No. 08-1004

IN THE

Supreme Court of the United States

PATRICK L. BAUDE, *et al.*,

Petitioners,

v.

THOMAS SNOW, Chairman of the Indiana Alcohol & Tobacco Commission, *et al.*,

Respondents.

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

BRIEF OF RESPONDENT THOMAS SNOW IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Whether, consistent with the Commerce Clause, a State may require both in-state and out-of-state wineries to conduct a single face-to-face transaction with consumers from that State before shipping wine directly to those consumers indefinitely.

PARTIES TO THE PROCEEDINGS

Petitioners are Patrick L. Baude, Larry J. Buckle, Kitty Buckle, J. Alan Webber, Jan Webber, and Chateau Grand Traverse, Ltd. They were the Plaintiffs-Appellees below.

Respondents are Thomas Snow, in his official capacity as Chairman of the Indiana Alcohol and Tobacco Commission, and Wine & Spirits Wholesalers of Indiana. David Heath was the original Defendant-Appellant; however, on March 23, 2009, Mr. Snow succeeded Mr. Heath as Chairman of the Indiana Alcohol and Tobacco Commission. Pursuant to Supreme Court Rule 35.3 Mr. Snow is hereby substituted as Respondent in this action. Wine & Spirits Wholesalers of Indiana was an intervening Defendant-Appellant in the district court.

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STATEMENT OF THE CASE

In *Granholm v. Heald*, 544 U.S. 460, 490-91, 493 (2005), the Court observed that, while states may not protect native wineries by precluding only foreign wineries from shipping directly to consumers, they may nonetheless protect against underage drinking with geographically neutral shipping regulations. Furthermore, the Court said, as long as there is no interstate discrimination, the traditional three-tier system for distributing alcohol to consumers—*i.e.*, requiring that producers sell only to wholesalers, who may sell only to retailers, who may ultimately sell to consumers—is "unquestionably legitimate." *Id.* at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)).

In the wake of *Granholm*, the Indiana General Assembly enacted House Enrolled Act 1016, effective March 24, 2006, which created a Direct Wine Seller's Permit and put into place a regulatory framework for wineries to ship directly to Indiana consumers. *See* Ind. P.L. No. 165-2006, Ind. H. Enrolled Act No. 1016, §§ 21-24, 34, 114th Gen. Assembly (2006) [hereinafter, "HEA 1016"]. HEA 1016 also expanded personal importation limits. *See* Ind. Code § 7.1-5-11-15. Previously, consumers had been limited to one quart per trip; this privilege has now been expanded to 18 liters per visit. *See id.*

One part of this regulatory scheme is the geographically neutral law at issue here—a single face-to-face transaction prerequisite to temporally unlimited direct shipping. This prerequisite has nothing to do with protecting Indiana wineries and everything to do with preventing youth access to alcohol. It affords all wineries a non-discriminatory bypass, with a youth-access safeguard, around

Indiana's general ban on shipping to anyone other than a wholesaler—a ban that the Court in *Granholm* fully accepted as consonant with the Commerce Clause. If a general ban on direct shipment is sound, so must be an exception to that ban that is available on equal terms to all wineries.

1. In general, Indiana maintains a classic three-tier alcohol distribution system. *See* Ind. Code § 7.1-3 *et seq.*; *see also Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000). In general, no alcohol producers in any state may ship directly to Indiana retailers or consumers. Specifically, Indiana law prohibits any "person in the business of selling alcoholic beverages in Indiana or outside Indiana to ship or cause to be shipped an alcoholic beverage directly to a person in Indiana who does not hold a valid wholesaler permit. . . . This includes the ordering and selling of alcoholic beverages over a computer network[.]" Ind. Code § 7.1-5-11-1.5(a).

