alcoholic  
23 beverages in favor of in-state producers.

24       “(c) PRESUMPTION OF VALIDITY AND BURDEN OF  
25 PROOF.—The following shall apply in any legal action

1 challenging, under the Commerce Clause or an Act of Con-  
2 gress, a State or territory law regarding the regulation  
3 of alcoholic beverages:

4           “(1) The State or territorial law shall be ac-  
5 corded a strong presumption of validity.

6           “(2) The party challenging the State or terri-  
7 torial law shall in all phases of any such legal action  
8 bear the burden of proving its invalidity by clear and  
9 convincing evidence.

10           “(3) Notwithstanding that the State or terri-  
11 torial law may burden interstate commerce or may  
12 be inconsistent with an Act of the Congress, the  
13 State law shall be upheld unless the party chal-  
14 lenging the State or territorial law establishes by  
15 clear and convincing evidence that the law has no ef-  
16 fect on the promotion of temperance, the establish-  
17 ment or maintenance of orderly alcoholic beverage  
18 markets, the collection of alcoholic beverage taxes,  
19 the structure of the state alcoholic beverage distribu-  
20 tion system, or the restriction of access to alcoholic  
21 beverages by those under the legal drinking age.”.

22 **SEC. 4. AMENDMENT TO WILSON ACT.**

23           The Act entitled “An Act to limit the effect of the  
24 regulations of commerce between the several States and  
25 with foreign countries in certain cases”, approved August

1 8, 1890 (27 U.S.C. 121), commonly known as the “Wilson  
2 Act”, is amended by striking “to the same extent” and  
3 all that follows through “Territory,”.

○

**TESTIMONY OF THE HONORABLE MIKE THOMPSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. THOMPSON. Thank you, Mr. Chairman, Ranking Member Smith, and other Members—

Mr. CONYERS. Turn on your microphone.

Mr. THOMPSON. Thank you, Mr. Chairman, Ranking Member Smith, and other Members of the Committee. I appreciate the opportunity to be here this morning to testify.

I was here just a few months ago to testify before the Courts and Competition subcommittee that the wholesalers' legislative proposal would do serious harm to thousands of American businesses that make beer, wine, and spirits.

Since that bill was introduced, these businesses have been joined by more than 100 major organizations, like the American Farm Bureau, the National Association of Manufacturers, the American Bar Association's Antitrust Section, and, believe it or not, the Progressive Policy Institute and FreedomWorks—two groups that you rarely see on the same page.

The NFL and Major League Baseball all joined in opposition to this bill because it would discriminate against producers, and limit the choices for American consumers.

Today, we are back discussing a rewritten version of the same bill, which I can tell you, without question, is just as damaging as the original version. The bill is still opposed by beer, wine, spirits producers. And it has all those major organizations that represent them.

It still allows states to discriminate against producers in ways that promote economic protectionism. It would still seriously harm American businesses and take choices away from American consumers.

You will hear today from legal scholars and industry experts who can tell you the broad, negative implications of the bill, but I am here to explain who if this bill were to be passed into law, it would hurt the lives and the livelihoods of people across our Nation.

I can tell you about the family-run winery that is only in business because of the following that they have been able to develop through online sales; the small vineyard that wouldn't be in business, and that the Ag-land that it occupies would probably be lost in wineries couldn't sell directly to retailers and restaurants; the rural consumer who can't get her favorite spirit unless she can buy in online; the brewery that can't get the wholesalers to pay attention to their microbrew, but it is the business that they built through a nationwide-cult following that allows them to stay in business.

These are the people that this bill still hurts. Those entrepreneurs and farmers are scared that Congress is going to irreparably harm their business by passing this bill. Small businesses are struggling in every one of our districts. Times are equally tough for the wineries in my district, but they have all been able to reach out and find customers.

Many of these wineries are small, with a very limited production, and they have had to be innovative, because many wholesalers won't give them the time of day. This bill, if passed into law, would

keep them from selling an American product to American consumers and, as a result, would threaten thousands of good jobs.

Is this bill needed to solve a problem? No. Is the current system broken? No. State-based, three-tier alcohol-distribution systems are working extremely well. Are states being treated unfairly? No. A state's right to pass alcohol laws is fully protected by our Constitution. In fact, there are over 4,000 state alcohol laws on the books. And there is no evidence and no avalanche of litigation to suggest otherwise.

Are wholesalers being treated unfairly? No. In California, our wineries can distribute to anyone—consumers, restaurants, even Costco. And our wholesalers are thriving. The top two wine-and-spirits wholesalers in California brought in over \$10.5 billion in 2009. They are estimated to bring in \$10.7 billion in 2010, a more than \$200 million increase in the middle of the worst recession that we have ever seen.

In the U.S. wine business, the top 10 wholesalers control over 60 percent of the market. Clearly, they are doing well. This bill is, at best, Mr. Chairman, a solution looking for a problem. But if passed, it would be a huge problem for U.S. businesses and consumers.

The Commerce Clause of our Constitution, from which the alcohol industry would be exempt, would this bill to become law, was designed to ensure a fair national marketplace. A state can pass their own laws. They just can't discriminate against out-of-state producers, nor out-of-state products.

Congress and the Supreme Court have upheld this principle. Why would Congress want to turn back these decisions and deprive family businesses of their constitutional rights?

Mr. Chairman and Members, this bill is not needed, and it would unfairly discriminate against producers and retailers, and limit the choices of consumers purely to give a competitive advantage to wholesalers. I urge you to oppose this bill, and I thank you again for your time.

[The prepared statement of Mr. Thompson follows:]

PREPARED STATEMENT OF THE HONORABLE MIKE THOMPSON,  
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Testimony by Rep. Mike Thompson (CA-1)

**H.R. 5034, the "Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010"**

September 29, 2010

Committee on the Judiciary

2138 Rayburn House Office Building

Good afternoon Chairman Conyers, Ranking Member Smith, Members of the Committee and colleagues. I appreciate the opportunity to testify today.

A few months ago, I testified before the Courts and Competition Policy Subcommittee that the wholesalers' legislative proposal would seriously harm thousands of American businesses that make wine, beer and spirits.

Since the bill – H.R. 5034 – was introduced, these businesses, joined by more than a hundred major organizations like the American Farm Bureau, the National Association of Manufacturers, the American Bar Association's Antitrust Section, Progressive Policy Institute, and Freedom Works, joined in opposition against it because it would discriminate against producers and limit the choices for American consumers.

Today, we are back discussing a rewritten version of this bill, which I can tell you unequivocally is just as damaging as the original version.

This bill is still opposed by wine, beer and spirits producers, including all the major organizations that represent them. It still allows states to discriminate against producers in ways that promote economic protectionism. It would still seriously harm American businesses and take choice away from American consumers.

You'll hear today from legal scholars and industry experts who can tell you the broad, negative implications of this bill. But I am here to tell you how if passed into law this bill would hurt the lives and livelihoods of people across our nation.

I can tell you about the family-run winery that's only in business because of the following they've developed through online sales. The small vineyard that wouldn't be in business – and the ag land that would probably be lost – if wineries couldn't sell directly to retailers and restaurants. The rural

consumer who can't get her favorite spirit unless she can buy it online. The brewery that can't get the wholesalers to pay attention to their microbrew, but is in business because of a cult following nationwide. These are the people this bill hurts. Those entrepreneurs and farmers are scared that Congress is going to irreparably harm their businesses by passing this bill.

Small businesses are struggling in every one of our districts. Times are equally tough for the wineries in my district, but they are finding innovative new ways to reach customers. Many of these wineries are small, with a very limited production, and they have to be innovative because many wholesalers won't give them the time of day! This bill, if passed into law, would keep them from selling an American product to American consumers, and as a result, would threaten thousands of good jobs.

Is this bill needed to solve a problem? Absolutely not. Is the current system broken? No. State-based three-tiered alcohol distribution systems are working extremely well. Are states being treated unfairly? No. A state's right to pass alcohol laws is fully protected by the Constitution. In fact, there are over 4,000 state alcohol laws on the books. And there is no avalanche of litigation to suggest otherwise. Are wholesalers being treated unfairly? No. In California, our wineries can distribute to anyone – consumers, restaurants, even Costco, and our wholesalers are thriving! According to a recent study, the top two wine and spirits wholesalers in California brought in over \$10.5 billion in 2009 sales revenues, and are estimated to bring in \$10.7 billion in 2010, a more than \$200 million increase in the middle of a recession! In the U.S. wine business, the top 10 wholesalers control over 60 percent of the market – clearly they are doing well.

This bill is at best a solution looking for a problem. But if passed, it would be the problem for U.S. businesses and consumers.

The Commerce Clause – from which the alcohol industry would be exempt were this bill to become law – was designed to ensure a fair national marketplace. A state can pass their own laws, they just can't discriminate against out-of-state producers and products. Congress and the Supreme Court have upheld this principle. Why would Congress want to turn back these decisions and deprive family businesses of their constitutional right?

Mr. Chairman and Members, this bill is not needed and would unfairly discriminate against producers and retailers and limit the choices of consumers purely to give a competitive advantage to wholesalers.

I urge you to oppose this bill. Thank you.

---

Mr. CONYERS. Thanks, Mike Thompson.  
I now turn to Pete DeFazio—Oregon.

**TESTIMONY OF THE HONORABLE PETER DeFAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON**

Mr. DeFAZIO. Thank you, Mr. Chairman—always good to see you. I just wish it wasn't for this issue today.

You know, I appreciate the opportunity to speak here today. I actually have the honor of being the co-founder and co-chairman of

the House Small Brewers Caucus. But my remarks could, as well, reflect the concerns of the more than 400 vintners in my state; and I am a member, also, of the Wine Caucus.

There are over 1,600 small breweries in this country. The brewers working in them are true craftsmen, creating a uniquely American product. They are also small-business men and women, creating thousands of jobs in local communities across the country. They all this in one of the most highly regulated business sectors.

Small brewers are, for the most part—they are not rich men and women; and they operate with small margins, higher costs than the large corporations. And they compete against those large corporations every day. Even small, miniscule changes in their client base, particularly in this economy, can have a massive impact on their ability to survive.

H.R. 5034, the CARE Act, is a direct threat to their success. The bill would demolish the constitutional balance and Federal oversight over alcohol regulation. The effect would be devastating to America's small brewers. The CARE Act would virtually eliminate the role of Federal courts in stopping states from enacting discriminatory laws, violating antitrust laws, and even undermining acts of Congress.

There are dozens of cases, stretching back decades, where Federal courts have relied on the Commerce Clause to strike down blatantly discriminatory state alcohol laws.

One example: In New York, Federal courts struck down a state law that required all beer to have its own unique UPC code. Now, that is not a problem for Miller or Bud or any of those other foreign-owned giant corporations. But it is a problem for small brewers, who operate on small budgets and tight margins. And they would have had to spend thousands of dollars on new labels just to be required to sell in one state, which would mean someone would go under or they wouldn't sell there, or they might not add employees—a really bad and perverse result that was justifiably struck down.

If H.R. 5034 is enacted, this type of law can and will return. Even worse, states would have free reign to come up with new ways to discriminate against small brewers or vintners. They could pass laws giving all in-state brewers or vintners preferential treatment—tax breaks for using in-state ingredients. States would, then, retaliate against other states over unfair laws, and we could have a real mess on our hands.

This bill is anti-consumer, special-interest legislation of the worst sort, and it undermines the basic economic principles of our Constitution.

You know, why do we need this? Well, some would have us believe there is a flood of litigation out there. There is not. And it would protect state interests. State interests are protected today. Small brewers in Oregon and elsewhere have to obtain licenses, register their brand, and file tax returns in every state in which they do business. There has been no flood of lawsuits contesting these legitimate state interests, and no need for this legislation.

Mr. Chairman, I would ask that the Committee not act on this legislation. I appreciate the opportunity to testify.

[The prepared statement of Mr. DeFazio follows:]

PREPARED STATEMENT OF THE HONORABLE PETER DEFazio,  
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

**Testimony before the Committee on Judiciary**

The Honorable Peter DeFazio

September 29, 2010

H.R. 5034, the "Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010"

Good afternoon Chairman Conyers, Ranking Member Smith, Members of the Committee and colleagues.

I appreciate the opportunity to speak to you today. I have the honor of being the cofounder and co chairman of the House Small Brewers Caucus. The caucus was created in 2007 to educate members and their staff about the business of running a small brewery and the economic and regulatory challenges small brewers face every day.

There are over 1,600 small breweries in this country. The brewers working in them are true craftsman creating a uniquely American product. They are also small businessmen, creating thousands of jobs in local communities across the country. They do all of this in one of the most highly regulated business sectors. Small brewers are for the most part not rich men and women, and operate with smaller margins and higher costs than the giant corporations they compete against every day. Even small changes in the client base can have a massive impact on their ability to survive.

For 75 years since enactment of the Twenty-first Amendment ending prohibition, sale and distribution of alcohol have been effectively regulated at the state level within the bounds of the Commerce Clause of the Constitution. The dormant Commerce Clause, which prevents states from enacting unfair or anti discriminatory laws affecting interstate commerce, has been a settled principle of American law since 1829. In addition to Constitutional principles, Congress has enacted statutes governing labeling, advertising, the minimum drinking age, and other alcohol regulatory measures that clearly affect interstate commerce. In short, the federal government has always played a vital role in alcohol regulation. This balanced approach has helped the industry grow while at the same time protecting consumers and the general public.

H.R. 5034, the CARE Act, is a direct threat to that success. The bill would demolish the constitutional balance and the federal oversight over alcohol regulation. The effect would be devastating to America's small brewers. The CARE Act would virtually eliminate the role of the federal courts in stopping states from enacting discriminatory laws, violating antitrust laws, and even undermining acts of Congress. There are dozens of cases stretching back decades where federal courts have relied on the commerce clause to strike down blatantly discriminatory state alcohol laws.

- In New York, federal courts struck down a state law that required all beer to have its own unique UPC code. This meant that any small brewers, who operate on small budgets and tight margins, would have had to spend thousands of dollars on new labels just to be required to sell in one state.
- In Oklahoma, the court struck down a state law that banned the interstate transmission of alcohol beverage commercials

If H.R. 5034 is enacted these types of laws can, and will, return. Even worse, states would have free reign to come up with new ways to discriminate against small brewers. They could pass laws giving all in state brewer's preferential treatment, or tax breaks for using in-state ingredients. States would then retaliate against other states over unfair laws. This bill is anti-consumer, special interest legislation of the worst sort, and it undermines the basic economic principles of our Constitution.

What is the reason for such a drastic and unprecedented step as H.R. 5034? If we are to believe the advocates pushing this bill, they would tell you it is to stop the flood of lawsuits that were the result of the Supreme Court decision that struck down laws in Michigan and New York that barred out-of-state wineries from selling directly to consumers. That ruling was a win for consumers. The litigation surrounding direct shipping of wine is not a threat to a state's ability to license and tax businesses engaged in the sale of alcohol beverages. Small brewers in Oregon and elsewhere obtain licenses, register their brands, and file tax returns in every state in which they do business.

Excessive lawsuits cannot be the driving force to H.R. 5034. The number of pending lawsuits challenging state alcohol laws is in the low single digits. Compare that with the number of other cases pending against states, and the alcohol litigation is a tiny part of the thousands of cases filed annually against state governments.

H.R. 5034 is a solution to a nonexistent problem. I urge you all to reject it. Thank you.

---

Mr. CONYERS. Thank you, Pete DeFazio. And you are unusually brief this morning. We appreciate that.  
Bruce Braley—Iowa. Greetings.

**TESTIMONY OF THE HONORABLE BRUCE BRALEY, A  
REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA**

Mr. BRALEY. Thank you, Mr. Chairman. It is a pleasure to be here. And I want to thank the Ranking Member, also, for allowing me the opportunity to testify today.

I respect both of my colleagues who have already testified. I have a slightly different perspective that I wish to share with the Committee. And I am here in support of the CARE Act, because congressional silence on the ability of a state's right to regulate alcohol is being misused in Federal court system by private interests.

The 2005 Supreme Court decision in *Granholm v. Heald* struck down some state regulation of alcohol. These regulations are necessary to ensure that alcohol is used safely by adults, and kept out of the hands of children. Since then, it may not be a "flood" to Mr. DeFazio, but there have been at least 20 lawsuits challenging state regulations that put into jeopardy the current system, and create a burden for states like mine, Iowa.

Alcohol, as we all know, is a unique product in American history. Wine, beer, and spirits need to be regulated differently than toothpaste, soda, or other consumer goods. Unlike other products, regulations are needed to promote moderation, as well as to abide by drinking-age laws so that responsible adults can enjoy alcoholic beverages responsibly.

People in Iowa may have very different opinions than those in other parts of the country about how alcohol should be consumed, sold and supplied, and it is essential to maintain the authority each state has been granted to regulate as they see fit.

The simple fact of the matter is that states such as mine are seeking to protect the public interests, have been under attack from private interests that are seeking to provide personal gain for themselves. Iowa and 26 other states have been sued, and the opponents of state-based regulation and the special interests that fund them have been quoted as saying they, "won't stop suing until there is no law left standing."

The private interests filing these lawsuits are not members of our community, but they are out-of-state corporate interests who bear no responsibility to our safety, our cities or our constituents.

In addition to 18 other states, Iowa is a control state, which means that it manages the wholesaling of liquor as a state-run enterprise. Our regulator is a member of the National Alcoholic Beverage Control Association, which unanimously voted to endorse the CARE Act. My attorney general, Tom Miller, also signed a letter asking for congressional action on this issue, citing the significant time and resources required by states from unprecedented legal challenges.

There has been exponential growth in the wine, beer, and spirits industry over the past 30 years, not in spite of a system of local control, which has always sought to balance socially responsible business practices on all tiers with robust competition in the marketplace, but because of it.

Iowa also has a vibrant craft-beer, micro-distillery, and native-wine industry that I support wholeheartedly. And I am pleased that this bill will do no harm to them and, in fact, protect their right to self-distribute.

Volume caps have recently come under attack using the Dormant Commerce Clause as justification. And I believe that it is necessary to defend the right for these business, and look forward to working with small businesses to help them thrive and grown.

So, again, Mr. Chairman, I would like to voice my support for the CARE Act, and hope that you can find time to move this bill to the floor at your earliest opportunity. And I yield back.

Mr. CONYERS. Thank you so much.

From Brooklyn, New York—chair of the Committee on Oversight and Government Reform—Edolphus Towns. Welcome.

**TESTIMONY OF THE HONORABLE EDOLPHUS TOWNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK**

Mr. TOWNS. Thank you very much, Chairman Conyers and Ranking Member Smith, and Members of the Judiciary Committee. Thank you for the opportunity to express my support for H.R. 5034, the CARE Act.

States need assistance in defending laws which protect the public interest from those who are seeking to line their pockets by deregulating the alcohol industry. My home state, New York, has been sued not once, but twice, in the past 4 years.

Attorney General Cuomo and 38 other attorneys general wrote to me in the spring seeking congressional action to assist them in stemming the tide of these lawsuits. And I am proud to help.

On a more personal level, I believe that our constituents know better than anyone the terms of how they want alcohol to be sold and supplied in their community. Alcohol is different than any other consumer good, and should be regulated as such. And our constituents know this and want the ability to control this product to protect public health and the public interest.

Here are two examples of how this bill will help to protect our communities. First, laws that mandate identification checks have recently come under attack in court by online liquor stores who view them as discriminatory. I believe that I.D. laws assist retailers and communities to keep alcohol away from minors, and are vital components in protecting public health and safety.

Second, New York City and communities across the country have begun using alcohol control zones to stop the practice of single sales, and the sales of certain products such as malt liquor. These products are not conducive to public health or public safety. These control zones have made my community safer. And law enforcement has testified to this result.

I fear that without congressional action, these laws will be challenged as well, erasing a great deal of progress that we have made.

I would leave you with one last thought to gauge how I am doing back in Brooklyn. I use what we call “The Church Test.” This basically involves me speaking directly to my constituents outside their houses of worship.

As I conduct this test, I regularly hear the need for better schools, a better economy, more police presence, and a better health-care system. What I do not hear from any of them is about

the need for cheaper, more accessible alcohol. And that will be the end result if we fail to act on this legislation.

I want to thank you, Mr. Chairman, for the opportunity to come, and to indicate my support. And on that note, I yield back the balance of my time.

[The prepared statement of Mr. Towns follows:]

PREPARED STATEMENT OF THE HONORABLE EDOLPHUS "ED" TOWNS,  
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

**Testimony of Rep. Edolphus "Ed" Towns in the House Committee on the  
Judiciary  
Hearing on: H.R. 5034, the "Comprehensive Alcohol Regulatory  
Effectiveness (CARE) Act of 2010"  
September 29, 2010**

Thank you Mr. Chairman for allowing me to testify to my support for HR 5034, the CARE Act.

States need assistance in defending laws which protect the public interest from those who are seeking to line their pockets by deregulating the alcohol industry. New York State has been sued not once but twice in the past 4 years alone. Attorney General Cuomo and 38 other Attorneys General wrote to me in the spring seeking Congressional action to assist them in stemming the tide of these lawsuits and I'm proud to help.

On a more personal level, I believe that our constituents know better than anyone the terms of how they want alcohol to be sold and supplied in their communities. Alcohol is different than any other consumer good and should be regulated as such--and our constituents know this and want the ability to control this product to protect public health and the public interest.

Here are two examples of how this bill will help to protect our communities:

First, laws that mandate identification checks have recently come under attack in court by online liquor stores who view them as discriminatory. I believe that ID laws assist retailers and communities keep alcohol away from minors and are vital components in protecting public health and safety.

Second, New York City and communities across the country have begun using "alcohol control zones" to stop the practice of "single sales" and the sale of certain products such as malt liquor. These products are not conducive to public health or public safety. These control zones have made my community safer and law enforcement has testified to this result. I fear that without Congressional action these laws will be challenged as well, erasing a great deal of progress.

I'll leave you with one last thought. To gauge how I'm doing back in Brooklyn, I use what's called the Church Test. This basically involves me speaking directly to my constituents outside my houses of worship.

As I conduct this test, I regularly hear the need for better schools, a better economy, more police presence and better healthcare. What I do **NOT** hear about is a need for cheaper, more accessible alcohol. And THAT will be the end result if we fail to act on this legislation.

Thank you again and I yield back the balance of my time.

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Mr. CONYERS. Thank you, Edolphus.

Which side would we be on to get cheaper and more available alcohol? Would you clarify that for some of the Members up here?

Mr. TOWNS. My side, Mr. Chairman. I would be against cheaper. I mean, I think that—

Mr. CONYERS. Oh.

Well, you just slid into invisible minority there, buddy.

Too bad, Brother Towns.

George Radanovich, 19th District, California—welcome and good morning.

**TESTIMONY OF THE HONORABLE GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. RADANOVICH. Thank you, Chairman Conyers.

And thank you, Ranking Member Smith, and Members of the Committee.

I appreciate being able to testify. As you know, I am co-founder of the Congressional Wine Caucus, and Member of the Energy and Commerce Committee, which has jurisdiction over interstate commerce, I also have been an owner of a California winery.

The business of wine is far from the splendor of the vineyards. It is difficult to sell wine; maybe more difficult than selling most other products or services in the United States. And much of that is due to the level and the diversity of regulation and control of all aspects of the business.

Wine is a highly taxed and highly regulated business, with 50 sets of laws, as well as oversight from numerous Federal agencies. In such an environment, there are great costs involved not only in making wine, but also in getting wine to the market. Tax rates differ; some states require licenses or permits; and, still, others require that I pay a fee to register my labels.

One state requires that I buy a license and hire a wholesaler to distribute my wine, and that I designate a sales territory for that wholesaler, while a second state prohibits me from doing this very same thing. One state makes it virtually impossible for me to fire my assigned wholesaler, even if the wholesaler has not performed as represented. In most of the states we try to ship into, every bottle of wine had to pass through a wholesaler, which added cost and delay, even though the wholesaler was doing little, if anything, to help build the brand.

For new wineries, it is always a shock to realize how difficult it is to acquire distribution in other states. Even for long-established wineries, significant resources are required to comply with varying state laws. In many cases, compliance with certain state laws discouraged my winery from selling in those states. This is common among thousands of wineries. The costs to introduce a wine in a market can far outweigh the potential profits.

People in the wine business hear a lot about the three-tier distribution. But all know that a pure three-tier distribution system does not exist in the United States. Instead, over the years, since prohibition was repealed, states have chosen to exercise their powers under the 21st Amendment to create hybrid distribution systems that use three-tier principles as a framework.

In at least 39 states, state laws allow in-state wineries to self-distribute. Self-distribution laws permit the in-state winery to act as its own distributor, allowing direct sales by the winery. In California, the number of wineries could not increase without self-distribution. But self-distribution stops at the state line.

In my home state, I am allowed to sell wine directly to a consumer. I can operate a wine-tasting room at the winery, and one other retail location where I can also conduct educational wine tastings. Without this manner of distribution, most small wineries would find it difficult to survive. Many wineries are surviving in today's economy solely on the strength of their direct-to-consumer wine clubs. I remember a time when some states would punish such sales as felonies.

Operating a winery in this country is difficult and complex. The wine industry is an industry of different laws and confusing regulations, which is why I wholeheartedly disagree with the premise of H.R. 5034, that states' rights are being greatly impaired by the Commerce Clause; that states should be able to regulate alcohol products even if it means that they can openly discriminate; and that states are on the verge of regulatory collapse, without congressional intervention.

In my 16 years in Congress, I do not recall another time when an industry group has come seeking complete immunity from nothing less than the U.S. Constitution. I am interested to hear why today's speakers think the only way to prevent such deregulation is to surgically remove that portion of the Constitution from applying to their industry.

I wait for an explanation as to how this assault on the Constitution will better serve the industry, the states, the Nation, and the American consumers. H.R. 5034 is being promoted by the beer, wine, and spirits wholesalers. They present this Committee with a simple request: They want Congress to expressively give states the ability to regulate alcohol without limits of national fairness and market equity. They say that without this express permission from Congress, states will be unable to regulate effectively.

As a Member of the Energy and Commerce Committee, I urge this Committee to listen carefully and respectfully to today's testimony. If we allow states to set their own alcohol laws and the market ends at the state level, we lose the cohesiveness and energy of our national market. By allowing trade barriers that openly defy these concepts of an American market, we become 50 nations instead of one. Small businesses like my winery will see themselves shut out, and it will become harder and harder to make a profit and provide jobs.

Again, I want to thank the Committee for giving me this opportunity to testify on this important legislation. And I ask that my full written testimony be submitted to the record.

[The prepared statement of Mr. Radanovich follows:]

PREPARED STATEMENT OF THE HONORABLE GEORGE RADANOVICH,  
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

<p><b>ENERGY AND COMMERCE</b> COMMITTEE ON ENERGY AND COMMERCE SUBCOMMITTEE ON COMBUSTIBLES, TECHNOLOGY, AND EFFICIENCY OVERSIGHT AND INVESTIGATION</p> <p>2410 RAYBURN BOWER OFFICE BUILDING WASHINGTON, DC 20515-0510 TEL (202) 395-6140 FAX (202) 225-4907 <a href="http://www.congress.gov">http://www.congress.gov</a></p>	  <p><b>U.S. House of Representatives</b> Washington, DC 20515-0510 <b>GEORGE RADANOVICH</b> 15th District, California</p>	<p>OFFICE OF THE CLERK 1640 PAVY HIRSHORN, SUITE 201 FREMONT, CA 94720 TEL (510) 444-3540 FAX (510) 440-2400</p> <p>5809 COLLETT ROAD, SUITE 101 MODOC, CA 95965 TEL (530) 579-5425 FAX (530) 579-5178</p> <p>LEGISLATIVE LIAISON TEL (415) 478-6587</p>
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**Statement of Representative George Radanovich (CA-19):**

Thank you Mr. Chairman, Ranking Member Smith and Members of the Committee for allowing me to make remarks today. As you know, I am a co-founder of the Congressional Wine Caucus, and a member of the Energy and Commerce Committee, which has jurisdiction over interstate commerce. I have also been the owner of a California winery, both of which are the bases for my testimony today.

**Introduction:**

In March, when we last had a hearing about alcoholic beverages, I started by saying that when consumers visited my winery, they thought I had the ideal job and wondered why I ever went into public service. I was outside a lot, made a good product associated with fine living and good food, and my office had a great view. But the business of wine is far from the bucolic splendor of the vineyards. It is difficult to sell wine, perhaps more difficult than selling most other products or services in the United States, and much of that is due to the level and diversity of regulation and control of all aspects of the business.

**The Business of State Regulation**

I spoke about how wine is a highly taxed and highly regulated business, with 50 sets of state laws as well as federal oversight from the Tax and Trade Bureau, the Federal Trade Commission, the EPA, among others. In such an environment, there are great costs involved not only in making wine, but also in getting wine to market. Tax rates differ: some states require licenses or permits; and still others will require that I pay a fee to register my labels. One state will require that I buy a license and hire a wholesaler to distribute my wine and that I designate a sales territory for that wholesaler, while a second state will prohibit me from doing that very thing and prohibit me from assigning exclusive sales territories. One state will make it virtually impossible for me to fire my assigned wholesaler, even though the wholesaler has not performed as represented. In most of the states we tried to ship into, every bottle of our wine had to pass through a wholesaler, which added to costs and delay even though the wholesaler was doing little, if anything, to help build my brand.

For new wineries, as it was for me, it is always a shock to realize how difficult it is to acquire distribution in other states. Even for long-established wineries, there are a lot of human resources that are dedicated to complying with divergent state laws so that they can attempt to realize a profit. In many cases, compliance with certain state laws discouraged my winery from selling in some states. That is common among thousands of wineries. The cost to introduce a wine in a market can far outweigh the potential profits to be realized.

***Three Tier Distribution vs Self-Distribution:***

People in the wine business hear a lot about three-tier distribution, but all know that a pure three-tier distribution system does not exist in the United States. Instead, over the years since prohibition was repealed, states have chosen to exercise their powers under the 21st Amendment to create hybrid distribution systems that use three-tier principles as a framework. In at least 39 states, for example, state laws allow in-state wineries to self-distribute. Self-distribution laws permit the in-state winery to act as its own distributor, allowing sales by the winery directly to retail on- and off-sale licensees. In California, the number of wineries could not proliferate without self-distribution. But self-distribution stops at the state line, and the privilege is only available for in-state wineries.

***Direct-to-Consumer:***

What is also not three-tier is a winery's ability in 37 states and the District of Columbia to sell wine directly to a consumer either at their tasting room or over the internet. In my home state, I'm allowed to sell wine directly to a consumer. I can operate a wine-tasting room at my winery and at one other retail location where I can conduct educational wine-tastings and sell my wine directly to consumers. Without this manner of distribution, most small wineries would find it difficult to survive. Many wineries are surviving in today's economy solely on the strength of their direct-to-consumer wine clubs. I remember when some states would punish such sales as felonies. States like Kentucky would equate wine sales with serious crimes against the person.

Self-distribution and winery direct sales are not three-tier concepts. They are methods of distribution that would not be categorized as three-tier. In California as well as in some other states, these methods of distribution exist in addition to three-tier distribution methods, and wineries can choose to exercise any combination of methods in California to sell their wine. Even in the Granholm state of Michigan, laws have been changed to allow out-of-state wineries to sell wine direct to Michigan residents, just like Michigan wineries are able to do so in their home state.

***H.R. 5034, Commerce Clause, and Deregulation***

I speak from experience when I say that operating a winery in this country is difficult and complex. The wine industry is an industry of disparate laws and confusing regulations. Which is why I am fascinated with the premise of HR 5034, that States rights are being greatly impaired by the dominant Commerce Clause, that States should be able to regulate alcohol products, even if it means that they can openly discriminate; that States are on the verge of regulatory collapse without Congressional intervention.

In my eight terms in Congress, I do not recall another time when an industry group has come seeking complete immunity from nothing less than the US Constitution, when the continued application of one of the fundamental provisions of the Constitution, the Commerce Clause, has been associated with underage drinking, statewide loss of regulatory control, and market chaos; where facial and nonfacial discrimination is somehow needed by States to regulate effectively.

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Mr. RADANOVICH. I would also like to submit for the record a recently released analysis by the FreedomWorks Foundation, along with a resolution that recently passed the California legislature opposed to this bill.

Mr. CONYERS. Without objection, so ordered.  
[The information referred to follows:]

**FOR IMMEDIATE RELEASE**  
**FreedomWorks Foundation**  
**July 23, 2010**

**Contact: Jacqueline Bodnar**  
**Email: [jbodnar@freedomworks.org](mailto:jbodnar@freedomworks.org)**  
**Phone: 202-942-7652**

**FREEDOMWORKS FOUNDATION RELEASES ANALYSIS OF NEW  
LEGISLATION AIMED AT THWARTING WINE SHIPMENTS**

*The CARE Act, H.R. 5034, shores up monopoly profits at the expense of consumers who would face higher prices and fewer choices in the marketplace*

FreedomWorks Foundation has published a new study examining the detrimental effects of the Comprehensive Alcohol Regulatory Effectiveness (CARE) Act, H.R. 5034. Introduced by Rep. William Delahunt (D-Mass.), the legislation is a clear example of economic protectionism designed to shore up the monopoly profits of beer, wine, and spirits wholesalers, much to detriment of vintners, craft brewers, small distillers, and consumers, who will face higher prices and fewer choices.

"It seems that cronyism is still alive and well in Washington, D.C.," said Wayne T. Brough, chief economist and vice president for research at FreedomWorks Foundation. "This legislation is a classic example of rent-seeking, or special interests using the power of government to thwart competition and shore up monopoly profits. Unfortunately, consumers will bear the burden of this legislation, which is nothing more than economic self-interest on the part of the wholesalers." More specifically, the legislation is an attempt to overturn the legal victories that have opened the door to direct shipments of wine in 37 states and the District of Columbia.

A copy of the new study, "No Wine Shall Be Served Before Its Time—At Least Not Without Wholesalers Taking a Cut," is available at:

[http://www.freedomworks.org/files/Microsoft\\_Word\\_-\\_CARE\\_Act\\_IA\\_Final\\_Format.pdf](http://www.freedomworks.org/files/Microsoft_Word_-_CARE_Act_IA_Final_Format.pdf)

**No Wine Shall Be Served Before Its Time—  
At Least Not Without Wholesalers Taking a Cut**

Wayne T. Brough\*

Despite the flagging economy and historic unemployment rates, in Washington, D.C., it's business as usual. Efforts to promote real economic growth may flounder, but the cronyism typified by the Wall Street bailout continues unabated, and it seems no special interest is too small or trivial. A bill currently moving through the U.S. House of Representatives provides a sobering tutorial on how money drives politics in the nation's capital. Introduced by Rep. William Delahunt (D-Mass.), the Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010 is a clear example of economic protectionism designed to shore up the monopoly profits of beer, wine, and spirits wholesalers, much to detriment of vintners, craft brewers, small distillers, and consumers, who will face higher prices and fewer choices.

**SHIEP IN WOLF'S CLOTHING**

According to the official summary, the Care Act:

Amends the Webb-Kenyon Act to: (1) state that it is the policy of Congress that each state or territory shall continue to have the primary authority to regulate alcoholic beverages; (2) prohibit unjustified discrimination against out-of-state producers of alcoholic beverages in favor of in-state producers; and (3) establish higher evidentiary standards for legal actions challenging the authority of states or territories to regulate alcoholic beverages.

Amends the Wilson Act to eliminate the requirement that a state or territory regulate the importation of all fermented, distilled, or other intoxicating liquors or liquids to the same extent and in the same manner as such liquors or liquids produced in such state or territory.

Taken at face value, the legislation appears innocuous; a simple clarification of existing law. However, the legislation is a direct response to the growing number of legal challenges to the monopolistic powers wielded by wholesalers and distributors in many states. The actual impact of the CARE Act would be particularly devastating to small craft brewers, independent wineries, and small distillers who are typically underrepresented by wholesalers but have made some inroads to consumers through direct shipping. For example, a medium sized winery in California, Cakebread Cellars, estimates that direct shipments make up roughly 10 percent of their business.<sup>1</sup>

More specifically, the CARE Act, H.R. 5034, does two things. First, it seeks to strengthen state regulation of alcohol by clarifying the primacy of the state's authority. Second it proposes new evidentiary standards that would make it more difficult for anyone to challenge specific state

<sup>1</sup> Mike Treleven, "Napa Valley Leads U.S. in Direct Wine Sales," Napa Valley Register, July 2, 2010, available at [http://napavalleyregister.com/news/local/article\\_b751c2b2-85a5-11df-8990-001cc4c002e0.html](http://napavalleyregister.com/news/local/article_b751c2b2-85a5-11df-8990-001cc4c002e0.html).

\*Wayne T. Brough ([wbrough@freedomworks.org](mailto:wbrough@freedomworks.org)) is chief economist and Vice President for Research at FreedomWorks Foundation



regulations in the courts. And by amending the Wilson Act of 1890, the legislation makes clear that states have no obligation to treat out-of-state alcohol products in the same manner as those produced within the state.<sup>2</sup>

In clarifying the state's authority, the proposed legislation makes a simple but powerful change that swings the pendulum hard toward state regulation with the requirement that states may not engage in "unjustified discrimination" of out-of-state products. While sounding like a check on discriminatory activity, the legislation actually proposes a much tougher standard than current law that would allow the state far greater leeway to claim their form of discrimination is "justified."

