No. 21-2068

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHICAGO WINE COMPANY, et al.,
Plaintiffs-Appellants,

v.

ERIC HOLCOMB, et al.,
Defendants-Appellees,

and

WINE & SPIRITS DISTRIBUTORS OF INDIANA,
Intervening Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division,
No. 1:19-cv-2785-TWP-MG,
The Honorable Tanya Walton Pratt, Chief Judge.

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JURISDICTIONAL STATEMENT

The jurisdictional statement in the appellants' brief is not complete and correct. Plaintiffs sued the Indiana governor and attorney general, along with the chair of the Indiana Alcohol and Tobacco Commission, under 42 U.S.C. §1983, alleging that several Indiana alcoholic beverage laws violate both the dormant Commerce Clause and the Privileges and Immunities Clause. R.7 at 3–9. They sought injunctive relief barring the State from enforcing its laws forbidding out-of-state retailers to ship wine directly to Indiana consumers via common carrier. R.7 at 9–10. The district court had subject-matter jurisdiction under 28 U.S.C. §§1331 and 1343 because Plaintiffs alleged violations of their federal civil rights.

On March 30, 2021, the district court granted summary judgment to the State and to the intervenor-defendant, Wine & Spirits Distributors of Indiana, on Plaintiffs' commerce-claus claim. R.81. Plaintiffs later voluntarily dismissed their privileges-and-immunities claim, but neither the motion nor the court's acknowledgment of the dismissal indicate whether the dismissal was with or without prejudice, R.91; R.93; R.94, so by rule the dismissal was without prejudice, *see* Fed. R. Civ. P. 41(a). Then, on May 19, 2021, the district court entered final judgment. R.94; *see* Fed. R. Civ. P. 58. Plaintiffs filed their notice of appeal on June 9, 2021. R.95.

As explained in Part I of the argument, this Court lacks appellate jurisdiction because although the district court purported to enter final judgment, Plaintiffs have attempted to manufacture appellate jurisdiction by dismissing their privileges-and-immunities claim without prejudice. Because that claim is revivable, the judgment

is not final as to all issues, so this Court does not have jurisdiction under 28 U.S.C. §1291.

INTRODUCTION

Like most States, Indiana controls the distribution and consumption of wine through a comprehensive three-tier system. Under that system, licensed producers sell to licensed wholesalers, wholesalers sell to licensed retailers, and retailers in turn sell to consumers. With a limited exception for farm wineries—both in-state and out-of-state—all wine sold to Hoosiers must pass through this three-tier system.

Indiana law funnels wine through the three-tier system by requiring all retailers to sell wine purchased from Indiana-licensed wholesalers. To implement this general rule, Indiana's Importation Statute forbids selling and shipping wine and other alcoholic beverages to consumers; alcohol can be sold and shipped into Indiana only through a licensed wholesaler. Ind. Code §7.1-5-11-1.5(a). By requiring all wine to go through a wholesaler, the State is able, among other things, both to collect excise taxes to combat the societal costs of alcohol consumption and to protect consumers from unsafe or counterfeit products.

State law also imposes restrictions at the retail level to promote temperance, to curb underage drinking, and to ensure appropriate state oversight of the alcohol trade. For instance, Indiana law authorizes retail permits only for premises physically located in Indiana and sets quotas on the number of retail establishments that may operate in a locality, thereby limiting the amount of wine and other alcohol available for sale from retail outlets in any given locality. And as pertinent here,

Indiana law allows retailers to deliver alcohol to consumers but forbids them from shipping via common carriers. Specifically, under Indiana's Delivery Statute, the retail-license holder or a trained employee who holds a permit from the Indiana Alcohol and Tobacco Commission must perform the delivery, which allows the retailer to verify the purchaser's age and to avoid overserving already-intoxicated individuals or habitual drunkards. Ind. Code §7.1-3-15-3(d).

Plaintiffs are an Illinois wine retailer and several Indiana oenophiles who believe that any out-of-state wine retailer should be able to ship wine to Hoosiers via common carrier, bypassing Indiana's three-tier system altogether. In their view, by allowing only wine retailers located in Indiana to deliver wine to Indiana consumers in compliance with the Delivery Statute, the Importation Statute and the Delivery Statute both violate the dormant Commerce Clause and are not saved by the Twenty-first Amendment. Plaintiffs also alleged that this statutory regime violates the Privileges and Immunities Clause, though they voluntarily dismissed that claim, ostensibly without prejudice.