As noted, the statute contains an exception for wineries, located inside or outside of Indiana, that hold an Indiana Direct Wine Seller's Permit and thereby may, under certain (and equally applicable) conditions, ship wine directly to Indiana consumers. *See* Ind. Code §§ 7.1-5-11-1.5(a), 7.1-3-26 *et seq.* The condition at issue here requires Permit holders to conduct "an initial face-to-face transaction" with a consumer before shipping wine directly to that consumer. Ind. Code § 7.1-3-26-9(1)(A). At that initial face-to-face transaction, the Permit holder must collect "proof of age by a state issued driver's license or state issued identification card showing the consumer to be at least twenty-one (21) years of

age" and a "verified statement" that the consumer is 21-years old, is an Indiana resident, and intends the wine for personal use. Ind. Code § 7.1-3-26-6(4).

2. Indiana adopted the face-to-face rule as one means among many to deter underage drinking. The District Court, in fact, "accept[ed] at face value the State's worthy goal of protecting minors from the sale of alcohol. There is no need to rehash the numerous studies showing the harm to developmental growth, fatal accident rates, and other injuries resulting from the mix of minors and alcohol." Pet. App. 74a.

With regard to the sale of alcohol via the internet, a Federal Trade Commission report observed that "every state that has used a minor to do a sting has been able to buy." *Baude v. Heath*, No. 1:05-CV-00735-JDT-TAB, Docket No. 60, attach. 9 at 35 (S.D. Ind. May 18, 2005). This same report also notes that Michigan found that about one-third of the websites contacted agreed to sell alcohol to minors with "no more age verification than a mouse click," and that shippers did not properly complete age verification. *See id.* at 36. Moreover, a National Academy of Sciences report cited a survey finding that 10% of young people obtained alcohol over the internet or through home delivery, and forecasted that the increasing use of the internet may increase this percentage. *See Baude*, Docket No. 74, attach. 4 at 174. And, as attested by Alex Huskey, Superintendent of the Indiana Excise Police, requiring a direct, face-to-face transaction "is one effective barrier to youth access to alcohol." *Baude*, Docket No. 52, at ¶ 6.

3. The district court's acceptance of the State's rationale for the law notwithstanding, it invalidated the face-to-face requirement on the grounds that it would have a greater negative impact on out-of-state wineries than on in-state wineries, in violation of the Commerce Clause. Pet. App. 67a, 73a, 78a-79a. According to the district court, "the face-to-face requirement effectively requires the out-of-state wineries to establish a physical presence in the state or accept the greatly reduced sales that might result from the occasional traveler." Pet. App. 73a. Finding that the State failed to show that it could not achieve the valid goal of protecting Indiana's youth "through less discriminatory means," the district court held that the State did not meet its burden under the Commerce Clause. Pet. App. 78a.

The Seventh Circuit reversed, holding that even-handed rules such as the face-to-face requirement are not subject to strict Commerce Clause scrutiny and that Indiana's law easily passes muster under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Pet. App. 3a, 12a. The court ruled that Indiana's face-to-face requirement is not like the Michigan law invalidated in *Granholm* because it does not "discriminate[] explicitly [and] applies to every winery, no matter where it is located." *Id.* at 2a-3a.

Furthermore, the court observed that the principal impact of the face-to-face requirement may be on competition between larger and smaller wineries of *any* state (including Indiana) because the former but not the latter tend to have wholesale

distributors. *Id.* at 12a. Even so, "[f]avoritism for large wineries over small wineries does not pose a constitutional problem, and the fact that all Indiana wineries are small does more to show that this law's disparate impact cuts *against* in-state product than to show that Indiana has fenced out wine from other jurisdictions." *Id.* Consequently, the State's "legitimate" and "powerful" interest in keeping alcohol out of the hands of minors is sufficient to justify the face-to-face requirement under the *Pike* balancing test. *Id.* at 3a, 9a.