This new authority is solidified by the new evidentiary standard included in the legislation, which raises the bar for anyone challenging a state law. Under the proposed legislation, the state would be "accorded a strong presumption of validity."<sup>3</sup> Moreover, the legal hurdle for anyone challenging a state regulation is much higher, putting the burden on the challenger to provide "clear and convincing evidence" that the law is discriminatory.<sup>3</sup> Under the CARE Act, a state would have no duty to justify its laws on alcohol sales; it is up to the individual to demonstrate that the state is wrong, and doing so requires a significant burden of proof.

<sup>2</sup>The Wilson Act was originally passed as a means of allowing dry states to keep alcohol from other states off the shelves by requiring out-of-state alcohol to be the same laws as in-state alcohol. In effect, banning local alcohol products allowed a state to ban out-of-state alcohol without violating the commerce clause.

<sup>3</sup>The CARE Act of 2010, p. 3.

#### IN SEARCH OF BALANCE

The Founding Fathers were acutely aware of the lure of economic protectionism and deliberately sought to prohibit states from imposing economic restrictions or regulations on one another. James

Madison sought to eliminate the "existing and injurious retaliations among the States" that economic protectionism created. A broader market, with the free flow of goods and services throughout the states, was critical to the development of the nation. To address such

problems, the Commerce Clause of the U.S. Constitution placed authority over interstate commerce exclusively at the federal level.<sup>4</sup> Through history and precedent, a "dormant commerce clause" has emerged, which is interpreted as clarifying that if Congress has not regulated a particular issue in interstate commerce, then Congress meant that area not to be regulated and states should forbear from doing so as well.<sup>5</sup>

With respect to the sale of alcohol, however, there is a constitutional wrinkle. To repeal Prohibition, the Constitution was amended in 1933. The 21<sup>st</sup> Amendment allowed states to enact laws with respect to temperance—the trade, possession, or importation of alcohol was required to comply with state laws. Since that time, the states have played the dominant role in regulating the sale of alcoholic beverages, something made emphatically clear in the 21<sup>st</sup> Amendment: "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,*

<sup>4</sup>The United States Constitution, Article I, Section 8, Clause 3.

<sup>5</sup>For a discussion of Dormant Commerce Clause Doctrine, see Brannon P. Denning, "The Dormant Commerce Clause Doctrine and Constitutional Structure," (February 19, 2001). Available at SSRN: <http://ssrn.com/abstract=260830> or doi:10.2139/ssrn.260830

is hereby prohibited.<sup>6</sup> (Emphasis added.) However, this authority has always been tempered by the courts, which must balance the regulatory authority provided to states by the 21<sup>st</sup> Amendment with concerns over the Commerce Clause and interstate commerce.

Indeed, the courts have played a key role in the evolution of the marketplace, tackling tough questions that guide state policy on interstate shipments of wine, beer, or spirits. Perhaps most importantly, in 2005, the Supreme Court ruled in *Granholm v. Heald* that state regulations on direct shipping must treat in-state shippers the same as out-of-state shippers.<sup>7</sup> The Supreme Court's action was the culmination of the growing legal challenges to state practices with respect to interstate shipments of alcohol.

The issue was becoming increasingly important as the number of wineries expanded dramatically while the number of wholesalers and distributors dropped significantly due to consolidations within the industry. In testimony in the House Judiciary Committee, Rep. Mike Thompson (D-Calif.) noted that there has been a 500 percent increase in the number of wineries over the last 30 years, while the number of distributors has decreased by 50 percent.<sup>8</sup> These trends were also accompanied by the expansion of e-commerce and the internet, which made new systems of delivery a viable option.

The *Granholm* decision was followed by another important legal case in 2008, *Family Wine Makers of California v. Jenkins*, where a federal

<sup>6</sup>The United States Constitution, 21<sup>st</sup> Amendment, Section (2).

<sup>7</sup>*Granholm v. Heald*, (03-1116) 544 U.S. 460 (2005).

<sup>8</sup>Rep. Mike Thompson, testimony before the House Judiciary Committee, Subcommittee on Courts and Competition, "Hearing on Legal Issues Concerning Alcohol Regulation," March 18, 2010.

court clarified that a law that appeared neutral on its face yet had a discriminatory effect on out-of-state producers was unconstitutional. The courts rejected an appeal of this decision by Massachusetts in 2010.<sup>9</sup> As acknowledged by the courts, direct shipment has become more important; today, 37 states plus the District of Columbia currently allow some form of direct shipments. The CARE Act threatens to overturn these legal precedents and limit the ability to file lawsuits challenging harsh and unfair state regulations.

**Over time and through changes in state laws, the three tier system created a system of government-protected monopolists who ultimately control the market by determining which producers eventually make it into the market and which products consumers see on the shelves of retailers.**

#### THE THREE-TIER SYSTEM

In the wake of Prohibition's repeal, states predominantly adopted some form of the "Three-Tier System" as a means of regulating alcohol sales. Under this system, purportedly adopted to limit the influence of organized crime in the market for alcohol, producers never sell directly to retailers. There is always a three step process of producers selling to wholesalers and distributors who then sell to retailers who sell to the final customers. Vertical integration between the tiers is typically prohibited by states; however, a number of states allow small vintners and craft brewers to self-distribute as a means of competing in a marketplace where they might otherwise be ignored by distributors.

This system has defined the market for over 75 years, creating substantial benefits for those fortunate enough to be wholesalers and distributors. Over time and through changes in state laws, the three tier system created a system of government-protected monopolists who ultimately control the market by determining which producers eventually make it into the market and which products consumers see on the shelves of retailers.

<sup>9</sup>*Family Winemakers of California v. Jenkins*, 592 F. 3d 2010

It is difficult for a small vineyard in California to convince a wholesaler across the continent to purchase its wine, because the wholesaler does not make much money carrying it. As a result, consumers enjoy fewer choices in the marketplace. As one trade publication for professional brewers noted, "First and foremost, these distributors are selling their primary brand and are therefore often unwilling to provide much attention to the smaller brands in their portfolio."<sup>10</sup>

Due to franchise laws imposed in most states, it is often very difficult to terminate an agreement with the wholesaler. Franchise laws protect the wholesalers, and impose significant costs on producers seeking to terminate a contract.<sup>11</sup> Further, franchise laws in many states provide exclusive territory for wholesalers, reducing competition and allowing wholesalers to increase profits through their state-protected monopolies. Such practices are anti-competitive and harmful to consumers. As the Federal Trade Commission noted in its comments on a California law to implement more restrictive franchise laws, "if enacted, the Proposed Franchise Act is likely to lead to higher beer prices for California consumers, and may reduce the variety of beers from which California consumers can choose."<sup>12</sup>

This is not to say that wholesalers provide no benefits to the economy. In fact, wholesalers are active in many sectors of the economy and have been a part of the American economy since the colonial era. Wholesalers are specialists with important information about local markets that provide producers an opportunity to get their products to retailers efficiently. Wholesalers also

<sup>10</sup> Tom McCormick, "Distribution 101: A Short Course in Distribution Basics," ProBrewer.com, available at <http://www.probrewer.com/resources/distribution/distribution101.php>

<sup>11</sup> *Ibid.*

<sup>12</sup> Federal Trade Commission, "Comment on Proposed Beer Franchise Act," August 24, 2005.

allow small retailers access to products that allow them to compete with larger competitors. Their presence on the ground provides point of sales contacts to supplement any advertising or promotions by producers as well as ensuring an adequate inventory of products is available.

Yet as Nathanael H. Engle noted back in 1933, throughout the economy there always has been a tension between wholesalers and retailers: "Long the dominant factor in the distribution of merchandise, as has been pointed out, he [the wholesaler] gradually came to accept his position as a 'divine right,' and has been slow to adjust himself to the irresistible changes taking place around him."<sup>13</sup> With respect to alcohol, not only have wholesalers been slow to adjust, they have actively pursued legislation to protect the status quo and avoid any need for change.

#### MONEY AND POLITICS

As in all markets, technology and innovation have altered the underlying market for alcohol sales, expanding the market for both producers and consumers. New shipping and transportation technologies, along with new internet technologies, allow producers to reach a much larger group of potential customers. At the same time, consumers can both find new wineries or craft brewers that have been ignored by local wholesalers. In response to these trends, wholesalers have turned to government to protect their bottom line.

Wholesalers are political creatures and they defend their interests vigorously. Many states have enacted franchise laws on their behalf that guarantee a stream of monopoly profits. Purportedly, this is to keep producers from

<sup>13</sup> Nathanael H. Engle, "Economic Phases of the Wholesale Market," *American Economic Review*, Vol. 23, No. 2, June 1933, pp. 189-199.

switching wholesalers after the wholesaler had invested heavily in marketing the producer's products. Yet it is not intuitively obvious why this is more problematic for alcoholic beverages than for other merchandise where wholesalers and producers are left to come to terms through contractual negotiations in an open market.

Rather than a negotiation, the debate over direct shipment bears all the markings of such a political firefight. Technology is chipping away at the cozy relationship that the wholesalers and distributors have created with their regulators and they are fighting back, turning to the government to protect their profits in a changing marketplace.

Wholesalers are working feverishly to protect their highly prized state-protected franchises. The largest, Southern Wine and Spirits, generated annual revenues of more than \$8.5 billion in 2009, and the top ten wholesalers in alcohol generated revenues of more than \$25 billion and controlled 56 percent of the market.<sup>14</sup> And alcohol wholesalers are far more profitable than the typical wholesaler, earning 66 percent to 83 percent more in profits than the typical wholesaler over a 10 year period.<sup>15</sup>

To ensure these impressive returns, wholesalers maintain a significant presence in state capitals and Washington, D.C. The National Beer Wholesalers Association, for example, ranks number 26 on the Center for Responsive Politics list of "Heavy Hitters," giving a total of \$21 million to politicians, both Democrats and Republicans, from 1989 to 2010.<sup>16</sup> An investigation by *Wine Spectator* found that "in the five years since the Supreme Court decided *Granholm v. Heald*, both the NBWA [National Beer Wholesalers Association] and the WSWA [Wine and Spirits Wholesalers Association]

have dramatically increased spending on federal campaign initiatives."<sup>17</sup>

Of course, when discussing H.R. 5034, the legislation is swathed in noble public goals to disguise the naked economic self-interests at play. Wholesalers cling to two arguments when supporting the legislation. Specifically, they have been quick to point out the possibility of a loss of state revenue on such direct sales, as well as the potential for illegal sales to minors. Yet state regulators already have the authority to address these issues and will continue to do so with or without the CARE Act.

There is nothing unique or novel to the direct shipment of alcohol with respect to state revenues. Catalog and mail order sales have existed for some time, and are a major component of commerce. States face the same issue for orders from L.L. Bean, and there is no reason revenue from beer or wine sales should be addressed any differently. Internet tax questions are much broader than beer and wine sales, and they have been addressed as an issue of national tax policy. Direct shipping of wine comprised roughly 1 percent of total wine sales, which suggests the revenue question is trivial.<sup>18</sup> Shipping is expensive and will naturally limit the scope of the market; the vast majority of sales will be in-state and therefore subject to revenue remittance. Wine shipments are relatively insignificant in terms of e-commerce, making it odd to propose singling them out for special tax consideration.

**When discussing H.R. 5034, the legislation is swathed in noble public goals to disguise the naked economic self-interests at play.**

<sup>14</sup> IMPACT, April 1 and April 15, 2010.

<sup>15</sup> Dun & Bradstreet, Industry Norms & Key Business Ratios.

<sup>16</sup> Opensecrets.org, "Heavy Hitters: Top All-Time Donors, 1989-2010," available at <http://www.opensecrets.org/orgs/list.php?order=A>.

<sup>17</sup> Robert Taylor and Ben O'Donnell, "Support for Direct Shipping Restrictions Builds in Congress," *Wine Spectator*, May 27, 2010, available at <http://www.winespectator.com/webfeature/show/id/42823>.

<sup>18</sup> Mike Treleven, "Napa Valley Leads U.S. in Direct Wine Sales," *Napa Valley Register*, July 2, 2010, available at [http://napavalleyregister.com/news/local/article\\_b751e2b2-85a5-11d1-8990-001cc4c02e0.html](http://napavalleyregister.com/news/local/article_b751e2b2-85a5-11d1-8990-001cc4c02e0.html).

Concern over underage sales, an issue bound to capture a regulator's attention, is also a questionable reason to oppose the direct shipment of beer and wine. While it is unlikely that underage drinkers will order expensive wines and craft beers and wait for delivery, safeguards have been established to address such concerns. A simple signature at delivery goes a long way towards eliminating abuse. States have the authority to control underage drinking without banning direct shipments. And if underage drinking were a concern, it is hard to understand why states such as Virginia allowed in-state shipping from vineyards while banning out-of-state shipments.

That wholesalers would play the public safety card is particularly ironic. For a group whose income is a function of the volume of alcohol sales to be suddenly claiming that "unregulated" direct shipments of alcohol may promote underage drinking or other irresponsible acts lacks credibility, especially considering that direct shipments comprise such a small percentage of the market. Promoting responsibility in the vast majority of the market they control may be a better use for the millions spent on lobbying by the wholesalers.

#### CONCLUSION

Many argue that the 21<sup>st</sup> amendment provided an exemption from the Commerce Clause, which meant states were free to regulate as they saw fit—even if that meant engaging in economic protectionism. Yet the courts made clear that the 21<sup>st</sup> Amendment does not trump the Commerce Clause. States have the authority to regulate alcohol sales, but this must be balanced against constitutional protections of interstate trade.

Laws that protect local monopolies from out-of-state competition not only harm consumers, but violate the U.S. Constitution as well. As the

Supreme Court noted in *Granholm v. Heald*: "The Twenty-first Amendment's aim was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. It did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they never enjoyed. The 21<sup>st</sup> Amendment allows states to regulate issues of temperance; it does not allow them to treat out-of-state suppliers any different from in-state suppliers."<sup>19</sup>

Alcohol regulations are certainly outdated and need reforming. Unfortunately, H.R. 5034 would ensure that no meaningful reforms are even considered, leaving producers and consumers trapped in a regulatory model created in a bygone era. The CARE Act is a simple piece of economic protectionism, designed to shore up the monopoly earnings of wholesalers at the expense of everyone else. The bill already has 124 co-sponsors in the House, a tribute to the lobbying muscle displayed by the wholesalers.

Ultimately, consumers pay the price for such economic protectionism. Choice is restricted and prices are higher. The Internet provides a greater degree of economic integration that makes Prohibition-era laws on the distribution of beer and wine horribly outdated. A similar debate over clothing or CD sales would be farcical. Yet temperance laws continue to provide opportunities to wring out more profits from the regulatory system. Arguing from pure economic greed is less appealing than framing the issue in broader concerns about temperance and the welfare of the state, but the ultimate outcome of H.R. 5034 remains the same—an extension of monopoly power to a profitable and politically well-connected special interest.

**Arguing from pure economic greed is less appealing than framing the issue in broader concerns about temperance and the welfare of the state, but the ultimate outcome of H.R. 5034 remains the same—an extension of monopoly power to a profitable and politically well-connected special interest.**

<sup>19</sup> *Granholm v. Heald*, (03-1116) 544 U.S. 460 (2005).

**Senate Joint Resolution No. 34**

\_\_\_\_\_  
Adopted in Senate June 17, 2010

\_\_\_\_\_  
*Secretary of the Senate*

\_\_\_\_\_  
Adopted in Assembly August 2, 2010

\_\_\_\_\_  
*Chief Clerk of the Assembly*

\_\_\_\_\_  
This resolution was received by the Secretary of State this  
\_\_\_\_ day of \_\_\_\_\_, 2010, at \_\_\_\_ o'clock \_\_\_\_M.

\_\_\_\_\_  
*Deputy Secretary of State*

SJR 34

— 2 —

## RESOLUTION CHAPTER \_\_\_\_\_

Senate Joint Resolution No. 34—Relative to California wines.

## LEGISLATIVE COUNSEL'S DIGEST

SJR 34, Padilla. California wines: sales.

This measure would urge Congress to defeat H.R. 5034 in order to protect and preserve the ability of California wineries, and all wineries in the United States, to ship wine directly to consumers without discrimination between in-state and out-of-state wine producers.

WHEREAS, California is the fourth largest wine producing region in the world, after France, Italy, and Spain; and

WHEREAS, California has 2,972 bonded wineries; and

WHEREAS, California has 4,600 winegrape growers; and

WHEREAS, California has 531,000 acres of winegrapes; and

WHEREAS, California winegrowers ship over 193 million cases, representing some 467 million gallons of wine to the United States wine market; and

WHEREAS, The California wine industry creates more than 330,000 jobs, billions of dollars in economic impact, and preserves agricultural land and family farms; and

WHEREAS, The California wine industry generates higher taxes than most industries because, as a regulated industry, it pays excise taxes to the state and federal government on every gallon of wine; and

WHEREAS, The California wine industry has an annual impact of \$61.5 billion on the state's economy and produces the number one finished agricultural product in the state; and

WHEREAS, The economic impact of the United States wine industry on the national economy is \$121.8 billion annually; and

WHEREAS, California's wine industry attracts 20.7 million tourists annually to all regions of California and generates wine-related tourism expenditures of \$2.1 billion; and

WHEREAS, Currently 37 states and the District of Columbia allow direct shipping of wine from winegrowers to consumers; and

WHEREAS, The innovation and entrepreneurial spirit of small California wineries drives the entire industry to improve and progress; and

WHEREAS, In order to reach consumers in other states, many California wineries have turned to direct marketing and shipping of their wines; and

WHEREAS, Since 1985 California has pioneered consumer access to wine through reciprocal and permit shipping to alleviate scarcity at the retail level of California wines; and

WHEREAS, Over the past 10 years, consolidation trends within the wholesale tier have made it difficult for California wineries to achieve adequate distribution, and, as a result, have limited consumer choice; and

WHEREAS, California wineries have offered voluntarily to have their direct marketing and shipping permitted and regulated by other states to ensure that those states collect the same taxes that wines sold through the three-tier system must pay, that direct deliveries would be made only to adults, and that direct deliveries are not made in "dry" areas, as defined under the laws of each state; and

WHEREAS, The California wine industry has developed comprehensive model direct shipping legislation to address all of the concerns expressed by state alcohol regulators across the country; and

WHEREAS, California has enacted a law to open direct shipping of wine from other states to its own residents without limitation through a simple permit system to comply with the decision in *Granholm v. Heald* (2005) 544 U.S. 460; and

WHEREAS, States' rights to regulate wine and alcohol granted by the 21st Amendment to the United States Constitution have always been subject to constitutional limitation and judicial review; and

WHEREAS, Court decisions over the last 40 years balance state authority to regulate alcohol with the framer's belief that the nation would only succeed if interstate commerce thrived; and

WHEREAS, The Commerce Clause has been applied judiciously by the courts to foster national economic goals while preserving nondiscriminatory state authority; and

WHEREAS, The landmark 2005 United States Supreme Court case, *Granholm v. Heald*, reaffirmed states' rights under the 21st

SJR 34

— 4 —

Amendment to the United States Constitution to regulate wine as long as they do not discriminate between in-state producers and out-of-state producers, and correctly ruled that these rights do not supersede other provisions of the Constitution; and

WHEREAS, H.R. 5034 would severely limit consumer choice in California wine throughout the nation as direct-to-consumer laws are amended or repealed; and

WHEREAS, H.R. 5034 would imperil market access for California wineries that cannot secure effective wholesale distribution; and

WHEREAS, H.R. 5034 would stunt competition among the nation's 7,011 wine producers as markets are artificially constrained and access is limited; and

WHEREAS, H.R. 5034 would allow certain state alcohol laws to avoid judicial scrutiny through a presumption of validity; and

WHEREAS, H.R. 5034 would reverse decades of long-established jurisprudence that has balanced interstate commerce concerns with state regulatory authority and fostered a dramatic growth in wine production, sales, and tax revenue; and

WHEREAS, H.R. 5034 would insulate and sanction discriminatory state laws by reversing evidentiary rules for Commerce Clause legal challenges and increasing the burden of proof of plaintiffs; and

WHEREAS, H.R. 5034 would frustrate legitimate challenges to superficially neutral, but nonetheless discriminatory, state laws like the landmark Massachusetts production cap case, *Family Winemakers of California v. Jenkins* (2010) 592 F.3d 1; and

WHEREAS, H.R. 5034 would be an unprecedented shift in the relationship between federal and state authority over wine; now, therefore, be it

*Resolved by the Senate and the Assembly of the State of California, jointly,* That the Legislature of the State of California hereby respectfully urges Congress to protect and preserve the ability of California wineries, as well as all American wineries, to ship wine directly to consumers without discrimination between in-state and out-of-state wine producers; and be it further

*Resolved,* That the Legislature of the State of California urges the defeat of H.R. 5034; and be it further

*Resolved,* That the Secretary of the Senate transmit copies of this resolution to the President and Vice President of the United

States, to the President pro tempore of the United States Senate, to the Speaker of the House of Representatives, and to each Senator and Representative from California in the Congress of the United States.

Attest:

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*Secretary of State*

Mr. CONYERS. And thank you George Radanovich.  
And, now, we turn to Gary Miller of California. Welcome, sir.

**TESTIMONY OF THE HONORABLE GARY G. MILLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. MILLER. Thank you, and so as not to offend the Chairman—I am not against lower prices for legal consumers, nor Members of Congress. We are on the same side, here.

Mr. Chairman, Ranking Member Smith—thanks for the opportunity to testify before you today about the impact of H.R. 5034, the CARE Act.

While the issue of alcohol regulation is complex, I would like to focus my testimony on the impact of this proposed legislation on underage drinking. According to the National Alliance to Prevent Underage Drinking, every day 7,000 children under the age of 16 take their first alcoholic drink. Youth who start drinking before the age 15 are five times more likely to develop alcohol dependency or abuse later in life than those who begin drinking at or after the age of 21 years.

And, according to the Center for Disease Control, although drinking by persons under the age of 21 is illegal, people aged 12 through 20 years drink 11 percent of all alcohol consumed in the United States. With the nearly \$170 billion annual market for alcoholic beverages, underage drinking comprises a significant part of this market.

One of the most important ways we can limit underage drinking is by reducing illegal access and increasing enforcement. We must require a strong regulatory structure that balances the free market with public-health concerns with respect to alcohol. The system of state-based regulation has served our Nation well because states and localities know their own communities' needs best. A one-size-fits-all strategy does not work with alcohol.

What is socially acceptable in one part of my congressional district, much less the country, won't work in another. All alcohol regulation is a balance between competition, price, and availability on the one hand, and appropriate control to mitigate and moderate an underage consumption on the other. Each state must determine how this balance should be achieved, and where the appropriate balance points should be fixed.

States view alcohol differently from the authority of each state to regulate according to its own norms and standards—must be safeguarded. Surely, it is not in the public interest to advocate for weak regulation and an unrestricted marketplace. While I understand that some of our Nation's small businesses rely on the Internet to widen their marketplace, we must ensure that appropriate precaution and regulations are followed so that the enforcement of state underage drinking laws can be adequately enforced.

No one will argue that it is not the states' responsibility to monitor alcohol sales and consumption by instituting and enforcing age restrictions. Indeed, minors on the Internet can purchase wine, beer, or grain alcohol with the click of a mouse, and have it delivered to their house.

Sting after sting by law enforcement and media consumer-protection advocates have shown just how easy it is for minors to buy alcohol online with no I.D. check or age verification. Many online businesses rely on interstate carriers to verify the legality of an alcohol shipment. It is commonplace for the buyer to self-certify that they are of age. It is up to the individual UPS or FedEx employee delivering the shipment to verify the age of the recipient. The problem is that the Supreme Court has ruled that the states cannot require interstate carriers to verify the recipients' age. This, of course, raises questions as to whether legal liability would lie if, indeed, a carrier delivered alcohol to a minor without first verifying age.

Many of the legal decisions rendered in the *Granholm* have been conflicting, leaving regulators, attorneys general and legislators in a dilemma with regard to their authority to regulate the unique product. We need to clarify congressional intent that the states are the primary authority to regulate alcohol sales, and that they should exercise the authority to protect the public interest.

In a narrow-balance fashion, the revised version of H.R. 5034 accomplishes these goals. H.R. 5034 keeps in place the states' authority to regulate alcohol, but upholds the high standard of the *Granholm* decision to ensure interstate commerce.

The CARE Act expressly prohibits a state from enacting discriminatory laws that favor in-state producers of alcohol to the detriment of out-of-state producers. In fact, the bill reserves the right of states to enact strict regulations if such regulations advance legitimate local purpose. Ensuring that minors do not have inappropriate access to alcohol is an example of such a purpose. In the end, the bill would force retailers to be responsible not only to their bottom line, but to the communities they serve as well.

While the confusion in the court system spurred by the *Granholm* decision creates regulatory inconsistencies based on judicial jurisdiction, this alone makes it necessary for Congress to clarify intent. However, according to the Concerned Women for America, the authority for states to manage the distribution and sale of alcohol is especially critical for society to effectively regulate access to alcohol to minors.

As a conservative, I am regularly on the side of lessening the regulatory burden on our businesses across America, but I will not endorse a strategy that weakens state law and helps underage access to alcohol.

I yield back.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF THE HONORABLE GARY G. MILLER,  
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

**Statement of Congressman Gary G. Miller  
House Committee on the Judiciary  
Hearing on H.R. 5034  
The Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010  
September 29, 2010**

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Chairman Conyers and Ranking Member Smith, thank you for the opportunity to testify before you today about the impact of H.R. 5034, the CARE Act. While the issue of alcohol regulation is complex, I would like to focus my testimony on the impact of this proposed legislation on underage drinking.

According to the National Alliance to Prevent Underage Drinking, every day, 7,000 children under the age of 16 take their first alcoholic drink. Youth who start drinking before age 15 years are five times more likely to develop alcohol dependence or abuse later in life than those who begin drinking at or after age 21 years. And according to the Centers for Disease Control, although drinking by persons under the age of 21 is illegal, people aged 12 to 20 years drink 11% of all alcohol consumed in the United States. With a nearly \$170 billion annual market for alcoholic beverages, underage drinking comprises a significant part of this market. One of the most important ways we can limit underage drinking is by reducing illegal access and increasing enforcement.

We must require a strong regulatory structure that balances the free market with public health concerns with respect to alcohol. The system of state-based regulation has served our nation well because states and localities know their own communities' needs best. A one-size-fits-all strategy doesn't work with alcohol. What is socially acceptable in one part of my congressional district—much less the country—won't work in another.

All alcohol regulation is a balance between competition, price, and availability, on the one hand, and appropriate control to mitigate immoderate and underage consumption, on the other. Each state must determine how this balance should be achieved and where the appropriate balance point should be fixed. States view alcohol differently and the authority of each state to regulate according to its local norms and standards must be safeguarded. Surely it is not in the public interest to advocate for weak regulations and an unrestricted marketplace.

While I understand that some of our nation's small businesses rely on the internet to widen their marketplace, we must ensure that appropriate precautions and regulations are followed so that the enforcement of state underage drinking laws can be adequately enforced. No one will argue that it is not the state's responsibility to monitor alcohol sales and consumption by instituting and enforcing age restrictions.

Indeed, minors on the internet can purchase cheap wine, beer, or grain alcohol with the click of a mouse and have it delivered to their door. Sting after sting by law enforcement and media consumer protection advocates has shown just how easy it is for minors to buy alcohol online with no I.D. check or age verification. Many online businesses rely on interstate carriers to verify the legality of the alcohol shipments. It is commonplace for the buyer to "self certify" that they are of age. It is up to the individual UPS or FedEx employee delivering the shipment to verify the age of the recipient. The problem is that the Supreme Court has ruled that states cannot require interstate carriers

to verify the recipient's age. This of course, raises questions as to where legal liability would lie if, indeed, a carrier delivered alcohol to a minor without first verifying their age.

Many of the legal decisions rendered since *Granholm* have been conflicting, leaving regulators, attorneys general, and legislatures in a dilemma with regard to their authority to regulate this unique product. We need to clarify Congressional intent that the states are the primary authority for regulating alcohol sales and that they should exercise that authority to protect the public interest. In a narrow, balanced fashion the revised version of H.R. 5034 accomplishes these goals.

H.R. 5034 keeps in place the state's authority to regulate alcohol, but it upholds the high standard of the *Granholm* decision to ensure interstate commerce. The CARE Act expressly prohibits a state from enacting discriminatory laws that favor in-state producers of alcohol to the detriment of out-of-state producers. In fact, the bill preserves the rights of states to enact strict regulations if such regulations advance a legitimate local purpose. Ensuring that minors do not have inappropriate access to alcohol is an example of such a purpose. In the end, the bill would force retailers to be responsible not only to their bottom lines but to communities they serve as well.

While the confusion in the court system spurred by the *Granholm* decision creates regulatory inconsistency based on judicial jurisdiction, this alone makes it necessary for Congress to clarify intent. However, according to the Concerned Women for America,

the authority for states to manage the distribution and sale of alcohol is especially critical for society to effectively regulate access to alcohol by minors. As a conservative, I'm regularly on the side of lessening the regulatory burden on our businesses across America. But I will not endorse a strategy that weakens state laws that help deter underage access to alcohol.

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Mr. CONYERS. Thank you very much.  
Did any of you here—any of your colleagues say something that you felt like you would like to make a comment on?  
Mike Thompson?  
Mr. THOMPSON. Thank you, Mr. Chairman.

I could go on and on disputing some of the things that have been said. But a couple of folks have referenced state attorneys general positions on this bill. And I think it is important for the record, if you would allow, to take these 10 letters from 10 different state attorney generals who are stating that, in fact, their support for this bill was misrepresented, and they have no position on that. I would like to submit that.

And I would also like to submit for the record, the American Bar Association's Antitrust Section opposition, and the Progressive Policy Institute's position of opposition as well.

Mr. CONYERS. We will accept them into the record.

[The information referred to follows:]



Rob McKenna  
**ATTORNEY GENERAL OF WASHINGTON**  
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

May 17, 2010

Mr. Steve Gross  
Director of State Relations  
Wine Institute  
425 Market Street, Suite 1000  
San Francisco, CA 94105

Dear Mr. Gross:

Thank you for bringing to my attention the issues the wine industry has with HR 5034, a bill currently pending in Congress. I enjoyed our discussion about the successes of the U.S. wine industry, and the possible negative impacts that this legislation could have on it.

It has since also come to my attention that some proponents of HR 5034 have suggested, both in direct meetings with Members of Congress and in advertising, that I support this legislation. Let me assure you that this is not correct.

I was proud to sign a letter with 39 fellow attorneys general from across the country supporting the 21<sup>st</sup> Amendment and states' rights to regulate alcohol within their borders. The rights of states are very important to attorneys general, and we often provide our perspectives when such rights are threatened either by federal legislation or litigation. A general letter on the principle of states' rights, like the one on state regulation of alcohol which we sent to a Congressional subcommittee chairman on March 29, is relatively common from the attorneys general.

My support of this National Association of Attorneys General (NAAG) sign-on letter is now being construed by some as support for HR 5034. This is false; the NAAG sign-on letter was sent March 29, while HR 5034 was not even introduced in Congress until April 15. Further, HR 5034 goes far beyond the general states' rights principle which was the focus of the NAAG letter. Indeed, HR 5034 is seen by some as an attack on the ability of winemakers to sell directly to consumers via wine clubs or the Internet.

I have been a strong supporter of the wine industry and will remain one. A key to the industry's growth is to be able to continue to sell wine, where states allow direct-to-consumer shipments, in a non-discriminatory regulatory environment. This should not impact states which have decided not to allow such direct sales, as that is within each state's control.



ATTORNEY GENERAL OF WASHINGTON

Mr. Steve Gross  
May 17, 2010  
Page 2

I hope that this letter has cleared up any misperceptions which have been created by some proponents of HR 5034. If my office can provide any additional information on this subject, please do not hesitate to contact my Chief of Staff, Randy Pepple, at 360-586-5579.

Sincerely,



ROB MCKENNA  
Attorney General

RMM:tit

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OFFICE OF THE ATTORNEY GENERAL  
STATE OF ARIZONA

TERRY GODDARD  
ATTORNEY GENERAL

June 29, 2010

Ms. Rhonni Moffitt  
Executive Director  
Arizona Wine Growers Association  
PO Box 94152  
Phoenix, AZ 85070

Dear Ms. Moffitt:

Congratulations on the recent successes of our state's growing wine industry. I am sure you were pleased to read the June 8, 2010 Arizona Republic Editorial highlighting Arizona wines and noting that our wines had outperformed competitors from California and around the world at a recent taste testing competition.

I appreciated the meetings with you and members of the Arizona Wine Growers Association (AWGA). The tour with members of the Verde Valley Wine Consortium at the Page Springs Cellars Vineyard drove home for me the important role Arizona Wineries have in our economy and tourism industry. Learning about the success of the Yavapai College Viticulture and Enology Program was particularly impressive. I look forward to following the progress of Arizona's wine industry.

At our meetings, you brought to my attention key issues and concerns AWGA has with HR 5034, a bill recently introduced in Congress. In particular, you indicated that the National Association of Attorneys General (NAAG) letter supporting state regulation of alcohol, of which I was one of 39 signatories, is being used to indicate support for HR 5034. I want to assure you that while I stand behind the NAAG letter and support state regulation of alcohol, I have not taken a position regarding any federal legislation on the issue of alcohol regulation. This is particularly true in light of the fact that HR 5034 is in its infancy, and will likely undergo many amendments before being presented for a final congressional vote.

I hope that this letter has cleared up any misperceptions. If my office can provide any additional information or assistance on this subject, please do not hesitate to contact my Deputy Attorney General, Greg Stanton, at 602.542.7922.

Sincerely,

Terry Goddard  
Attorney General

PROTECTING ARIZONA

1275 WEST WASHINGTON, PHOENIX, ARIZONA 85007-2926 • 602.542.4266 • FAX 602.542.4085 • WWW.AZAG.GOV



ATTORNEY GENERAL OF COLORADO  
John W. Suthers

July 5, 2010

Hon. John Conyers, Jr., Chairman  
Hon. Lamar Smith, Ranking Member  
U.S. House of Representatives Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Conyers and Congressman Smith:

I write to clear-up some confusion regarding the March 29, 2010, National Association of Attorneys General sign-on letter (the "NAAG Letter") regarding states' rights and alcohol regulation that I signed. I am a firm believer in federalism and states' rights and often support such letters to express that support. My joining that letter was meant, not as an endorsement of any particular legislation, but as a general statement of policy.

Unfortunately, it has come to my attention that various reports in the media, and potentially directed to members of Congress, suggest that the NAAG Letter indicates my support for H.R. 5034, the "Comprehensive Alcohol Regulatory Effectiveness Act of 2010." This is false. The NAAG Letter was sent on March 29, while H.R. 5034 was not introduced until April 15, more than two weeks later. I was not aware of the existence H.R. 5034, let alone its scope, when I agreed to sign the NAAG Letter. Indeed, H.R. 5034 is much broader in scope than the NAAG Letter and raises issues beyond the principles of federalism.

I continue to support states' rights in alcohol regulation, and stand by my signature on the NAAG Letter. However, I have not endorsed, and do not endorse, H.R. 5034.

I appreciate the opportunity to address this matter with you.

Sincerely,

A handwritten signature in black ink that reads "John W. Suthers".

JOHN W. SUTHERS  
Colorado Attorney General

c: Members of the Committee on the Judiciary



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY  
65102

CHRIS KOSTER  
ATTORNEY GENERAL

P.O. Box 898  
(573) 751-5921

July 7, 2010

The Honorable Russ Carnahan  
United States House of Representatives  
1710 Longworth House Office Building  
Washington, D.C. 20515

Dear Congressman Carnahan:

In March 2010, the National Association of Attorneys General circulated a letter related to preserving the state-centric regulatory framework for alcohol. Because I support each state's interest in regulating alcohol, a position that is codified in the 21st Amendment to the United States Constitution, I was proud to affix my signature to the NAAG letter along with 38 of my fellow attorneys general.

I continue to believe that states are the appropriate governmental entities to regulate alcohol. However, it has come to my attention that some parties are using my signature on the NAAG letter to represent that I support HR 5034. I joined the NAAG letter in late March 2010, but HR 5034 was not introduced until April 15. Thus, I did not contemplate or consider HR 5034 when I joined the NAAG letter; indeed, I was not aware of the resolution's existence or its forthcoming introduction.

To clarify, I take no position on HR 5034. While I continue to support the belief that states should maintain regulatory oversight over alcohol, I leave it up to federal legislators to consider the merits of HR 5034 and its potential impact on the alcohol regulatory landscape.

If my office can provide any additional information on this subject, please do not hesitate to contact me.

Respectfully,

A handwritten signature in black ink that reads "Chris Koster".

CHRIS KOSTER  
Attorney General



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

July 9, 2010

Scott Brown, President  
Idaho Grain Producers Association  
821 West State Street  
Boise, ID 83702-5832

Re: Comprehensive Alcohol Regulatory Effectiveness Act of 2010 / HR 5034

Dear Mr. Brown:

Thank you for writing me about HR 5034, a bill currently pending in Congress. I appreciated learning of your concerns about the bill and how it might affect Idaho's barley farmers. Some proponents of HR 5034 have suggested that I support this legislation, but let me assure you, that is not correct.

It is true that I signed a letter, with 39 other Attorneys General, supporting the 21st Amendment and states' rights to regulate alcohol within their borders. Our state's rights are very important to me, and it is not unusual for me to write or join other Attorneys General in such a letter when I think Idaho's rights are threatened, either by federal legislation or litigation. A general letter on the principles of states' rights, like the one on state regulation of alcohol sent to a Congressional subcommittee chairman on March 29, is quite common.