The district court rejected Plaintiffs' dormant Commerce Clause challenges. Relying chiefly on this Court's decisions in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008), and *Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455 (7th Cir. 2012), the court concluded that the importation and face-to-face delivery requirements further legitimate Twenty-first Amendment interests. As a result, those requirements are valid even if they discriminate against or incidentally burden interstate commerce.

STATEMENT OF THE ISSUES

I. Whether this Court lacks appellate jurisdiction because Plaintiffs dismissed their Privileges and Immunities Clause claim without prejudice.

II. Whether the Commerce Clause and the Twenty-first Amendment permit Indiana to prohibit out-of-state retailers who have no physical presence in Indiana to bypass Indiana's three-tier system and use a common carrier to ship wine directly to Indiana consumers.

STATEMENT OF THE CASE

I. Indiana Utilizes a Three-Tiered System to Control the Importation and Distribution of Wine and Other Alcoholic Beverages

Since the end of Prohibition, Indiana has utilized a traditional three-tier system for purposes of regulating the importation, distribution, and sale of alcoholic beverages. *Indiana Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371, 377 (Ind. 2017). Under the three-tier system, producers (first tier) may sell only to wholesalers (second tier), who may sell only to retailers (third tier), who may sell only to eligible consumers. *E.F. Transit, Inc. v. Cook*, 878 F.3d 606, 608 (7th Cir. 2018). With the limited exception for farm wineries,[1] all wine sold to consumers in

[1] Farm wineries can, up to certain limits, ship their own products directly to consumers, bypassing both the wholesaler and retailer tiers. R.63-1 at 5–6 (¶10(c)). This exception to the three-tier system applies equally to both in-state and out-of-state farm wineries. Ind. Code §7.1-3-26-5. Additionally, farm wineries that sold less than fifteen thousand (15,000) gallons in Indiana the prior year can, up to certain limits, sell and deliver their own product direct to retailers if they do not also distribute their product through a wholesaler. Ind. Code §7.1-3-12-5(a)(14).

Indiana must pass through this three-tier system. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000); Ind. Code §§7.1-5-11-1.5, 7.1-4-4-3, 7.1-3-15-3, 7.1-3-13-3.

This three-tier system, which the United States Supreme Court has declared "unquestionably legitimate," *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion)), is the fundamental way that Indiana controls the flow and taxation of alcohol. The Indiana legislature has deemed this system critical to protecting "the economic welfare, health, peace, and morals" of the people of Indiana; to promoting temperance and avoiding bootlegging by regulating and limiting "the manufacture, sale, possession, and use of alcohol and alcoholic beverages"; and to raising revenue. Ind. Code §7.1-1-1-1. The classifications and distinctions throughout the alcoholic-beverage laws and within the three-tier system "are actually and substantially related to the accomplishment of the purposes" of Indiana's alcoholic-beverage laws. Ind. Code §7.1-1-2-1.

Indiana's three-tier system serves multiple public health and safety interests. State-law requirements at the manufacturing tier protect Indiana citizens from unsafe or counterfeit products. Alcohol that enters Indiana's distribution chain must originate with a business regulated and licensed by the Tax and Trade Bureau of the U.S. Treasury Department. R.63-1 at 3 (¶8(a)). The Alcohol and Tobacco Commission relies on that federal oversight to ensure that products have approved formulas and labeling. *Id.* at 4 (¶8(c)). All out-of-state manufacturers, wholesalers, and importers

that intend to introduce products into the Indiana supply chain must register with the Commission as a primary source and provide proof of a federal permit from the Tax and Trade Bureau. *Id.* at 4 (¶8(d)). And in-state manufacturers must obtain a manufacturing permit from the Commission and provide proof of licensure with the Bureau. *Id.* at 5 (¶10(b)).