REASONS FOR DENYING THE PETITION

I. No Definitive Conflict With The Sixth Circuit Justifies Review

Petitioners claim review is justified because, while the decision below upheld a statute that "require[s] consumers to appear in person at an out-of-state winery before the winery may sell and ship wine to them," Pet. 6, the Sixth Circuit invalidated such a statute in *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008). There is indeed undeniable tension between the Seventh Circuit's analysis in this case and the Sixth Circuit's analysis in *Cherry Hill*. The Sixth Circuit held that a facially neutral statute making it more difficult for Kentucky residents to receive direct shipment from out-of-state wineries is subject to strict scrutiny because of the likelihood of discriminatory impact. *Id.* at 432-34. The Seventh Circuit, on the other hand, held that a facially neutral statute making it more difficult for Indiana citizens to receive direct shipment from out-of-state wineries is subject only to balancing under

Pike v. Bruce Church, Inc., 397 U.S. 137 (1990), at least where there is no proof (or even theoretical likelihood) of discriminatory impact. Pet. App. 3a, 12a.

However, while it is literally accurate to say that the Indiana and Kentucky statutes both "require consumers to appear in person at an out-of-state winery before the winery may sell and ship wine to them," Pet. 6, that assertion carefully ignores a big difference between the two regulatory schemes. As is apparent from the side-by-side quotation of statutory text in footnote 4 of the Petition, whereas Indiana requires only *one* face-to-face transaction as a prerequisite to temporally unlimited direct shipping for future purchases, Kentucky requires that *each* purchase be made face-to-face in order to qualify for direct shipping. *Compare* Ind. Code § 7.1-3-26-6 (a winery "may sell and ship wine directly only to a consumer who . . . has [made] *one (1) initial* face-to-face transaction at the seller's place of business") (emphasis added) *with* Ky. Rev. Stat. 243.155(2) (a winery may "sell . . . wine [and] ship to a customer [only] if the wine is purchased by the customer in person at the . . . winery.").

This difference means Indiana accommodates to a far greater degree its consumers' interests in purchasing alcohol from all wineries, including those in Michigan and Napa Valley. That is, while a resident of, say, Owensboro, Kentucky must travel to Traverse City or Napa Valley (or even Lexington or Louisville) to complete the transaction for each direct shipment from a particular winery, a resident of, say, Ogden Dunes, Indiana need make that trip

(or to a winery in Bloomington) only once to receive direct shipments from the winery indefinitely.

For purposes of analyzing whether a circuit conflict exists, this distinction undermines the suggestion that this case would have come out differently in the Sixth Circuit. In *Cherry Hill*, the court expressly focused on the seemingly needless repetitive burdens the Kentucky law imposed on consumer purchases of wine from other states. *See* 553 F.3d at 433 ("Under Kentucky's in-person requirement, even if a winery has established a relationship with an individual consumer or a restaurant and has verified their age and shipping address, the customer must travel to the winery each time he or she wishes to execute a purchase."). Since Indiana's law does take heed of such established relationships, it is demonstrably less burdensome on the same set of transactions, and a significant question exists as to whether the Sixth Circuit would have viewed Indiana's law more favorably under the Commerce Clause. That is, the result in *Cherry Hill* is entirely consistent with upholding a wine distribution law requiring only *one* face-to-face sale as opposed to repeated such transactions.

Accordingly, no hard-and-fast circuit conflict justifying certiorari exists. This is not a situation where Indiana is entitled to impose a particular regulation, but an adjacent state in another circuit is not. The Indiana and Kentucky schemes differ markedly in ways peculiarly relevant to the Sixth Circuit's analysis. Perhaps if Kentucky were to adopt a single face-to-face transaction rule, that

regulation would pass muster in the Sixth Circuit as well as in the Seventh Circuit.

In fact, *Cherry Hill* notwithstanding, the Sixth Circuit has already issued an opinion upholding a state law restricting direct shipment of wine, concluding in *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008), that Tennessee's ban on *all* direct shipment of wine to consumers is constitutional because it applies equally to in-state and out-of-state wineries. *Bredesen* at best keeps the door open for a single face-to-face transaction law and at worst cannot be squared with *Cherry Hill*. That is, the *Bredesen/Cherry Hill* combination either suggests that the Sixth Circuit takes a highly fact-sensitive, case-by-case approach to Commerce Clause review of wine distribution laws, in which case it might well find the Indiana approach acceptable, or else it constitutes an intra-circuit conflict that this Court should leave for later en banc circuit resolution.