Apparently, my support of this specific National Association of Attorneys General (NAAG) sign-on letter is now being construed by some as support for HR 5034, which is false. The NAAG sign-on letter was sent March 29, while HR 5034 was not even introduced in Congress until April 15. Further, HR 5034 goes far beyond the general states' rights principles, which were the focus of the NAAG letter. I have been advised that HR 5034 is seen by some as an attack on the ability of businesses to sell directly to consumers.

I understand that other Attorneys General have expressed similar concerns related to HR 5034. In fact, Washington Attorney General Rob McKenna wrote a letter to that effect on May 17, and we are in agreement on this issue.

DOUGLAS F. GANSLER  
*Attorney General*



KATHERINE WINFREE  
*Chief Deputy Attorney General*

JOHN E. HOWARD, JR.  
*Deputy Attorney General*

410-576-7036  
FACSIMILE NO.

STATE OF MARYLAND  
OFFICE OF THE ATTORNEY GENERAL

410-576-6311  
WRITER'S DIRECT DIAL NO.

July 20, 2010

The Honorable John Conyers, Jr., Chairman  
The Honorable Lamar Smith, Ranking Member  
U.S. House of Representatives Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Conyers and Congressman Smith:

In March 2010, the National Association of Attorneys General circulated a letter supporting the primacy of states in regulating alcoholic beverages. I joined 38 fellow attorneys general in signing the letter to endorse this position, codified in the 21st Amendment to the United States Constitution.

It has come to my attention that some parties are misconstruing my signature on the NAAG letter as support for HR 5034, introduced after I joined the NAAG letter. I write to clarify that I take no position on HR 5034.

I appreciate the opportunity to address this matter with you.

Sincerely,

A handwritten signature in cursive script that reads "Douglas F. Gansler".

Douglas F. Gansler  
Attorney General

cc: Members of the Committee on the Judiciary

DFG/caws  
Alcoholic Bev 072010.docx



STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street  
Carson City, Nevada 89701-4717

CATHERINE CORTÉZ MASTO  
*Attorney General*

KEITH G. MUNRO  
*Assistant Attorney General*

JIM SPENCER  
*Chief of Staff*

July 13, 2010

Sent via U.S. Mail

Peter H. Cressy, President/CEO  
Distilled Spirits Council  
1250 Eye Street, N.W. Suite 400  
Washington, DC 20005

Re: *HR 5034*

Dear Mr. Cressy:

On March 29, 2010, forty state attorneys general, including me, signed and sent a letter to the Honorable Hank Johnson, Chairman, Subcommittee on Courts and Competition Policy, House Judiciary Committee, regarding the subject of alcohol regulation by the States. The express intent of the letter was to suggest that Congress address the erosion of the States' autonomy in the area of alcohol regulation following the decisions in *Granholm v. Heald*, 544 U.S. 460 (2005) and other, lower court, rulings, which have effectively eroded a long line of prior decisions recognizing state primacy in the area of alcohol regulation.

There was no support in the attorneys general letter for any specific piece of legislation. In particular there was no indication of support for HR 5034, which is currently being considered in Congress. Indeed, HR 5034 was not in existence at the time the letter was sent. While HR 5034 may indeed be important legislation for its maker, my intention with this communication is to clarify that I have not taken a position as to the merits of HR 5034.

Peter H. Cressy - pg. 2  
July 13, 2010

If you have any questions, please feel at liberty to call me or my solicitor general,  
Wayne Howle, whose telephone number is 775-684-1227.

Sincerely,



CATHERINE CORTEZ MASTO  
Attorney General

CCM:vjb/lf



**COMMONWEALTH of VIRGINIA**

Kenneth T. Cuccinelli, II  
Attorney General

Office of the Attorney General

July 16, 2010

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1981  
Virginia Relay Services  
800-828-1120  
7-1-1

B. E. Brannock  
41 Fallon Street  
Staunton, VA 24401

Dear Mr. Brannock:

Thank you for contacting the Office of Attorney General Kenneth T. Cuccinelli, II. The attorney general appreciates you taking the time to share your thoughts. We are sorry for the delay in responding to your letter.

The attorney general did not support a federal bill that takes away the rights of states to control alcoholic beverage sales and distribution. To the contrary, Mr. Cuccinelli signed on to a letter with 39 other states attorneys general reinforcing the states' roles in alcoholic beverage regulation. The letter expressed that the attorneys general were against the federal government imposing a once-size-fits-all regulation over the industry. The letter was supportive of a congressional hearing to discuss a measure that protected the rights of states to regulate alcohol. As the letter stated, for more than a decade, major retailers and other interests have executed a systematic legal campaign to deregulate alcohol in favor of the one-size-fits-all structure – a structure that the Constitution's Twenty-first Amendment rejected.

Unfortunately, HR 5034 does not reflect the views we had outlined in the letter. The endorsement of the congressional hearing was not an endorsement for the legislation that resulted from such hearing.

The attorney general understands the importance of direct shipment opportunities for Virginia wineries, the interstate sale of Virginia products, and the added choices that small family wineries provide for consumers. Mr. Cuccinelli supports efforts that aid in the success of Virginia wineries, without compromising the rights of states.

Again, thank you for taking the time to share your concerns. I hope that this letter clarifies the attorney general's position. If this office can be of further assistance with this or any other matter, please do not hesitate to contact us again.

Sincerely,

Constituent Relations  
Office of the Attorney General



Wayne Stenehjem  
ATTORNEY GENERAL

STATE OF NORTH DAKOTA  
OFFICE OF ATTORNEY GENERAL  
STATE CAPITOL  
600 E BOULEVARD AVE DEPT 125  
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August 20, 2010

Hon. John Conyers, Jr., Chairman  
Hon. Lamar Smith, Ranking Member  
US House of Representatives Committee  
on the Judiciary  
2138 Rayburn House Office Building  
Washington DC 20515

Dear Chairman Conyers and Congressman Smith:

I write to clear up any confusion that may have arisen over the March 29, 2010 National Association of Attorneys General (NAAG) sign-on letter that I joined regarding states' rights and alcohol regulation.

The NAAG sign-on letter, which was signed by 40 Attorneys General, supported the 21<sup>st</sup> Amendment and the states' rights to regulate alcohol within their borders. Our state's rights are important to me and to the people of North Dakota, and it is not unusual for me to join other Attorneys General in such a letter when I think North Dakota's rights are threatened by federal action.

I am informed that some proponents of HR 5034 (the "Comprehensive Alcohol Regulatory Effectiveness Act of 2010") may be suggesting that by signing the NAAG letter, I also support this legislation. That is not the case.

The NAAG sign on letter was sent March 29, 2010, while HR 5034 was not even introduced in Congress until April 15, 2010. Further, HR 5034 goes far beyond the general states' rights principles, which were the focus of the NAAG letter. I continue to support states' rights in alcohol regulation and stand by my signature on the NAAG letter.

However, I want to make it clear that I have not taken a position with respect to HR 5034. Any representation that I have done so would not be accurate.

Should you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,

Wayne Stenehjem  
Attorney General

**ATTORNEY GENERAL**  
STATE OF MONTANA

Steve Bullock  
Attorney General



Department of Justice  
215 North Sanders  
PO Box 201401  
Helena, MT 59620-1401

August 24, 2010

The Honorable John Conyers, Jr., Chairman  
The Honorable Lamar Smith, Ranking Member  
U.S. House of Representatives Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Conyers and Congressman Smith:

Earlier this year, the National Association of Attorneys General circulated a letter supporting the right of the states to regulate the sale and use of alcohol, as codified in the 21<sup>st</sup> Amendment to the Constitution. I joined 38 of my colleagues in signing the letter.

I have become aware that my signature has been misconstrued by some as endorsement of H.R. 5034. I write to clarify that I take no position on the aforementioned legislation.

If you should have further questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Bullock", written over a horizontal line.

STEVE BULLOCK  
Attorney General

SB:sj

cc: Members of the Committee on the Judiciary

TELEPHONE: (406) 444-2026 FAX: (406) 444-3549 E-MAIL: [contactdoj@mt.gov](mailto:contactdoj@mt.gov)

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Mr. THOMPSON. Thank you, Mr. Chairman.  
Mr. CONYERS. Anyone else feel disposed to make any comment before I excuse and thank all of you for your statements?  
Okay. Thanks so much.  
Let me start the hearing by calling this the last hearing of Bill Delahunt, so that we will have this dedicated appropriately. And this is also his bill. So I just want to take this moment to thank Bill Delahunt for his many years of service not only on this Com-

mittee, but as a prosecutor in Massachusetts, and all the friends that he has garnered on both sides of the aisle.

And I think I will put the rest of my statement into the record and yield to my dear friend, Mr. Smith.

[The prepared statement of Mr. Conyers follows:]

**Hearing on H.R. 5034,  
“Comprehensive Alcohol Regulatory  
Effectiveness (CARE) Act of 2010”  
11:00 am, 2141 Rayburn HOB  
September 29, 2010**

**Statement**

We are here today to examine H.R. 5034, the Comprehensive Alcohol Regulatory Effectiveness Act, or the CARE Act, and in particular, the proposed manager’s amendment to that legislation developed by our colleague Bill Delahunt. I’d like to begin our discussion by emphasizing three points.

**First, the proposed revisions to H.R. 5034 represent a very positive step in my judgment.**

The initial legislation would have insulated State

alcohol laws from challenges under laws protecting interstate commerce, as well as a wide variety of other federal statutes. The revised language is far more focused.

With regard to the commerce clause, the revised proposal protects only those alcohol regulations that do not facially or intentionally discriminate against out-of-State producers.

The new language also drops entirely the provision that would have protected State alcohol regulations that conflict with other federal laws.

This could conceivably have insulated anti-competitive behavior violative of the antitrust laws, as well as other conduct inconsistent with federal civil rights or labeling laws.

This was not the authors' intent, and I believe the revised language is more appropriately balanced.

**Second, I hope we can consider whether** the legislation helps ensure that States have the tools available to promote temperance and guard against underage drinking.

In *Cherry Hill Vineyards v. Lilly*, the Sixth Circuit struck down a State alcohol regulation that allowed direct shipment of wine from small wineries only if the customer made the actual purchase in person, ensuring that the customers identification was checked at the time of sale, not just at the later time of delivery.

In *Siesta Village Market LLC v. Granholm*, a federal court in Michigan struck down a State law that permitted only in-State retailers to deliver alcohol directly to consumers.

The question before us today is whether H.R. 5034 would prevent such rulings in the future, strengthening the States' hands to protect against underage alcohol consumption, but without leading to unjustified discrimination by the States.

**Third, I would like to reach out to parties on all sides of this complex issue to work with the Committee to find common ground that best serves the public interest.**

At a time when underage drinking is reaching epidemic levels – the National Survey on Drug Use and Health recently found that 28% of youth aged 12 to 20 years drink alcohol and 19% reported binge drinking – it behooves all of us to work together to find the right balance.

This is not a partisan issue, and it should not be a rancorous issue. I know the stakes are high, and the dollar amounts involved are immense. But that should not prevent us from working across the aisle to make sure the 21st amendment remains relevant in the 21st century.

**Finally, as this will be our last full committee hearing before the mid-term elections, I would like to acknowledge the sponsor of this bill, my good friend and colleague Bill Delahunt, who will unfortunately be retiring at the end of this Congress.**

Representative Delahunt has served on the Judiciary Committee since first coming to Congress in 1997. As a member of our committee, he has brought invaluable insight and experience garnered from more than 20 years working as a district attorney.

He has been an outspoken advocate and stalwart ally, and has played a central role in passing bipartisan legislation to assist international adoptions, improve forensic laboratories, and improve our criminal justice system.

He has also been tireless in his efforts to expose misconduct and abuses in the Justice Department and across the government.

I thank Congressman Delahunt for his many years of service on this committee and to the people of Massachusetts.

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Mr. SMITH. Thank you, Mr. Chairman. I certainly agree with you, and want to thank our colleague, Bill Delahunt, for his years of service to his constituents and to his state, and to our country, as well as his dedication to this particular Committee.

Bill Delahunt is one of the most able, most effective Members of Congress who I know. And he and I have worked on a number of pieces of legislation together, showing that bipartisanship can work

and, particularly, with someone like Bill Delahunt, who is well motivated in so many areas. And we wish him well.

And I have a hunch that we will be able to stay in touch with him, and keep up with him, and look forward to hearing from him as we go into the next Congress, even though he may not be present. We will certainly remember all of his contributions and continue to appreciate him and his service. And I do hope he stays in touch with all of us.

Mr. CONYERS. Howard Coble?

Mr. COBLE. Mr. Chairman, I know time is important. I will be very brief. But my fellow Coast Guards and I would be remiss if I didn't echo what you and the gentleman from Texas just said. I will put Bill—

Mr. CONYERS. All right.

Bill Delahunt?

Mr. DELAHUNT. Hello, and it is nice to be present when you are hearing your own obituary. People tend to say very positive things when you are leaving.

Just a quick anecdote, Mr. Chairman—during the course of the primary, I was asked to endorse a particular candidate to succeed me. And I said, "I am not going to get involved." And this particular candidate said, "Well, it is absolutely essential." And I said, "Why is it essential?" He said, "Because your numbers are through the roof." And my response was, "They are through the roof because I am leaving."

Let me just say that it has been an honor to serve on this Committee. This Committee has a tremendous record. I think, oftentimes, the public is unaware that despite the policy disagreements that are obvious on a number of issues—that the personal relationships are such that it has allowed this Committee to perform admirably.

I consider every Member of this Committee a friend. And those friendships—with you, with Lamar, with Howard Coble, and with every Member—I will truly cherish. And those friendships will endure long after the campaigns are over.

You know, political life is difficult. I don't think the American people really understand the sacrifices that Members make. I can say that now, because I am leaving. But each and every Member of Congress—each and every Member of this Committee worked diligently. They work because they are here to serve. We have a different understanding sometimes in terms of what is the best for public policy. But people here are committed. They are committed to their country; they are committed to their district; and they make tremendous sacrifices.

This is a job that never ends. When we leave here, we go back to our district and communicate with our constituents. But every Member of this Committee can be very proud of what we have accomplished, at least during my 14 years and, I dare say, as we look forward.

But let me just end by saying the friendship—your friendship, Lamar Smith's friendship, and everyone's friendship—is a memory that I will take with me and enjoy and savor and cherish for the rest of my life.

You said, Mr. Chairman, this is the last bill and the last hearing. I want you to understand that I drafted or offered this bill because I believe it is an issue that demands immediate attention to prevent the, in my judgment—the unraveling of America’s system of alcohol regulation. It has an important goal. It is a very simple one. And that is to protect communities, protect children, and protect families.

My granddaughter was with me this morning when we took the pledge of allegiance to the flag, on the floor of Congress. I want to make sure that she is protected, you know, so many different ways. I have witnessed, as a former prosecutor, the ravages of alcoholism and alcohol abuse, and what that can do, and what that can lead to. And that is why I sponsored this legislation. I want that to be known to my constituents back in the Massachusetts 10th District. And I have a more lengthy statement that I will submit for the record.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Delahunt follows:]

Statement of the Honorable Bill Delahunt  
Judiciary Hearing on H.R. 5034

Mr. Chairman;

I want to thank you for holding this hearing on the Comprehensive Alcohol Regulatory Effectiveness Act of 2010, also known as the CARE Act, which to date has support from over 140 of our colleagues.

I introduced this legislation, along with my friends Howard Coble, Jason Chaffetz and Mike Quigley, in response to a series of concerns raised by a bipartisan group of 40 state Attorneys General urging an end to the erosion of state alcohol laws. They are concerned about the “unprecedented legal challenges that seek to eliminate [their] ability to regulate alcohol”.

Alcohol is a unique consumer product that requires effective legislation. Ultimately, this is about states’ rights- it does not change any existing state’s laws, or reinstate any state’s laws that have already been invalidated.

In response to some of the feedback I’ve received from colleagues, I have proposed an amendment to the CARE Act that will provide states with the legal tools to successfully defend their regulations by restating congressional intent, while also ensuring that robust competition continues in the alcohol marketplace.

This bill codifies the 2005 U.S. Supreme Court ruling from the *Granholm* decision, which prohibits states from facially and intentionally discriminating against out-of-state producers. This bill would NOT ban direct shipping of wine or affect the ability of any producer to advertise their products in a lawful manner.

I ask that this language be entered into the record, and urge my colleagues to support it.

Thank you Mr. Chairman.

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Mr. CONYERS. Thanks, Bill Delahunt.

I want you to know that the picture we have of you in the hallway is going to remain up, even after you are gone. So that is about the highest tribute that we can offer anybody in this Committee.

Mr. DELAHUNT. Thank you, Mr. Chairman.

Mr. CONYERS. You are welcome.

Lamar Smith?

Mr. SMITH. Thank you, Mr. Chairman.

As you have noted, our Judiciary colleague, Mr. Delahunt introduced H.R. 5034, the Comprehensive Alcohol Regulatory Effectiveness Act of 2010, on April 15th. Since that time, the bill has acquired 146 co-sponsors, which represents a remarkable level of bipartisan support. However, it has also generated a great deal of controversy among wineries, breweries, and distilleries. They believe that the bill, as introduced, could lead to discriminatory state regulation and legislation that could hurt some small businesses.

Most states have enacted some form of the three-tier system for alcohol distribution. This system separates alcohol producers, alcohol wholesalers and alcohol retailers into three distinct tiers. Inclusion of wholesalers as middle men in the transaction makes it easier for states to regulate alcohol. It makes it possible for states to ensure that alcohol is safe. It makes it simpler to ensure that alcohol is sold only to individuals over 21 years old. And it provides a straightforward alcohol tax-collection system for states.

These are all laudable goals. And for those reasons, I support the three-tier system. And I feel it is important to help the states maintain and defend the system, and the benefits it brings.

At the hearing in March, we were told that the three-tier system was under assault by lawsuits from producers and retailers. It was claimed that these suits are a drain on states' finances, and diminish their ability to effectively maintain the safety of the alcohol-distribution system.

The CARE Act was designed to limit these lawsuits; however, as I have told many of the wineries in my home state, I also recognize that the legislation perhaps went too far to achieve those laudable goals. And I am pleased that Mr. Delahunt has offered and is preparing a manager's amendment that I think addresses many of the producers' complaints about the original language. I appreciate his efforts and those of the Chairman to create and improve piece legislation.

I am also well aware that the producers, as well as some retailers, still oppose this modified proposal. To that end, I would like to use this hearing to get at the facts of the matter. First, how many lawsuits are there? How does the number of lawsuits compare with the historical average? How much do these lawsuits cost states? What other priorities do the states have to forego to defend these suits?

The revised bill provides that states cannot discriminate against out-of-pocket producers. Are there examples of states discriminating against out-of-state commerce? Are there any examples of statutes that have been overturned, even when there was no evidence of intent to discriminate? What additional specific suggestions can those who oppose this bill make that will enable us to address their concerns without hampering this effort to preserve the three-tier system that has served us so well?

These are some of the questions I hope our panel of witnesses can help us answer. And I hope these answers will help us construct a bill that will be acceptable to all stakeholders.

With that, Mr. Chairman, I will yield back the balance of my time.

Mr. CONYERS. Thank you.

We will take a couple more opening statements when we return. But right now, we will recess until 12:30 in the afternoon. Thank you.

[Recess.]

Mr. CONYERS. The Committee will come to order. Thank you for your patience. We welcome our second panel—Michele Simon, Ms. Tracy Genesen, Professor Elhauge, Professor Diamond, Mr. Richard Doyle; Ms. Nida Samona, chair from Michigan, and the Attorney General from Utah, Mark Shurtleff.

We are happy to start off with the attorney general, who has, among other things—and I don't know how he finds time—written a book of—I think it is going to be very well received not only on the Hill, but in government as well.

Is Mr. Chaffetz here? We would like to recognize him for any further introductions.

Mr. CHAFFETZ. Thank you, Mr. Chairman. I appreciate it. It is an honor to have all of the panel here; but, in particular, the attorney general from the great State of Utah.

Mark Shurtleff was reelected as the Utah attorney general in November of 2008, with a strong 70 percent of the vote. He is now serving as the first three-term attorney general in the history of Utah. In his first 8 years in office, the number of meth labs in Utah was reduced by 98 percent. And he has talked to thousands of students and parents about the dangers of drugs, and led an effort to obtain millions of dollars in funding in education and rehabilitation.

Attorney General Shurtleff was born and raised in Utah, graduated from Brigham Young University and the University Of Utah College Of Law. He served in the U.S. Navy Judge Advocate General Corps as an officer and attorney from 1985 to 1990. Mr. Shurtleff returned to Utah to serve as the assistant attorney general from 1993 to 1997.

He is the past chairman of the Conference of Western Attorneys General. And he has served in the executive committee from the National Association of Attorneys General. He also served on the board of directors of several national and local organizations. He is the author of "Am I Not a Man?: The Dred Scott Story," a historical novel about the man behind the landmark legal case.

And, most importantly, he and his wife, M'Liss, have been married for 27 years and are the proud parents of five children and two grandchildren. And we are honored to have him here today. And I appreciate the Chairman for allowing me to say a few words. Thank you

Mr. CONYERS. Welcome.

**TESTIMONY OF THE HONORABLE MARK L. SHURTLEFF,  
ATTORNEY GENERAL FOR THE STATE OF UTAH**

Mr. SHURTLEFF. Thank you very much.

Congressman Chaffetz, thank you—good friend. We worked together when he was chief of staff for Governor Huntsman, now Ambassador Huntsman. Good to be here.

Mr. Chairman, Members of the Committee, thank you very much for the invitation. It took me 7 years, Mr. Chairman, to write that book, so start writing yours now.

It is an honor to testify, truly. I really appreciate this invitation to talk about things that are so important to my heart, including the United States Constitution, states' rights, the role of Congress vis-a-vis states, and the protection of the public.

Utah knows a thing or two about the 21st Amendment. You may not know that it was Utah, after all, that was the 36th deciding state to ratify the 21st Amendment. And the reasons why Utah and this Nation endorsed the 21st Amendment remained as relevant today, in 2010, as they did back in 1933, when it was ratified by Utah.

The relevance of the 21st Amendment stems from the undisputable fact that alcohol or, as the Constitution calls it, "intoxicating liquor," is a unique product both constitutionally and physically. Alcohol, clearly, isn't for everyone. We know this. It is age-restricted for good reason.

Science, every day, is coming out with more information as to why youth access to alcohol and the harm that alcohol causes to the developing brain. It causes harm to society. The costs to states and local communities are extensive. So states do have a compelling interest in using their police power and all their regulatory tools to mitigate those costs.

When people of Salt Lake City feel differently about alcohol than the people in Detroit—that is the beauty of the American system; and, as the historian, I will tell you that the part that the Federal Government—intervention in alcohol policy has not been really successful, whether it is the Whiskey Rebellion or the failure of Prohibition.

The 21st Amendment and the state-based regulation of alcohol has been a stunning success these many years. Well, there is still too much misuse and abuse, no doubt. Our problems pale in comparison to those of other countries like United Kingdom. Every state has tools to regulate this industry. They cannot be slowly whittled away in court, which is what is happening, and why we are concerned.

Now, Utah takes alcohol regulation very, very seriously. We are a control state, as you may know. The state controls the sale of distilled spirits, certain malt-beverage products. Any profits go to the state to offset the cost of government. We have other alcohol laws not found in other states. That is a function of state-based regulation that we should not be hauled into Federal court to defend our efforts to protect our citizens.

Now, as a past chair, many years for the Youth Access to Alcohol Committee of the National Association of Attorneys General, we worked very hard over the years to work to reduce underage drinking. We have collaborated and worked effectively with industry in these efforts to keep alcohol out of the hands of those who should not have it.

But concerns over states' rights is something that unites all of us as attorneys general. From liberal to conservative, Republican to Democrat, alcohol regulation under the 21st Amendment is "a state rights on steroids," you may say. Over 35 different lawsuits in 27 states, challenging the right of the state to regulate alcohol has been filed since that *Granholm* decision in 2005. Now, there

has been more uncertainty due to that decision, by creative lawyers, who I am sure we will hear from later.

In a close 5-to-4 vote, as you know, the court believed that the Michigan system impermissibly harmed a poor artisan out of a out-of-state winery. Now, fast-forward 5 years later and ask, “Where are the states in trying to understand what this decision meant?” The answer is: The legal waters are muddier. They are not clearer. We are all over the place in this country.

And, now, instead of a small, aggrieved winery struggling to get to market, we now have Anheuser-Busch InBev—\$84 billion global company—using the same theory in *Granholm* to say they are being discriminated against in Illinois. Last I checked, AB InBev beer was everywhere. How they compare to a small winery or similarly situated is beyond me.

As you will hear from the regulator from Michigan, Michigan has been hauled into Federal court on this very issue of retailer shipping. Texas and New York were sued, too. Michigan lost in the district court. Texas and New York won at the 5th and 2nd circuits.

So what am I supposed to tell the legislature in the State of Utah? Go with Texas and New York ruling, or race to the bottom and abandon regulation to be safe from a Michigan or Washington decision, where the circuit court—the 9th circuit overturned a judge’s ruling and only left one regulation they said was impermissible. And, yet, the judge still awarded over \$1 million in attorney fees to the cost of the taxpayers of the State of Washington.

We have lawsuits that twist the *Granholm* decision—from treating small businesses differently than big business. This needs to be resolved and, so, we are coming to you. We are asking for your help. We need to have you clarify this.

Now, true, there were 40 AGs who signed a letter, but that was before the bill was passed. The letter is there. The wording is clear. They didn’t say they endorsed this bill. But they are asking for help the same way we are in this bill, and that bill provides it.

We need you to clarify that. You can do that. We beg of you to say what is meant by the Dormant Commerce Clause, so that when the Supreme Court gets this again, Congress has spoken, and they are going to receive that information.

The revised CARE Act would capture the essence of *Granholm*’s decision by preventing wanton discrimination against out-of-state suppliers. It will also provide clarity to state legislators and will strengthen states to keep the ability to regulate alcohol according to local customs. So thank you very much for the opportunity to be heard on this.

[The prepared statement of Mr. Shurtleff follows:]

PREPARED STATEMENT OF THE HONORABLE MARK L. SHURTLEFF

**Testimony of  
Mark Shurtleff  
Utah Attorney General  
Before the  
U.S. House Committee on the Judiciary  
on  
H.R. 5034, the “Comprehensive  
Alcohol Regulatory Effectiveness (CARE) Act of 2010”**

**September 29, 2010**

Good Morning. It is an honor to testify today about important issues of state rights, the role of Congress, the protection of the public and the U.S. Constitution.

Utah knows a thing or two about the 21st Amendment. After all, this amendment was officially ratified when Utah became the 36th and deciding state to ratify this amendment.

The reasons why Utah, and this nation, endorsed the 21st Amendment remain as relevant today in 2010, as when Utah ratified it in 1933.

Its relevance stems from the undisputable fact that alcohol, or as the constitution calls it, “intoxicating liquor,” is a unique product both constitutionally and physically.

Alcohol isn’t for everyone. It is age restricted for good reasons. It causes harm to society. The costs of people who abuse alcohol are extensive. States have a compelling interest in using all their regulatory tools to mitigate these costs.

The people of Utah feel differently about alcohol than the people in Detroit. That is the beauty of the American system.

The 21st Amendment and state based alcohol regulation has been a stunning success. While there is still too much misuse and abuse, our problems pale with those in other countries such as the United Kingdom. Every state has the tools to regulate this industry. They cannot be slowly whittled away in court.

Utah is a leader in innovation. I am the world’s biggest fan of the internet and electronic commerce and have lead many efforts to expand new technologies in many fields, yet at the end of the day, every law must flow from our Constitution, not the whims of industry. Just because alcohol can be sold like toothpaste, doesn’t mean it should.

Utah takes alcohol regulation very seriously. Utah for example is a control state. The state controls the sale of distilled spirits and certain malt beverage products. Any profits go to the state coffers to offset the costs of government. We have other alcohol laws not found in other states. That is the function of state based regulation and we should not be hauled into federal court to defend our efforts to protect our citizens.

I have been a past chairman of the Youth Access to Alcohol Committee at the National Association of Attorneys General (NAAG). The National Association of Attorneys General Youth Access to Alcohol Committee formed in 2004 to work to reduce underage drinking. The Committee studies youth exposure to alcohol advertising and access to alcohol, educates state Attorneys General on ways to reduce access and change social norms about underage drinking, and partners with national and state entities to augment and enhance on-going efforts to stop underage drinking. The AGS are united in working to keep the alcohol industry regulated and keep alcohol out of the hands of those who should not have it.

Concerns over state rights is something that unites all state Attorney Generals from liberal to conservative, Democrat or Republican. And alcohol regulation under the 21st Amendment is state rights on steroid.

Over 25 different lawsuits challenging the right of the state to regulate alcohol have been filed since the *Granholm* decision supposedly “settled” things in 2005. There has been more uncertainty due to this decision and by creative lawyers who I am sure we will hear from later.

In a close 5-4 vote, the Court believed that the Michigan system impermissibly harmed a poor artisan out of state winery.

Fast forward five years and ask, where are the states in trying to understand what this decision meant? The answer is the legal waters are muddier, not clearer.

Instead of the poor small aggrieved winery “struggling” to get to market. We now have Anheuser Busch In Bev, an \$84 billion global company using the same theory in *Granholm* to say they are being “discriminated against” in Illinois. Last I checked ABInbev beer was everywhere. How are ABInbev and a small winery similarly situated? I don’t know.

We now have out of state retailers saying that the *Granholm* decision means that out of state, remote sellers of alcohol have the same rights as entities licensed to sell alcohol in the state. There are 2,966 accounts that sell alcohol in Utah and Utah does a fine job regulating them. We cannot regulate the 521,000 accounts that sell alcohol across the country.

As you will hear from the regulator from Michigan. Michigan has been hauled into federal court over this very issue or retailer shipping. Texas and New York were sued too. Michigan lost at the district court. Texas and New York won at the 5th and 2nd Circuits. What am I to tell the Utah

legislature? Go with Texas/New York ruling or race to the bottom and abandon regulation to be safe from a Michigan-type decision?

We have lawsuits twisting the *Granholm* decision to say the ruling prevents states from treating small businesses differently than big businesses. In this case, laws that help small wineries and small breweries are being attacked as violating *Granholm*. Again, we have circuits in conflict. The 1st Circuit ruled against Massachusetts, the 9th Circuit ruled for Arizona. Again, what am I to advise the Utah legislature to do?

And we even have lawsuits challenging the basic state powers such as requiring someone to prove they are over 21, not intoxicated, and who they say they are before alcohol can be sold to them. Seems pretty basic. Show ID before you can be sold alcohol. Apparently, not to the courts. The 6th Circuit in a Kentucky case said this is a violation of the Constitution, the 7th Circuit, literally across the river in Indiana said it is not a violation of the Constitution. Again, what am I as Attorney General to tell my state?

This confusion has to stop. Because of the attorney generals great concern for state rights and the great concern that state attorneys general have had about this scattershot litigation, 40 Attorneys General wrote in to this Committee expressing their concern about the continued onslaught of litigation against the states.

The letter from March did not endorse the CARE Act. It was written before the Act was even introduced. But the request remains the same, Congress should act to end this confusion.

The letter highlighted a problem that remains unresolved and more confusing to the states. The pace of conflicting litigation remains unabated and no more certainty has been provided to the states.

And it is a problem this Congress can help solve. You and I can't do anything to change the 21st Amendment and how it has been interpreted. Only the Supreme Court can interpret the 21st Amendment.

However, Congress can clarify what is meant by the Commerce Clause. The dormant Commerce Clause does not apply where Congress has spoken.

Congress has long done that in insurance with the McCarran Ferguson Act, and Congress recently clarified that state hunting and fishing licenses are not subject to the dormant Commerce Clause.

In my view, it shouldn't come to this legislation since the Commerce Clause was altered by the 21st Amendment, but nevertheless, here we are trying to put the toothpaste back in the tube.

The CARE Act has now been dialed back to just deal with the Dormant Commerce clause and I applaud this Congress (and my friend Congressman Chaffetz) for your leadership in moving forward with this modified, albeit limited legislation.

Passage of this modified CARE Act, while not giving state AGS every tool needed to defeat these increasingly bold lawsuits, would be a great step in restoring sanity to this area of law and allowing resources to be spent on more important matters.

The revised CARE Act would capture the essence of Granholm's holding by preventing wanton discrimination against out of state suppliers; would provide clarity to state legislatures; and would strengthen states to keep their ability to regulate alcohol according to local customs.

I appreciate the opportunity to testify before this committee on this important subject.

Mr. CONYERS. Thank you for starting us off.

Our next witness has been before us before. She is the chair of the Liquor Control Commission of Michigan—lawyer, former prosecutor—and has put in a great deal of time working to make sure that Michigan has a safe and effective alcohol marketplace.

Welcome, again, Ms. Samona.

**TESTIMONY OF NIDA SAMONA, CHAIRPERSON,  
MICHIGAN LIQUOR CONTROL COMMISSION**

Ms. SAMONA. Thank you, Mr. Chairman.

Thank you very much to the Committee for listening to us.

Thank you to all of that have taken the time and the opportunity to recognize how important this issue is to the State of Michigan, and to all states, actually, in regards to the 21st Amendment, which gave plenary power to the states to regulate alcohol.

The State of Michigan was the very first state in 1933 that ratified that 21st Amendment. And like Utah, we saw the need—we understood the need for it, and the recognition that the state has to intervene. This is not milk we are talking about here. This is a product that can be enjoyed that is very beneficial and lucrative to the State of Michigan; that can also be in the wrong hands at the wrong time, with kids that are minors, with overconsumption of alcohol, and with doing things with alcohol and mixing it in a way that can be lethal. We understand that. I understand that as the only regulator sitting up here on the panel.

Now, Ranking Member Smith asked, “How many lawsuits are we talking about here?” Twenty-five to count, and still going—two of them have been within the last 7 years of the State of Michigan. That is the *Granholm* case. That is my boss, Governor Granholm—who sends her best to all of you—that started it, and 24 lawsuits later that came after that.

There was a lawsuit that dealt with wineries, “Why can’t wineries be treated the same out-state as in-state?” We modified our state laws so that we can do that, and created a permit system because it went all the way to the Supreme Court; and in a very narrow, 5-4 decision was in favor of the wineries.

Then, several years later, we have a case of Siesta Village. This time, it is not about wineries. It is about retailers that say, “An out-state retailer should be able to sell and ship alcohol into the State of Michigan to anyone that they want to, at any time.”

When we regulate our own retailers—and we have 17,000 retailers in the State of Michigan—and, certainly, you know that, Mr. Chairman—that they are very active. They are small, independent businesses, as well as large chain stores throughout the State of Michigan. We make these retailers have to go through server-training classes so that they understand they have to ask for I.D. They have to look and determine if a person is intoxicated; if it is an on-premise licensee, to determine when they can cut them off.

The have to go through violations and penalties up to being suspended and/or revoke their license. These are all these retailers that are within my state, that we regulate to ensure that they follow the laws of the State of Michigan and the rules of the Michigan Liquor Control Commission. But Siesta Village would have you, in that lawsuit, say, “A retailer in California, Florida, Ohio, Indiana, anywhere else, should be able to sell this product and ship it to a home, not knowing, “Is that person of age to receive it?”—not having any identification processes.”

And this thought about the UPS system or delivery system checking for I.D. is just not one that works. What if they don’t? What power do I have over that licensee that is not in the State of Michigan? Because my 17,000 retailers that are struggling every

single day—but we are hammering at them and on their back to make sure that they follow the rules and understand this is a commodity that is enjoyable, but can be very dangerous. Understand that the Liquor Control Commission means business.

And so when we talk about these cases, I talk to you as a regulator. I am also a lawyer. I am also a former prosecutor. I understand what happens when you abuse this product. And I understand, as a regulator, that my role is to ensure that that doesn't happen.

These lawsuits, Mr. Smith, have cost millions of dollars to the State of Michigan—well, not one, but two lawsuits. With Siesta Village, we, in fact, had to tell our independent retailers that they cannot deliver to a client or a customer of theirs any of the product; that they must come in—not just purchase them, but pick them up at that time, as a result of that lawsuit. We didn't want to continue incurring additional millions of dollars in taking it up to a higher court.

That is why it is so essential for Congress to act on this; so that this silence does not lead to all these ambiguous rulings across this great country of ours. The 21st Amendment and Commerce Clause has given us the power for each state to regulate, based on the fit and the need of that state. That is the beauty of it. It should not be a one-size-fits-all.

The rules exist, and we are here to follow them. But I, as a regulator, surely know what is in the best interest of my state and those that are living in my state and consume this product in my state. That is my duty. And I ask for you, Mr. Chairman, and all of you, as the Committee Members, to please act on this bill. Thank you.

[The prepared statement of Ms. Samona follows:]

## PREPARED STATEMENT OF NIDA SAMONA

**Nida Samona's Statement to Congress**

Distinguished members of Congress, I am the Chairperson of the Michigan Liquor Control Commission. Thank you for the invitation to discuss Michigan's system for regulating alcoholic beverages and the need to amend the Webb-Kenyon Act to preserve state regulatory authority over the distribution of alcohol beverages.

Experience has taught us that government regulation can be in the public interest. Whether it is financial markets, food safety, or mortgages, government has a role in protecting the public. This is especially true with alcohol.

In 1941 Supreme Court Justice Jackson stated that liquor is "a lawlessness unto itself". That was true then and is true today. Because of their potential for abuse, and their importance as a source of tax revenue, alcoholic beverages must be highly regulated. History has taught us that regulation is most effective and accepted, when done at the State level.