Likewise, regulation at the wholesale tier serves multiple, vital public health and safety interests. The wholesale tier is critical to the three-tier system and to regulation of the Indiana alcoholic-beverage industry generally. Situated between the production and retail tiers, this middle tier is the gatekeeper for virtually all alcohol importation and distribution within Indiana. It consolidates and warehouses alcoholic beverages from around the world. R.63-2 at 12 (¶20). And it is the only tier that interacts directly with the other two tiers—licensed wholesalers buy directly from producers and sell directly to retailers. Moreover, retailers selling wine to Indiana consumers may only purchase product from Indiana wholesalers. *See* Ind. Code §§7.1-3-15-3, 7.1-3-13-3.

The wholesaler tier ensures that alcohol is properly imported into Indiana and is properly distributed within Indiana to licensed dealer and retailer outlets. Because wholesalers may receive products only from registered primary sources, because suppliers and manufacturers must list the wholesalers to whom they sell alcoholic beverages, and because retailers must purchase from Indiana wholesalers, the wholesale tier ensures that only legitimate products are sold and that unsafe

and counterfeit products can quickly be detected at the wholesale level and addressed with inspections, investigations, and recalls. R.63-2 at 16–17. Wholesalers are also responsible for collecting excise taxes, *see* Ind. Code §§7.1-4-2-2, 7.1-4-3-2, which are used by the State to offset (albeit only partially) the societal costs of alcohol consumption. R.63-1 at 2 (¶5); R.63-2 at 17–18. Excise taxes also promote temperance—thereby decreasing social costs—by driving up the price of alcohol; indeed, a meta-analysis of the available literature shows that the mean negative price elasticity for alcoholic beverages is -0.5, which means that a 10% increase in price results in a 5% reduction in consumption. R. 63-2 at 17–19.

State regulation at the retail level similarly serves multiple public health and safety goals. Although the retail tier plays no role in the collection of excise taxes, it plays a critical role in promoting temperance. The physical-presence requirement authorizes retail permits only for premises physically located in Indiana, and capitalizing on this physical-presence requirement, Indiana law further imposes quota limitations on the availability of alcohol and on retailer permits in any given locality.[2] *See* Ind. Code §§7.1-3-22-4, 7.1-3-15-2, 7.1-3-22-5. State law also requires that retail permits be approved by the local alcoholic beverage board in the county in which the retailer is located, which allows the local citizenry to have a say in the

[2] The physical presence requirement is not the same as requiring that the holder of a permit be an Indiana resident. *See, e.g.*, *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010) (distinguishing between physical-presence requirements and residency requirements). Because Indiana has discontinued any residency requirements for holding a permit, *see* Pub. L. No. 194-2021, §49, 2021 Ind. Acts 2813, 2853, Chicago Wine may if it is otherwise qualified apply as a non-resident for a retail wine permit for one or more locations in Indiana—subject, of course, to the limits on the number of retail permits allowed in individual localities.

number and location of retail establishments—and thus the amount of alcohol available for sale—in the community. R.63-1 at 6 (¶10(d)). In connection with the local board approval process, the Alcohol and Tobacco Commission reviews retailers to determine character and whether they are qualified to hold a permit. *See* Ind. Code §§7.1-3-4-2, 7.1-3-14-3; 905 I.A.C. 1-27-1. And employees of retailers must undergo specific training on the effective recognition and authentication of age to combat the problems associated with underage drinking. R.63-1 at 3 (¶7(d)); *see* Ind. Code §7.1-3-1.5 *et seq*. To further ensure that retailers are not selling to minors, the Indiana State Excise Police seeks to conduct underage-buy investigations at 100% of retail locations each year. R.63-1 at 3 (¶7(b)).

II. The Importation Statute Ensures that Alcohol Flows Through the Three-Tier System, and the Delivery Statute Promotes Temperance and Combats Underage Drinking

The two primary statutes at issue in this case are components of the three-tier system. Indeed, the Importation Statute is a critical, essential component of the three-tier system, for without that statute the three-tier system would cease to exist.

The Importation Statute ensures that the wholesale tier maintains its gate-keeping role by making it "unlawful for a 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 under this title. This includes the ordering and selling of alcoholic beverages over a computer network." Ind. Code §7.1-5-11-1.5(a). Under the plain terms of this statute, virtually no one can sell alcohol to Hoosiers without funneling it through an Indiana

wholesaler, which collects and remits to the State all excise taxes. R.63-1 at 5–6 (¶10(c)).

