No. 08-

IN THE

Supreme Court of the United States

PATRICK L. BAUDE, *et al.*,

Petitioners,

v.

DAVID L. HEATH,
Chairman of the Indiana Alcohol & Tobacco Commission,
and WINE & SPIRITS WHOLESALERS OF INDIANA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT D. EPSTEIN
EPSTEIN COHEN DONAHOE
& MENDES
50 S. Meridian Street
Suite 505
Indianapolis IN 46204
(317) 639-1326

JAMES A. TANFORD
Counsel of Record
INDIANA UNIV. MAURER
SCHOOL OF LAW*
211 S. Indiana Avenue
Bloomington, IN 47405
(812) 855-4846

Counsel for Petitioners

* *For associational purposes only*

220862

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

OPINIONS BELOW

This petition seeks review of the opinion of the United State Court of Appeals for the Seventh Circuit in Nos. 07-3323 and 07-3338. The opinion is reported at 538 F.3d 608 (7th Cir. 2008). The opinion of the United States District Court for the Southern District of Indiana in 1:05-cv-0735 is unreported, but appears at 2007 U.S. Dist. Lexis 64444 and 2007 WL 2479587 (S.D. Ind. Aug. 29, 2007).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 7, 2008. Rehearing *en banc* was denied on September 10, 2008. A motion to extend the time within which to file a petition for certiorari was granted by Justice Stevens on November 18, 2008, and the time was extended to and including February 7, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1) to hear this case by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The Commerce Clause, U.S. Const., Art. I, § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

B. The 21st Amendment, U.S. Const., Amend. XXI, § 2: "The transportation or importation into any State, Territory, or possession of the United States for delivery

or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

C. Indiana Code §§ 7.1-3-26-5, 7.1-3-26-6, 7.1-3-26-7 and 7.1-3-26-9: Reprinted in Appendix, 97a-103a.

STATEMENT OF THE CASE

This case challenges the constitutionality of a provision in Indiana's wine-distribution law that requires an Indiana resident to travel to a winery and make a face-to-face appearance as a precondition to buying wine directly from that winery and having it shipped home. Petitioners complain that the high cost of undertaking such journeys to out-of-state wineries, most of which are located over 2000 miles away on the west coast, effectively forecloses Indiana consumers from buying wine directly from most out-of-state wineries. Instead, consumers must buy their wine from Indiana wineries or retailers. Thus, this provision has the effect of discriminating against interstate commerce and providing economic protection to in-state businesses.

This case arose in the wake of *Granholm v. Heald*, 544 U.S. 460 (2005), in which this Court declared unconstitutional a Michigan law that gave preferential treatment to in-state wineries by allowing them to sell directly to consumers while prohibiting out-of-state wineries from doing so. In the same opinion, the Court struck down a New York law that did not explicitly ban out-of-state wineries from making direct sales, but rather imposed discriminatory terms and conditions on their doing so that made direct sales infeasible as a

practical matter. The Court cited a long line of Supreme Court precedent that discrimination can be established either on the face of a statute or in its practical effect. It made clear that the 21st Amendment does not authorize a state to discriminate against out-of-state wineries.

After the *Granholm* decision, Indiana rewrote its law. Where formerly it had banned all direct sales by out-of-state wineries, it now enacted a facially neutral law that allowed any winery to sell and ship directly to consumers, but only if the consumer first traveled to that winery to make a face-to-face appearance.[1] However, the undisputed evidence introduced in the district court shows that as a practical matter, the result is the same. There are more than 6000 wine producers in the United States, 3600 of which are located in California, Oregon and Washington.[2] These west coast wineries account for 93% of all wine produced in this country.[3] That means most of the wine that consumers

1. The law also required the winery to obtain a permit, but limited the issuance of such permits to out-of-state wineries that did not have wholesale rights in any state. Because many states grant their local wineries limited wholesale rights, this provision would have precluded most out-of-state wineries from making any direct sales even if the consumer appeared in person. The Seventh Circuit struck this provision as unconstitutional under the Commerce Clause, App. 3a-5a, so it is not involved in this petition.