The detrimental impacts on individuals, families, and society as a whole that result from intemperate or underage consumption of alcoholic beverages are dramatically different from those related to the use of other products, whether measured by scale, severity, nature, or remedy. As a consequence, states attempt to mitigate these problems through regulation. Indeed, alcoholic beverages have always been, and remain, one of the most heavily regulated products in the country. Localities and states have enacted a variety of restrictions on the manufacture, distribution, and sale of alcoholic beverages.

Alcohol is the only product that has been the subject of two Constitutional Amendments: the first was the Eighteenth Amendment, which established National Prohibition, and the second was the Twenty-first Amendment, which returned primary responsibility for alcohol regulation to the states. Community norms and standards across the country differ widely regarding

alcohol. This fact underscores the soundness of the Constitutional and Congressional decisions to rest regulatory authority primarily at the state and local level. Under the authority provided by the Twenty-First Amendment, the Michigan Legislature created the Michigan Liquor Control Commission and granted it plenary powers to control alcoholic beverage traffic in Michigan, including the manufacture, importation, possession, transportation and sale of alcoholic beverages within the State. Among the goals of the Commission, are controlling the traffic in alcoholic beverages within the state, collecting tax revenue, and protecting both the consumer and general public from unlawful consumption and use of alcohol.

The overriding policy of Michigan's Liquor Control Code is to provide strict regulation and control over the alcoholic beverage industry as opposed to fostering the significant degree of free enterprise afforded other business endeavors, dealing with other products. This regulation is achieved through a transparent system that requires that all alcoholic beverages be distributed through the Commission or its licensees—who are subject to extensive oversight and regulation.

That system has worked remarkably well for over seventy – five (75) years. Through the delicately balanced and historically tested regulatory scheme used by Michigan, Michigan has been able to address fundamental state interests, such as: preventing illegal sales to minors, inhibiting overly aggressive marketing and consumption, collecting taxes, creating orderly distribution and importation systems, and preventing a recurrence of the problems that led to the enactment of National Prohibition. These are all recognized as core interests of Twenty-First Amendment.

Michigan's regulatory system is the product of Michigan's experience and history. Prior to Prohibition large suppliers dominated saloons and retailers leading to overconsumption of alcoholic beverages. These arrangements were blamed for producing monopolies and exclusive

dealing arrangements, for causing a vast growth in the number of saloons and bars, for fostering commercial bribery, and for generating other "serious social and political evils," including political corruption, irresponsible ownership of retail outlets, and intemperance. Today state regulators are not only faced with large producers trying to promote their products and business, but also with large retailers who because of their market dominance can exert extreme influence over manufacturers and others in the distribution chain, if left free from state regulation.

No responsible person believes that unfettered competition, the lowest price, and ubiquitous availability of alcohol are in the public interest. Therefore, in regulating the distribution system, Michigan has significantly restricted the use of aggressive marketing techniques and drastic price-cutting of alcoholic beverages thereby promoting responsible usage and temperance.

In 2004 the Supreme Court's 5-4 decision in *Heald v Granholm* struck down Michigan and New York laws that banned wineries located out of state from shipping wine directly to the doorsteps of Michigan and New York customers. While the *Granholm* decision did not invalidate Michigan's three-tier distribution system for alcoholic beverages, and, indeed, referred to that three tier system as "unquestionably legitimate", State regulatory systems remain under siege. Michigan and other states continue to be challenged with lawsuits whose goal is to eviscerate effective state regulation of alcoholic beverages, by opening the floodgates and allowing entities over whom state regulators have little or no control to distribute alcoholic beverages free of the oversight and rules that govern in-state licensees.

For example, Michigan was sued on the theory that out-of-state retailers should be able to ship wine to Michigan residents. The District Court ruled against Michigan's position and rather than face the additional costs of litigating the Michigan Legislature restricted the ability of all retailers to ship to consumers. Michigan reached this resolution even though it believed its

legal position was correct. The same arguments that were put forth by Michigan and rejected by our District Court were subsequently accepted by the 2<sup>nd</sup> and 5<sup>th</sup> Circuit Courts of Appeals who upheld regulatory systems similar to Michigan's against the same type of legal challenge. Because of this type of expensive and uncertain litigation -- where a state may be forced to expend great manpower and incur great defense costs and where the state is forced to litigate under the threat of severe economic sanctions (attorney fees totaling over millions of dollars) if it doesn't prevail-- a federal statute is needed to confirm the primacy of State regulation over dormant commerce clause and antitrust challenges that might apply to other products.

Finally, I would like to address why as a practical matter it is important that States like Michigan have the ability to establish their own regulatory structure.

Michigan uses its limited resources, Commission staff and local law enforcement officers, to ensure that in-state retailers and wholesalers are physically inspected and checked to make sure that Michigan's regulatory system is being followed, that only approved alcoholic beverages are being sold, that alcoholic beverages are not being sold to underaged persons and that taxes are being paid. Michigan simply does not have the ability or financial resources to effectively regulate hundreds of thousands of out-of- state retailers to ensure they are not selling to minors and to ensure that they are paying taxes and only selling products approved by the Commission. In 2008, the Michigan Liquor Commission had almost a billion dollars in taxable spirit sales. It is unknown how much revenue is generated from illegal and untaxed out-of-state sales.

The proposed legislation before you (Comprehensive Alcohol Regulatory Effectiveness Act of 2010 (CARE)) would amend the Webb-Kenyon Act to support State based alcohol regulation, establish higher evidentiary standards for legal actions challenging the authority of

states or territories to regulate alcoholic beverages and help ensure the collection of all alcohol taxes.

This legislative action is necessary to help Michigan and other states regulate alcoholic beverages free from certain dormant commerce clause and federal antitrust law restrictions that would otherwise apply. It is also needed to help states defend against attacks that are motivated by economics not for public health reasons. When confronted with commerce clause litigation dealing with attacks on state alcohol regulatory systems the Twenty-first Amendment should mean what it says. Congress has the power to regulate commerce and the opportunity here to preserve state control over alcohol regulation. This power is being eroded by Court decisions based upon the dormant commerce clause that invalidate state alcohol regulatory systems.

Additionally, Section 1988 of Title 42 of the United States Code provides for reimbursement of attorneys' fees to plaintiffs who prevail over states under Section 1983 dormant commerce clause litigation. Dormant commerce clause litigation is typically brought by very well funded corporations or individuals in the alcohol businesses. This type of litigation has proliferated and attorney fee awards are often enhanced at unimaginable lodestar rates that drain essential state resources. Michigan alone, has incurred well over several million dollars in fees and costs in defending these lawsuits. States are being punished for making legislative choices that others may not agree with but are nevertheless based on public policy and welfare concerns that address the unlawful distribution and abuse of alcoholic beverages.

Thank you for your time and consideration of this important matter.

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Mr. CONYERS. Thank you very much.  
The next witness is the chairman and CEO of Harpoon Brewery,  
a member of the Brewers Association and the Beer Institute.  
And we are glad to have you here, Mr. Doyle. You may proceed.

**TESTIMONY OF RICHARD A. DOYLE, CHAIRMAN AND CEO,  
HARPOON BREWERY**

Mr. DOYLE. Thank you.

Mr. Chairman, and Members of the Committee, my name is Richard Doyle, and I am the chairman—founder and CEO of the Harpoon Brewery. We operate breweries in Boston, Massachusetts and Windsor, Vermont.

On behalf of the Brewers Association, I appreciate the opportunity to speak today. I am here to give you a small-brewer's view of H.R. 5034. You are entrusted to make the rules, and I want to provide you with my perspective on what it would be like to try to successfully play by those rules, if H.R. 5034 is enacted.

The wholesale, or middle tier, of the three-tier system of beer distribution is very important to small brewers. We do not have the scale to establish our own distribution network and need wholesalers to reach markets, particularly in other states. A successful and vibrant middle tier is vital to the interests of small brewers and our consumers.

The current system has served the public well for the last 77 years. There is a delicate balance between state-based regulation that reflects the needs of individual states and a Federal role to protect interstate commerce. Passage of H.R. 5034, even in its amended form, risks exposing that delicate balance to unintended consequences.

Our brewery sells beer in 25 states. The wholesalers we sell to typically do business in only one state. State franchise laws, with the stated goal of protecting wholesalers from dominant large brewers, are also used to dictate the terms of trade between small brewers and wholesalers.

I have worked through franchise agreements mandated by state laws with dozens of wholesalers, and we have developed beneficial relationships, and even friendships. But those negotiations are always tough because state laws provide wholesalers with strong leverage. We are always the “away team,” playing in a state system that favors the home-team wholesalers. H.R. 5034 would undeniably make that situation worse. Not only would we be playing away, but the state-based referee would not have any concern about being tempered by Federal oversight.

Small brewers are also concerned about the diminution of Federal role in another area. State label regulation is a good practical example of how subtle discrimination could work. If we are required to have 25 different labels for the 25 states where Harpoon sells beer, that cost would be prohibitive. We would not be able to manage the inventory and keep our beer fresh. We would need to sell in fewer states, and our brewery and our customers would be worse off.

Small brewers also tend to make many different styles of beer, which only compounds any state-based labeling requirements. This is not a hypothetical situation. In the last 2 years, wholesalers have lobbied successfully in Michigan and New York for unique labeling requirements. The New York law was struck down as a violation of the Commerce Clause, and the Michigan legislation had to be amended to exempt small brewers. Under H.R. 5034, those

laws could stand, and we would be at a great disadvantage in both states.

We appreciate the threat that wholesalers feel to their businesses from a change in the status quo, and more power flowing to large retailers. However, we do not think that solving a problem for wholesalers by creating a problem for brewers makes sense. It is very unfortunate that after more than a year of discussion between wholesalers and suppliers, we could not reach a compromise. Brewers large and small worked very hard, and in good faith, to reach a compromise, despite the fact there was nothing we would gain from the legislation.

Each version of H.R. 5034 that we have seen this year is detrimental to small brewers in three aspects. First, it repeals the Wilson Act of 1890, which prohibits discrimination against out-of-state producers and products. Second, the new language in H.R. 5034 encourages states to adopt laws that discriminate in subtle ways. Finally, the bill diminishes the Federal role in regulating interstate commerce.

As a small brewer in Massachusetts, I do not have the resources to fight every discriminatory state statute and regulation that restricts my ability to compete and grow in other states. I spend thousands of dollars every year attempting to comply with state laws, many of which were clearly intended to protect local economic interests.

I make great beers, and I want to sell them to your constituents. Great principles of limited government and free enterprise are often ignored when local economic interests and legal authority are combined with no checks and balances. The Federal courts provide that constitutional check, and they have exercised it responsibly in decisions concerning alcoholic beverages.

The Supreme Court and appellate courts have overturned the relative handful of unconstitutional state laws. Those policies clearly favored state and local interests, or reduced competition in ways that had nothing to do with temperance or public safety.

In closing, I respectfully urge the Committee to refrain from reporting H.R. 5034. Our industry is already adequately regulated at the Federal and state level. No credible group or industry organization is attempting to deregulate the sale and consumption of beer, wine, and spirits. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Doyle follows:]

PREPARED STATEMENT OF RICHARD A. DOYLE

**Testimony of Richard A. Doyle  
Chairman & CEO of The Harpoon Brewery**

**On Behalf of**

**The Brewers Association**

**Hearing on HR 5034**

**“Comprehensive Alcohol Regulatory Effectiveness Act of 2010”**

**United States House of Representatives**

**Committee on the Judiciary**

**September 29, 2010**

#### **Background on The Harpoon Brewery**

Two friends and I founded The Harpoon Brewery was founded in Boston in 1986. Today we employ 135 people and operate breweries in Boston, Massachusetts, and Windsor, Vermont. Our 2009 production ranked The Harpoon Brewery as the 10<sup>th</sup> largest craft brewery in the US. We sell our beer in 25 states.

#### **Background on Brewers Association**

The Brewers Association represents 1,100 of the 1,600 small brewers from every American state and the District of Columbia. More than 19,000 homebrewers and adult beer consumers around the nation belong to our affiliate, the American Homebrewers Association. More than 700 larger brewers, beer wholesalers, vendors, and individual brewing professionals are associate members.

Mr. Chairman and Members of the Committee, my name is Richard Doyle, and I am Chairman and Chief Executive Officer of The Harpoon Brewery. We operate breweries in Boston, Massachusetts and Windsor, Vermont. On behalf of the Brewers Association, I appreciate the opportunity to speak today. I am here to give you a small brewer's view of HR 5034. You are entrusted to make the rules, and I want to provide my perspective on what it would be like to successfully play by the rules if HR 5034 is enacted.

The wholesale or middle tier, of the three tier system of beer distribution is very important to small brewers. We do not have the scale to establish our own distribution network and need wholesalers to reach markets, particularly in other states. A successful and vibrant middle tier is vital to the interest of small brewers and our consumers.

By and large, the current system has also served the public well for the last seventy-seven years. There is a delicate balance between state-based regulation that reflects the needs of individual states and a federal role to promote and protect interstate commerce. Passage of HR 5034, even in its amended form, risks exposing that delicate balance to unintended consequences.

Our brewery sells beer in twenty-five states. The wholesalers we sell to typically do business in only one state. State franchise laws, with the stated goal of protecting wholesalers from dominant large brewers are also used to dictate the terms of trade between small brewers and wholesalers. I have worked through franchise agreements mandated by state laws with dozens of wholesalers, and we have developed beneficial business relationships and even friendships. But those negotiations are always tough because state laws provide wholesalers with strong leverage. We are always the "away team" playing in a state system that favors the "home team" wholesalers. HR 5034 would undeniably make this situation worse. Not only would we be

playing away, but the state-based referee would not have any concern about being tempered by federal oversight.

Similarly, small brewers also are concerned about the diminution of the federal role. State label regulation is a good practical example of how subtle discrimination would work. If we are required to have twenty-five different labels for the twenty-five states where Harpoon sells beer, the cost would be prohibitive. We would not be able to manage the inventory and keep our beer fresh. We would need to sell in fewer states and our brewery and our customers would be worse off. Small brewers also tend to make many different styles of beer, which only compounds any state-based labeling requirements. This is not a hypothetical situation. In the last two years, wholesalers have lobbied successfully in Michigan and New York for unique labeling requirements. The New York law was struck down as a violation of the Commerce Clause, and the Michigan legislation had to be amended to exempt small producers. Under HR 5034, those laws would stand, and I would be at a great disadvantage in both states.

We appreciate the threat that wholesalers feel to their businesses from a change of the status quo, and more power flowing to large retailers. However, we do not think that solving a problem for wholesalers by creating a problem for brewers makes sense. It is very unfortunate that more than a year of discussion between wholesalers and suppliers did not yield a compromise. Brewers large and small worked very hard and in good faith to reach a compromise despite the fact that there was nothing we would gain from the legislation.

Each version of HR 5034 that we have seen this year is detrimental to small brewers in three respects. First, it repeals the Wilson Act of 1890, which prohibits discrimination against out-of-state producers and products. Second, the new language in HR 5034 encourages states to adopt laws that discriminate in subtle ways. Finally, the bill diminishes the federal role in regulating interstate commerce.

As a small brewer in Massachusetts, I do not have the resources to fight every discriminatory state statute and regulation that restricts my ability to compete and to grow in other states. I spend thousands of dollars every year attempting to comply with state laws, many of which were clearly intended to protect local economic interests. I make great beers, and I want to sell them to your constituents.

The Harpoon Brewery in Boston is across the harbor from the Bunker Hill monument, and I am reminded every day of the wisdom and the sacrifices of those who founded our nation. In practical terms, the drafters of our constitution understood that legislators will always try to help their constituents. From the aftermath of Prohibition to the 2010 session of the Massachusetts Legislature, thousands of protectionist state bills have been introduced and many have been signed into law.

Great principles of limited government and free enterprise are often ignored when local economic interests and legal authority are combined with no checks and balances. The federal courts provide that constitutional check, and they have exercised it responsibly in decisions concerning alcohol beverages. The Supreme Court and appellate courts have overturned a relative handful of unconstitutional state laws. Those policies clearly favored state and local

interests or reduced competition in ways that have nothing to do with temperance or public safety.

Mr. Chairman, you and I come from cities in the Northeast and the Midwest that have suffered greatly in the current economic climate. I do not believe, however, that additional state regulation of alcohol distribution will help us navigate these uncertain times.

In closing, I respectfully urge the Committee to refrain from reporting HR 5034. Federal legislation is not needed to better address underage drinking, drunk driving, or other problems that rightly concern Congress, state lawmakers, and all conscientious citizens. Our industry is already adequately regulated at the federal and state level. No credible group or industry organization is attempting to deregulate the sale and consumption of beer, wine, and spirits. In 2010, I cannot think of any regulated business or social relationship in the United States in which Congress would step in to give a green light to discrimination.

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Mr. CONYERS. You are welcome.  
Professor Stephen Diamond is professor from the University of Miami. He has both a Ph.D. and J.D. from Harvard University. He is co-chair of the American Bar Association Committee on Beverage Alcohol Practice.

We welcome you here this afternoon, sir.

**TESTIMONY OF STEPHEN M. DIAMOND, PROFESSOR OF LAW,  
UNIVERSITY OF MIAMI**

Mr. DIAMOND. Thank you for the opportunity to appear before you.

I would like very briefly to make several observations about H.R. 5034; observations which I have developed at greater length in my written submission.

The Supreme Court has made it unquestionably clear that the final authority on the relationship between state alcoholic-beverage law and the Dormant Commerce Clause is Congress. Congress can protect state alcoholic-beverage laws to the extent it sees fit.

From 1880 onward, Congress did attempt to do so. But until 1917, when the Supreme Court upheld the Webb-Kenyon Act, its efforts to support and protect state alcoholic-beverage regulation were constantly frustrated by the courts. But decades after repeal, Congress had no need to speak further to maintain its support of state alcoholic-beverage laws, as the Supreme Court interpreted the 21st Amendment to protect those laws from challenge.

In *Granholm*, however, the Supreme Court limited the protective effect of the 21st Amendment, and of the Webb-Kenyon Act, holding that the latter was limited by the Wilson Act. This interpretation of Webb-Kenyon is at odds with this history of the enactment. An analog of the Wilson Act supposed to be included in the Webb-Kenyon had been withdrawn during consideration of the bill, as inconsistent with what was ultimately enacted; that is, the Wilson Act was explicitly detached from the Webb-Kenyon Act.

There was, moreover, no congressional discussion during the Webb-Kenyon debates about the importance of preventing discrimination against producers. There was, on the other hand, lots of talk about the need to shield state alcoholic-beverage regulation so that it might be effective.

The court's interpretation of the Webb-Kenyon Act is, of course, not binding on Congress. Congress can now do what it thinks right. Misunderstandings of *Granholm* are rampant. The court did not declare that interstate commerce in alcoholic beverages could not be burdened. The Dormant Commerce Clause does not do that for any products.

The court held only that the 21st Amendment and the Webb-Kenyon Act, as the court interpreted it, did not protect intentional or facial discrimination against other state producers. Contrary to some claims that have been made, the Dormant Commerce Clause, as articulated and as applied, is not exactly clear and unequivocal. In the so-called canonical expression of Dormant Commerce Clause doctrine in the Brown-Forman decision, the court immediately concedes that it has proved impossible to apply the doctrine consistently. This is not a bad thing.

The court has, in effect, cautiously refrained from treating the Dormant Commerce Clause as one-dimensional. It has looked to many factors in cases where it has held that no discrimination was demonstrated, and that state laws should, therefore, be upheld. In *Exxon v. Maryland*, the court rejected the claim that state law discriminated in favor of in-state retailers, declaring that the Dormant Commerce Clause protects interstate commerce, but not the business strategies of particular out-of-state sellers.

In *General Motors v. Tracy*, the court rejected an intentional discrimination claim because to accept it would threaten a highly regulated system of local utility. In *Kentucky v. Davis*, the court rejected the facial discrimination claim because the distinction was one which many, or all, states had made for many decades.

H.R. 5034 is a modest step, consistent with constitutional jurisprudence, and respectful and protective of 75 years of state regulatory practices. The terms and conditions of distribution and sale of alcoholic beverages must be controlled by law, and not left up to the desires of thirsty drinkers and profit-maximizing sellers.

State alcoholic-beverage regulations, since repeal, have attempted to constrain overselling and, thus, overconsumption and abuse. It has conversely attempted not to over-regulate and, thus, stimulate elicit and, therefore, unregulated manufacture, distribution and sales.

It has aimed for moderation and regulation to achieve moderation in selling and moderation in consumption. This regulation has worked well. Congress should continue to support it.

Thank you for your consideration.

[The prepared statement of Mr. Diamond follows.]

PREPARED STATEMENT OF STEPHEN M. DIAMOND

Prepared Statement of  
Professor Stephen M. Diamond

To the Committee on the Judiciary  
House of Representatives  
United States Congress

Hearing on H.R. 5034  
"The Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010"  
September 29, 2010

Thank you for the opportunity to appear before you. My name is Stephen Diamond. I am a professor at the University of Miami School of Law where I have taught alcoholic beverage law for the past fifteen years. I have a Ph.D. in American History as well as a J.D., and I have written about the theory and practice of post-Repeal state alcoholic beverage regulation.

H.R.5034 has been criticized for several alleged defects. It has been suggested:

- 1) that the state alcoholic beverage regulations that it would support serve no public purpose;
- 2) that Congress lacks the Constitutional authority to enact it;
- 3) that it marks a sharp break from the role that Congress has previously exercised with regard to state alcoholic beverage regulation;
- 4) that it does not respect the Granholm decision;
- 5) and that it flies in the face of a long tradition of general dormant Commerce Clause jurisprudence.

None of these criticisms are valid.

I

I would like to begin by describing very briefly the theory and practice of state alcoholic beverage regulation as it has been implemented since Repeal. The state alcoholic beverage regulatory system that has developed post-Repeal is in theory and practice a sensible one that has worked well. The absence of crisis is evidence of

regulatory success. This was a goal of post-Repeal regulation. The aim was to avoid big swings in regulatory policy which dominated political campaigns and led to a regulatory volatility that encouraged the destructive short-term pursuit of profits by businesses unsure of the security of their legal status. Instead, the aim was to constrain the marketing of alcoholic beverages so as to prevent the stimulation of excessive sale and consequent abuse. The aim was also not overly to restrict availability so as to stimulate illicit and therefore unregulated manufacture, distribution, and sale with consequent abuse. The appetite for drink had to be controlled as did the pursuit of profit in the selling of it. The industry was to resemble a quasi-public utility: that is, highly regulated, with competition limited, to keep the market orderly and stable, to reduce pressure to pursue short-term profits. As a Texas regulator once remarked, the greatest threat to temperance for this reason is the publicly traded corporation, which is under ceaseless pressure to grow.

Rather than implementing either deregulation or intrusive supervision, the three-tier system set up competing economic interests, interests invested in keeping state control effective through preserving their own independence and a level playing field. It had been observed that one reason for the failure of Prohibition was that there were no economic interests – legal ones, that is – invested in Prohibition's success.

In the post-Repeal regulatory scheme, sellers were to be regulated to constrain marketing practices that would encourage over-consumption. Wholesalers were created and regulated in part to reduce pressures on retailers to oversell. Buying and selling were two sides of the same problem. No particular segment of the industry was to feel disproportionately over-regulated. These laws were to create a comprehensive

system: a culture and a climate of control. They were not aimed just at the few. The alcoholic was not the only problem consumer; the gangster was not the only problem seller.

The aim was moderation in drinking, moderation in selling, and moderation in law-making. Has this worked perfectly? Of course not. But it still commands respect and deserves support. H.R. 5034 is a moderate, reasonable effort to preserve this program of moderation.

## II

Although state alcoholic beverage regulation is sheltered from challenges by both the Twenty-first Amendment and the Webb-Kenyon Act, Congress can only express its will by amending the latter. I now therefore turn to the sometimes problematic coexistence of state alcoholic beverage regulation and the dormant Commerce Clause leading to the passage of the Webb-Kenyon Act, what Justice Frankfurter described as the “unifying history” (concurring in Carter v. Virginia, 321 US 131, 142 [1944]) of Supreme Court frustration of state regulatory initiatives and of Congressional efforts to protect them. This requires a review of the passage of the Wilson and the Webb-Kenyon Acts in some detail.

In 1880, in the Leisy case, the Supreme Court struck down an Iowa statute banning the importation of alcoholic beverages as a violation of the dormant Commerce Clause, an early example of the expansion of this Court-made doctrine to limit state law. Chief Justice Fuller noted, however, that the Court was acting in the name of a presumed Congressional intent that such interstate commerce be unrestricted.

Congress, therefore, might grant such laws immunity from the dormant Commerce Clause. In other words, Congress might make clear that its silence had not been intended to condemn particular categories of state regulation. Congress immediately accepted the invitation to clarify its intent, passing the Wilson Act that same year.

What became the Wilson Act, as originally proposed, would have proved a much broader shield of state alcoholic beverage law from dormant Commerce Clause challenge than what ultimately was adopted. As originally drafted it read:

"That no state shall be held to be limited or restrained in its power to prohibit, regulate, control, or tax the sale, keeping for sale, or the transportation as an article of commerce or otherwise, to be delivered within its own limits, of any fermented, distilled, or other intoxicating liquids or liquors by reason of the fact that the same have been imported into such state from beyond its limits, whether there shall or shall not have been paid thereon any tax, duty, or excise to the United States." Vol.21, Cong. Rec., p. 534.

Senator Hiscock objected because this bill, if enacted, "may be invoked by the legislature of a State, not for that purpose, but for the purpose of protecting industries, the distillers, of their own State, the brewers of their own State, the wine-makers of their own State, against those of others, and who doubts it or denies it." Vol.21, Cong. Rec., p. 5090.

Senator Hoar concurred. He summarized the objection:

"The senator says that he finds the vice in this bill that it will leave the States of the Union free to undertake to regulate or control the traffic in intoxicating liquors

for the purpose of protecting their own industries against the competition of other States or other nations.” Vol. 21, Cong. Rec., pp. 5090-5091.

He then offered new language:

“...provided that such prohibition, regulation, control, or tax shall apply equally to all articles of the same character wherever produced.” Ibid.

Ultimately, the language passed explicitly withheld approval from discriminating state laws. It is worth noting that the concern about discrimination was focussed on out-of-state “industries”, the producers of alcoholic beverages.

As the Granholm opinions described, the Wilson Act was soon interpreted by the Supreme Court in such a way as to make it ineffective in shielding state law. The Court held that “upon arrival in the state” meant upon delivery to the consignee rather than upon crossing the state boundary. The Court did this ostensibly as an interpretation of Congressional intent, but Congress was understandably uncertain whether such interpretation might be Constitutionally compelled. That is: it was then understood – although this view has long been rejected – that Congress could not delegate its power to regulate interstate commerce and it was possible that the Court would interpret the Commerce Clause to define interstate commerce as Constitutionally ending only with delivery to the consignee.

Congress intermittently for several decades considered various proposals in an effort better to shield state regulation without doing so in a way which the Supreme

Court would find unconstitutional. This was, to repeat, a time when Constitutional jurisprudence was not yet clear that the scope of the dormant Commerce Clause – the extent to which Congress could shield state laws from it – was entirely at the discretion of Congress.

In 1912, what became the Webb-Kenyon Act was first considered by Congress. The original bill contained a second section:

“Sec. 2. That all fermented distilled, or other intoxicating liquors, or liquids, transported into any State or Territory, or remaining therein, for use, consumption, sale or storage therein, shall, upon arrival within the boundaries of such State or Territory and before delivery to the consignee, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its reserved police powers, to the same extent and in the same manner as if such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise.” Vol. 49, Cong. Rec., p. 2687.

This section comprised the Wilson Act altered to make clear that “upon arrival” meant at the state boundary rather than to the consignee. It would, like the original Wilson Act, have withheld protection from state laws that discriminated against out-of-state products.

This entire section was eliminated from the Act as enacted. This was not because Congress favored discrimination, but because it was deemed inconsistent with the first section of the bill and because it was feared that the Supreme Court would

reject it. Congress wanted an effective and Constitutional law shielding state regulation more than it feared state discrimination against out-of-state products. There is no expression in the Congressional debates of a concern about possible discriminatory laws. There are repeated demands that state regulations be shielded from dormant Commerce Clause attacks.

The Webb-Kenyon Act was thus not a simple extension of the Wilson Act, but marked a very different approach to the problem of shielding state laws from dormant Commerce Clause challenges. This was set forth clearly by Senator Borah:

"The prohibition which has been made in the preceding section [the Webb-Kenyon Act as ultimately enacted] is, in a sense, abrogated in the second [the Wilson Act analogue], and liquor is recognized as an article of commerce. Recognizing it as an article of commerce, and one which may go into a state, then the question is, can you stop it and turn it over to the state before it is finally delivered to the consignee? In the first section you make it a contraband of commerce when it is being shipped for unlawful use. In the second you recognize it as an article of commerce, but turn it over to the state before it is delivered to the consignee. I do not think this aids the law in its efficiency, and I believe it is unconstitutional." Vol. 49, Cong. Rec., p. 702.

Senator Kenyon agreed:

"The first section takes certain liquor out of commerce, and the second section seems to recognize it as being in. There is some incongruity in this." Vol. 49, Cong. Rec., p. 830.

The Webb-Kenyon Act, as passed, was vetoed by President Taft because it would permit the states to reassert the authority they had exercised, "before they became States, to interfere with commerce between them and their neighbors." 49 Cong.Rec.4292. Attorney General Wickersham had informed Taft that the Supreme Court would hold the Act unconstitutional because Congress had not declared alcoholic beverages to be "an outlaw of commerce", but instead: "leaves to the varying legislation of the respective States to more or less endow [alcoholic beverages] with qualities of outlawry." 49 Cong.Rec. 4296.

Wickersham was wrong. Congress, of course, easily overrode the veto and the Supreme Court upheld the constitutionality of the Act in Clark Distilling.

Oliver Wendell Holmes was one of two Justices who dissented without opinion to that decision. He explained his reason to a correspondent: "...I dissented in that case, being of opinion that the statute should not be construed to simply substitute the state for Congress in control of interstate commerce in intoxicants – i.e. to permit a state to say although the purpose of the shipment (personal consumption) is one that we permit, we forbid the shipment in interstate commerce – the unlawfulness by state law thus consisting solely in the element of interstate commerce.... I thought the act did not mean more than to say that if on other grounds the shipment would be illegal but for want of power on the part of the state over interstate commerce, the fact of I.C. [interstate commerce] should not interfere. 1 Holmes-Laski Letters, M.Howe, ed. At 54.

Given all of this, it is surprising that the Granholm majority declared that the Webb-Kenyon Act was limited by the Wilson Act. Each Act sheltered state law if specific conditions were met. The conditions imposed were very different. Each Act also sheltered state law in very different ways. The Wilson Act redefined the physical terrain of interstate commerce. The Webb-Kenyon Act defined the circumstances in which some products were not entitled to be considered as legitimately in interstate commerce, whatever the physical terrain which the latter encompassed.

Upon Repeal, paragraph two of the Twenty-first Amendment was enacted in part to protect state regulation even if Congress were to repeal the Webb-Kenyon Act. For years, the Court then interpreted the Twenty-first Amendment to be broadly protective of state alcoholic beverage regulation, making superfluous any appeals to Congressional intent to shield it. In Granholm, however, a divided Court limited the scope of the Twenty-first Amendment and also of the Webb-Kenyon Act. The four dissenters, in an opinion by J. Thomas, focused on the Webb-Kenyon Act, possibly to encourage a Congressional response.

That the Granholm Court incorrectly interpreted the Webb-Kenyon Act by reading the Wilson Act into it is irrelevant. Congress must accept the Supreme Court's interpretation of the meaning of the Constitution. That is, it must accept the Supreme Court's interpretation of the effect of the Twenty-first Amendment on dormant Commerce Clause challenges. Congress is not bound by the Supreme Court's interpretation of what Congress meant in enacting the Webb-Kenyon Act.

Parenthetically, Congress is not bound by what it originally enacted in the Webb-Kenyon Act, either as interpreted by the majority or the dissent. In my view, H.R.5034 is actually imposing a stricter standard on state law entitled to immunity from dormant Commerce Clause challenge than was imposed in 1913 and again in 1935 in the Webb-Kenyon Act.

H.R.5034, if enacted into law, would reflect Congressional determination to accept the result in Granholm – that is, a similar case would be decided in the same way – although Congress need not so decide. H.R.5034 would declare that Congress does not wish to shield state laws whose intent is to discriminate against out-of-state producers in favor of in-state ones. Congress would permit dormant Commerce Clause challenges to laws facially or intentionally discriminating against producers. H.R.5034 also would reflect the intention of Congress to shield from challenge requirements that wholesalers and retailers be physically present in the state. H.R.5034 would recognize that such in-state physical presence requirements for wholesalers and retailers are crucial to effective enforcement of state laws designed to maintain a transparent and accountable system for the distribution and sale of alcoholic beverages and have been a critical feature of state law continuously since Repeal.

Congress is actually in H.R.5034 imposing under its Commerce Clause power the only plausible interpretation of the result in Granholm. Producer-level discrimination is rejected, yet the three-tier system, with mandated physical presence for the middle and bottom tier to effectuate a transparent, accountable, and stable system of distribution and sale, is protected. The Granholm dissenters did not think that this

distinction was logical. We must remember, however, that they believed that the physical presence requirement could also be imposed at the producer level.

Under H.R.5034, discrimination without regulatory justification in favor of in-state producers would not survive. However, the system by which states have regulated the distribution and sale of alcoholic beverages for over seventy-five years would. H.R.5034 does not flout decades of judicial decisions. It conforms to and respects the accumulated judicial and regulatory experience since Repeal. It reflects the fact that the physical presence requirement for wholesalers and retailers has been universally accepted since Repeal, unchallenged until very recently.

Removing protection from state laws which facially or intentionally discriminate against out-of-state producers does not permit clever, yet formally even-handed, laws to avoid challenge. If they were enacted only to discriminate, they are vulnerable. That most laws that differentiate by size might survive challenge is not surprising. As Judge Easterbrook reminded us in Baude v. Heath, 538 F.3d 608 (7<sup>th</sup> Cir. 2008), the dormant Commerce Clause does not prohibit distinctions between big and small. Merely artful even-handedness whose purpose was to discriminate would not, however, survive. In a magisterial and persuasive article, "The Supreme Court and State Protectionism", 84 Mich.L.Rev. 1091(1986), Professor Regan has demonstrated that the Supreme Court has never used the dormant Commerce clause to overturn a state law purely because of perceived discriminatory effects. There has always been a concomitant finding either of facial or intentional discrimination.

It should now be clear why H.R.5034 also seeks to amend the Wilson Act. The Wilson Act should have been irrelevant. Since the Court in Granholm, however, used it to interpret the Webb-Kenyon Act, the Court might use it again when interpreting H.R.5034, since Congress, if it did not amend the Wilson Act, might be deemed to have tacitly consented to this. H.R.5034, however, attempts to be a comprehensive expression of Congressional intent with regard to the effect of the dormant Commerce Clause on state alcoholic beverage regulation. The expression of Congressional will is to be completely embodied in the language of the amendment to the Webb-Kenyon Act. Amending the Wilson Act assures that this be the case.

## IV

It is useful to remember that state laws mandating physical presence for distributors and retailers, the core of what is the three-tier system, are still protected from dormant Commerce Clause challenge by the Twenty-first Amendment. The Granholm Court made this explicit with regard to a physical presence requirement for distributors, quoting with approval Justice Scalia's concurring words to this effect in North Dakota. This quotation immediately follows explicit approval for the North Dakota Court's statement that the three-tier system is "unquestionably legitimate." [At p.489].

Moreover, the holding of the North Dakota plurality presupposes the legitimacy of the three-tier system, with physical presence requirements for distributors and retailers. This is because the Supremacy Clause inquiry in North Dakota was whether the State was discriminating against the federal government because some other retailer – which is what the United States was for purposes of the litigation – was better treated. The

plurality held that, as a retailer of intoxicating liquors, the federal government was no worse off than any other such retailer selling to consumers in North Dakota. This was because all other retailers had to buy from licensed in-state North Dakota wholesalers and the federal government had the option of doing so. Only because of this requirement could the plurality be assured that there was no retailer receiving better terms and conditions of sale than those available to the federal government if the federal government bought from licensed in-state wholesalers.

The possibility of sales by out-of-state retailers, operating under different rules than those of North Dakota, was not even considered by the Court, probably because out-of-state retailers were not part of the mandated three-tier system through which North Dakota funneled alcoholic beverages. At a minimum, North Dakota requires that any retailer buy from an in-state wholesaler. See North Dakota, 495 U.S. at 439, noting that the North Dakota "system applies to all liquor retailers in the state", and that "liquor retailers are required to buy from state licensed wholesalers".

Two Circuit Courts, the Second, in Arnold's Wine v. Boyle, 571 F.3d 185 (2009), and the Fifth, in Wine Country Gift Baskets v. Steen, 612 F.3d 809 (2010), have since held that the Twenty-first Amendment, as interpreted by the Supreme Court in Granholm, does protect a physical presence requirement for retailers from dormant Commerce Clause challenge.