II. The Decision Below Correctly Applied The Court's Precedents To Hold That States Need Not Neutralize Geographic Market Barriers

In upholding the Indiana face-to-face requirement, the Seventh Circuit properly and straightforwardly implemented the Court's Commerce Clause precedents. While the Commerce Clause precludes states from discriminating against interstate commerce, it does not require states to neutralize geographic barriers to its markets or otherwise enable businesses to have the cheapest or easiest access possible to its consumers.

1. Petitioners argue that the Seventh Circuit should have subjected the Indiana law to strict scrutiny because the practical effect of the face-to-face requirement is that it "raises the cost of most interstate transactions to a prohibitive level." Pet. 5. Even if this proposition is true, it is only because the natural geographic distance between in-demand wineries and Indiana consumers imposes costs of its own. The Court has made it plain that States are not required to ensure that out-of-state producers have the same economic opportunities to reach their residents as in-state producers. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978) ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.").

Petitioners rely on *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), for the proposition that strict scrutiny applies to a facially neutral state regulation that has a disproportionate negative impact on interstate transactions resulting in a benefit to intrastate "economic interests." *Hunt*, however, is not nearly that broad. First, *Hunt* does not forbid a State from enacting, absent compelling interests, business regulations that happen to hit foreign firms harder as a function of natural barriers to that State's consumers. Rather, it is essentially the mirror image of *Exxon*. Whereas *Exxon* says that States need not *neutralize* non-regulatory market barriers impeding foreign businesses, *Hunt* says States may not *target*, through facially neutral laws, competitive

advantages wielded by businesses in other states (in that case the superior grade of Washington apples). *Id.* at 351. Indiana's face-to-face law plainly does not target the superior qualities of Napa Valley or Michigan wine, so it does not create the sort of discriminatory effect that triggered strict scrutiny in *Hunt*.

Second, *Hunt* red-flags laws that burden foreign-state businesses in ways that directly redound to the benefit of in-state *competitors*, not in-state "economic interests" generally. *Id.* at 352. In that case, without the Washington apple grades to guide them, North Carolina consumers might just as readily purchase in-state apples as any other. *Id.* Here, however, there is no reason to suppose that Indiana consumers stymied by the face-to-face law from purchasing a favorite Napa Valley or Michigan wine will turn instead to Indiana wineries to satisfy their demand. It is far more likely that they will instead purchase some other wine produced in another state (or country) from their local grocery store. And while this may benefit larger wineries in all states that have better access to wholesalers, that is not protectionism precluded by the Commerce Clause.

This Court's rulings have demanded, moreover, that in disparate impact cases, "[t]he burden to show discrimination rests on the party challenging the validity of the statute[.]" *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Here Petitioners introduced no evidence proving that the face-to-face requirement benefits Indiana wineries at the expense of foreign-state wineries. Nor have the consumer-plaintiffs in this case even "contend[ed] that Indiana's law has

led [them] to buy more wine from Indiana and less from other states." Pet. App. 12a

In fact, *amicus curiae* the Indiana Winegrowers Guild opposes the face-to-face provision not because the law is protectionist but because it burdens its members as well. Indiana Winegrowers Guild *Amicus* Br. 5. As the Seventh Circuit observed, "if what the Guild says is true, then the statute although bad economically for Indiana's wineries must be sustained against a challenge under the commerce clause." Pet. App. 12a.

The Court in *Granholm* observed that "[t]ime and again" it "has held that . . . state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (internal citation omitted). Here, there is no proof that the face-to-face requirement provides any advantages for in-state wineries, so there is no violation of the Commerce Clause.

2. Petitioners also argue that the Seventh Circuit's Commerce Clause doctrine is so in conflict with other circuits that an "intolerable situation" has been created. Pet. 15. A glance at the cited cases, *id.* at n. 13, shows that this "situation" has been grossly overstated and does not justify review under the Court's supervisory power.