2. Http://www.ttb.gov/wine/wine_producers.shtml (last visited 1/09/2009).

3. Http://www.ttb.gov/statistics/alcohol_stats.shtml (last visited 1/09/2009). This statistic was judicially noticed in the district court. App. 32a.

would like to buy comes from the west coast, and plaintiffs testified that they cannot afford the time and expense of traveling there to make the necessary face-to-face appearances, and consequently must buy their wine from Indiana sellers. Out-of-state winemakers are losing business to in-state retailers and wineries, which are they only ones consumers can realistically afford to visit. The facts are summarized by the District Court at App. 56a-58a, 68a-71a, 73a-77a.

The question presented is whether a state may accomplish indirectly that which it is constitutionally forbidden to do directly. Indiana could not, consistent with the Commerce Clause, explicitly impose higher costs on interstate wine sales than in-state sales. *See Bacchus Imports Ltd. v. Dias*, 486 U.S. 263, 276 (1984) (law imposing higher tax on imported than locally made alcohol struck down). Could it do so indirectly through the seemingly innocuous face-to-face appearance rule?

Petitioners brought this action in the Southern District of Indiana pursuant to 42 U.S.C. § 1983 to resolve this question. They sought a declaratory judgment that the in-person appearance rule violated the nondiscrimination principles of the Commerce Clause by making the cost of interstate wine sales many times more expensive than the cost of in-state purchases. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), which confer original jurisdiction on federal district courts to hear suits alleging the violation of rights and privileges under the United States Constitution.

On cross-motions for summary judgment, the district court concluded that the disparate cost to purchasers of appearing in person at in-state and out-of-state wineries had a clear discriminatory effect The court cited several Supreme Court cases, including *Granholm*, for the principle that discrimination and protectionism are questions of "practical effects rather than stated intents," App. 46a, and that increasing the cost and expense of interstate transactions compared to in-state transaction was such a discriminatory effect. App. 69a-71a. The court held that although the statute applies on its face to both in-state and out-of-state wineries, the practical effect is different because it raises the cost of most interstate transactions to a prohibitive level. *Id.* The court then declared the rule unconstitutional because the state had failed to carry its burden of demonstrating that there were no reasonable nondiscriminatory alternatives that would advance its interest in preventing the sale of alcohol to minors. App. 73a-74a.

The court of appeals reversed. It held that the statute containing the face-to-face requirement was not discriminatory because it applied on its face to sales and shipments by every winery, whether in-state or out-of-state. The panel ruled that since the statute did not discriminate explicitly, it was not subject to heightened scrutiny but was only required to pass muster under the minimal scrutiny balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). App. 2a-3a. It upheld the law because plaintiffs had not proved that the burden imposed on interstate commerce was clearly excessive in relation to the putative local benefits. App. 5a-9a. In reaching its decision, the panel chose not

to analyze whether the face-to-face requirement had a discriminatory effect, nor did it acknowledge that this Court has consistently held that discrimination and protectionism are primarily questions of the practical effect of a law. App. 2a-3a ("unnecessary for us to rehearse the standards"). The panel's decision is in conflict with the result in *Cherry Hill Vineyards LLC v. Lilly*, __ F.3d __, 2008 WL 5396257 (6th Cir. 2008), which struck down a similar face-to-face rule in Kentucky, and with the prior decisions of this Court that discrimination is primarily a question of effect.

REASONS FOR GRANTING THE PETITION

1. The Seventh Circuit has decided an important Commerce Clause question in a way that conflicts with a recent decision from the Sixth Circuit.

Both the Sixth and Seventh Circuits have recently considered the constitutionality of state statutes that require consumers to appear in person at an out-of-state winery before the winery may sell and ship wine to them.[4] They have arrived at different answers. The Sixth Circuit in *Cherry Hill Vineyards, LLC v. Lilly*, declared that Kentucky's requirement violated the Commerce Clause because the cost of traveling to out-of-state wineries to appear in person was so high that it

4. Ind. Code § 7.1-3-26-6 (a winery "may sell and ship wine directly only to a consumer who . . . has [made] one initial face-to-face transaction at the seller's place of business.") (App. 97a-98a); Ky. Rev. Stat. 243.155(2) (winery may "sell . . . wine [and] ship to a customer [only] if the wine is purchased by the customer in person at the . . . winery.")