If lower tier physical presence requirements are Constitutionally compelled, why should Congress act? The answer is that the Granholm decision has encouraged some litigants to attempt further to erode the Twenty-first Amendment protections given to

states. Congress cannot alter judicial reinterpretation of the Twenty-first Amendment, but it can, under its Commerce Clause powers, draw the line it wishes and define the terms under which state alcoholic beverage regulation will be immune from dormant Commerce Clause challenge. The uncertainty that the Granholm decision has created has discouraged some states from defending what are valid and useful laws. Congress can end this uncertainty.

## V

Statements have been made that H.R.5934 flies in the face of decades of dormant Commerce Clause jurisprudence. These are false. First, as Clark Distilling made clear, state alcoholic beverage regulation and Congressional efforts to support it constitute a special category. The Court concluded its opinion:

“The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guarantees, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace.”

Second, there is no one yardstick by which to measure the scope of the dormant Commerce Clause. The Supreme Court concedes this. In the so-called canonical expression of dormant Commerce Clause doctrine, in Brown-Forman v. N.Y.S. Liquor Authority, 476 US 573, 578-79 (1986), the Court immediately concedes that it has proved impossible to apply the doctrine consistently and confidently. This is not a bad thing. The Court has, in effect, wisely refrained from treating the dormant Commerce Clause as one-dimensional. The Court has looked to many factors when it finds that no discrimination has been demonstrated and that state law should therefore be upheld. In Exxon v. Maryland, vertically integrated out-of-state sellers challenged a prohibition against petroleum producers or refiners operating service stations within the state. They argued that this ban discriminated against them in favor of in-state retailers. The Court rejected the claim, declaring that the dormant Commerce Clause protected interstate commerce, not the business strategies of particular out-of-state sellers. In General Motors v. Tracy, 519 U.S. 278 (1997), the challenger asserted that Ohio's taxation of natural gas companies violated the dormant Commerce Clause. All sellers of natural gas, whether in-state or out-of-state, were taxed unless they met the definition of a "natural gas company". Only Ohio-regulated utilities called "local distribution companies" [LDCs] did so. The Court first warned against facile predictions as to whether overall benefits and burdens favored in-state or out-of-state entities.

The Court then held the LDC's to be different from out-of-state sellers, thus negating the intentional discrimination dormant Commerce Clause claim. It did this because failing to do so "could subject LDC's to economic pressure that in turn could threaten the preservation of an adequate customer base to support continued provision

of bundled services to the captive market. The conclusion counsels against taking the step of treating the bundled gas seller like any other, with the consequent necessity of uniform taxation of all gas sales." At 309

The Court thus distinguished in-state sellers in a highly regulated market from unregulated, out-of-state sellers serving only large Ohio customers. It did so because a contrary finding would endanger the state's effort to assure adequate provision of natural gas to all customers. Such reasoning would likewise support distinguishing regulated physically present in-state wholesalers and retailers from unregulated out-of-state ones

In Kentucky v. Davis, 533 U.S. 328, the Court rejected a dormant Commerce Clause challenge to a state tax exemption only for its own bonds. The Court rejected the claim, feeling "apprehension" about indulging in "unprecedented ... interference" [the Court redacting its own language in United Haulers] with "a traditional government function." [At p.342]. Physical presence requirements for wholesalers and retailers have long and widely been used. They have not been the object of debate in the past and have only recently been challenged.

## VI

H.R. 5034 is congruent with the views of the Granholm majority. The minority thought Congress had also protected physical presence requirements at the producer level. All members of the Court thought that physical presence requirements for distributors and retailers are Constitutionally protected. It is also congruent with the views of the dormant Commerce Clause offered in other cases in which the Supreme

Court has shown a reluctance to intrude into areas traditionally or extensively regulated by the states.

In conclusion, H.R. 5034 helps sustain an effective system for the regulation and sale of alcoholic beverages. It is the prerogative of Congress to do this. Congress has acted previously to support state alcoholic beverage regulation. It should do so again.

Thank you for your consideration.

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Mr. CONYERS. Thank you.

Also, from Harvard, is Professor Einer Elhauge, the Petrie Professor of Law at the Law School. And he is testifying on behalf of the Beer Institute. He is a former clerk for Justice William Brennan, and has taught previously at the University of California Berkeley, before coming to Harvard.

Welcome this afternoon, sir.

**TESTIMONY OF EINER ELHAUGE, PETRIE PROFESSOR  
OF LAW, HARVARD LAW SCHOOL**

Mr. ELHAUGE. Thank you, Chairman Conyers, Ranking Member Smith, and other Members of the Judiciary Committee.

I am, as the Chairman said, Einer Elhauge, the Petrie Professor of Law at Harvard Law School, where I specialize in antitrust and statutory interpretation. I have been asked to present my views of the bill by the Beer Institute.

Proponents of this bill argue that it is necessary to correct three problems: Case conflicts, deregulation, and excessive litigation. But when I reviewed the cases, I found that none of those three concerns was well founded.

First, the alleged case conflicts largely reflected differences in case facts, or had been largely resolved by the courts through the common law process. Second, none of these cases actually resulted in deregulation. Third, because the courts have already clarified the issues, and state legislatures have responded with legally sound laws, the initial stream of cases has dwindled to a trickle. Today, there appears to be only one active case in this arena that has not already been substantively resolved by the trial courts.

Even if those three concerns were justified, the proposed act would be a poor remedy for them. The act would greatly increase legal uncertainty, and could be expected to spawn new legal conflict and litigation.

For example, ambiguities in proposed act, section 3a, mean that courts might variously interpret it to either have no effect, or to inversely preempt some, or perhaps even, all Federal statutes that conflict with state alcohol regulation. Those ambiguities are likely to induce a spate of new lawsuits. Only, this time, for the courts to figure out what section 3a means. Further, decisions that interpreted section 3a to inversely preempt Federal statutes could allow state regulations that permit anti-competitive conduct contrary to Federal antitrust policy.

Section 3b would also create three new harmful exceptions to current Dormant Commerce Clause doctrine. First, section 3b would eliminate protection against state alcohol laws that have discriminatory effects on out-of-staters. This would allow states to discriminate by picking some seemingly neutral factor that has discriminatory effects.

For example, the state could restrict sales by producers who sell a type of alcohol that is not made in the states; or who meet a production threshold that no in-state producer meets. Section 3b would, then, require sustaining such laws unless an affirmative discriminatory intent could be proven—a test which is difficult to meet, is likely to generate new case conflicts, and would not address the core concern that discrimination prompted by indifference to harms in other states is just as undesirable.

Second, section 3b would allow discrimination in any form, even facial and intentional discrimination against anyone who is not a producer. Thus, states could pass laws that explicitly discriminate against out-of-state consumers. That would seem contrary to Congress' strong pro-consumer policy.

For example, states could adopt laws that require all producers to charge higher prices to out-of-state consumers, or that levy high-

er taxes on beer that will be sold to out-of-state consumers. Third, section 3b would permit a state to directly regulate interstate commerce. For example, the proposed act will allow a state to enact a law that requires producers to affirm that they will not charge future prices in other states below the price charged in the first state.

The Supreme Court held such price-affirmation laws to be unconstitutional decades ago, observing that such laws interfered with the ability of those other states to regulate alcohol in ways that those states feel optimally advance their own 21st Amendment interests.

These examples are not fantastic or theoretical; rather, most come straight from the pages of existing judicial decisions. Thus the—proposed by the proposed act is real and substantial.

I am a big believer in states' rights. But those rights also include the right of states to be free from regulatory interference and discriminatory effects from other states. I also strongly believe in protecting children. But I see no reason why states cannot protect children with non-discriminatory laws, given the ample powers they already have under the 21st Amendment.

So far as I can tell, the only two concrete issues that proponents point to is that current case law might threaten either laws requiring in-person consumer purchases or in-state residency requirements for retailers. In my view, the current case law has already evolved to fairly clearly sustain such laws. But if those are the real concerns, the solution would be a much more narrow bill, not a bill that creates vast new exceptions to the constitutional jurisprudence that protects states from discrimination and interference from other states.

The Dormant Commerce Clause may seem like an obscure technical topic, but it is the constitutional jurisprudence that really united this Nation into the world's greatest free-trade area, preventing states from engaging in the sort of beggar-thy-neighbor protectionism that nations often use against each other. It is a vital part of what made America a great Nation, and its principles should not be unnecessarily cast aside.

[The prepared statement of Mr. Elhauge follows:]

PREPARED STATEMENT OF EINER ELHAUGE

**AN ANALYSIS OF AMENDED H.R. 5034, THE  
COMPREHENSIVE ALCOHOL REGULATORY  
EFFECTIVENESS ACT OF 2010**

**Einer Elhauge**

Petrie Professor Of Law

Harvard Law School\*

**Date Submitted: September 26, 2010**

**Submitted for House Judiciary Committee Hearing on H.R.**

**5034**

**11 a.m., September 29, 2010**

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\* I have been retained to state my opinions in this statement by the Beer Institute. The views expressed here are my own and should not be taken to reflect the views of Harvard University, which does not take institutional positions with respect to specific legislation, litigation, or regulatory proceedings. I am grateful for the invaluable research assistance of Michael Darby and Mitchell Reich.

## I. INTRODUCTION

This white paper analyzes H.R. 5034, the Comprehensive Alcohol Regulatory Effectiveness Act of 2010, on the assumption that the substitute amendment offered by Congressman Bill Delahunt is adopted.<sup>1</sup> Proponents have argued that this proposed Act is necessary to resolve conflicts in caselaw, avoid the threat of deregulation, and end excessive litigation.<sup>2</sup> But a review of the recent cases indicates that the alleged conflicts in caselaw generally reflect results that properly varied with different facts, that the common law process has largely resolved the alleged conflicts, and that none of the cases has resulted in deregulation. Probably because the common process has already clarified the main issues, the initial stream of cases has dwindled to a trickle, thus mooted any concern about excessive litigation.

Moreover, even if fears of uncertainty, deregulation, and excessive litigation were serious, the proposed Act would be a poor remedy for them. Worse, the Act would allow many types of protectionist state laws and could allow state regulations that conflict with federal antitrust statutes or other important Congressional Acts.

The proposed Act has two main provisions. First, § 3(a) declares that: “It is the policy of Congress that each State or territory shall continue to have the primary authority to regulate alcoholic beverages.” Most courts would likely interpret § 3(a) to have no actual legal effect because it merely states a “policy” that is meant to “continue” (rather than change) the existing congressional policy that leaves states as primary alcohol regulators. However, some courts

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<sup>1</sup> Amendment in the Nature of a Substitute to H.R. 5034, 111th Cong. (2010), offered in Letter of Representative Bill Delahunt to Chairman John Conyers, Jr. (Sept. 13, 2010). Although I had initially analyzed the original version of the H.R. 5034, my understanding is that the forthcoming committee hearing is likely to focus on the substitute amendment, and thus I limit this white paper accordingly.

<sup>2</sup> See National Beer Wholesalers Association, *Section by Section Analysis of the CARE Act*, available at <http://www.alcoholawreview.com/wp-content/uploads/2010/09/Section-by-Section-Analysis-of-the-CARE-Act.pdf> [hereinafter NBWA, *Section by Section*]; National Beer Wholesalers Association, *Fact vs. Fiction: H.R. 5034 – The Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010*, available at [http://www.nbwa.org/sites/default/files/Fact\\_vs\\_Fiction\\_H.R.5034.pdf](http://www.nbwa.org/sites/default/files/Fact_vs_Fiction_H.R.5034.pdf) [hereinafter NBWA, *Fact v Fiction*].

might conclude (given the canon against superfluous language) that § 3(a) must have been intended to accomplish something, and thus might interpret § 3(a) to inversely preempt some -- or maybe even all -- federal statutes that conflict with state alcohol regulation. In short, there are at least two ways to interpret § 3(a). Under the first interpretation, § 3(a) changes nothing, and thus cannot address any of the concerns animating the act. But if any courts adopt some version of the alternative interpretation, then § 3(a) will create legal conflict, and the possibility that courts might adopt such an alternative interpretation will likely induce a spate of litigation to resolve the meaning of § 3(a). Thus, § 3(a) would affirmatively worsen two of the proponent's concerns because § 3(a) will likely foment a new round of litigation and case conflicts about how to interpret § 3(a). Under the alternative interpretations, § 3(a) could also generate inverse preemption decisions that immunize state alcohol regulation that is anticompetitive, contrary to the congressional policy of the antitrust statutes, or that immunize state alcohol regulations that conflict with other congressional statutes and policies.

Second, § 3(b) eliminates commerce clause scrutiny unless a state alcohol regulation "intentionally or facially" discriminates against out-of-state "producers." This provision would have three unfortunate effects. (1) It would eliminate dormant commerce clause scrutiny of state alcohol laws that have discriminatory *effects* on out-of-state interests unless a discriminatory intent can be proven. This could allow protectionist state alcohol laws where intent is hard to prove or where a state has no discriminatory intent but the state's lack of political accountability to out-of-state interests makes the state indifferent to those discriminatory effects. Further, § 3(b) can be expected to create new court conflicts about whether and when courts can properly infer a discriminatory intent from the discriminatory effects, which will undermine the proponent's concerns about legal uncertainty and excessive litigation. (2) Because the § 3(b)

exception is limited to discrimination against out-of-state “producers,” § 3(b) would eliminate dormant commerce clause scrutiny of state alcohol laws that *intentionally or facially* discriminate against out-of-state interests other than producers, such as out-of-state *consumers*. (3) Because the § 3(b) exception is limited to discrimination, § 3(b) would eliminate current dormant commerce clause scrutiny of nondiscriminatory state alcohol laws that *directly* regulate interstate commerce. Because the “direct regulation” branch of dormant commerce clause doctrine protects states from interfering with the ability of *other* states to regulate, eliminating such scrutiny would ironically allow some states to directly regulate interstate commerce in ways that hamper the ability of *other* states to exercise their own Twenty-First Amendment rights.<sup>3</sup>

In short, the proposed Act would actually worsen the concerns about legal uncertainty and excessive litigation and can be expected to produce a spate of new legal conflict and litigation. Nor does the proposed Act further an interest in avoiding deregulation of alcohol markets. Nothing in the proposed Act would prevent a state from deregulating its alcohol markets. Nor is the proposed Act at all necessary for states to avoid deregulation of alcohol markets. The Twenty-First Amendment already provides the states with ample power to regulate their alcohol markets, and the Supreme Court has interpreted such powers broadly. So long as the state law does not violate other constitutional provisions, including the dormant commerce clause, states have unquestioned power to ban the sale and consumption of alcohol, assume direct control of it, and adopt regulations funneling sales through the three-tier system. In addition, states may adjust their alcohol tax to achieve their legitimate interests. Thus, states already have all the regulatory authority they need to advance legitimate interests like encouraging temperance or curbing underage drinking.

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<sup>3</sup> Proposed Act § 4 seems largely mooted by § 3(b), but if the proposed Act were further amended to cut § 3(b), then § 4 would raise serious problems because it could be interpreted to allow discrimination against out-of-state alcohol even if such discrimination would have been illegal under § 3(b). *See infra* Section III.C.

## II. THE CONCERNS MOTIVATING THE PROPOSED ACT ARE UNFOUNDED OR MOOT

### A. The Concerns About Conflicting Caselaw and Excessive Litigation

Since the Supreme Court decided *Granholm v. Heald*,<sup>4</sup> litigants have brought numerous actions against state alcohol regulations. Plaintiffs have brought these challenges mainly under two theories. First, they have argued that the state laws violate the Sherman Act because they restrain trade in a way that does not qualify for antitrust state action immunity. Second, litigants have alleged that the state laws violate the dormant commerce clause. Despite claims that these cases have resulted in conflicting conclusions, the following analysis shows that the caselaw has been consistent, and that the differences in legal outcomes instead properly reflect differences in the facts of each case.

**1. Recent Antitrust Cases.** In three recent cases, plaintiffs have claimed that state laws restrain trade in ways that violate the Sherman Act. Their results are all perfectly consistent. First, the Louisiana state court of appeals found that antitrust state action immunity protected various state laws designed to preserve the state's three-tier distribution system.<sup>5</sup> Second, the Fourth Circuit federal court of appeals denied antitrust state action immunity to Maryland's post-and-hold laws, which required wholesalers to post prices and adhere to them, and found that those laws violated the Sherman Act.<sup>6</sup> Finally, the Ninth Circuit federal court of appeals upheld Washington state laws that protected the three-tier distribution system but invalidated its post-and-hold laws.<sup>7</sup> Thus, the antitrust cases are consistent with each other because they invalidated

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<sup>4</sup> 544 U.S. 460 (2005).

<sup>5</sup> *Manuel v. Louisiana*, 982 So. 2d 316 (La. Ct. App. 2008).

<sup>6</sup> See *TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009); *TFWS v. Schaefer*, 242 F.3d 198 (4th Cir. 2001).

<sup>7</sup> See *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008).

post-and-hold schemes that helped financially interested firms anticompetitively fix prices, while sustaining laws that protected the three-tier system.<sup>8</sup>

Bill proponents have argued that these cases are in conflict with each other because a volume discount was prohibited in the Maryland case but not in the Washington state case.<sup>9</sup> However, there is no actual conflict. The court in the Maryland case found that the volume discount was inseparable from the invalid post-and-hold provisions and indeed was designed to reinforce those provisions by making it easier for rivals to observe deviations from posted prices.<sup>10</sup> In contrast, the court in the Washington state case found that the volume discount was separable from the invalid post-and-hold provisions because it was designed to instead enforce a valid uniform pricing requirement.<sup>11</sup> This is not a conflict, but is rather an application of severability principles that reached different results because the facts differed.

**2. Recent Dormant Commerce Clause Cases.** More frequently, plaintiffs prompted by the Supreme Court's decision in *Granholm* have alleged that state alcohol regulations violate the commerce clause by discriminating against out-of-state alcohol firms to protect in-state businesses. Plaintiffs principally have relied on *Granholm* to mount challenges. Many of these cases concerned state regulations that treated out-of-state producers differently from in-state producers. For example, many cases involved state laws which provided that only in-state producers could ship directly to in-state consumers. Courts, relying on *Granholm*, easily disposed of these cases, often on a motion for summary judgment or a judgment on the

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<sup>8</sup> Recent empirical work has confirmed the anticompetitive effects of post-and-hold laws and further has found that they do not measurably reduce drunk driving or underage drinking. See James C. Cooper & Joshua D. Wright, State Regulation of Alcohol Distribution: The Effects of Post & Hold Laws on Consumption and Social Harms, FTC Working Paper No. 304 (August 2010).

<sup>9</sup> NBWA, *Fact v Fiction*, *supra* note 3.

<sup>10</sup> 572 F.3d at 193; 242 F.3d at 209.

<sup>11</sup> 522 F.3d at 900.

pleadings, by holding that they violated the dormant commerce clause.<sup>12</sup> In other instances, state legislatures took the initiative to make their statutes even-handed, such as by either prohibiting direct shipment to state residents altogether or allowing both in-state and out-of-state entities to ship to state residents.<sup>13</sup> Such evenhanded state laws have been sustained or unchallenged.<sup>14</sup>

Challenges have also been brought against state laws that make direct sales to consumers illegal for out-of-state retailers but legal for in-state retailers. However, even though these state laws are facially discriminatory, they have actually been upheld by all three appellate federal circuits to consider the question, on the ground that favoring in-state retailers is inherent to the states' Twenty-first Amendment authority to define who constitutes a retailer within the three-tier system—a system whose legal validity has been unquestioned in the courts.<sup>15</sup> True, one district court reached the opposite conclusion based on the law's facial discrimination, but that district court did not consider the connection between the state law and the three-tier system and the appeal was mooted when the legislature amended the statute.<sup>16</sup> There thus does not appear to be any final judgment that prohibits such statutes and little risk they would be invalidated, and in any event any nominal conflict in caselaw appears to have been decisively resolved in favor of the three circuits that sustained such laws.

State alcohol regulations that were facially nondiscriminatory have been invalidated in only three instances, each of which involved state laws that were found to be discriminatory in effect. First, an Indiana statute provided that any winery could ship directly to Indiana

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<sup>12</sup> See, e.g., *Action Wholesale Liquors v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n*, 463 F. Supp. 2d 1294 (W.D. Okla. 2006).

<sup>13</sup> See, e.g., MICH. COMP. LAWS § 436.1203 (2010); MO. REV. STAT. § 311.185 (2010).

<sup>14</sup> See, e.g., *Jelovsek v. Bredeben*, 545 F.3d 431 (6th Cir.2008) (upholding Tennessee ban on direct shipment to consumers by any winery), *cert. denied*, 130 S. Ct. 199 (2009); *Hurley v. Minner*, Civ. No. 05-826, 2006 WL 2789164, at \*6 (D. Del. Sept. 26, 2006) (upholding Delaware ban on direct shipment to consumers by any winery).

<sup>15</sup> *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 815-821 (5th Cir. 2010); *Arnolds Wines, Inc. v. Boyle*, 571 F.3d 185, 188 (2d Cir. 2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006).

<sup>16</sup> *Siesta Village Market v. Granholm*, 596 F. Supp. 2d 1035, 1039-45 (E.D. Mich. 2008); *Wine Country*, 612 F.3d at 817 n.5 (noting that the appeal was mooted by a change in statute).

consumers, so long as the winery did not act as its own wholesaler in any other state.<sup>17</sup> Because California, Oregon, and Washington, which accounted for 93% of the country's wine production, allowed their wineries to sell directly to retailers, producers in these states were prohibited from selling directly to Indiana consumers.<sup>18</sup> The Seventh Circuit struck down this provision because it protected Indiana wholesalers at the expense of Indiana consumers and out-of-state wineries.<sup>19</sup>

Second, a Massachusetts law provided that "small" wineries could sell wine through any or all of three methods – to wholesalers, retailers, or directly to consumers – whereas large wineries had to choose between one of two methods – selling to wholesalers or directly to consumers.<sup>20</sup> Although the Massachusetts law defined small and large wineries by their wine volume, and thus was facially nondiscriminatory, the First Circuit held the law was discriminatory in effect because the plaintiffs proved that all Massachusetts wineries qualified as "small" wineries and that all "large" wineries were out of state, and that the law increased the market share of in-state wineries.<sup>21</sup> The court also inferred that the state law had a discriminatory intent from its discriminatory effects, from the fact that the statutory provision were not closely tailored to achieve the asserted legitimate purposes, from its context because it was enacted along with other provisions favoring local industry, and from the statements of various state legislators.<sup>22</sup>

Bill proponents have argued that this First Circuit decision is inconsistent with a Ninth Circuit decision upholding an Arizona law that allowed small but not large wineries to ship directly to consumers.<sup>23</sup> But there is no inconsistency. The case results differed because the

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<sup>17</sup> See *Baudc v. Hcath*, 538 F.3d 608, 611 (7th Cir. 2008).

<sup>18</sup> See *id.* at 611–12.

<sup>19</sup> See *id.*

<sup>20</sup> See *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 4 (1st Cir. 2010).

<sup>21</sup> See *id.* at 4–5, 8–13.

<sup>22</sup> See *id.* at 7, 13–17.

<sup>23</sup> NBWA, *Fact v Fiction*, *supra* note 3.

evidence differed. The Ninth Circuit upheld the Arizona law because no evidence was presented that the Arizona law was discriminatory in effect or purpose.<sup>24</sup> The evidence did not prove that the Arizona law altered the share of wine sales by in-state wineries, and to the contrary the evidence indicated that the vast bulk of benefitted small wineries who used the law to sell directly to Arizona consumers were located out of state.<sup>25</sup> Nor was any evidence offered that the Arizona legislature's intent was protectionist.<sup>26</sup>

Third, the Sixth Circuit invalidated a Kentucky law requiring in-person transactions because the evidence showed that the law was discriminatory in effect, favoring in-state wineries and wholesalers over out-of-state wineries.<sup>27</sup> In contrast, the First, Seventh, and Ninth Circuits have all reached the contrary conclusion, sustaining state laws requiring in-person transactions because the evidence in those cases did not prove a discriminatory effect that altered the market share of in-state wineries.<sup>28</sup> The opinions leave it unclear whether this difference in result simply reflects a difference in the evidence presented (in which case there is no real legal conflict) or rather a different conclusion about how the discriminatory effect test applied to similar facts. But even if the latter is the case, the weight of authority is clearly with the latter three circuits, so the common law process seems to be resolving any conflict in favor of sustaining in-person sale requirements.

**3. *There Remains Little Legal Conflict or Litigation.*** The upshot is that state legislatures have generally reacted responsibly to comply with *Granholm* and the courts have almost always reached consistent results, and in the two possible exceptions the common law

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<sup>24</sup> See *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232-33 (9th Cir. 2010).

<sup>25</sup> *Id.* at 1231-32.

<sup>26</sup> *Id.* at 1230-31.

<sup>27</sup> *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 432-34 (6th Cir. 2008).

<sup>28</sup> See *Black Star Farms*, 600 F.3d at 1231-32; *Baude*, 538 F.3d at 613-15; *Cherry Hill Vineyard LLC v. Baldacci*, 505 F.3d 28, 36-38 (1st Cir. 2007); see also *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1042 (10th Cir. 2009) (distinguishing *Lilly* on the ground that the plaintiffs in *Lilly* had presented sufficient evidence to establish a discriminatory effect).

process appears to already be resolving any inconsistency. Courts have properly struck down state laws that were facially discriminatory, except that the appellate courts have all upheld state laws that involved the sort of facial discrimination that is inherent in defining the three-tier system whose legitimacy the cases have never questioned. When state laws are facially neutral, the courts have upheld them when the evidence did not prove a discriminatory effect, but have invalidated them when courts found that the evidence did prove such an effect. Generally, this difference in result does not indicate a conflict in law, but a difference in the facts presented, and the one possible exception appears to be disappearing as the common law process resolves the issue in favor of sustaining state in-person sale requirements.

In the wake of this common law clarification, the number of cases has dropped sharply. I can find only three cases that have been filed in this arena in the last 12-18 months, two of which have already reached substantive resolution in the trial court.<sup>29</sup> Further, there are only five other active cases, two of which have been resolved on appeal, and three of which have been resolved in the trial court and have appeals pending.<sup>30</sup> The concern about excessive litigation thus now appears moot and is no longer a strong reason to adopt a federal statute.

<sup>29</sup> See *Lebamoff Enterp., Inc. d/b/a Cap N' Cork v. Snow*, 09-00744, United States District Court for the Southern District of Indiana (filed in state court on May 19, 2009) (challenging state law that permitted wineries, but not wine retailers, to ship directly to consumers via common carrier); *S.L. Thomas Family Winery, Inc. v. Walding*, No. 3:10-cv-4, United States District Court for the Southern District of Iowa (filed Jan. 12, 2010) (dismissed May 3, 2010) (challenging state's prohibition against direct shipment by out-of-state wineries from non-reciprocal states); *Anheuser-Busch, Inc. v. Schnorf*, Case No: 10-cv-1601 (filed March 10, 2010) (partial summary judgment to plaintiff granted Sept. 3, 2010, based on facial discrimination).

<sup>30</sup> See *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010) (awaiting a decision on attorney's fees); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 815-821 (5th Cir. 2010) (awaiting a possible petition for certiorari); *Freeman v. Fischer*, 563 F. Supp. 2d 493 (D.N.J. 2008) (striking down facially discriminatory laws that charged out-of-state wineries double the license fee charged to in-state wineries and limited out-of-state wineries to one salesroom when in-state wineries were allowed six salesrooms); *US Airways, Inc. v. O'Donnell*, --- F. Supp. 2d ---, 2009 WL 6340104 (D.N.M. 2009) (holding that state alcohol laws at issue were not preempted by federal air transportation laws); *Browning v. Oregon Liquor Control Commission*, No. 0805-0685, Circuit Court of Oregon, County of Clackamas (rejecting challenge to state's prohibition against central warehousing by retailers).

### B. The Alleged Threat of Deregulation

In an effort to gather support for the proposed Act, several proponents have alleged that the litigation summarized above threatens to “deregulate” the alcohol industry.<sup>31</sup> Some proponents have suggested that such deregulation by lawsuit could cause the sort of problems that one report found resulted from deregulating alcohol markets in the United Kingdom.<sup>32</sup>

This fear is misplaced because none of the cases hampers the ability of states to effectively regulate their alcohol markets. As the Supreme Court stressed in *Granholm*, states have unquestioned power to ban the sale and consumption of alcohol, assume direct control of it, or adopt regulations funneling sales through the three-tier system.<sup>33</sup> Rather, what the cases legitimately strike down are laws that violate the dormant commerce clause (because the laws discriminate against out-of-state interests) or violate antitrust law (because the laws give financially interested firms the power to impose anticompetitive restraints).

Even if deregulation were a serious concern, the proposed Act does not alleviate it. Nothing in the proposed Act prevents states from deregulating their alcohol markets. Under the proposed Act, states could even adopt precisely the deregulatory approach as the U.K. approach decried by proponents of the proposed Act. All the proposed Act does is allow states to adopt new laws regulating or deregulating alcohol markets in ways that have discriminatory effects against out-of-state producers, that discriminate intentionally or facially or in effect against

<sup>31</sup> See, e.g., NBWA, *Section by Section*, *supra* note 3; Letter from Nat’l Assoc. of Att’ys Gen., to Rep. Hank Johnson (Mar. 29, 2010), available at <http://www.naag.org/assets/files/pdf/signon.Final%20Alcohol%20Letter%20Submit%20Committee.pdf>; *Hearing on Legal Issues Concerning State Alcohol Regulation Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Rep. Steve I. Cohen), available at <http://judiciary.house.gov/hearings/pdf/Cohen100318.pdf>; (statement of Representative Bobby L. Rush), available at <http://judiciary.house.gov/hearings/pdf/Rush100318.pdf>.

<sup>32</sup> See *Hearing on Legal Issues Concerning State Alcohol Regulation Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Pamela S. Erickson, Chief Executive Officer, Public Action Management, Scottsdale, Ariz.), available at <http://judiciary.house.gov/hearings/pdf/Erickson100318.pdf>.

<sup>33</sup> See *Granholm*, 544 U.S. at 489.

consumers or other nonproducers out-of-state, or that directly regulate interstate commerce in ways that interfere with the ability of other states to exercise their Twenty-First Amendment powers. Further, if § 3(a) were interpreted by courts to inversely preempt the application of federal antitrust law, the proposed Act could also allow states to regulate or deregulate in ways that empower financially interested firms to restrain alcohol markets.

**III. THE PROPOSED ACT WOULD NOT REMEDY ITS MOTIVATING CONCERNS, BUT WOULD HAVE MANY UNDESIRABLE EFFECTS**

**A. The Possible Effects or Non-effects of § 3(a)**

*1. Why § 3(a) Would Increase Uncertainty and Litigation.* § 3(a) of the proposed Act provides: “It is the policy of Congress that each State or territory shall continue to have the primary authority to regulate alcoholic beverages.” The effects of this provision are quite unclear. Most courts would likely interpret § 3(a) to have no actual legal effect. The main reason is that § 3(a) provides that it will only “continue” the current congressional policy of allowing states to have primary authority over alcohol regulation. The word “continue” suggests that the § 3(a) was not meant to change the current state of law, which means that Congress deems the state powers allowed under current law to already give states “primary authority” over alcohol regulation. Under this interpretation, although *certain* types of state alcohol regulation would continue to be preempted because they conflict with federal statutes like the antitrust laws, such isolated preemptions would be deemed consistent with the *overall* “primary authority” that states have over alcohol regulation because those isolated preemptions do not bar states from all the other types of alcohol regulation that can achieve legitimate state interests.

Reinforcing this first interpretation would be the fact that § 3(a) states only a general “policy”, which some courts would likely conclude means that § 3(a) was not intended to have operative effect, but rather was only intended to state a general purpose that should be used to interpret the operative provisions of the proposed Act. These courts could cite a line of cases that have treated other statutory statements of “policy” like a statement of legislative purpose that has no operative effect itself but instead provides only a guide to help interpret any ambiguity that exists in the statute’s actual operative provisions.<sup>34</sup>

If this first interpretation were adopted by all the courts, then § 3(a) changes nothing and has no real point. Lacking any effect, § 3(a) could not serve any of the purposes animating the proposed Act. To the contrary, under this first interpretation, the proposed Act would have exactly the same meaning as the Act would have without § 3(a).

However, an alternative interpretation is also possible. Some courts might conclude that the first interpretation cannot be right precisely because it would mean that § 3(a) has no real point. These courts could reason that Congress cannot have meant to enact a meaningless provision. They could cite the canon of statutory construction that statutes should not be interpreted in ways that make some words superfluous.<sup>35</sup> This canon seems particularly apt here because § 2(a) already states that Congress’ purpose is to “reaffirm and protect the primary authority of States to regulate alcoholic beverages,” so that § 3(a) would be superfluous even as a statement of purpose if the first interpretation were adopted.

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<sup>34</sup> See, e.g., *Rapanos v. U.S.*, 547 U.S. 715, 737 (2006); *U.S. v. New Mexico*, 438 U.S. 696, 713 (1978).

<sup>35</sup> *Moskal v. United States*, 498 U.S. 103, 109-110 (1990) (“a court should ‘give effect, if possible, to every clause and word of a statute.’”)(citing *United States v. Menasche*, 348 U.S. 528, 538-539 (1955); *Gustafson v. Alloyd Company, Inc.*, 513 U.S. 561, 574 (1995) (“the Court will avoid a reading which renders some words altogether redundant”); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001) (rejecting an interpretation because it would make a “provision superfluous”, noting that “Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment”) (quoting *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990)).

Given the canon against superfluous words, these courts might reason that the fact that Congress wanted to “continue” its existing policy does not necessarily mean that Congress believed that its existing policy was being correctly followed by the courts. Instead, these courts might conclude, the only way to give § 3(a) any meaning would be to assume that Congress believed that its existing Congressional policy was being violated by the courts and that § 3(a) was necessary to reverse some or all of those decisions in order to give states the intended “primary authority.”

Courts adopting this second interpretation could also rely on another line of cases that have sometimes interpreted statements of congressional “policy” to have operative effect.<sup>36</sup> There is thus likely to be a conflict about how to interpret both the word “policy” and the word “continue” in § 3(a).

Moreover, there is also an ambiguity in how to interpret the words “primary authority” that is likely to lead to at least two possible versions of the alternative interpretation, which I will call the second and third interpretations to distinguish them from the first interpretation. Under the second possible interpretation, the issue of whether a state retains “primary authority” would be judged *overall*. That is, the court would ask about all the ways in which states can regulate alcohol, and all the ways in which federal statutes restrict particular types of alcohol regulation, and determine whether the latter was so large that the states no longer had primary authority overall. The second interpretation would thus interpret Congress to be displeased with the overall balance of authority struck by current court decisions, requiring that some (but not all) of the decisions preempting state alcohol regulation should be reversed.

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<sup>36</sup> Byers v. Inuit, 600 F.3d 286, 294-95 (3d Cir. 2010) (interpreting a statute that stated it was congressional “policy” that the IRS “should cooperate with and encourage the private sector” to provide statutory authority to enter into certain contracts that granted antitrust immunity); Schutz v. Thorne, 415 F.3d 1128, 1137-38 (10th Cir. 2005) (interpreting a statement of congressional “policy” to grant dormant commerce clause immunity, although in that case there was also an operative provision to the same effect).

Under the third possible interpretation, courts would interpret “primary authority” to mean that states must have primacy over federal law in *each instance* when states regulate alcohol, even though that state regulation conflicts with federal statutes. Courts may reach this construction because several federalism decisions, including the seminal case *United States v. Lopez*,<sup>37</sup> have used the term “primary authority” to refer to states’ power over subject matters outside the proper reach of Congress.<sup>38</sup> Under this possibility, § 3(a) would mean that any state alcohol regulation would inversely preempt the application of any federal statute that conflicts with that state regulation.

If all the courts uniformly adopted the first interpretation, then § 3(a) has no effect and cannot advance any of the purposes of the proposed Act. But if at least some Courts adopt the second or third interpretations, then that will create a conflict among the courts and vastly increase legal uncertainty. Indeed, the second interpretation would generate considerable uncertainty even within itself, because courts would likely vary in their interpretation of just how many (and what types) of federal statutes have to be inversely preempted in order to restore overall “primary” authority to states. Under the second interpretation, it would be unclear, for example, whether all, some, or no applications of federal antitrust law would be inversely preempted.

Second 3(a) would thus likely create great legal uncertainty if, as seems likely, some courts adopt the second or third interpretations. Further, the prospect that the set of claims that win under § 3(a) could differ from the set of claims that have won under preexisting law will

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<sup>37</sup> 514 U.S. 549 (1995).

<sup>38</sup> *E.g. id.* at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)); *Engle v. Isaac*, 456 U.S. 107, 128 (1982); *see* *Nextel Partners Inc. v. Kingston Tp.*, 286 F.3d 687, 691 (3d. Cir. 2002) (construing Telecommunications Act to grant states “primary authority for land use regulation”). Courts have rarely construed the term “primary authority” when it has been used in statutory text. *See, e.g.*, 42 U.S.C. § 290bb-25b(b)(7); 18 U.S.C.A. § 1030; 22 U.S.C.A. § 2707; *but see* *Mammel v. State*, 982 So.2d 316, 326 n.7 (La. App. 2008) (interpreting term “primary authority” in 42 U.S.C. § 290bb-25b(b)(7) to mean that Congress has continued to “show respect for the States’ authority in this area”).

induce a new round of litigation to test the limits of § 3(a) and clarify its meaning. Thus, far from serving the statutory purposes of reducing legal uncertainty and ending excessive litigation, § 3(a) is likely to thwart those purposes by increasing legal uncertainty and increasing litigation. If § 3(a) does not have those adverse effects, it will likely be because the courts have uniformly read it to have no effect at all, in which case it might as well be eliminated.