First, two of the supposedly conflicting cases actually upheld wine shipment laws *more* restrictive than Indiana's law. *See Jelovsek v. Bredesen*, 545

F.3d 431, 436 (6th Cir 2008) (upholding Tennessee's ban on direct shipment of alcoholic beverages, including wine, to consumers, as it applied equally to in-state and out-of-state wineries); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 39 (1st Cir. 2007) (upholding Maine law outlawing all direct shipping of wine). Those cases certainly pose no conflict with the decision below.

Second, as in this case, the plaintiffs in many of the other cited cases were unable to prove that the laws in question had an unconstitutionally negative effect on interstate commerce. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 49 (2d Cir. 2007) (upholding law restricting local ferry terminal use because it "does not give any advantage to local businesses at the expense of out-of-state competitors" as demonstrated by "the fact that even local businesses operating within the Town itself challenge the validity of this law"); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007) (finding no discrimination when "[n]either in-state nor out-of-state insurers may acquire a body shop and the statute raises no barriers whatsoever to out-of-state body shops entering the Texas market so long as they are not owned by insurance companies"); *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 469-71 (9th Cir. 2001) (affirming requirement that city contractors provide employees domestic partner benefits because the rule applied only to employees "that have direct contact with the City" and because the plaintiff did not prove "practical effect" of interstate commerce discrimination); *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1254 (10th Cir. 2000)

(declaring valid a professional licensing requirement that applies equally to firms headquartered in any state notwithstanding plaintiff-licensee's multi-state presence).

In fact, of the nine cases cited by Petitioner, only three declared a statute invalid, and in two of those the statute was inherently discriminatory (as in *Hunt*) and not simply the cause of a disparate impact on out-of-state firms. *See Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Marketing Bd.*, 298 F.3d 201, 213, 219 (3d Cir. 2002) (invalidating Pennsylvania's facially neutral wholesale milk price floors that effectively negated price advantages of out-of-state dealers who, unlike Pennsylvania dealers, could purchase raw milk at rates below Pennsylvania's minimum producer prices); *Jones v. Gale*, 470 F.3d 1261, 1267-68 (8th Cir. 2006) (rejecting, as necessarily favoring Nebraska residents, a prohibition against corporate farming that exempted family-farm corporations where at least one family member resides or works on the farm). And in the third, *Yamaha Motor Corporation, U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 573 (4th Cir. 2005), the court applied *Pike* balancing, not strict scrutiny, to declare invalid a franchise-protest law that effectively barred new entrants from any state from the Virginia market.

Further underscoring its consistency with other circuits, in this very case the Seventh Circuit rejected a law much like the facially neutral, but practically discriminatory, laws invalidated in *Hunt*, *Cloverland-Green Spring Dairies*, and *Jones*. Here, an Indiana law (which the State did not defend in

the Seventh Circuit) provided that a winery may only ship to consumers if it "does not hold a permit or license to wholesale alcoholic beverages issued by any authority" and is not owned by an entity that holds such a permit. *See* Ind. Code § 7.1-3-26-7(a)(6). Because wineries in California, Oregon and Washington, but not Indiana, may sell directly to retailers, the Indiana wholesaler-disqualification law inherently "forbids interstate shipments direct to Indiana's consumers, while allowing intrastate shipments." Pet. App. 4a. This holding of the decision below conclusively demonstrates that the Seventh Circuit's application of Commerce Clause doctrine remains consonant with other circuits when it comes to facially neutral, but practically discriminatory, business regulations.

* * *

The Seventh Circuit's refusal to invalidate the Indiana single face-to-face transaction requirement does not conflict with the cases from this Court or from other circuits. In fact, it seems likely that the result of each case cited by Petitioners—and certainly the level of scrutiny applied in each case—would have been the same in the Seventh Circuit, so there is no "intolerable situation" in need of review.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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