The Importation Statute generally prevents out-of-state sellers of alcoholic beverages, including wine retailers, from bypassing the wholesaler tier, which would otherwise jeopardize the entire three-tier system. If out-of-state sellers could sell directly to Hoosier consumers, the wholesale tier would no longer serve as the gatekeeper for virtually all alcohol importation and distribution within Indiana—the result would be decreased prices and a wave of alcohol flooding the market. R.63-2 at 15 (¶¶35–36). Moreover, the State would lose out on excise tax revenue to combat the government and social costs associated with alcohol consumption. R.63-2 at 17–18 (¶¶ 48–51). So as the risk of overconsumption would rise with readily available cheap alcohol, the revenue used to address the costs of overconsumption would fall.

Unlike the Importation Statute's focus on the wholesaler tier, the Delivery Statute regulates the retail tier. That law provides that a "wine dealer . . . may deliver wine only in permissible containers to a customer's residence, office, or designated location. This delivery may *only* be performed by the permit holder or an employee who holds an employee permit." Ind. Code §7.1-3-15-3(d) (emphasis added). To obtain an employee permit, an employee must undergo server training on the selling, serving, and consumption of alcoholic beverages, with an emphasis on preventing the distribution of alcohol to minors. Ind. Code §7.1-3-1.5-4.3. Delivery must involve a direct, face-to-face encounter between the customer and a licensed and

properly trained employee of the retailer to verify the age and sobriety of the customer. R.63-2 at 13 (¶26). In other words, the Delivery Statute forbids any and all retailers from delivering alcohol by hiring a common carrier or by simply dropping a shipment on a doorstep themselves. *See Indiana Alcohol & Tobacco Comm'n v. Lebamoff Enterprises, Inc.*, 27 N.E.3d 802, 814 (Ind. Ct. App. 2015).

By prohibiting retailers from delivering alcohol by common carrier and requiring that they undertake the face-to-face delivery themselves, the Delivery Statute furthers the State's goals in policing underage drinking and promoting temperance. Checking IDs is often difficult without proper training, and compliance with requirements related to labeling and checking ID by common carriers is low and enforcement is extremely difficult. R.63-4 at 11. For these reasons, only individuals trained in, and tested on, Indiana's alcoholic beverage laws, age determination, and the recognition of phony IDs are allowed to make alcohol deliveries. *See Lebamoff Enterprises*, 27 N.E.3d at 813. And because the Delivery Statute requires a face-to-face interaction between the consumer and a trained employee, retailers are better equipped to police overconsumption and deny delivery to those who are already intoxicated. R.63-2 at 13 (¶26).

The physical-presence requirement, in connection with quotas on the number of retail permits for localities based on population, also regulates the retail tier by limiting the quantity of alcoholic beverages available in any given locality and by

facilitating oversight of retailers by State regulators. *See* Ind. Code §7.1-3-22-4.[3] The reason for these quotas is to limit the availability of alcoholic beverages to Indiana consumers. R.63-1 at 2(¶6(c)); *see also* Ind. Code §7.1-1-1-1; *Indiana Ass'n of Beverage Retailers, Inc. v. Indiana Alcohol & Tobacco Comm'n*, 945 N.E.2d 187, 191, 199 (Ind. Ct. App. 2011). Licensees consent "to the entrance, inspection, and search by an enforcement officer, without a warrant or other process, of his licensed premises and vehicles to determine whether he is complying with the provisions of this title." Ind. Code §7.1-3-1-6. Retailers are thus required to make their premises available for inspection and can be monitored, audited, and sanctioned for failure to comply with Indiana laws. These checks enable the State to ensure responsible business practices, including promoting product integrity, proper labeling, compliance with taxes and the reduction of alcohol related crimes. R.63-2 at 15(¶38).