*2. The Possible Adverse Substantive Effects If § 3(a) Were Interpreted to Give It Meaning.* To the extent that courts did interpret § 3(a) to sometimes or always inversely preempt the application of federal statutes that conflict with state alcohol regulation, the substantive effects are likely to be undesirable because such inverse preemption will thwart the congressional policy behind that federal statute. To illustrate, suppose a court either (a) adopted the third interpretation or (b) adopted the second interpretation and concluded that inverse preemption of federal antitrust laws was necessary to restore overall primary authority to states. Then § 3(a) would leave states free to adopt anticompetitive laws that favor financially interested firms in ways that are unnecessary to promote legitimate state interests protected by the Twenty-First Amendment.

A state legislature could, for example, adopt a statute that authorizes price-fixing cartels in any alcohol market.<sup>39</sup> Such a state might believe that allowing alcohol cartels would serve a legitimate public interest because it results in higher alcohol prices that the state might think would promote worthy goals like temperance or curbing underage drinking.<sup>40</sup> But even if a state

<sup>39</sup> Under current antitrust state action doctrine, a court would strike down the state statute because, although the state legislature has clearly authorized the cartel, the cartel prices are not being actively supervised by any state official. Einer Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 673–74 (1991) (summarizing caselaw). Thus, the terms of the restraint – the level of cartel prices – are being set by financially interested firms who cannot be trusted to act in the public interest and whose actions must instead be reviewed under antitrust laws that are designed to regulate interested market conduct.

<sup>40</sup> However, recent empirical work indicates that, although allowing anticompetitive pricing reduces output slightly, it does not measurably reduce drunk driving or underage drinking. See James C. Cooper & Joshua D. Wright, *State Regulation of Alcohol Distribution: The Effects of Post & Hold Laws on Consumption and Social Harms*, FTC

legislature truly believes that higher alcohol prices would achieve those public interest objectives, it can already achieve that objective with antitrust immunity under current law by simply authorizing the setting of alcohol prices by a state official who is financially disinterested and politically accountable.<sup>41</sup> Such a statute would satisfy the clear authorization and active supervision elements of current antitrust state action immunity, and such a disinterested political process would assure that the prices being set are optimally designed to further those public interest goals.

In contrast, the problem with a state allowing a private cartel to set alcohol prices is that it violates the fundamental premise of federal antitrust law that financially interested firms cannot be trusted to restrain trade in ways that further the public interest.<sup>42</sup> A private cartel has incentives to set prices to maximize its profits, rather than limit itself to the prices that best achieve public interest objectives. The cartel might set prices higher than optimal to achieve public interest objectives because doing so creates more cartel profits. Or the cartel might set prices too low because the cartel has a long run interest in maintaining a sales volume that is inconsistent with state alcohol policy. Thus, allowing legislatures to authorize alcohol cartels would enable financially-interested firms to reap cartel profits at the expense of consumers in ways that are unnecessary to advance any legitimate state interests and may well undermine them. The same is more generally true for other state laws that allow private actors to impose

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Working Paper No. 304 (August 2010). The most likely reason is that the price increases have little effect on the consumption of alcohol by persons prone to engage in drunk driving or underage drinking (their demand is inelastic), in which case anticompetitive price increases selectively reduce sales to the more temperate part of the market (adults who drink in moderation, the demand of whom is, not surprisingly, more elastic). Laws that directly target problem drinking by lowering the permissible blood alcohol level to .08 for everyone or to zero for underage drinkers do, in contrast, significantly reduce drunk driving and teen drinking. *Id.*

<sup>41</sup> Elhauge, *supra* note , at 696 (concluding that the Supreme Court caselaw can all be explained by the principle that “an anticompetitive restraint is immune from antitrust liability whenever a financially disinterested and politically accountable actor controls and makes a substantive decision in favor of the terms of the restraint.”); see also *id.* at 682–96 (explaining why this simple principle is consistent with all the Supreme Court precedent).

<sup>42</sup> *Id.* at 696-717.

anticompetitive restraints without having the terms of those restraints substantively approved and controlled by a disinterested public official.

**3. Legislative History and Savings Clauses.** In his letter proposing the current version of the proposed Act, Representative Delahunt stated: “I have removed from the text language that some claim would have allowed the states to engage in anti competitive behavior.”<sup>43</sup> One might mistakenly believe that such an explicit statement by the sponsor of a bill would make it implausible that any court would ever interpret § 3(a) to inversely preempt federal antitrust law. However, many modern judges are textualists who are against considering legislative history (certainly when the text is clear and some judges even when the text is unclear), and even when judges consider legislative history, many regard it with skepticism because it states the views of only some legislators and is not (like the statutory text) adopted by the legislature as a whole. This is true even when the legislative history consists of official committee reports.<sup>44</sup> Judges give statements by bill sponsors or floor managers even less weight than committee reports,

<sup>43</sup> See Letter of Representative Bill Delahunt to Chairman John Conyers, Jr. at 1 (Sept. 13, 2010).

<sup>44</sup> For example, *Exxon Mobil Corporation v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), held that courts should definitely not examine legislative history when the text is clear, expressed great skepticism about legislative history and committee reports in general, suggested (without deciding) that these problems might mean that courts should not examine legislative history even when the text is unclear, and concluded that the committee reports in the case at hand should not guide interpretation even if the text were unclear. The Court stated:

Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal’s memorable phrase, an exercise in “looking over a crowd and picking out your friends.”<sup>77</sup> Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed. It is clear, however, that in this instance both criticisms are right on the mark.

*Id.* at 568-69. See also *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 601 (1992) (Scalia, J., concurring in the judgment) (refusing to join opinion that relied on committee reports). *Blanchard v. Bergeron*, 489 U.S. 87, 97-99 (1989) (JUSTICE SCALIA, concurring in part and concurring in the judgment) (refusing to join portion of opinion that relied on committee report).

though more weight than statements made by other individual legislators.<sup>45</sup> Further, statements made during the committee hearing process are generally treated with the most judicial skepticism of all.<sup>46</sup> There is thus no guarantee that all or even most federal judges will view Representative Delahunt's statement as decisive. Indeed, the question about what weight to give this statement is likely to generate even more legal conflicts and litigation.

One might reasonably conclude that the solution to this problem would be to amend the bill to add an explicit antitrust savings clause into the statutory text. But while this would solve the antitrust problem, it would increase the likelihood that courts would interpret § 3(a) to inversely preempt the application of other federal statutes. The reason is that many courts would reason that such an antitrust savings clause would have no point unless Congress thought that, absent such a clause, the language of § 3(a) did inversely preempt the application of federal statutes that conflicted with state alcohol regulations.<sup>47</sup> The canon against superfluous words could again be applied, here to conclude that the antitrust savings clause would have no meaning unless § 3(a) were interpreted to have such an inversely preemptive effect. Further, courts would likely also rely on the *expressio unius* canon (short for *expressio unius est exclusio alterius*), which means "the expression of one thing excludes others."<sup>48</sup> This canon would suggest that expressing an antitrust savings clause implies that Congress *did* want § 3(a) to inversely preempt

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<sup>45</sup> *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *Zuber v. Allen*, 396 U.S. 168, 186 (1969); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-396 (1951) (Jackson, J., concurring).

<sup>46</sup> *See Kelly v. Robins*, 479 U.S. 36, 51 n.13 (1986); *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972).

<sup>47</sup> *See North Haven Board Of Education v. Bell*, 456 U.S. 512, 521 (1982) (concluding that the fact that two exceptions covered employment in religious and military schools suggested the main provision was meant to cover school employment).

<sup>48</sup> *See EINER ELHAUGE, STATUTORY DEFAULT RULES 189* (Harvard University Press 2008). The *expressio unius* canon is not always applied, and indeed sometimes courts apply the opposite canon that expressing certain things may indicate a statutory purpose that should be extended by analogy to include unexpressed things that advance the same purpose. ELHAUGE, *supra*, at 189-90. But the possibility of such a conflict in canons would only increase the likelihood of increased legal uncertainty and litigation.

the application to state alcohol regulations of all *non*-antitrust federal statutes, such as labor or civil rights laws.<sup>49</sup>

The only way to avoid that problem would seem to be to provide a savings clause for all federal statutes. But if such a global savings clause were adopted, § 3(a) would again seem to have no effect and thus might as well be eliminated.

### **B. The Adverse Effects of § 3(b) on Dormant Commerce Clause Scrutiny**

*1. How § 3(b) Changes Current Dormant Commerce Clause Doctrine.* Current dormant commerce clause doctrine provides the following. “When a state statute *directly* regulates *or discriminates* against interstate commerce, *or* when its *effect* is to favor in-state economic interests over out-of-state interests, [the courts] have generally struck down the statute without further inquiry.”<sup>50</sup> A state law that discriminates facially *or* in effect against out-of-state interests will be upheld “only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives.”<sup>51</sup> A state law is deemed to “directly” regulate interstate commerce in violation of the dormant commerce clause if the state law effectively (1) regulates out-of-state transactions or (2) subjects interstate conduct to the risk of inconsistent regulations, where one state prohibits the same conduct that the other state mandates.<sup>52</sup> “When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, [the courts] have examined whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.”<sup>53</sup>

<sup>49</sup> See *North Haven Board Of Education v. Bell*, 456 U.S. 512, 521-22 (1982) (concluding that the listing of certain exceptions to a statute implied that Congress did not intend any other exceptions).

<sup>50</sup> See *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (emphasis added).

<sup>51</sup> See *Dep’t of Revenue v. Davis*, 553 U.S. 328, 338 (2008); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 350–53 (1977); *Dean Milk Co. v. City of Madison, Wisconsin*, 340 U.S. 349 (1951).

<sup>52</sup> See *Brown-Forman*, 476 U.S. at 582–584.

<sup>53</sup> See *id.* at 579; *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

Proposed Act § 3(b) would eliminate any dormant clause scrutiny of state alcohol regulations, with the only exception being that the state “may not intentionally or facially discriminate against out-of-state producers of alcoholic beverages in favor of in-state producers unless the State or territory can demonstrate that the challenged law advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” Proposed Act § 3(b) thus changes current dormant commerce clause doctrine by allowing state alcohol regulations that: (1) are discriminatory in effect but cannot be proven to have a discriminatory intent, (2) discriminate against nonproducers out-of-state (such as out-of-state consumers), or (3) directly regulate interstate commerce in ways that interfere with the ability of other states to regulate their own alcohol markets.

*2. The Uncertain and Undesirable Effects of Eliminating the Discriminatory Effects Test.* Proposed Act § 3(b) would eliminate dormant commerce clause scrutiny of state alcohol laws that have discriminatory effects on out-of-state interests unless a discriminatory intent can be proven. This is likely to create problems because proving a discriminatory intent can be very difficult, in part because courts are naturally loathe to haul legislators before the courts to testify about their state of mind. Some courts are willing to infer a discriminatory intent from the discriminatory effects themselves.<sup>54</sup> To the extent they do so, § 3(b)’s elimination of the discriminatory effects test has little meaning. But not all courts infer a discriminatory intent from discriminatory effects. Further, the fact that § 3(b) eliminated the discriminatory effects test but not the discriminatory intent test is likely to lead some (but probably not all) courts to conclude that Congress must have viewed them as distinct tests and would not want courts to infer a discriminatory intent from discriminatory effects for state alcohol regulations anymore.

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<sup>54</sup> See, e.g., *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 13-17 (1st Cir. 2010).

Thus, § 3(b) is likely to generate new legal uncertainty and about the extent to which courts can infer a discriminatory intent from discriminatory effects. This will affirmatively worsen the proponent's concerns about legal uncertainty and excessive litigation.

Further, in courts that do not allow a discriminatory intent to be inferred from discriminatory effects, litigants will often be unable to prove a discriminatory intent, even if it exists, because the evidence of such an intent will be largely in the control of state regulators who (by hypothesis) were intentionally being discriminatory and thus have incentives to hide that fact. The difficulty of proving a discriminatory intent thus may encourage intentionally protectionist state laws when the state regulators think their discriminatory intent is unlikely to be provable.

Moreover, a state regulator might adopt a protectionist state regulation not because it affirmatively has a discriminatory intent, but rather because the state regulator's lack of political accountability to out-of-state interests makes the state *indifferent* to those discriminatory effects. A state regulator might, for example, adopt some state law that does have some minor effect in furthering some nondiscriminatory state purpose, even though that state law causes discriminatory effects against out-of-state producers that could be avoided with another law that would equally advance the state's nondiscriminatory purpose. The state regulator might do so not because it affirmatively intends the discriminatory effects, but rather because the state regulator simply does not *care* about those discriminatory effects because they are suffered by out-of-staters to whom the regulator is not politically accountable. Such a state regulation would be immune under § 3(b), which is undesirable because an important goal of dormant commerce clause doctrine is not only to stop states from deliberately harming out-of-staters, but also to

force such issues to be decided at a federal level that can affirmatively protect all the effected interests.

**3. *The Undesirable Effects of Allowing Facial and Intentional Discrimination Against Out-of-Staters Who Are Not Producers.*** Suppose a state legislature adopts a protectionist state alcohol law that facially and intentionally discriminates without any justification whatsoever against out-of-state consumers, say by requiring firms to sell at a higher price to consumers from other states. Under current doctrine, such a facially discriminatory state law would violate the dormant commerce clause, which invalidates discrimination against out-of-state consumers just as much as discrimination against out-of-state producers.<sup>55</sup> But under proposed Act § 3(b), the state law would enjoy complete commerce clause immunity because the facial discrimination is not against out-of-state “producers.” It seems clearly undesirable to immunize all protectionist state alcohol regulations, no matter how blatant and justified, just because the harmed out-of-state interests are not producers.

Facially nondiscriminatory state laws might also discriminate in effect against out-of-state consumers. For example, suppose California, which makes 62.4% of the wine sold in the United States and consumes 10.9% of the wine bought in the United States,<sup>56</sup> decided to adopt a state law allowing wine producers to set cartel prices whether those producers were in-state or out-of-state, with those prices subject to substantive review by California state officials. This state law not only creates no facial discrimination, but also has no discriminatory effect on out-of-state producers because it would benefit all producers (whether in or out of the state) by

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<sup>55</sup> See *Brown-Forman*, 476 U.S. at 580.

<sup>56</sup> See The Wine Institute, *2009 California Wine Sales*, available at <http://www.wineinstitute.org/resources/statistics/article122>. (last visited June 28, 2010); <http://www.discus.org/pdf/May2009Preliminary.pdf> (last visited June 30, 2010).

increasing their profits. Thus, such a state law would not discriminate against out-of-state *producers* even if proposed Act § 3(b) were amended to cover discriminatory effects.

However, if one considered the interests of *consumers*, the statute would have a clear discriminatory effect because 89.1% of the burden of those cartel prices would be borne out of state, while 62.4% of the gain from those cartel prices would be reaped in state. Antitrust state action immunity would likely apply given the clear authorization by the state and the active supervision through substantive review by the state official.<sup>57</sup> But the state itself would have a financial interest in such a law because its residents would gain 62.4% of the resulting cartel profits, but only pay 10.9% of the cartel overcharge. Thus, the state officials would be politically accountable to state residents who have a financial interest in excessive pricing, undermining our confidence that the state officials would have incentives to approve only price levels that further the public interest of the nation as a whole. Today, a court would strike down this statute under the dormant commerce clause because the statute has a discriminatory effect that does not serve any legitimate purpose that cannot be furthered in a non-discriminatory fashion. But the state law could not be challenged under proposed Act § 3(b) because it does not discriminate against out-of-state *producers*. Further, even if § 3(b) were amended to cover intentional or facial discrimination against all out-of-state interests, such a state law would not discriminate on its face, and a discriminatory intent may be hard to prove.

***4. The Undesirable Effects of Eliminating Dormant Commerce Clause Scrutiny of State Laws that Directly Regulate Interstate Commerce.*** Suppose a state legislature adopts a nondiscriminatory law that directly regulates alcohol transactions in other states. Under current doctrine, the fact that the state law directly regulates interstate commerce would violate the

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<sup>57</sup> See Einer Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 673–74 (1991); *Parker v. Brown*, 317 U.S. 341 (1943).

dormant commerce clause even though the state law is nondiscriminatory. But under proposed Act § 3(b), the state law would enjoy commerce clause immunity because the state law does not violate the standards of that section, which allow any nondiscriminatory state alcohol regulations even if they directly regulate interstate commerce. This would be unfortunate because such direct regulation of out-of-state transactions can affirmatively *hamper* the ability of other states to exercise their own Twenty-First Amendment powers.

To illustrate how the proposed Act could immunize state laws that affirmatively hamper the ability of other states to exercise their own Twenty-First Amendment powers, consider the application of the Act to price affirmation laws. Under current dormant commerce clause doctrine, a state can require that a distiller set in-state prices that are no higher than the lowest price at which the distiller sold in other states in the *previous* month, but a state cannot require that a distiller set in-state prices for the following month that are no higher than the lowest price at which the distiller *will* sell in other states in following month.<sup>58</sup> The former is valid because the state is simply using past data from other states to set the state's own in-state price regulations, without interfering with the ability of other states to regulate pricing in their states as they please. The latter, in contrast, directly regulates out-of-state pricing by prohibiting future price cuts in other states below the prices posted in the first state and may create inconsistent obligations if other states regulate pricing in other ways. In striking down the latter sort of statute, the Court has rejected a Twenty-First Amendment defense, observing that such state statutes could actually impair the ability of other states to exercise their Twenty-First Amendment authority.<sup>59</sup>

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<sup>58</sup> See *Brown-Forman*, 476 U.S. at 581–583.

<sup>59</sup> See *id.* at 584–85.

The proposed Act would force courts to uphold a state law that required distillers to affirm that they would not cut future prices in other states below the level in the first state, even though the Supreme Court has explicitly held that such a scheme violates the dormant commerce clause. The state would enjoy commerce clause immunity under § 3(b) because such a law is nondiscriminatory, preventing both in-state and out-of-state distillers from cutting prices both in-state and out-of-state. Thus, the proposed Act would immunize this state statute even though it constitutes direct regulation of interstate commerce that interferes with the ability of other states to regulate liquor prices in ways that the other states feel optimally advance their own Twenty-First Amendment interests.

#### **C. The Possible Adverse Effects of Proposed Act § 4.**

If the proposed Act remains as written, then proposed Act § 4 would largely be mooted by § 3(b). Section 4 removes the Wilson Act's nondiscrimination requirement that alcohol imported into one state "be subject to . . . the laws of such State . . . to the same extent and in the same manner as though such liquids or liquors had been produced in such State." Even though § 4 would remove this affirmative nondiscrimination requirement, proposed Act § 3(b) would still protect out-of-state alcohol producers from state laws that were facially or intentionally discriminatory.

However, if the proposed Act were amended to eliminate § 3(b) in order to avoid the problems outlined above, then § 4 might have a very large negative effect because § 4 could be interpreted to allow discrimination without even meeting the standards of § 3(b). That is, a court might reason that, by eliminating the Wilson Act's nondiscrimination requirement, § 4 means to allow discrimination against out-of-state producers even if that discrimination is facial or

intentional and even if the state alcohol regulation fails to advance any legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. Thus, if the proposed Act were amended to eliminate § 3(b), then it should also be amended to eliminate § 4. Alternatively, § 4 should at least be amended to make clear that § 4 does not alter existing dormant commerce clause standards.

#### **D. The Proposed Act and the Twenty-First Amendment**

Because some proponents of the proposed Act suggest it is necessary to protect the Twenty-First Amendment powers of states, it is worth emphasizing that the proposed Act would go beyond the scope of the Twenty-First Amendment and that without the proposed Act the states would still have more than ample powers to advance legitimate state interests through state alcohol regulations. The Supreme Court has explained that the goal of the Twenty-First Amendment was to permit states to “maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use.”<sup>60</sup> The Court, however, held that the Twenty-First Amendment does not provide states with the ability to discriminate against out-of-state goods.<sup>61</sup>

In *Granholm*, the Supreme Court explained three basic principles derived from decades of Twenty-First Amendment precedent. First, the Twenty-First Amendment does not save state laws that violate other constitutional provisions.<sup>62</sup> Second, § 2 of the Amendment does not

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<sup>60</sup> See *Granholm*, 544 U.S. at 484.

<sup>61</sup> See *id.* at 484–85.

<sup>62</sup> See *id.* at 486–87.

abrogate Congress' commerce clause powers with respect to liquor.<sup>63</sup> Third, the Twenty-First Amendment does not allow states to violate the dormant commerce clause doctrine.<sup>64</sup>

The Court, however, carefully noted that the Amendment still provides extraordinary power to states to regulate alcohol beverages and, thus, contrary to the views of many proponents of the proposed Act, states can still take into account the unique norms and standards of their communities.<sup>65</sup> First, a state can prohibit the importation of alcohol if the state bans the sale and consumption of alcohol completely.<sup>66</sup> Second, a state can assume total and direct control of the alcohol market through state-administered liquor outlets.<sup>67</sup> Third, if a state believes that price controls support state alcohol policy goals, it is far more effective for the state to adjust its alcohol tax, rather than leaving the price levels up to financially interested parties who might overweigh their interest in cartel profits. Finally, with respect to other state interests in orderly markets or distribution, states can funnel transactions into the three-tier system if they find that desirable. The proposed Act is not necessary to protect the validity of the three-tier system because the Supreme Court has stated that it is "unquestionably legitimate."<sup>68</sup> These are all undoubtedly valid mechanisms for the states to employ in an effort to achieve their legitimate interests in regulating alcohol.

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<sup>63</sup> See *id.* at 487.

<sup>64</sup> See *id.*

<sup>65</sup> See *Hearing on Legal Issues Concerning State Alcohol Regulation Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Nida Samona, Chairperson of the Michigan Liquor Control Commission), available at <http://judiciary.house.gov/hearings/pdf/Samona100318.pdf>.

<sup>66</sup> See *id.* at 488–89.

<sup>67</sup> See *id.* at 489.

<sup>68</sup> See *Granholm*, 544 U.S. at 489.

#### IV. CONCLUSION

Proponents of the H.R. 5034 argue that it is necessary to redress legal uncertainty, a deregulatory threat, and excessive litigation. But claims that recent cases are in conflict are overblown, and to the contrary the common law process has largely resolved any remaining legal uncertainty in a way that makes clear the cases pose no deregulatory threat and that has greatly reduced the volume of litigation. Moreover, even if those problems did exist, the proposed Act would be a poor remedy because it would actually greatly increase legal uncertainty in a way that would likely foment more litigation and it does nothing to prevent states from deregulating if they wish.

Further, the proposed Act would create many new problems. It would allow protectionist state laws that discriminate against out-of-state nonproducers, such as out-of-state consumers, even if the discrimination were facial and intentional. It would also allow protectionist state laws that discriminate against out-of-state producers whenever a discriminatory intent could not be proven. It would allow states to directly regulate interstate commerce in ways that interfere with the ability of other states to exercise their own Twenty-First Amendment rights. Finally, it could inversely preempt the application of some federal statutes to state alcohol regulations, including federal antitrust law, and might even inversely preempt the application of all federal statutes.

The effects are not only undesirable, but unnecessary because the current regulatory power of the states under the Twenty-First Amendment is adequate to achieve their goals. If this proposed statute were to be approved by this Committee, such action would also set a dangerous precedent that would attract other special interests in seeking their own immunity from generic constitutional protections and legal safeguards that were designed to be uniformly applied to all.

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Mr. CONYERS. Thank you very much.

Ms. Tracy Genesen from Kirkland & Ellis is testifying on behalf of the Wine Institute. She has litigated Commerce Clauses challenging state regulations, including the *Granholm* case in the Supreme Court.

We welcome you this afternoon.

**TESTIMONY OF TRACY K. GENESEN, PARTNER,  
KIRKLAND & ELLIS, LLP**

Ms. GENESEN. Thank you very much, Mr. Chairman.

I am Tracy Genesen, and I will pretty much focus my remarks today on Mr. Delahunt's new language. I represent the Wine Institute, a public-advocacy association of California wineries, which includes more than 1,000 wineries and affiliated businesses.

Those wineries represent a vital sector of the United States economy. America's 6,700 wineries—the vast majority of which are family-owned farms, are responsible for more than \$20 billion in sales in the United States, and support more than 1 million jobs. The passage of H.R. 5034 will greatly imperil this dynamic agricultural industry.

Today's wine-distribution system is shaped like an hourglass, with thousands of producers at the top, and millions of consumers at the bottom; but only a few wholesalers in between to distribute their product. United States' wineries have an interest in evenhanded, robust state regulation, permitting them to ship wine directly to consumers and retailers. But wholesalers have an interest in maintaining this exclusive grip on the bottleneck between alcohol producers, wine retailers and consumers.

H.R. 5034 is a piece of special-interest legislation for the benefit of those wholesalers, at the expense of retailers, producers, and consumers—literally, everyone else. In particular, H.R. 5034 would harm millions of American consumers—to reduced access to wine, increased prices, and reduced wine selection.

And contrary to the rhetoric advanced by the wholesalers, 99 percent of these alcohol regulations are not vulnerable to Federal challenge. The only state regulations that are truly vulnerable in court today are the anti-competitive ones that discriminate against out-of-state businesses or products.

H.R. 5034, however, would eviscerate Commerce Clause challenges that protect the national union from states that discriminate in this way. And the Commerce Clause is the cornerstone of our national economic union. It applies to products and entities in the stream of commerce. It prevents state legislatures from affording in-state local market participants a competitive advantage or benefit without extending that privilege to out-of-state alcohol-market participants.

Through legislative efforts, and when forced through litigation, states have cured this discrimination in two distinct ways. One, they have leveled up, which means they have extended the privilege to out-of-state interests as well. And, from our standpoint, this is the best pro-consumer remedy. But states can also level down. If they want to take the privilege away from the in-staters, then they have also cured the discrimination there.

In short, the Commerce Clause requires evenhandedness, and so do Federal statutes concerning alcohol regulation, such as the Wilson Act. When a state regulates evenhandedly, or when it proves a legislation interest that cannot be met through non-discriminatory means, it will survive Commerce Clause scrutiny.

Since the Supreme Court's *Granholm* decision, courts regularly uphold state statutes when plaintiffs fail to meet their substantial burden of showing impermissible state discrimination. And we have recent examples of state statutes being upheld in such cases in the 1st, 7th and 9th Federal circuits.

Discriminatory laws basically fall into several categories. And I will mention a few here. Some state laws are facially discriminatory, like the Michigan statute. The Supreme Court struck that down in *Granholm*. Those statutes, on their face, apply to companies differently, depending on where they are located. Other state laws appear to be geographically neutral, but they might require an in-state presence, like the New York statute in *Granholm*; or exempt a local product from a tax, such as the Bacchus case; or impose wine-production tax that only in-state wineries can meet, and out-of-state wineries can't.

These statutes discriminate in purpose and effect. Under the Commerce Clause, such state statutes can be invalid for either of these reasons. H.R. 5034 would immunize these kind of alcohol statutes that do discriminate against out-of-state businesses in purpose and effect. Critically, the bill sweeps away the existing Commerce Clause standards and amends the Wilson Act to abolish evenhandedness.

H.R. 5034 really allows only one kind of limited challenge for one type of wine business. It preserved challenges against statutes that intentionally or facially discriminate against alcohol producers. But even as to producers, states could escape H.R. 5034 by discriminating against out-of-state products. A good example of this is: A state like New York, where no zinfandel is produced, could ban a sale and shipment of zinfandel to New York residents. That would discriminate against California zinfandel producers, without incurring scrutiny under H.R. 5034.

In place of the current legal standard that focuses on multiple factors to determine whether a state is discriminatory in purpose and effect, this bill calls for a narrow, intrusive inquiry into what state legislators intended. This is both highly speculative to prove and extremely difficult for courts to divine.

As the Supreme Court in Bacchus pointed out, it could always be said that there was no intent to discriminate. Instead, the state legislatures couch it as an effort to help in-state industries; an effort to insulate them. H.R. 5034 confines courts to a narrow, second-guessing-like probe into legislative intent.

Commerce Clause cases are not common. In fact, there is only one of them left. And if you compare these Commerce Clause challenges to civil-rights cases, in 2008, there were 32,000 civil-rights challenges in Federal court; compared to the initial 25 here, down to one, as we speak.

When a state discriminates against out-of-state businesses without justification, Congress should want that discrimination invalidated. Such statutes are a blow to the economic union of 50 states. They undermine our Federal system. To put it bluntly, Mr. Chairman, the rule against economic non-discrimination among states prevents what our founders envisioned—interstate trade wars.

And to conclude, H.R. 5034 gives states free reign to pass intentionally and facially discriminatory statutes that foreclose out-of-

state wholesalers and retailers from market access. If passed, the bill would exempt specific types of wine businesses from Commerce Clause protection. This is virtually unprecedented in the law.

Today, state-regulated, robustly regulated interstate wine shipping is available in 37 states and the District of Columbia. These permits in the states that allow direct shipping require I.D. checks. They require licensing. They require that the wine seller submit to the jurisdiction of the state. They require strict reporting requirements. And, if a winery or retailer runs afoul of one of these laws, under the 21st Amendment Enforcement Act, its state attorney general can take them into Federal court.

There is more and clearer regulation of wine than ever before. Simply put, H.R. 5034 is a drastic solution to a problem that does not exist. In its original or amended form, it is a transparent attempt to maintain a lucrative anomaly for a few by eviscerating the Commerce Clause.

And, finally, my last point: As the Bacchus court put it, and as Justice White so eloquently stated, "If we abandon the Commerce Clause in this way, the trade and business of our country would be at the mercy of local regulation; having, for their object, to secure exclusive benefits to citizens and products of particular states."

This Committee should decisively reject H.R. 5034.  
[The prepared statement of Ms. Genesen follows:]

PREPARED STATEMENT OF TRACY K. GENESEN

Testimony of Tracy K. Genesen  
Kirkland & Ellis LLP

On Behalf of  
The Wine Institute

Hearing on H.R. 5034, the "Comprehensive Alcohol Regulatory  
Effectiveness Act of 2010"

United States House of Representatives  
Committee on the Judiciary  
September 29, 2010

## 1. Introduction

I represent the Wine Institute, the public advocacy association of California wineries, which includes more than 1,000 wineries and affiliated businesses. Those wineries represent a vital sector of the United States economy. America's 6,700 wineries—the vast majority of which are small, family-owned farms—are responsible for more than \$20 billion in sales in the U.S. and support more than 1 million American jobs. Wineries are important tourist destinations, attracting 27 million visitors annually and supporting other businesses such as hotels, restaurants and shops. With or without amendment, the passage of H.R. 5034 will greatly imperil this vibrant, dynamic agricultural industry.

Today, a winery seeking access to consumers in a state barring or restricting direct shipment of wine has only one real option—to obtain a wholesaler to distribute its products. Small and medium wineries are unlikely to find wholesalers willing to distribute their wines for two reasons. First, small and medium wineries cannot offer distributors sales volume comparable to that of the largest winemakers. Second, considerable consolidation has occurred in the wholesale tier in recent years. This means the vast majority of wineries face an increasingly narrow gauntlet of wholesalers. As the number of wineries has exploded, the number of wholesalers has dwindled. In 1998, there were approximately 1200 wine distributors nationwide.<sup>1</sup> By 2008, that number decreased by half to 600 distributors nationwide. Today's wine distribution system is shaped like an hour-glass, with thousands of producers at the top, and millions of consumers at the bottom, with only a few distributors between them. The top 10 US wine and spirits wholesalers dominate the market with 59% of the market share.<sup>2</sup> At the same time in the U.S., there were 84,000 Certificates of Label Approvals (COLAS) approved for wine alone in 2009.

To make matters worse, wholesalers tend to focus almost exclusively on the well-known, high-volume wines to the exclusion of the smaller, lesser-known brands.<sup>3</sup> Wholesalers ordinarily do little in exchange for the high costs they charge small and medium wineries. Not surprisingly, wineries that succeed in obtaining wholesalers often complain that the wholesaler fails to maintain contact with restaurants or wine shops after making an initial sales call. Some wineries learn that restaurants have stopped selling their wines because the wholesaler has told the restaurant the wine is unavailable even though the wholesaler actually has the wine in stock. As a result, wineries with wholesalers often find they must incur additional marketing expenses, further draining their narrow margins. In contrast, alcohol wholesalers exact margins that can exceed 30 percent and are far more profitable than the typical wholesaler, earning 66 to 83 percent more in profits than the typical wholesaler over a 10 year period.<sup>4</sup>

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<sup>1</sup> See SVB, 2008-2009 report.

<sup>2</sup> Impact Databank, April 1 and April 15, 2010.

<sup>3</sup> See Rob McMillan, *2010-2011 State of the Wine Industry* (2010) (available online at [http://www.svb.com/2147483667/2010\\_-\\_2011\\_State\\_of\\_the\\_Wine\\_Industry\\_Report/](http://www.svb.com/2147483667/2010_-_2011_State_of_the_Wine_Industry_Report/)) (“The large wholesale partners in the business locked themselves inside their castles last year and pretended they didn't know the small wine producer.”).

<sup>4</sup> See Dun & Bradstreet, *Industry Norms & Key Business Ratios*.

For all these reasons, United States wineries have an interest in even-handed regulation permitting them to ship wine directly to consumers and retailers. The development of phone and internet sales provide them an opportunity for just that. But for similar reasons, United States alcohol wholesalers have an interest in maintaining their grip on the bottleneck between alcohol producers and alcohol retailers and consumers. H.R. 5034 is a piece of special interest legislation for the benefit of wine, beer, and spirits wholesalers at the expense of producers, retailers and consumers. As the free-market advocacy group FreedomWorks put it, H.R. 5034 “is a simple piece of economic protectionism, designed to shore up the monopoly earnings of wholesalers at the expense of everyone else.”<sup>5</sup> While wholesalers have trumped up reasons why H.R. 5034 serves state and public interests, none of those reasons withstand scrutiny on the facts or the law.

## 2. Regulation

Where the alcohol industry is concerned, we live in a regulated world. A complex web of state and federal regulation governs, and will for the foreseeable future.

Ninety-nine percent of these regulations currently in place are legally secure. As the Subcommittee on Courts and Competition heard in March, when Pamela Erickson testified regarding her study of alcohol deregulation in the U.K., the United States is *not* in danger of following the U.K.’s bad example, because the United States has a comprehensive, carefully balanced system of alcohol regulation at both the federal and state levels. Congress has delegated power to regulate alcohol to the federal government, in particular the Department of the Treasury. In addition, states have robust regulatory power under the Twenty-First Amendment.

The centerpiece of federal regulation of alcohol is the Federal Alcohol Administration Act, or FAAA. The FAAA establishes federal permit requirements for the manufacture, shipment, and sale of most alcoholic beverages. It also imposes special prohibitions on unfair and anticompetitive trade practices in the alcohol market, and creates labeling requirements for alcoholic beverages. In addition, other domains of federal regulation apply equally to the alcohol market. Antitrust law, for example, applies to alcohol markets, and the Supreme Court has prevented states from enabling in-state cartels and monopolies in the alcohol market. Lastly, there is the 21st Amendment Enforcement Act, which authorizes state attorneys general to seek injunctive relief in federal court for violations of their states’ alcohol regulations. 27 U.S.C. § 122a.

Few would argue that federal regulations such as these are not sound public policy. Can you imagine what would happen to American wine and beer commerce if every state had different and contradictory labeling requirements? These federal regulations are uncontroversial and unchallenged.

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<sup>5</sup> See Wayne T. Brough, *No Wine Shall Be Served Before Its Time—At Least Not Without Wholesalers Taking A Cut* (FreedomWorks Issue Analysis No. 128, 2010).

Meanwhile, states impose regulations of their own. Every state has an alcoholic beverage code. Combined, states enforce nearly 4,000 alcohol laws today. Most states have adopted a “three-tier system” in which alcohol production, wholesale, and retail are separately licensed and strictly separated into different market segments. All states license the alcohol producers, wholesalers, and retailers authorized to do business in-state, and regulate (or even prohibit) direct shipping of alcohol. States are permitted to prohibit tied houses, keep alcohol from minors, impose alcohol taxes, or take direct control of liquor distribution through state-run stores.

Importantly, 37 states and the District of Columbia have struck an appropriate balance between robust alcohol regulation and consumer market access. In 1997, the Model Direct Shipment Bill was approved by the National Conference of State Legislatures’ Task Force on the Wine Industry. This even-handed alcohol regulation requires licenses for interstate wine shipment and requires adult signatures on all wine deliveries. These laws require that licensees submit to the jurisdiction of the destination state and file monthly reports regarding type and quantity of shipments entering the state. Some restrict the number of cases of wine allowed in each state. To date, no state legislature has repealed this kind of permit.

State alcohol regulations such as these are guaranteed by the Constitution itself, in the Twenty-First Amendment. Alcohol is the only article in American commerce with its own special constitutional provision, and what that provision says is that states have the right to regulate transport of alcohol across their borders and to structure their internal alcohol markets. The Webb-Kenyon Act and the Wilson Act, the two century-old federal statutes that H.R. 5034 would amend, reinforce that right. The Twenty-First Amendment is safe. Nothing has happened since its enactment to detract from it. In fact, in 2000 Congress took a close look at the Twenty-First Amendment and the field of state alcohol regulation. Congress had the opportunity then to conclude that states’ Twenty-First Amendment powers needed additional protection or extension, but decided they did not. In enacting the 21st Amendment Enforcement Act, mentioned earlier, Congress only granted states a federal forum, but made that forum available only for cases that were consistent with a valid exercise of state power as interpreted by the Supreme Court, including interpretations in conjunction with other provisions of the Constitution, and expressly stated that the Act “shall not be construed to grant to States any additional power.” 27 U.S.C. § 122a(e). Although Congress enacted the 21st Amendment Enforcement Act in 2000, no state has ever taken advantage of the federal court forum it provides, because they have never needed to. Nothing has changed since 2000 to change Congress’s conclusion. The Twenty-First Amendment is, in other words, alive and well. The rumors of its death you may have heard from the wholesalers are greatly exaggerated.