"makes it economically and logistically infeasible for most consumers to purchase wine from out-of-state small farm wineries," 2008 WL 5396257 at *8, and "that the challenged statutes discriminate against interstate commerce in practical effect." *Id.*. By contrast, the Seventh Circuit in the present case held that Indiana's in-person appearance rule did not violate the Commerce Clause because it applied on its face to both in-state and out-of-state wineries alike. App. 12a.

There is no dispute about the issue involved. Both Indiana and Kentucky used to have laws that explicitly prohibited consumers from buying wine directly from out-of-state wineries and having it shipped to their homes.[5] Wine had to go through the state's three-tier system, where it was distributed by an in-state wholesaler and sold by an in-state retailer. Each state also had an exception for its own in-state wineries, allowing them to bypass the expensive three-tier system and sell their wine directly to consumers. This Court declared schemes like these unconstitutional in *Granholm v. Heald*, because they discriminated against interstate commerce and gave local wineries preferential access to the market. 544 U.S. at 466. In the wake of *Granholm*, both Indiana and Kentucky passed new laws that purport to eliminate the discrimination — in-state and out-of-state wineries alike may bypass the three-tier system and ship directly to consumers, as long as the consumer first appears in person at the winery. However, the evidence shows that the cost of traveling to out-of-state wineries is prohibitive. Ninety-three

5. See former Ky. Rev. Stat. §§ 243.155, 243.156 (2006); former Ind. Code § 7.1-5-11-1.5 (2005).

percent of American wine is produced on the west coast, and consumers cannot afford to travel 2000 miles to appear at hundreds of wineries. The effect of these new laws, then, is the same as the old — out-of-state wineries are prevented from selling wine directly to consumers and must use the three-tier system, while in-state wineries may bypass that system and sell directly. The only difference is that the new laws make it economically rather than legally impossible. Both appellate courts faced the same question — may a state accomplish indirectly that which they are constitutionally forbidden to do directly?

This Court suggested in *Granholm* that they could not. It said that if states allowed in-state wineries to sell and ship directly to consumers, it was unconstitutional not only to explicitly "prohibit out-of-state wineries from doing so," but also "to make direct sales impractical from an economic standpoint." 544 U.S. at 466. The Court struck down a New York law that required wineries to establish a physical presence in the state in order to gain the privilege of direct sales, holding that this "is just an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system," 544 U.S. at 474, because "[f]or most wineries, the expense of establishing a bricks-and-mortar distribution operation in 1 State, let alone all 50, is prohibitive." 544 U.S. at 475. This Court has consistently said that a statute violates the Commerce Clause either when it "directly . . . discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Dist. Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). But *Granholm* ultimately left

open the question of the constitutionality of a state law that made direct sales by out-of-state wineries economically infeasible, because the New York law also discriminated on its face. 544 U.S. at 475.[6]

The Sixth Circuit read *Granholm* broadly as extending all of this Court's nondiscrimination principles to interstate commerce in wine. It therefore looked at whether the face-to-face rule had the practical effect of making it harder and more expensive to buy wine from out-of-state wineries than local ones. It concluded that the cost of traveling thousands of miles impermissibly made such direct sales "economically and logistically infeasible," 2008 WL 5396257 at *8, and declared that, since other methods of verifying age were available, the rule was invalid under the heightened scrutiny given to discriminatory regulations. *Id.* at *9.

The Seventh Circuit read *Granholm* narrowly as only extending part of the nondiscrimination principles to wine. Only if a statute discriminated on its face would it be subject to heightened scrutiny. The panel concluded that since the face-to-face law does not "discriminate[] explicitly [and] applies to every winery, no matter where it is located," *Granholm's* heightened scrutiny analysis did not apply. App. 3a. The fact that "the rules impose higher costs on interstate commerce as a practical matter," *id.*, would be subject only to minimal scrutiny under which laws "will be upheld unless

6. The Court noted that "New York discriminates against out-of-state wineries in other ways," primarily that they "are still ineligible for a 'farm winery' license, the license that provides the most direct means of shipping to New York consumers." 544 U.S. at 475.

the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*[7] The Seventh Circuit ruled that cost disparity "is not enough to declare a law unconstitutional" App. 11a.

