Testimony of
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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.