It is only discriminatory and anti-competitive alcohol regulations that are an issue. The Federal Trade Commission has now twice concluded that discriminatory state alcohol regulations detract from consumer welfare with no benefit. In 2003, the FTC concluded that state limits on the ability of consumers to order wine shipments by mail, phone, or the internet are anticompetitive and harm consumers, and that they are not necessary to serve positive goals such as keeping alcohol from minors.<sup>6</sup> And just this summer, an FTC working paper analyzed

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<sup>6</sup> See FTC, *Possible Anticompetitive Barriers to E-Commerce: Wine* (2003).

certain state alcohol regulations, in particular “post and hold” laws requiring alcohol wholesalers to post their prices in advance and maintain them for a certain period of time, and reached some striking conclusions.<sup>7</sup> First, the paper found that monopoly protection laws lead to higher prices and reduced consumer welfare. Second, it actually discussed the pre-amendment version of H.R. 5034, and concluded “that constraining antitrust enforcement through the proposed legislation would result in lower consumer welfare for alcoholic beverage consumers with no offsetting reduction in social harms.”<sup>8</sup>

### 3. **Litigation**

Contrary to the “sky is falling” de-regulation rhetoric advanced by wholesalers, the only state alcohol regulations that are truly vulnerable in court today are ones that discriminate against out-of-state businesses.

Commerce Clause challenges are actually not common, but they are vital to the American economy, and even to the union itself. The Framers of the Constitution created this country as a *single* economic union. As Justice Cardozo put it, “the peoples of the several states must sink or swim together[.]” *Baldwin v. G.A.F. Seeig, Inc.*, 294 U.S. 511 (1935). When a state discriminates against out-of-state businesses without justification, Congress should *want* that discrimination invalidated. Such statutes are a blow to the economic union of the fifty states; in fact they undermine our federal system. To put it bluntly, the rule against economic nondiscrimination among the states prevents inter-state trade wars. To characterize the invalidation of such statutes as an assault on state regulatory prerogatives is simply wrong.

The Commerce Clause applies to items and entities in the stream of interstate commerce. In virtually all successful Commerce Clause challenges to state alcohol laws, a state legislature has afforded in-state alcohol market participants a competitive advantage or benefit, but has not extended that privilege to out-of-state alcohol market participants. Importantly, the state legislature has already performed a public policy analysis regarding the public health and safety consequences of conferring the privilege. The constitutional problem arises when the legislature chooses to confer it without providing a level playing field for out-of-state entities. Under the Commerce Clause, states must either “level up” or “level down,” that is, extend the privilege to all similarly situated alcohol market participants or none at all.

*Granholm v. Heald*, 544 U.S. 460 (2005), is the Supreme Court’s most recent major pronouncement on how the Commerce Clause interacts with the Twenty-First Amendment. In that case, the Supreme Court struck down discriminatory laws from Michigan and New York. Notwithstanding the power states have under the Twenty-First Amendment, *Granholm* establishes that the Commerce Clause’s nondiscrimination principle is binding on them. Just as the Twenty-First Amendment does not justify violations of federal statutes or other constitutional provisions, it “does not abrogate Congress’ Commerce Clause powers with regard to liquor.” *Id.*

<sup>7</sup> See James C. Cooper & Joshua D. Wright, *State Regulation of Alcohol Distribution: The Effects of Post & Hold Laws on Consumption and Social Harms* (FTC Working Paper No. 304, 2010).

<sup>8</sup> *Id.* at 25.

Under *Granholm* and other Supreme Court cases, the existing Commerce Clause standard for challenges to state alcohol regulations is essentially as follows. A state may not enforce a law that discriminates against out-of-state economic actors, including alcohol market participants, in any of the following ways. First, some state laws are “facially discriminatory,” that is, they apply to companies differently depending on where they are located. The Supreme Court stated in *Granholm* that under the Commerce Clause, when state alcohol regulations are facially discriminatory, they must be struck down unless they serve a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. The Supreme Court found that Michigan could regulate out-of-state wine shipments without discriminating against non-resident producers or shippers. The Supreme Court embraced the Model Direct Shipment Bill as a non-discriminatory alternative and struck down Michigan’s facially discriminatory wine shipping law.

Second, and critical to the analysis of H.R. 5034, in *Granholm* the Court invalidated a “facially neutral” New York statute that created an in-state presence requirement for wineries wishing to ship directly to New York consumers. The law required all New York-licensed wineries to open branch offices in-state. Similar in-state presence or ownership requirements have been struck down in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994), and *Southern Wine & Spirits v. Steen*, 486 F. Supp. 2d 626 (W.D. Tex. 2007). Many other kinds of statutes also discriminate without doing so facially. In *Family Winemakers v. Jenkins*, 592 F.3d 1 (1st Cir. 2010), the United States Court of Appeals for the First Circuit struck down a Massachusetts statutory exemption permitting direct shipments of wine by “small wineries” while prohibiting direct shipment by medium and large wineries—all of which happened to be from out-of-state. In *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008), the Seventh Circuit struck down an Indiana law which prohibited wineries from holding wholesale licenses, a statute which had the effect of preventing of out-of-state wineries from shipping directly to Indiana consumers while allowing all wineries in Indiana to do so. In *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008), the Sixth Circuit struck down a Kentucky statute that imposed a first time mandatory winery visit requirement that made it “financially infeasible for out-of-state wineries to sell directly to Kentucky residents.” Each of these statutes constituted economic protectionism harmful to out-of-state business, and ultimately to consumer welfare as well. If H.R. 5034 passes, these discriminatory statutes that harm an already stressed industry will be immunized from Commerce Clause challenge.

These laws were challenged on the basis of discriminatory *purpose and effect*. Identifying a legislature’s purpose is challenging, but courts do so by reading the statute as a whole and considering how the practical operation impacts out-of-state businesses. Perhaps the statute includes a statement of purpose; if so, courts consider whether the statute is tailored to achieve it. Courts look at the statute’s history as well. Relevant history might include, for example, statements by legislators during the statute’s drafting and enactment, or the place of the statute in the development of the state’s laws over time. These were among the factors that the First Circuit considered in striking down the discriminatory Massachusetts statute.

Courts usually avoid striking down statutes for discriminatory purpose alone, in the absence of discriminatory effect. When a court finds both that the statute has discriminatory

effect and that the legislature had a discriminatory purpose, unsurprisingly the court is much less deferential. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977). In *Bacchus*, for example, the Supreme Court found that because the state of Hawaii had discriminated in purpose and effect, its regulations were subject to a strict scrutiny standard. In other words, when a statute is not facially discriminatory but has discriminatory effect, a finding of discriminatory purpose weighs strongly for invalidation. Similarly, in *Family Winemakers*, the First Circuit Court of Appeals struck down a state statute finding substantial evidence of discriminatory purpose that had the effect of excluding 98 percent of the United States wine market from shipping directly to Massachusetts consumers. Congress should applaud that result as well.

H.R. 5034 substitutes a new more intrusive standard for courts to evaluate “facially neutral” statutes under the Commerce Clause. In place of the current standard that focuses on multiple factors to determine whether a statute is discriminatory in purpose and effect, this bill calls for a narrow, intrusive inquiry into what state legislators “intended” at the time a state alcohol regulation was passed. This is both highly speculative to prove and extremely difficult for Courts to divine. Today, as explained above, a statute’s purpose is thoroughly examined through a broad investigation of its context and circumstances. In contrast, H.R. 5034 confines courts to a narrow, “second guessing” like probe into legislative intent.

Further, the proposed amendments to H.R. 5034 do not indicate the nature of the evidentiary burden necessary to prove legislative intent. Under the current framework, the burden on plaintiffs to show discriminatory purpose and effect is quite heavy: The First and Ninth Circuits have said a plaintiff’s evidence must be “substantial.” Often plaintiffs challenging state regulations fail to produce evidence that they have been harmed, for example in a recent case in the Ninth Circuit involving Arizona regulations. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010). It is rare that a state statute is struck down on that basis alone. As a result, the statutes now struck down on the basis of discriminatory effect alone are particularly flagrant ones. Disrupting the current framework with H.R. 5034’s intrusive “intent” standard and ill-defined evidentiary burden will only create confusion and generate additional litigation.

Because Congress and the Commerce Clause already leave states vast regulatory discretion, and because the framework for scrutiny of state alcohol regulation adopted by the Supreme Court in *Granholm* has proved workable in practice, there is actually very little current litigation over those state alcohol laws. The supporters of H.R. 5034 have told you that the state system of alcohol regulation is threatened by an onslaught of litigation seeking to invalidate state alcohol regulations. Our response is, quite simply: What onslaught? There is none.

The total number of cases challenging state alcohol regulations in the five years since *Granholm* has been small. We have identified only about two dozen cases in that time frame involving such challenges. Not all of those cases relate to the Commerce Clause in the first place, and it is specifically Commerce Clause challenges that H.R. 5034 purports to address. Some of the cases that have been filed were actually filed by wholesalers, the same businesses now pressing H.R. 5034 as a defense to excessive litigation. Furthermore, the number of cases has been declining. Today, there are only three such cases pending. Thirty-two of the fifty states

have seen no new litigation in the wake of *Granholm*. Considering how little litigation has occurred, the argument that Commerce Clause litigation poses a financial burden for states falls flat. If anything, H.R. 5034 is the true harbinger of new waves of expensive litigation.

Currently, courts give state alcohol regulations great deference. And, plaintiffs must meet a heavy burden in Commerce Clause challenges. Congress need not enact any further federal legislation in this area.

#### **The Real Story of H.R. 5034**

The fact is that H.R. 5034 is not about protecting the overwhelming majority of state alcohol regulations at all. Tellingly, the National Association of Attorneys General takes **no** position on this bill. Instead, H.R. 5034 is about protecting wholesalers from competition. It is nothing less than a power grab designed to protect their market share. What wholesalers want is the opportunity to develop in-state cartels, free from competition from out-of-state wineries, breweries, retail outlets, and other wholesalers. H.R. 5034 would give the wholesalers just that.

Critically, the Bill sweeps away the existing Commerce Clause standards that protect the American union from states discriminating against businesses from other states. The Commerce Clause now provides a comprehensive range of protections related to product and entities in interstate commerce, H.R. 5034 would permit only one type of challenge, protecting one type of entity. It preserves challenges against statutes that intentionally or facially discriminate against out-of-state alcohol *producers*. But, it gives states free reign to pass intentionally and facially discriminatory statutes that foreclose out-of-state wholesalers and retailers from market access.

Even as to producers, states could escape H.R. 5034 by discriminating against out-of-state *products*. Today, under *Bacchus*, discrimination between in-state and out-of-state products is as much a Commerce Clause violation as discriminating between in-state and out-of-state businesses. But H.R. 5034 does not recognize discrimination based on products. For example, a state like New York where no zinfandel is produced could ban sale and shipment of zinfandel to New York residents. That would discriminate against California zinfandel producers without incurring scrutiny under H.R. 5034. H.R. 5034 therefore leaves states free to reformulate their alcohol regulations to discriminate against out-of-state entities without possibility of judicial scrutiny, so long as they do so surreptitiously, and without expressly discriminating against out-of-state wine.

“The Commerce Clause forbids discrimination, whether forthright or ingenious.” *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). At the core of the Supreme Court’s Commerce Clause jurisprudence is what the Court called its “duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.” *Id.* (quoting *Best & Co. v. Maxwell*, 311 U.S. 454 (1940)). Fulfilling that duty requires a “sensitive, case-by-case analysis of [a statute’s] purposes and effects.” *Id.* H.R. 5034 nullifies this thoughtful specific framework and replaces it with the vague, intrusive standard of discriminatory intent. But again, courts hesitate to narrowly inquire

into legislative intent, and H.R. 5034 would *prevent* courts from considering challenges based on discriminatory effects.

H.R. 5034 would thus overrule the First, Sixth, and Seventh Circuit decisions discussed above that struck down facially neutral statutes discriminating against out-of-state wineries. It would also arguably overrule half of *Granholm* itself, for the *Granholm* Court invalidated a New York statute that required an out-of-state winery to establish a physical presence in New York. The only discriminatory statutes that could still be challenged under H.R. 5034 would be ones like the Michigan statutes the *Granholm* Court struck down, which facially discriminated against out-of-state wineries explicitly. That, plainly, is only a narrow slice of the state discrimination that Congress should be concerned about, and that the Commerce Clause has so far guarded against.

#### 4. Conclusion

H.R. 5034 is an invitation for undemocratic subterfuge by state legislatures, and it eviscerates the foundations of the Commerce Clause by dramatically limiting its application. Today, interstate wine shipping is available in 37 states and the District of Columbia. There is more, and clearer, regulation of wine than ever before. Simply put, H.R. 5034 is a drastic solution to a problem that does not exist. The wholesalers defend their monopolistic self-interest under the guise of a constitutional conflict between federal and state's rights guaranteed by the Twenty-First Amendment. H.R. 5034 in its original or amended form is a transparent attempt to maintain a lucrative anomaly for a few by eviscerating the Commerce Clause—the foundation of our economic union. This Committee should decisively reject H.R. 5034.

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Mr. CONYERS. Very persuasive.

Michele Simon is research and policy director of the Marin Institute; has a master's in public health from Yale School of Medicine, and a law degree from Hastings College of Law; and has worked extensively on the prevention of alcohol-related public-health concerns.

Welcome.

**TESTIMONY OF MICHELE SIMON, RESEARCH AND  
POLICY DIRECTOR, MARIN INSTITUTE**

Ms. SIMON. Thank you very much, Chairman Conyers—and to the Members of the Committee—for the opportunity to testify today in support of H.R. 5034.

I am a public-health lawyer and the research and policy director at Marin Institute, a non-profit whose mission is to protect the public from alcohol-related harm.

While the discourse of this bill has pitted different sectors of the alcohol industry against each other, that fight is irrelevant to us. Our only interest is what is in the best interest for the public's health and safety. Indeed, Marin Institute often disagrees with the industry proponents of this bill and other policy matters, and will likely continue to do so.

Our goal is to advance prevention policies to reduce the tremendous harm caused by alcohol consumption. Far from being a benign substance, alcohol use causes a wide variety of harm, even when consumed at what the Federal Government defines as moderate levels.

In the United States today, alcohol remains the third-leading cause of preventable death. At least 85,000 deaths are attributable to alcohol consumption each year. Also, the economic costs of alcohol are estimated to have been \$220 billion in 2005. Much of that cost is from lost productivity; meaning that businesses and our economy also suffer greatly.

And while my organization is based in California, Marin Institute has always been a national leader, and we work closely with policymakers and public-health advocates at the state and local levels throughout the Nation. I can attest to the critical role that state regulation of alcohol plays in giving policymakers and advocates the tools they need to protect the public.

Indeed, I just returned speaking from Wisconsin and Massachusetts, where state and local lawmakers, along with public-health advocates, were gathered to learn how they can help advance effective prevention policies to reduce alcohol harm in their communities. At both events, it was well understood that states have the authority to regulate alcohol; and, yet, this authority, which has largely been taken for granted, is increasingly coming under attack by those who want to see Federal law trump well-established state authority.

The current state-based system of alcohol regulation has been in place for a long time because, for the most part, it works well. Moreover, due to the severity of alcohol problems throughout our country, numerous Federal agencies work to assist states in addressing alcohol-related prevention, treatment, law enforcement, and research; therefore, the CARE Act would go a lot way to help ensure that such Federal programs are not undermined by current legal threats to state-based regulations.

I want to share three specific examples of state regulation to protect the public's interests through prevention. The first is access to alcohol. The research is abundantly clear that the more access people have, especially youth, to alcohol, the greater the number of problems communities will experience. By controlling where and when alcohol is sold, states can seek to prevent those problems as-

sociated with increased availability. And states are in the best position to evaluate and address problems facing their communities and restrict access when and where it is needed.

Another area where states need to be able to regulate is pricing. For example, policies that prohibit volume discounts make good sense from a public-health perspective. Substantial research shows that higher alcohol prices are associated with reduced alcohol consumption, especially in youth.

Marin Institute is very concerned about legal challenges and pricing policies by certain chain stores in the retail sector. Cheap prices for consumers should not be the only consideration. In fact, such consideration should be secondary to public health and safety.

A third important aspect of state regulation is the three-tier system. Requiring that alcohol be sold from producers to distributors, and then to retailers, has proven to be a necessary policy for protecting the health and safety of the public. The three-tier system helps to ensure that the state has adequate oversight of alcohol sales, helping to prevent aggressive marketing and sales tactics.

Although how to best regulate alcohol might seem like any other rhetorical debate over balancing the interests of private industry with government, there is an important difference; diminished state authority will most certainly result in more lives lost, higher costs, and more families forever changed by alcohol consumption. Odds are that most people in this room know someone who has been negatively impacted by alcohol use. Make no mistake; this is not a rhetorical debate. This is about saving lives.

For decades, alcohol has been recognized as being different because it is. The cornerstone of that recognition is a state's authority under the 21st Amendment to regulate the sale of alcohol to ensure an orderly marketplace. I urge the Committee to strengthen the regulatory authority of states to ensure that the public health and safety of the American people remain a top priority, and to continue to seek additional ways to support state-level efforts to reduce alcohol harm.

Thank you very much.

[The prepared statement of Ms. Simon follows:]

PREPARED STATEMENT OF MICHELE SIMON



Written Statement of Michele Simon, JD, MPH  
Research and Policy Director  
Marin Institute  
San Rafael, California

To the Committee on the Judiciary  
House of Representatives  
United States Congress

Hearing on H.R. 5034, the Comprehensive Alcohol Regulatory Effectiveness  
(CARE) Act of 2010

September 29, 2010

TESTIMONY OF MICHELE SIMON, MARIN INSTITUTE, IN SUPPORT OF H.R. 5034

Thank you to Chairman Conyers and to the members of the Committee for the opportunity to testify at this hearing in support of H.R. 5034.

I am a public health lawyer and the Research and Policy Director at Marin Institute, a nonprofit whose mission is to protect the public from alcohol-related harm. In addition to almost four years of experience in alcohol policy, I am also a recognized expert in food policy. As a result of my educational training in law and public health, combined with many years of experience, I have become a strong advocate for the rights of states, whether under the broad police powers granted by the 10<sup>th</sup> Amendment, or under the specific authority of the 21<sup>st</sup> Amendment, to enact laws to protect public health.

While the discourse over this bill has pitted different sectors of the alcohol industry against each other, we offer our unique public health perspective. It is irrelevant to us if the bill favors any particular party's economic interests. Marin Institute often disagrees with the industry proponents of this bill on other matters, and will likely continue to do so. Our goal is to advance policies to reduce alcohol harm. Likewise, this Committee's deliberations should be focused on what is in the best interests of the public.

Founded in 1987, Marin Institute advances policies to reduce over-consumption of alcohol and the many physical, mental, and societal harms that result. Marin Institute also monitors and reports on alcohol industry practices that can undermine public health and safety. While our organization is based in California, we have always been a national leader and we closely monitor and promote sound alcohol policy in every state.

More specifically, we work closely with public health advocates at the state and local levels throughout the nation, supporting them to effectively reduce underage drinking and adult over-consumption and related alcohol-related harm in their communities. In working with our allies, I can attest to the critical role that state regulation of alcohol plays in protecting public health. The current state-based system of alcohol regulation has been in place for a long time because for the most part it works well. So I testify today on behalf of the thousands of people doing this crucial work in every state.

Indeed I just returned from speaking in Wisconsin and Massachusetts where state and local lawmakers, along with public health advocates, were gathered to learn how they can help advance effective policies to reduce alcohol harm in their communities. At both events, it was well understood that states have the authority to regulate alcohol. And yet this authority, which has largely been taken for granted, is increasingly coming under attack by those who want to see federal law trump well-established state authority. This is why Marin Institute supports the CARE Act, and why we're asking for your support.

**Alcohol Consumption: Still a Major Threat to Public Health and Safety**

Far from a benign substance, alcohol use causes a wide variety of harm, even when consumed at what the federal government defines as moderate levels. Unfortunately,

## TESTIMONY OF MICHELE SIMON, MARIN INSTITUTE, IN SUPPORT OF H.R. 5034

unlike other public health problems (such as smoking) the serious scope of alcohol-related harm largely goes unrecognized by the general public and policymakers alike.

In the United States today, alcohol is the third leading cause of preventable death.<sup>1</sup> In 2000 (the most recent year for which figures are available), 85,000 deaths were attributable to alcohol consumption.<sup>2</sup> Moreover, according to the Surgeon General's 2009 "Call to Action" on underage drinking, approximately 5,000 people under the age of 21 die annually from injuries caused by drinking alcohol.<sup>3</sup>

While of course, the impact of these figures is felt most significantly by the families of the victims, society at large also bears much of the burden. The economic costs of alcohol were estimated to have been a startling \$220 billion in 2005.<sup>4</sup> Much of that cost is from lost productivity, meaning that businesses and our economy also suffer greatly.

In addition, our healthcare system bears a tremendous burden from alcohol consumption. According to the U.S. Centers for Disease Control and Prevention, in 2005 alone, there were more than 1.6 million hospitalizations and 4 million emergency room visits for alcohol-related conditions.<sup>5</sup> Other research has estimated U.S. healthcare costs from alcohol problems amount to more than \$26 billion annually.<sup>6</sup>

The alcohol-related harm experienced by Americans is not only felt on a national level. State and local governments across the U.S., along with communities, also bear the personal and financial burden of alcohol over-consumption and its related harm.

In 2008, Marin Institute published a landmark study, estimating the total annual cost of alcohol problems in the state of California. The results included deaths, hospitalizations, crimes, traffic crashes, and economic losses both to individuals and to society. We found that the total economic cost of alcohol use is \$38.4 billion annually, with more than 10,000 lives lost each year in California due to alcohol consumption.

California's data is but one example, albeit a large one, of the multitude of problems states experience from alcohol sales and consumption. Sadly, because most states do not have the resources to conduct similar analyses, we are lacking in the data to describe the specific burdens experienced by each state. But we know it is significant.

#### **Federal Agency Recognition of Alcohol Problems**

Due to the severity and significance of the problems alcohol causes throughout our country, numerous federal agencies work to assist states in addressing their many alcohol-related prevention, treatment, law enforcement, and research needs. Many of the local groups that Marin Institute works with and supports in various states are actually funded in whole or in part by one or more of these federal agencies.

These agencies include: the Substance Abuse and Mental Health Services Administration (SAMHSA) and its Center for Substance Abuse Prevention, which

## TESTIMONY OF MICHELE SIMON, MARIN INSTITUTE, IN SUPPORT OF H.R. 5034

houses the National Clearinghouse for Drug and Alcohol Information and has developed the Strategic Prevention Framework, which promotes community-based solutions; the Department of Education's Higher Education Center for Alcohol, Other Drug Abuse and Violence Prevention; and the Department of Labor's Working Partners for an Alcohol- and Drug-Free Workplace. Also, the Office of National Drug Control Policy directs the Drug-Free Communities Support Program in partnership with SAMSHA.

Especially important to reducing underage drinking through law enforcement and other strategies is the Department of Justice's Office of Juvenile Justice and Delinquency Prevention, which supports states and local communities in their efforts to develop and implement effective alcohol prevention programs for youth. Also, the Department of Defense has an Alcohol Abuse and Tobacco Use Reduction Committee to address concerns about alcohol use and related harm in the military.

The Department of Transportation's National Highway Traffic Safety Administration and the Department of Health and Human Services' Centers for Disease Control and Prevention also allocate some of their resources toward reducing alcohol-related harm. The CDC is especially critical in providing researchers the tools they need to measure alcohol harm in specific populations and geographic areas. Finally, the National Institute of Alcoholism and Alcohol Abuse and the National Institute on Drug Abuse both research important topics such as the various types of harm attributed to alcohol use.

Each of these agencies provides critical support in the form of data collection, educational materials, and funding for programs and other resources that assist efforts at the state and local levels to prevent alcohol harm in communities. While these federal resources remain insufficient to address the true scope of the problem (and are increasingly being cut back), the CARE Act could go a long way to help ensure that such efforts are not undermined by current legal threats to state-based regulation.

**State-based Regulation Under Attack**

The history of alcohol use and regulation in the United States is a study in contrasts that resulted in two Constitutional amendments. With the passage of the 21<sup>st</sup> Amendment, the federal government granted the states the authority to regulate alcohol. After the pervasive lawlessness of the Prohibition era, states wanted to restore legitimacy to the government and law enforcement while minimizing alcohol consumption and its various associated harms—the conditions that led to Prohibition in the first place. The idea was to balance people's desire for legal alcohol sales with the government's interest in protecting public health and safety.

Since that time, states have established varying regulatory systems that allow for the orderly distribution and taxation of alcohol within their borders. Regulatory models vary to some extent among states, but all express a policy of restricting alcohol availability to reduce consumption and associated problems. While there is always room for improvement, the regulation of alcohol by the states has by most measures been a

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success that balances the desire of consumers to consume alcohol with the state's right and duty to protect the public's health and safety.

Whether it is through the direct sale alcohol, the licensing of retailers, or a combination of the two, the most direct and effective method for states to reduce problems with alcohol is to control its sale. The scientific literature is abundantly clear that the more access people (especially youth) have to alcohol, the greater the number of alcohol related problems communities will suffer.

The benefits of state alcohol control are significant: lower consumption, especially by underage youth; less alcohol-related harm; and a stable source of revenue for state services and programs. State laws and regulations controlling alcohol sales were passed to help protect the health and safety of the public; however, certain special interests are challenging state regulatory authority and threaten to undermine the very protections every state has established.

One such legal challenge by the wine sector went as far as the Supreme Court of the United States. In *Granholm v. Heald*, the Court struck down laws in Michigan and New York that permitted direct shipping from in-state wineries but forbade it from out-of-state. *Granholm* was meant to be a narrow decision dealing with discrimination between in-state and out-of-state wineries, but there has since been a proliferation of lawsuits fighting to expand *Granholm*'s meaning to allow further deregulation. Various lawsuits have challenged volume caps, online retailers and license restrictions, supplier-owned wholesalers operations, and in-person purchase requirements—all the very types of regulations that can promote moderate consumption and reduce alcohol-related harm.

Court rulings such as those in *Granholm v. Heald* and *Costco v. Hoen* are chipping away at the authority of states to regulate the sale of alcohol within their borders by allowing the direct shipment of alcohol by out-of-state retailers into states and by undermining in-state distribution systems. Similarly, efforts for federal action to preempt states ability to control alcohol sales, as well as issues such as labeling and advertising, will further undermine the public health and safety that state regulation promotes. Rather than allowing the continual erosion of this public imperative, in contrast, state-based alcohol regulation should be protected and strengthened.

### **Examples of State-based Regulation to Protect the Public**

#### **I. Access to Alcohol**

As noted above, the scientific literature is abundantly clear that the more access people (especially youth) have to alcohol, the greater the number of problems communities will experience. In addition to the individual struggles of dependence and addiction, societal challenges include impaired driving, increased health care costs, violent crime, suicide, and child abuse and neglect, just to name a few.

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Currently, states have the authority to either directly sell alcohol or license private parties to do so. By controlling where and when alcohol is sold, states can seek to prevent those problems associated with increased availability. For example, studies have demonstrated that the higher the alcohol outlet density in a given area, the greater the incidence of community violence, drinking-driving incidents, injuries, underage drinking, and public nuisance activities, among other societal problems. Because states are in the best position to evaluate and address problems facing their communities, Marin Institute supports policies that reinforce the authority of states to regulate all aspects of the sale of alcohol within its borders.

Similarly, Marin Institute supports actions that limit the direct shipment of alcohol. The Internet has created a more interconnected world; however, this also potentially undermines the ability of states to fully account for the sale of alcohol within its borders. Marin Institute supports policies that allow states to strictly limit or ban Internet sales of all alcoholic beverages. Such strict measures are necessary because in addition to the aforementioned problems associated with increased access to alcoholic beverages, Internet sales present increased opportunities for underage youth to purchase alcohol, which are nearly impossible to police. In addition, Internet sales represent an end-run around the three-tier system that potentially deprives government of tax revenue.

**II. Pricing**

Marin Institute strongly supports measures that reinforce the authority of states to advance policies that ensure alcohol is priced reasonably to ensure public safety. For example, policies that prohibit volume discounts make good sense from a public health perspective. Substantial research shows that higher alcohol prices are associated with reduced alcohol consumption and alcohol-related problems, especially in youth. As a result, Marin Institute is concerned about legal challenges by certain chain stores in the retail sector over pricing. The only consideration should not be cheap prices for consumers. In fact, such concerns should be secondary to public health and safety.

**III. Three-Tier System**

Maintaining the integrity of the three-tier alcohol control system is necessary for ensuring the health and safety of the public. The three-tier system ensures that alcoholic beverages are distributed and sold in a responsible manner. By requiring all alcoholic beverages sold in states to go through the channels established in a three-tier system, states are more easily able to hold parties responsible for violations of the law, as well as more easily collect taxes.

Prior to the establishment of the three-tier system, manufacturers could sell directly to drinkers through tied houses. These vertically integrated systems often resulted in overly aggressive marketing and excessive sales, which in turn led to problems with over-consumption. Because larger manufacturers were not located in many of the communities in which their beverages were sold, it was difficult for communities to hold manufacturers responsible for their irresponsible sales practices.

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The system now requires manufacturers to sell their products to local or regional distributors, who in turn sell the products to local retailers. The three-tier system creates a structure that ensures that the state has adequate oversight of alcohol sales. It is in this way that the three-tier system helps prevent aggressive and abusive marketing and sales techniques, as well as encourage moderation. For these reasons, Marin Institute strongly supports maintaining the integrity of the three-tier system.

**IV. Labeling and Advertising**

Marin Institute supports the ability of states to regulate labeling and the advertising of alcoholic beverages within its borders. Alcohol advertising and packaging have been shown to influence both adult and underage drinking. As a result, active regulation of labels and advertising can have a positive impact on reducing alcohol consumption.

Some have argued that combined with federal labeling laws, state labeling laws are unnecessary, duplicative, and result in a lack of uniformity. However, this argument presupposes that one, the federal government is better suited to establish labeling rules than state authorities; and two, the need for alcohol companies to enjoy uniform labeling outweighs a state's citizens to have the most effective labeling laws possible, neither of which is necessarily true. As for free speech concerns with regard to advertising, states are already held accountable by the 1<sup>st</sup> Amendment.

**Conclusion**

Although the battle over the control of alcohol sales and distribution may seem like any other rhetorical debate over the role of private industry and government regulation, there is an important difference: The demonstrated likelihood of diminished state regulation of alcohol to increase the number of lives lost, damaged, and forever changed by alcohol consumption. For decades, alcohol has been recognized as being different, because it is. The cornerstone of that recognition is the state's authority under the 21<sup>st</sup> Amendment to regulate the sale of alcohol to ensure an orderly marketplace.

Alcohol use remains a major problem in America today. While it is not the health and safety catastrophe that it was prior to Prohibition, special interests are constantly challenging state regulatory authority and continuously threatening to undermine the protections every state has established that prevent problems from getting worse.

As long as the public and policymakers think this is all just an industry food fight, the science and historical context to support strong state regulation gets lost in the shuffle. While the fight between alcohol distributors and producers presents an obvious disagreement of economic interests, H.R. 5034 must not be dismissed as industry infighting. Indeed, alcohol wholesalers and distributors are subject to state-based regulation whether or not it happens to support that sector's economic interests.

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The Committee should be careful to consider decisions about state control of alcohol with public health and safety as the top priority. While chipping away at the current regulatory system may provide economic benefit to some businesses in the short run, all of us—individually and collectively—will ultimately suffer from the long-term toll on public health and safety, along with the related societal economic burdens.

Through our engagement with advocates and community members around the nation, we continue to see firsthand the critical role that state regulation plays in curbing potential harm from alcohol sales and consumption. Thousands of people throughout our nation work at the state and local levels to reduce underage drinking and adult over-consumption, and they rely heavily on the authority granted by the 21<sup>st</sup> Amendment to be able to continue to do so. H.R. 5034 supports the public health and prevention efforts of these advocates. Moreover, it supports the health and safety of each one of us.

The Committee can seize this rare opportunity to strengthen the regulatory authority of states, and more broadly reduce alcohol-related harm and ensure that the public health and safety of the American people remain the top priority. In conclusion, we urge the Committee to support this important bill, and to continue to seek additional ways to shore up critical state-level efforts to reduce alcohol-related harm.

Thank you for the opportunity to testify on this important matter.

#### Citations

<sup>1</sup> Institute for Health Policy, Brandeis University. *Substance Abuse: The Nation's Number One Health Problem: Key Indicators for Policy*. Princeton, NJ, Robert Wood Johnson Foundation, 1993. Smoking remains number one, while poor diet and lack of exercise are second.

<sup>2</sup> Mokdad AH, Marks JS, Stroup DF, Gerberding JL. Actual causes of death in the United States, 2000. *JAMA*. 2004;291:1238-1245.

<sup>3</sup> U.S. Department of Health and Human Services. The Surgeon General's Call to Action To Prevent and Reduce Underage Drinking. U.S. Department of Health and Human Services, Office of the Surgeon General, 2007. Available at: <http://www.surgeongeneral.gov/topics/underagedrinking/calltoaction.pdf>. Accessed July 22, 2009.

<sup>4</sup> Center for Addiction and Substance Abuse cost of living adjustment, using the Bureau of Labor Statistics Inflation Calculator, of 1998 data by Harwood, H. (2000). *Updating Estimates of the Economic Costs of Alcohol Abuse in the United States: Estimates, Update Methods, and Data*. Report prepared by The Lewin Group for the National Institute on Alcohol Abuse and Alcoholism, 2000.

<sup>5</sup> Centers for Disease Control and Prevention (CDC). General Information on Alcohol Use and Health. Available at: [http://www.cdc.gov/Alcohol/quickstats/general\\_info.htm](http://www.cdc.gov/Alcohol/quickstats/general_info.htm). Accessed July 9, 2009.

<sup>6</sup> Harwood H. *A Sound Investment: Identifying and Treating Alcohol Problems, Ensuring Solutions to Alcohol Problems*. The George Washington University Medical Center, April 2003. Available at: [http://www.ensuringsolutions.org/usr\\_doc/Primer3Costs.pdf](http://www.ensuringsolutions.org/usr_doc/Primer3Costs.pdf). Accessed August 9, 2009.

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Mr. CONYERS. Thank you, Ms. Simon.  
Before I yield to Lamar Smith, I would like to ask anyone—starting with our first witness—if anything that was said here would

lead you to want to remark about it by your fellow panelists, or any other final thoughts you might have about the subject matter that brings us here today.

Mr. Attorney General?

Mr. SHURTLEFF. Thank you, Mr. Chairman.

You know, the only thing that strikes me is that there is all this—obviously, the Commerce Clause. I support and love the Constitution of the Founding Fathers. The 21st Amendment was an extraordinary time in our history where, for over a decade, we saw mostly failed Federal policy, and what it did to tear apart this country. It was a well-reasoned—well thought out. It was current. It was dealing with the problem. It was taken back to the states. And it gave back to the states what traditionally was theirs; and that is the regulation of alcohol.

It is a unique product. It was a unique amendment. It is just as important a part of the Constitution as the Commerce Clause—as any other part of that Constitution. And that is why this is so unique. No other constitution dealt with any other products and services in this country. But this is different. It is unique. And we all know why. It has been spoken very clearly—the negative effects that alcohol can have on our society and, particularly, our youth.

And so—would remind you that this is—this is particularly unique. It is the 21st Amendment. But the courts have now made it clear that you have the—you, as Congress, have control in defining the extent of the Dormant Commerce Clause. And that is why we are coming back to you, to ask for your help.

Mr. CONYERS. The enforcer from Michigan—

Ms. SAMONA. Thank you.

Mr. CONYERS. What have you to say?

Ms. SAMONA. I like that title. Thank you, Mr. Chairman.

Mr. CONYERS. Regulator, perhaps? Okay.

Ms. SAMONA. I just want to comment on what Professor Elhauge had indicated about these losses—some of these losses have led to deregulation. Should we wait until the bottom falls out for us to act? Every lawsuit chips away at our ability to regulate this highly regulated product—every single lawsuit.

Of the 20 losses that have existed, one state or another had to act in one way or another to comply with what happened in regards to that lawsuit. And what happens when Michigan gets sued with Siesta Village, and we lose that lawsuit, but then two neighboring states, Texas and New York—the same identical issues and lawsuits—get that lawsuit and—well, they are not neighboring in that sense, but the results are exactly the opposite.

So when the Utah attorney general says, “What am I supposed to tell my regulators or other states? Who do you follow?”—are you extra cautious because Michigan lost, or do you follow the New York model? Do you follow the Texas model? That is why Congress really needs to come in here—the fact that none of these have led to deregulation—they have absolutely led to every regulator in that state to make some kind of change, or that legislature to comply with that lawsuit.