This issue extends beyond Indiana and Kentucky. There are 6000 domestic wineries, many of whom lack national distribution through the three-tier system and depend for their survival on direct sales.[8] At least ten other states have laws deterring direct sales by requiring consumers to appear in person at an out-of-state winery before they may buy wine.[9] Lawsuits have been filed challenging five of these state schemes as having discriminatory effects, including two that have appeals immediately pending in the Third and Ninth Circuits.[10] Although this Court has repeatedly stated

---

7. Citing *Pike v, Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

8. See James Alexander Tanford, *E-Commerce in Wine*, 3 J. LAW, ECON. & POLICY 275, 303-05 (2007) (summarizing the wine sales market).

9. Ariz. Rev. Stat. 4-205.04(c); Ark. Code § 3-5-1602(c); Del. Code, tit. 4, § 512A(b); Ga. Code § 3-6-32(a)(1); Kan. Stat. § 41-348(e); Maine Rev. Stat., tit. 28-A, § 1355(3); N.J. Stat. Ann. 33:1-10(2a-2b); Gen. L. R.I. § 3-4-8; S.D. Cod. L. § 35-12-5; Tenn. Code Ann. § 57-3-207(f)(1).

10. Three cases are still active: *Black Star Farms, LLC v. Oliver*, 2:05cv02620 (D. Ariz.), *appeal pending* (No. 08-15738, 9th Cir.); *Freeman v. Fischer*, 03cv03140 (D.N.J.), *appeal pending* (No.08-3302, 3d Cir.); *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008), *remanded to district court and pending* (No. 2:05-cv-181, E.D. Tenn.). Two cases have been concluded: *Cherry Hill Vineyards v. Baldacci*, 505 F.3d 28 (1st Cir. 2007); *Hurley v. Cordrey*, 1:05-cv-826 (D. Del.).

that discrimination under the Commerce Clause is established either by the terms of a statute or by its disparate effect, it has not actually heard a disparate impact case since *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). The lower federal courts need this Court to answer the question left open by *Granholm* — whether, in the context of alcohol regulation, states can accomplish indirectly that which they cannot do directly — give their in-state wineries preferential access to the consumer market.

2. The Seventh Circuit's decision so significantly departs from this Court's prior Commerce Clause rulings that it would call for an exercise of this Court's supervisory power even if no Circuit split existed.

When a statute is reviewed under the Commerce Clause, it is central to the resolution of the case that the correct level of scrutiny be applied, because the level of scrutiny often dictates the result. If the court applies heightened scrutiny, it is the State that bears the heavy burden of justification, and courts "have generally struck down the statute without further inquiry." *Granholm v. Heald*, 544 U.S. at 487. If minimal scrutiny applies, the plaintiffs must prove that the burden on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. State laws regularly pass this test, *Dept. of Revenue of Ky. v. Davis*, 128 S.Ct. 1801, 1808-09 (2008), because the courts generally defer to the legislature when balancing of values is involved. *See Id.* at 1821 (Scalia, J., concurring in part).

This Court has been clear and consistent for more than 60 years. Heightened scrutiny is given to state laws in two situations: (1) "When a state statute directly . . . discriminates against interstate commerce," and (2) "when its effect is to favor in-state economic interests over out-of-state interests." *Granholm*, 544 U.S. at 487; *Brown-Forman Distillers Corp. v. N.Y. State Liq. Auth.*, 476 U.S. at 579. A statute that places an out-of-state business at a commercial disadvantage compared to in-state businesses will be strictly scrutinized, whether that disadvantage is explicitly imposed by the terms of a statute or arises from the statute's practical effect. For example, in *Hunt v. Washington State Apple Advertising Comm'n*, this Court struck down a North Carolina law that prohibited apple shipping containers from bearing any grade other than the federal standard. Although the law applied on its face to both local and out-of-state apples, this Court ruled that it had the practical effect of discriminating against the Washington apple industry by "raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected," 432 U.S. at 351, "stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system," *id.*, and depriving Washington sellers of the "distinct market advantage vis-a-vis local producers" they would normally enjoy "in those categories where the Washington grade is superior." *Id.* at 352. Thus, the statute "offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to

prohibit." *Id.*[11] "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.* at 353.