So this is a public-interest issue. This is public interest versus the private sector. This is money versus protecting the health, safety, and welfare of the general public of the citizens of the State of

Michigan or any other state. That is the bottom line here, what we are talking about. All these projections about “a zinfandel is not made by New York, but New York discriminates”—why in the world would the State of New York discriminate against a product they don’t make, when they could make money for their state? This is a multimillion-dollar business for all of us in one form or another. But as the regulator, I don’t just carry the money that I bring to the states. I carry the responsibility that it comes with. And that never goes away. Thank you.

Mr. CONYERS. I wonder what he does tell them.

Mr. SHURTLEFF. Litigate—spend more taxpayers’ dollars litigating the question—litigating the question—more money spent—taxpayers’ dollars that could be going to educational programs like our parentsempowered.org, where we are giving information to parents in order to provide more information to their kids. That is the problem.

Mr. CONYERS. Mr. Doyle?

Mr. DOYLE. When I hear calls for Congress to back away from states’ regulatory authority, and to provide them with even more primacy, I think about the important role that Congress has played, and the Federal Government has played—and I also stated that I don’t want the Federal Government to back away.

I want to point out some of the important things the Federal Government role played in alcohol regulation and things like underage drinking. As a 19-year-old in 1979, it is certainly emblazoned on my mind what an important role the Federal Government had in passing effectively a 21-year-old drinking age nationally.

And without that role, that certainly wouldn’t have happened as quickly, and may not have happened at all, but everyone can conjecture. The 0.08 national blood-alcohol level effectively was also something that the Federal Government had a lot to do with.

So I think there is a Federal role. It isn’t to say that the states don’t have primary role. Look, I just want to remind everyone that it isn’t all bad what the Federal Government does. And in this realm, in particular—and that people like me look for protection. So, thank you.

Mr. CONYERS. Did you feel that way when you were 19 and the law kicked in?

Mr. DOYLE. No, but I will tell you, sir—I registered to vote. And I voted the next time around—not for the guy who didn’t—well, whatever. You know what I am saying.

Mr. CONYERS. Well, I think I get your drift. But—

Mr. DOYLE. At the time, I wasn’t in favor of it. Let us put it that way.

Mr. CONYERS. Professor Diamond?

Mr. DIAMOND. Thank you. I would like to make three points.

First, we have been told that there is a problem because there will be no longer a possibility to bring a case purely for discriminatory effects. Donald Regan, a professor at the University of Michigan wrote a very long article in 1986, in which he showed that there had never been, up to that point—and I believe it is still the case—a Supreme Court case—in which the Dormant Commerce Clause was used to reject a state law in the absence of either intentional or facial discrimination.

Indeed, if you look at how the Supreme Court is beginning to describe Dormant Commerce Clause jurisprudence—in *United Haulers* and in *Kentucky v. Davis*—two recent cases—they no longer go through what they used to—the old-fashioned incantatory repetition of three kinds of discrimination—facial, intentional, and effectual. They do not mention effectual anymore.

We have been told that there is a problem. As a matter of fact, this doesn't mean that discriminatory effects will become irrelevant. They will be very important as evidence on the question of whether there is intentional discrimination. We are told that that won't work because, as in *Bacchus*, the State of Hawaii said—denied that they were trying to intentionally discriminate. Well, the important point about *Bacchus* is the United States Supreme Court didn't believe them.

Secondly, we were told that price affirmation—the striking down of price affirmation would now be in jeopardy. This is simply false. And it is not false—it could be false on the grounds that *Brown-Forman* was a case of extra-territorial regulation, which does not really depend on the Commerce Clause. But more importantly, in the subsequent case, *Healy*, the court said that “Price affirmation, both prospective, simultaneous, and retrospective, constituted facial discrimination.” That would still be invalid.

And, thirdly, we have been given several tone poems about the importance of the national union, and I certainly share those. But we are not a single-market system. We are a Federal system. And I would like to—I can't quote it, unfortunately—I didn't bring it with me. But I can refer to another tone poem from a famous Harvard professor, who said, “It is only the fact that we are a Federal system where states still get to make laws that distinguishes us from Soviet totalitarianism.” Thank you.

Mr. CONYERS. Professor Elhauge?

Mr. ELHAUGE. Thank you.

So, one statement I would like to respond to is the claim not only that the amount of litigation has been excessive, but that it has increased. Now, I don't know exactly what the normative standard is for whether 20 to 30 cases is excessive or not—it is less in some other areas. But the one thing that is clear to me is that the rate has declined. There is far fewer cases now than before; so that if this is really the concern, it is just too late. It might have been a good reason a few years ago. It is not a good reason now for legislation.

Second, the claim was made that, “They haven't resulted in deregulation yet, but the cases might.” I don't think any of the cases pose any serious threats of general deregulation. The language is quite clear about the 21st Amendment powers of the states. They can ban alcohol. They can impose any tax they want to raze alcohol. They can take over the sale of alcohol. And they can have a three-tier system and require, I think, in-state residence for retailers, crucially.

Now, Ms. Samona, I think, I have some sympathy with, because she suffered from the *Siesta Village* district court case, which I think was wrongly decided. It was mooted on appeal. And, actually, there is not just two, but there is three appellate courts that, since, have come out the other way. So I think the law is actually now

fairly clear that in-state residency requirements for retailers are fine, because it is inherent in defining who the retailer is in the three-tier process.

But if that is really a concern—and there are two areas where I identify small, technical conflicts that I think were largely moot, but Congress could act—one of those is that area. But that would require, simply, a statute that said, “The Dormant Commerce Clause should not be construed to invalidate in-state residency requirements for retailers,” not this much broader statute.

The claim was also made that the discriminatory-effects test has never been used independently of intent. I mean, certainly, the courts have articulated it as separately. There is some controversy on this issue, I think, mainly because there is ambiguity about what “intent” means. Is “intent” subjective intent? Or is it an objective intent that we infer from effects?

Sometimes commentators think that, really, in all cases where courts are talking about effects, they are saying, “Well, we infer the objective intents do what you have actually had the effects of.” That actually creates a new ambiguity—a problem with this statute, because, right now, that is not a problem because effects or intents suffice.

With this statute, the courts would have to deal with this new question of, “Well, when they tell us we can only go on intents and not effects, are we allowed to infer the court will ask the intent from the effects anymore? Or are we not allowed to do that?” I would anticipate a new round of court splits on that issue, if this bill is passed.

And, then, finally, the claim was made that the price-affirmation—the notion of the price-affirmation laws will be sustained under this statute is simply false. The statute does get rid of the direct-regulation prong, which is what Brown-Forman relied on. There are some cases that talk about those laws as also being discriminatory. But what they say is they are discriminatory against out-of-state consumers. And the one thing that is clear from this act is it doesn’t cover discrimination against consumers.

Mr. CONYERS. Attorney Genesen?

Ms. GENESEN. Thank you, Mr. Chairman—just a few quick points.

First, I worked with the wine-producer and retailer industry for about 10 years now. And I can tell you two things about them. First, they are deeply committed to preventing underage access. We all have children. We are all concerned that the state alcohol regulations are in place, and they are effective. And, second, they have both been deeply committed to working with state legislatures.

The first effort is always, “Can we work something out at the state legislative level for a balanced, evenhanded regulation? And if, you know, at the last resort, we have to litigation in those states that stubbornly insist on discrimination, then we go to court.”

And I have to respectfully disagree with Professor Elhauge on the issue of wine retailers being allowed limited regulated market access into states. The only case that I have brought has to do with the State of Texas, where in-state wine retailers are given the au-

thority, by statute, to remotely sell and ship wine to Texas consumers.

An Arkansas wine retailer, on the other side of the border, cannot do that—precluded from being able to do that. The Commerce Clause protects articles—wine—in interstate commerce. Producers are selling wine; wine retailers are selling wine. If the State of Texas wants to put very intense regulatory teeth into a even-handed wine-retailers bill, we are all for that. But to preclude wine retailers from selling wine across state borders violates the Commerce Clause.

Mr. CONYERS. Ms. Simon?

Ms. SIMON. Thank you—just two quick points.

One—I think, just to take a step back and look at the other picture, in response to the minimization we are hearing about the litigation, and how many lawsuits there are—and, of course, many of these lawsuits are working their way up to higher levels, so that means they will have even broader impact in those jurisdictions.

But it is important to remember that litigation is really just one strategy being waged in what I think of as a larger march toward deregulation by many sectors—by different corners of this industry, frankly. And this is something that we are very concerned about at Marin Institute. We just did a whole report about the efforts to privatize and control states. And I know that is not what we are discussing here, but it is relevant to the company Costco, which has brought litigation in the State of Washington, and is currently funding a initiative there to privatize the system.

And so, you know, litigation is one—these companies will use any tools at their disposal. And what we are asking for here is for Congress to help limit this one particular strategy of litigation while, of course, they will continue to use other forms to get the deregulation that they ultimately want.

Second quick point is this idea of the baseball analogy that was made about the away team versus the home team—there is a reason—and it is not about discrimination—that we make sure that licensees have a local presence in states. And that has to do with accountability.

And that brings me to the point that it is important to remember that while we are hearing a lot about small producers, most of the alcohol sold in this country is, in fact, manufactured by foreign multinational companies. So Anheuser-Busch was taken over by a Belgian-based company, InBev; MillerCoors is a joint venture owned by two foreign companies. We did a whole report, in California, about the wine industry there, which is increasingly—these so-called small family wineries are increasingly being bought out by multinational companies that are certainly not based in California and, in some cases, not even based in the U.S.

So the point is we need state-based regulation to require local presence, because we can't get at it. As this industry becomes more and more consolidated, more and more globalized, it is critical to be able to regulate as much as we can at the local level. And not just retailers, but wholesalers, sort of are our last gasp at maintaining a local accountability over this industry. Thank you.

Mr. CONYERS. Well, I thank you all, and recognize my friend, Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Professor Diamond and Professor Elhaug—is that correct?

Mr. ELHAUGE. Elhaug—yes.

Mr. SMITH. Elhaug—let me go back to the question of the scope or extent of the problem, particularly with regard to lawsuits.

Could you give us an idea of how many lawsuits are pending, and how they compare, say, to the historical average, so that we can put them in perspective?

Mister—Professor Elhaug? Yes.

Professor Diamond?

Mr. DIAMOND. There have been three times in—since repeal—when there have been bursts of litigation, I think. One was in the 1930's, at the time when the Supreme Court finally and clearly said that the 21st Amendment protected state law. The second was in the 1970's and 1980's, when there was a series of challenges to state laws, claiming that they were preempted by the Sherman Act. And the recent one was in the last 7 years—starting before *Granholm*, and including *Granholm*.

And I want to second what Michele Simon said. It is not a matter simply of counting lawsuits. It is a matter of people saying that what they want to do is to be able to sell beer, for instance, like they could sell potato chips. It is a matter of a general sense that this—which has been referred to by many people—that, “Prohibition was a long time ago; alcohol really isn't so different. Why can't we just treat it like anything else?”

It is a view which is reflected when the FTC, sometimes talks as if the only issue with alcohol is, “Is the price as low as possible, and is the availability as wide as possible?” But, as we all know, that is not the point with alcohol.

Mr. SMITH. Thank you, Professor Diamond.

Professor Elhaug, you have anything to add to that?

Mr. ELHAUGE. Yes, just in terms of an actual count of cases now. The count has varied for different people. But I think in the mid 20's is overall—since *Granholm*. But in the last 12 to 18 months, there is only been three filed. So that is a declining rate. One of them was dismissed; one of them had facial discrimination—they ruled in favor of the plaintiff; and one of them is still awaiting actual substantive resolution.

There are five other sort of cases that—two which were resolved on appeal, with issues like attorney's fees still. But there are other cases—three cases that are on appeal that were in trial. But in terms of actual active trial litigation, there seems to be only one right now. And the new filing rate does not suggest an increasing rate.

Mr. SMITH. I see. Thank you.

Next question—Professor Diamond and Ms. Genesen—the revised legislation says that the states cannot discriminate against out-of-state producers. Are there any examples of that occurring now?

Mr. DIAMOND. Well, there is a lawsuit—

Mr. SMITH. Except—yes.

Mr. DIAMOND. There is a lawsuit—

Mr. SMITH. Right.

Mr. DIAMOND. I am not—

Mr. SMITH. Anything, Ms. Genesen?

Ms. GENESEN. Yes, Mr. Smith, there are still laws on the books that require an initial visit by a consumer to a winery before that consumer can, then, purchase a wine. So if you live in Oregon, say, you know, Indiana is going to require that, as a consumer, you fly all the way out to Indiana in order to purchase the wine. And, then, you may be able to purchase it over the Internet.

So that is still on the books. There are several states that still have production caps in place. And these production caps—they discriminate against wineries by the amount they produce every year. And they don't—that there is no relationship to any activity that they are doing in the concerned states. And so they just—they let their own wineries ship—they usually set the gallonage cap at the highest winery in their own state.

Mr. SMITH. Okay.

Ms. GENESEN. And then they preclude others.

Mr. SMITH. Right. Thank you.

Mr. Chairman, I would like to sneak in one more question.

And this would be for you, Ms. Genesen, Professor Elhauge and Mr. Doyle. Just very quickly, what suggestions do you have for improving the pending legislation?

And, Ms. Genesen—if you want to start?

Ms. GENESEN. Yes. Thank you, again, Mr. Smith.

We really do have in place a very, very sound, workable framework for analyzing these cases, which really strikes the appropriate balance between robust 21st Amendment regulation, which is still intact—alive and well—and entry for wineries and retailers.

Mr. SMITH. Okay. Thanks.

Professor Elhauge?

Mr. ELHAUGE. I would say, one, eliminate section 3a, because, right now, it either means nothing, or it means something quite unclear and ambiguous. And usually if the best thing you can say for a section is, "Maybe it means nothing," we should get rid of it, I think.

Mr. SMITH. Okay.

Mr. ELHAUGE. Then, with section 3b, I just think it needs to be drastically narrowed or eliminated. As far as I can tell, the main concern that has come out of this hearing is really protecting children, having I.D. checks. Again, I think that the law is allowing in-person sales requirements and in-residency requirements. But those two things could be clarified so Congress could say, without having this broad permission of discrimination—simply say, "States are allowed to require an I.D. check—in-person sales—if they want, or in-state residency requirements for retailers."

Mr. SMITH. Okay. Thank you.

And Mr. Doyle?

Mr. DOYLE. I think there is a lot of things that small brewers would like to see help with. But if you look at my testimony, the two things that I speak about are labeling laws that might discriminate; so Federal labeling requirements that trump state labeling requirements would be something.

And we also talked about state franchise laws, which are used to, you know, dictate the terms of trade with small brewers. And that is not really what the laws were made for. So state franchise

law—a Federal franchise law exemption for small brewers would be something else that would help.

Mr. SMITH. Okay.

Those are helpful answers. I thank you.

Mr. Chairman, thank you.

Mr. CONYERS. Gentleman from New York, Mr. Dan Maffei?

Mr. MAFFEI. Hi, Mr. Chairman. I thank you, and I thank the witnesses for being here.

This is a very interesting debate. It seems that there is some agreement on the panel that current three-tiered system does work, and that the key thing is to maintain it. It is very interesting—I have never heard quite such a spirited debate on how to best maintain the status quo, with half the panel saying that the best way to maintain the status quo is to pass this new law, and the other half saying, “Oh, gosh. We don’t want to do that.”

But it is very interesting. Also, it seems the crux of this is whether anti-discriminatory practices would be hurt or helped by the new law.

So I guess I will start by—and I don’t have a lot of time, so I can’t ask everybody.

But, Mr. Doyle, since you are an actual practitioner, what is your fear in terms of how this would encourage states to pass anti-discriminatory laws that would, say, discriminate against your product? And to the extent that you can be specific, I would ask you to be specific about—what is your fear?

Mr. DOYLE. What am I worried about?

Mr. MAFFEI. Yes.

Mr. DOYLE. And, again, I talked about franchise laws. I talked about labeling laws. I gave you some examples of a couple of states—

Mr. MAFFEI [continuing]. Have—that is already happening, and you can challenge them in court now. But you think if this law were passed, you wouldn’t be allowed to do that?

Mr. DOYLE. Yes. It think that is, in fact, part of the reason for the law. And the other thing would be differential taxation rates. That is something else that we would be concerned about. Those are three examples.

Mr. MAFFEI. Professor Diamond, do you think the CARE Act would lead to those issues? And, if now, how do you think it would prevent those sort of things from happening?

Mr. DIAMOND. Well, first of all, as far as labeling goes, states have control now to pass any labeling laws they want. The Federal labeling statutes are not preemptive. The only Federal labeling statute that is preempted—that claims preemption is the health-warning label that was passed when—in the 1980’s or much, much, later—and that has actually never been litigated to see if the 21st Amendment has any relation to that.

But the Federal labeling law does not trump state law in the—I can just refer you to the Broncher case, among others. Differential treatment of taxation—Federal Government does it. States do it. The question is—we can envisage schemes in which something might be done, and we are quite confident is only being done in order to hurt—people at—to the benefit of inside people. If that is the case, it would be vulnerable; otherwise, not.

Mr. MAFFEI. I mean, do you think the CARE Act would promote more of this or—

Mr. DIAMOND. I think the CARE Act would help prevent continued erosion. Judge Calabresi, in the 2nd Circuit, in the case in which they upheld the state law, insisting on physical presence for retailers, in effect intimated that the Supreme Court is beginning to—has been limiting the scope of the 21st Amendment, and what he delicately suggested was not particularly a principled way.

And while you can't change what the Supreme Court does—and neither can a circuit court of the United States—you can, in Congress, under your Commerce Clause powers, make clear that you still wish to support state laws. I might just say that the language about primary responsibility being in the state is language which has, in the sense of Congress, was mentioned not so many years ago, in the STOP Act.

But, more importantly, in the 1930's, Congress repealed the Reed Amendment, which was passed in 1917. The Reed Amendment said that if a state banned the sale of alcoholic beverages, the Congress, then, said it was illegal to ship alcoholic beverages into that state. This was passed because—this was proposed by Senator Reed, the senator from Missouri, who was known, then, as "The Senator from Anheuser-Busch," because he was hoping to embarrass the anti-saloon league because he thought that they wouldn't want to make states decide that if they banned sale within the state, they couldn't let people buy from other states. The anti-saloon league took him up on the bet.

The important point is, in the 1930's, Congress said, "We are repealing this because it is inappropriate for us to be attaching conditions to how states regulate." I think that shows a congressional recognition of primary responsibility being in the states.

Mr. MAFFEI. Thank you, Professor Diamond.

I do want to ask Ms. Genesen one question. We have been talking about preferences, and you mentioned wine from other places.

It does seem to me that there might be some valid reason to have some preference some, you know, local content or local control, particularly when it comes to alcohol consumption. Now, I say this as somebody who has local beer wholesalers who are family businesses that go back generations that employ hundreds of people; but also local wineries in Upstate New York and the Finger Lakes. I have small craft breweries. And I have an Anheuser-Busch brewery locally.

So, on this issue, by the way, you might note that there is a hard place here, and a rock here, and I am caught between them.

But I do want to ask you: I mean some of the Internet examples you used—I mean, is there any reason why you would want to have some sort of bias toward local or, you know, somebody who—as opposed to being able to order wine from across the country or even across the world?

Ms. GENESEN. Well, interestingly—thank you for the question.

And, interestingly, the in-state wine industries across the country, including places like Massachusetts and New York, have welcomed these evenhanded bills and laws. They have, you know—they feel that their in-state legislatures help them in other ways, by promoting their industry; that they don't need to be shielded

from competition, because, what they would like to do is they would like to ship wine all over the country, in a regulated way, too.

And so if each state starts protecting its own wineries, then nobody can ship anywhere. And so our work with the in-state wine industries around the country has been very valuable to demonstrate to us that they are very open to competition. In fact, a lot of their wines are award-winning wines. And they feel like they can compete on the same shelf, and with the same consumers as, say, California wines.

With respect to alcohol consumption, which was the other part of your question, we very much in agreement that states ought to engage in robust alcohol regulation regarding consumption. And that each state should be able to do that with I.D. checks, sting operations—whatever it takes to control the local underage-access problems.

But just as far as insulating states from competition—our experience is that wineries welcome it, and they really are ready to compete.

Mr. MAFFEI. Ms. Simon, I am out of time, but you look a little skeptical with—

Ms. SIMON. Sorry—hard to hide that.

So we are opposed to Internet shipping. And the reason for that is concerns over—you know, youth don't need any more ways to get access to alcohol. And this idea of requiring, you know, IDs—I mean, there are a lot of problems with third-party I.D. checks. We can't expect FedEx to be checking IDs when these, you know, bottles get delivered to who knows where.

So, you know, it is disingenuous to me to separate, you know, saying that we really want—support states to control youth access, but, you know, we don't want—you know, this word “discrimination,” I think is being tossed around a little too freely, when these aren't mutually exclusive—this idea of giving states the ability to control access and, yet, you know, opening up state borders to be able to ship wine all over the country.

And, you know, wine isn't a benign product either. I think the wine industry likes to kind of think of wine as not benign, and it is 14 percent alcohol in most cases. And also, we are very concerned about opening the floodgates. So if you let wine be shipped all over the country, you know, what is next?

And so, to me, it is really about restricting as much as, you know, reasonably feasible, access to alcohol.

Mr. MAFFEI. Thank you, Ms. Genesen,

I think you made your point very well. And I do want to thank the Chair and the Ranking Member for their indulgence.

Mr. CONYERS. Senior Member of the Committee, from Virginia, Bob Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I appreciate your holding this hearing. And I appreciate the testimony of all the witnesses. This has been very, very interesting.

I believe that the 21st Amendment gives the states special authority to regulate the importation and transportation of alcohol within its borders. And, thus, I am naturally inclined to give great deference to state laws regulating alcohol.

However, when H.R. 5034 was originally introduced, I had concerns that the legislation went too far. I thought the language was too broad and could be read to pave the way for allowing states to pass facially discriminatory laws that went beyond the ruling in the *Granholm* decision. And I thought it was unnecessarily—that it unnecessarily stifled the enforcement of antitrust law.

However, I am very pleased with the changes in the proposed manager's amendment. I believe that these changes go a long way toward striking the right balance between the strong right of states to regulate the sale and importation of alcohol and the interest of out-of-state businesses seeking to sell product in the state.

While I still have some concerns, and will continue to work with the beer producers and the wine producers, some of whom are in my congressional district in Virginia, I think that we can work on those as we move forward.

I also think that the number-one concern that we should have is the same concern that this Congress had when it passed the 21st Amendment back in the 1930's. And that is to make sure that we are doing everything we can to protect this unique product from being abused. And, therefore, I think the states should be entrusted, first and foremost, with that authority. And any changes that we make in the law should be geared toward making sure that we are keeping alcohol out of the hands of children, and are allowing the states the maximum authority that they need to make sure that it is properly regulated.

So nonetheless, I have heard some complaints from various sources about ways that this law could be burdensome upon beer producers and wine producers.

I would like to ask Mr. Doyle—one of the concerns I have heard is that the State of New York has a desire to require state-specific labels, UPC labels, on all bottles entering the state. I think that is because they have a deposit on their bottles. And so if you don't have some kind of identifying indication, and you buy beer and wine or something like that in Pennsylvania, and they don't know that it was not purchased in New York—they take it across the line and they get reimbursed for all these bottles.

And so proposals have been made to impose some pretty severe restrictions on out-of-state producers. And opponents of H.R. 5034 say that the current Delahunt draft would give states the ability to enact such laws.

And I am wondering if you believe that the amended language would still allow a law such as the proposal in New York, requiring state-specific UPC codes to move forward? And, then, I will see if anybody else wants to comment on that, too.

Mr. DOYLE. Well, as you know, I am a business person. I am not an attorney. But the attorneys that I have spoken to have told me that, yes, that is a concern.

Mr. GOODLATTE. And I know that the water-bottling industry—it is either through legislation in New York, or through a lawsuit—been able to argue, under the Interstate Commerce Clause, that that is an unfair burden on interstate commerce to require out-of-state bottlers of water to put these special UPC codes on, and so they are exempt from the law.

And I am wondering, since this is not an issue that relates to the actual regulation of alcohol—actually, we are talking here about the empty containers afterwards—isn't there some easy solution to this problem that would make it clear that the law simply doesn't cover the containers that might be shipped from out of state?

Mr. DOYLE. Well, in 5 minutes, I had a couple of examples. And that was, you know, a very recent one. But I will give you an example.

Professor Diamond was talking about government warning labels, and the fact that the—you know, there is no statutory reason why the Federal-Government warning label would trump state-government warning labels. We now have a situation where the various localities have asked retailers to put calorie counts and other nutritional information for each particular city or town you might be in.

My concern would be something like this—you could have 50 government warning labels necessary on—or 25 in 25 different states.

Mr. GOODLATTE. Since my time is running short, and we have got a vote—

Mr. DOYLE. Yes.

Mr. GOODLATTE.—I am going to turn to Professor Diamond, because he is shaking his head, and doesn't agree with that.

Mr. DIAMOND. Well, I think I was misunderstood. I said that the Federal warning label is the only act of Federal regulation involving alcoholic beverages which specifically claims to preempt state laws. The laws involving the labeling regulations in the original FAA do not.

Ms. SAMONA. May I jump in on that, please?

Mr. GOODLATTE. Sure. Yes.

Ms. SAMONA. Because labeling is an issue that states have an absolutely right to control at this point, because the Federal Government—has given states that authority and power to do that. In fact, in Michigan, just a few weeks ago, we took a motion to reconsider labels of this alcohol energy drinks that are—

Mr. GOODLATTE. But let me interfere. We are not talking about the content of the bottle. We are talking about the bottle itself here. So what I am asking you is, because I am supportive of the effort to protect the states' rights under the 21st Amendment—

Ms. SAMONA. Yes, sir.

Mr. GOODLATTE [continuing]. Can't we find a way to take off the table an issue like whether or not a state would discriminate between a bottle that is used to put alcohol in it, and a bottle that is used to put water in it, as to the recycling process that that state wants to enact for recycling. That seems to be the issue here that we need to find a way to resolve.

Ms. SAMONA. I think that may be an issue in Mr. Doyle's state. It isn't an issue in our state. I think there is a number of factors that come along with that. You know, it is the green initiative; it is the recycling initiative. It is a control mechanism.

Michigan has Wisconsin as a border state. Wisconsin's return laws are only \$0.05 a can. Some of them don't even have a return—

Mr. GOODLATTE. I understand the problem. It just seems to me that, in the context of this legislation, that issue could be—and we

probably ought to focus, moving forward, to make sure that that issue is off the table on this.

And let me ask one other question. Under the Delahunt amendment to H.R. 5034, would a state be able to enact a law that is facially neutral but, in effect, discriminates against out-of-state producers?

And I will start with you, Professor Diamond, and then we will go to Professor Elhauge.

Mr. DIAMOND. Yes, if it is deemed to be intentionally discriminatory.

Professor Elhauge, in his written testimony, said that that is unlikely to occur because courts are reluctant to tell legislatures that they have been, indeed, just playing cute, and being artful. I don't happen to agree that is the case. And if it is the case, that would suggest that maybe courts should do that and not overly intrude on the legislative process by claiming that they find discriminatory effects.

Discriminatory effects is a very problematic issue in the academic literature, because it so easily, as Lisa Heinzerling and others have pointed out, turns into abusive and Lochner-like supervision of legislative decisions by the courts. They could simply, if they believe—and, as Professor Regan says, “Judges decide questions of motive all the time.”

If they believe that this was done for the purpose of discriminating against—

Mr. GOODLATTE. Got to give it to him because time is of the essence here.

Mr. ELHAUGE. So I think that courts are reluctant to look at the subject of motive of legislators. There is this complicated question I alluded to earlier—whether effects tests really differs from looking at objective intent—the one inferred from the effect.

But I do think if a court does not find intent, this statute clearly would allow laws that have discriminatory effects—and that that is, in fact, harmful because part of the point of the Dormant Commerce Clause is also to police states' laws that are indifferent to the harms that they cause out of state.

So—political process is—accountable to everybody who is benefited and harmed by what they do. And if it is non-discriminatory, they weigh those benefits and harms well in the political process.

But if many of the harms are on the outside—with out-of-staters—that their discriminatory effects and all the benefits are in-state—even if they don't care about the—effects, it still distorts the political process.

When I think about the issue, I think, “Well, how would we feel if China passed a law that discriminated against U.S. producers and said, ‘It is fine because we didn't really care about U.S. producers. We are not trying to harm them; we just don't take them into account.’”

Well, I think we would still have just as big a problem with that. And the fact that we are only accountable to domestic interests are—is what caused that—whether or not they are intentionally thinking about harming out-of-staters.

Ms. SAMONA. May I jump in here, please?

Mr. GOODLATTE. That is up to the Chairman. My time has expired. And Ms. Genesen wants to comment, too.

Mr. COBLE. Mr. Chairman, may I ask the Chair a question?

I have been here all day, since you have—since the rooster crowed. Do we still have time to put questions to the panel?

Ms. JACKSON LEE. Mr. Chairman—

Mr. CONYERS. We are going to have everyone here. The time will be divided evenly between the last three members of the panel. And, then, all other questions will be submitted.

Mr. COBLE. I could come back, Mr. Chairman, if you want us to.

Mr. CONYERS. Well, I want you to, but the other seven don't want you to.

Mr. CONYERS. So let us just divide it up. And Rick Boucher is very—let me recognize Ms. Genesen, and then Rick Boucher, subcommittee Chair in Energy and Labor.

Ms. GENESEN. A statute like existed in Massachusetts, which—the effect of which was to prevent 98 percent of interstate commerce in wine from Massachusetts' market access—that was the effect. That kind of statute would be immunized from challenge if the amended version were to pass.

Mr. CONYERS. Chairman Boucher?

Mr. BOUCHER. Mr. Conyers, thank you very much. I appreciate your having this hearing today. I am going to be very brief.

Professor Elhauge, I am—and I am sorry if I have mispronounced your name—I am viewing this through the lens of what is in the consumer interest. And I would like to have your commentary on whether—if the bill, as amended by the manager's amendment, becomes law—that would advance or harm the consumer interest. Would it limit choice? Would it raise prices? How would the consumer be affected?

Mr. ELHAUGE. Thank you.

I think it is likely to harm consumer interests; 3a is a bit of a wild card. I think the most likely reading is that it has no effect. But precisely because it seems to have no—I don't have to tell you—precisely because it seems to have no meaning, there is—a lot of court interpretation documents are likely to interpret it to inversely preempt some unclear set of Federal statutes, one of which might well be the Federal antitrust laws. And that would be very harmful to consumers.

In addition, because it will allow various forms of laws that—in particular, laws that are even intentionally or facially discriminatory against out-of-state consumers—that will clearly be harmful.

Mr. BOUCHER. Out-of-state shippers?

Mr. ELHAUGE. What is that?

Mr. BOUCHER. You said, "Out-of-state consumers."

Oh, you mean out-of-state consumers of the product, with regard to the state where it is manufactured.

Mr. ELHAUGE. Right.

So the state is allowed to discriminate under this statute against anybody who is not a producer. You can discriminate if they are out of state. And that would be a—

Mr. BOUCHER. That would limit choice in terms of what is available to the consumer in a given state.

Mr. ELHAUGE. Yes.

Mr. BOUCHER. And that could raise prices?

Mr. ELHAUGE. I think that would likely raise prices.

Mr. BOUCHER. All right. In keeping with the Chairman's suggestion that we be brief, I will just have on other question.

And, Ms. Genesen, let me pose that to you.

The legislation has been criticized by some on the basis that it might enable states to provide special preferences to in-state manufactured products or other products that are tied, in some way, to that state, to the disadvantage of products manufactured in other states, and shipped into that state.

Would you care to comment on that?

Ms. GENESEN. Yes, sir. I—

Mr. BOUCHER. And could you turn your microphone on?

Ms. GENESEN. I think I just need to get closer. Thank you.

I would like to comment on that, because one great example is discriminatory taxes, like in the Bacchus case, where a state could exempt its own local industry from taxation, but require that taxes be levied on out-of-state products. And that was the case in Bacchus. And if this bill, as amended, were to pass, in my view, it overrules Bacchus. It does not protect the product. So any state could literally put that kind of tax, or some kind of unique labeling requirement or a bar code, where out-of-state products would be unfairly disadvantaged.

Mr. BOUCHER. All right. Thank you very much. And I appreciate your questions.

Thank you, Mr. Chairman. I yield back.

Mr. CONYERS. Thank you very much.

We now turn to Howard Coble, gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman. I, too, will be brief.

Thanks to the panel for being here.

Mr. Chairman, I am a member in good standing with the Wine Caucus. I hope I still am in good standing. But I was surprised when small wineries came to me recently and said this bill will jeopardize direct shipping.

Professor Diamond, is there any provision in this bill that will jeopardize direct shipping, because I assured them that was not my intent, nor the intent of the bill.

Mr. DIAMOND. There is nothing in this bill that would jeopardize direct shipping if a state has it or a state could decide to have it. What this bill does is preserves the physical-presence requirement for wholesalers and retailers from Dormant Commerce Clause challenge, and does remove a pure effects challenge at the producer level.

By the way, the Bacchus case was an intentional-discrimination case, and that would have been overturned.

Mr. COBLE. I thank you, Professor.

Mr. Doyle, I assume that—well, strike that. Maybe I shouldn't assume. Do you agree with me when I say that gallonage caps benefit small wineries and small breweries?

Mr. DOYLE. Gallonage caps?

Mr. COBLE. Yes.

Mr. DOYLE. Gallonage caps that allow them to do what—are exempt—

Mr. COBLE. To self-distribute.

Mr. DOYLE. Oh, to self-distribute. Well, it depends on what side of the cap you are on, I guess.

Mr. COBLE. Well, in your brewery, have you gained revenue or lost revenue in the last couple years?

Mr. DOYLE. Yes. I mean we self-distributed when we had no sales, and we self-distributed 24 years later, when we have more sales.

Mr. COBLE. But have you gained—

Mr. DOYLE. It has certainly helped us tremendously.

Mr. COBLE. That was my conclusion as well.

I have more questions, but I will yield back, Mr. Chairman. Thank you.

Mr. CONYERS. Well, that is very generous of you.

The Chair recognizes Sheila Jackson Lee, the gentlelady from Houston, Texas.

Ms. JACKSON LEE. Mr. Chairman, thank you very much.

And I thank the witnesses. This is a time that is calling us in different locations.

Let me go to you, professor. I want to follow the line of reasoning of my colleague from Virginia.

Professor Elhauge, let me ask a simple question: Why is this bill so broad? Why would you view it as being so broad, and could we narrow the bill and still be effective in some of the content that is necessary to provide some remedy?

Let me just add to that—could it be more narrowly tailored to deal with the immediate concerns, and not interfere with consumer options, which you seem to suggest, from the question of the gentleman from Virginia?

Mr. ELHAUGE. Yes, I think it could be. As I say, the big concern that is legitimate, I think, is protecting children from alcohol. And Congress could pass a statute that simply clarifies that the majority of the circuits are right. And we could codify the law—in a way that avoids any possible challenge. What the majority of the circuits say is that in-person sales requirements in order—so that people's IDs can be checked are, in fact—

Ms. JACKSON LEE. Legitimate.

Mr. ELHAUGE. Legitimate.

Ms. JACKSON LEE. Right.

Mr. ELHAUGE. And that could be clarified. That is a small technical issue, but that would be useful, I think; or, to the extent the Congress favors a majority on the rules on in-state residency requirements for retailers, it could codify that. And the theory, I think, of the three-tier system has been there was something important about the personal touch of retailers—that they know who their customers are, and are more likely to check their I.D.—can be more closely—in the state—

Mr. CONYERS. The gentlelady has 1 minute remaining before I will have to close.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Let me just say—and does that mean that we could also prevent online purchases if we found a narrowly tailored approach, which is what one of the concerns is?

Mr. ELHAUGE. Could we—

Ms. JACKSON LEE. Online purchases by underage.

Mr. ELHAUGE. Could they ban—

Ms. JACKSON LEE. Could we find a way to craft language narrowly to provide protection there?

Mr. ELHAUGE. So, to allow it, but have more I.D. checks for online sales?

Ms. JACKSON LEE. No, to find a way to prevent the online usage by young people—underage.

Mr. ELHAUGE. Oh, okay.

Well, I think Congress would have to pass a law that was about that, to guarantee that result. But it could pass a law that simply authorizes the states, as long as they do it in a non-discriminatory way—

Ms. JACKSON LEE. To handle it.

Mr. ELHAUGE. Yes.

Ms. JACKSON LEE. Yes.

Ms. GENESSEN, can I just—do you believe we can craft a bill more narrowly tailored to address some of the concerns, as opposed to the bill we now have?

Ms. GENESSEN. Honestly, madam, I do not.

I believe that the current system—the current legal framework—is working very well; that states enjoy broad powers under the 21st Amendment, and are exercising them regularly.

Ms. JACKSON LEE. So you are not ready for a compromise. And you see problems in this bill and approach?

Ms. GENESSEN. Yes, ma'am.

Ms. JACKSON LEE. But you would be open to us looking at a narrowly crafted effort?

Ms. GENESSEN. Depending on what that is.

Ms. JACKSON LEE. All right.

Mr. CONYERS. The Chair—

Ms. JACKSON LEE. Thank you, Mr. Chairman. I appreciate it. I yield back.

Mr. CONYERS. How timely.

The Chair thanks the witnesses and congratulates them at the same time, and invites them to send in any further discussion that we may not have completed. Just send it into the Committee, and we will include it in the record.

Thank you again. And the Committee stands adjourned.

[Whereupon, at 3:18 p.m., the Committee was adjourned.]