In its opinion below, the Seventh Circuit refused to follow this type of analysis. It held that heightened scrutiny applies only when a state law discriminates on its face and not when it has a discriminatory effect, so the state was not required to justify the in-person appearance rule.

> A state law that discriminates explicitly ("on its face," lawyers are fond of saying) is almost always invalid under the Supreme Court's commerce jurisprudence, which the

11. *See also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201-02 (1994) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 (1940)) ("The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack . . . will in its practical operation work discrimination against interstate commerce"); *Assoc. Indus. of Missouri v. Lohman*, 511 U.S. 641, 654 (1994) ("we repeatedly have focused our Commerce Clause analysis on whether a challenged scheme is discriminatory in 'effect' . . . measured in dollars and cents"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose . . . or discriminatory effect"); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) ("we must inquire . . . whether the challenged statute . . . discriminates against interstate commerce either on its face or in practical effect").

> Justices recapped this spring in *Department of Revenue of Kentucky v. Davis*, __ U.S. __, 128 S.Ct. 1801, 1808-11, 170 L.Ed.2d 685 (2008). (That recent decision makes it unnecessary for us to rehearse the standards.) Plaintiffs, oenophiles who want easier access to wine from small vineyards in other states, do not contend that either of the two challenged provisions discriminates in terms. Every rule applies to every winery, no matter where it is located. The argument instead is that the rules impose higher costs on interstate commerce as a practical matter.
>
> That brings into play the norm that, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). State laws regularly pass this test. . . .

App. 2a-3a. This decision is clearly at odds with the consistent opinions of this Court that discrimination is equally forbidden whether forthright or ingenious, *de jure* or *de facto*, explicit or as a matter of practical effect.

The panel's disregard for clear Supreme Court precedent could not have been an accident resulting from misunderstanding. The cases from this Court

concerning discriminatory effects were thoroughly briefed, see C.A. Brief of Plaintiffs-Appellees at 22-35, and formed the basis of the district court's ruling that the face-to-face requirement "[i]n practical effect . . . discriminates far more heavily against out-of-state wineries," App. 71a, and therefore triggered heightened scrutiny. App. 41a-47a. The Seventh Circuit does not cite, acknowledge or refer to any of this Court's cases.[12]

The Seventh Circuit has openly refused to follow this Court's Commerce Clause cases and the decisions of all other circuits.[13] If allowed to stand, it will create an intolerable situation in which the Seventh Circuit becomes the only Circuit where heightened scrutiny is not given to laws with discriminatory effects. This reason alone would call for an exercise of this Court's supervisory power to vacate the opinion even if no Circuit split existed.

---

12. Indeed, during oral argument, one member of the panel stated explicitly that "I don't care what the Supreme Court says." A transcript of the oral argument is available from petitioner's counsel.

13. *Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Marketing Bd.*, 298 F.3d 201, 210 (3d Cir. 2002) (statute invalid if it discriminates "either on its face or in practical effect"). *Accord Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 33 (1st Cir. 2007); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007); *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 48 (2d Cir. 2007); *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006); *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005); *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 466 (9th Cir. 2001); *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1254 (10th Cir. 2000).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES A. TANFORD
Counsel of Record
INDIANA UNIV. MAURER
SCHOOL OF LAW
211 S. Indiana Avenue
Bloomington, IN 47405
(812) 855-4846

ROBERT D. EPSTEIN
EPSTEIN COHEN DONAHOE
& MENDES
50 S. Meridian Street
Suite 505
Indianapolis IN 46204
(317) 639-1326

Counsel for Petitioners