III. The District Court Rejected Plaintiffs' Challenges to the Importation Statute and the Delivery Statute as Foreclosed by Controlling Circuit Precedent

Plaintiffs are Chicago Wine Company—an Illinois wine retailer that does not possess an Indiana alcoholic beverage retailer's or dealer's permit—one of Chicago Wine's co-owners (Devin Warner), and three Indiana residents (Stan Springer, Cynthia Springer, and Dennis Neary). R.7 at 2–3. They sued the governor and attorney general of Indiana, along with the chairperson of the Indiana Alcohol and Tobacco Commission, alleging that the Importation Statute and the Delivery Statute violate

[3] Because Indiana Code section 7.1-3-15-2 requires wine retailers to hold either a beer retailer permit or a liquor retailer permit, these limits on the number of beer and liquor retailer permits also function as a limit on the number of wine retailers from which alcoholic beverages can be purchased.

the dormant Commerce Clause because they allow in-state retailers to ship alcohol to Indiana consumers but deny out-of-state retailers from doing so. R.7 at 4–8. Plaintiffs also alleged that the Importation and Delivery Statutes violate the Privileges and Immunities Clause, R.7 at 8–9, but they did not seek summary judgment on these claims, R.81 at 4. Plaintiffs also challenged a then-existent five-year durational-residency requirement for obtaining an Indiana retailer's permit, but a district court enjoined that law and the Indiana legislature later repealed it. *See* R.81 at 10; Pub. L. No. 194-2021, §49, 2021 Ind. Acts 2813, 2853. Wine & Spirits Distributors of Indiana, an unincorporated association of members holding wine and liquor wholesaler's permits in Indiana, intervened. R.81 at 3.

The district court granted summary judgment to the State and to Wine & Spirits Distributors and denied Plaintiffs' motion for summary judgment, ruling that neither the Importation Statute nor the Delivery Statute violates the Constitution. R.81 at 18. The court determined that the Importation Statute "is valid under the Twenty-first Amendment and is not violative of the Commerce Clause" because the law "advances legitimate local interests by controlling the quantity of alcohol in the State to curtail public health concerns, protecting against unsafe or counterfeit products, and keeping alcohol out of the hands of minors." R.81 at 17–18. And with respect to the Delivery Statute, the court determined that the statute's health and safety benefits—"keeping alcohol out of the hands of minors, controlling the quantity

of alcohol in the State to curtail public health concerns, and protecting against unsafe or counterfeit products"—justify the statute on "nonprotectionist grounds." R.81 at 16.

SUMMARY OF THE ARGUMENT

I. The Court should dismiss the appeal for lack of appellate jurisdiction because Plaintiffs have appealed from a nonfinal judgment. Plaintiffs brought two claims below to attack Indiana's regulatory regime, a claim under the dormant Commerce Clause and a claim under the Privileges and Immunities Clause. After losing on their commerce-clause claim, Plaintiffs voluntarily dismissed their privileges-and-immunities claim. But they did not specify that the dismissal was with prejudice. Nor did the district court's order. By rule, then, that dismissal was without prejudice, Fed. R. Civ. P. 41(a), and could theoretically be revived in a later suit. This Court has repeatedly held that parties cannot manufacture a final judgment by voluntarily dismissing a claim without prejudice. Unless and until Plaintiffs bind themselves to a dismissal of their privileges-and-immunities claim with prejudice, this Court lacks jurisdiction and the appeal must be dismissed.

II. If the Court's jurisdiction is secure, then it should affirm the district court's judgment. Although the Commerce Clause prohibits States from adopting protectionist laws that unduly burden interstate commerce, §2 of the Twenty-first Amendment confers on States "broad power. . . to regulate the importation and use of intoxicating liquor within their borders." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Indiana, like many States, has adopted a three-tier system for

the importation and distribution of alcohol, a system the Supreme Court has deemed "unquestionably legitimate" under the Twenty-first Amendment, *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2471 (2019); *Granholm v. Heald*, 544 U.S. 460, 488–89 (2005); *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion); *id.* at 441 (Scalia, J., concurring in judgment) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler."). The Importation Statute and the Delivery Statute operate together to ensure that nearly every drop of alcohol sold to Indiana consumers passes through the State's three-tier system. Indeed, this Court has already upheld those statutes against dormant Commerce Clause challenges on the ground that they do not discriminate against interstate commerce. *See Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455, 460–62 (7th Cir. 2012); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851–54 (7th Cir. 2000).

This case can easily be resolved simply by applying this Court's holdings in *Huskey* and *Bridenbaugh*. Contrary to Plaintiffs' belief, the Supreme Court's decisions in *Granholm* and *Tennessee Wine*—both of which involved facially discriminatory state laws that were presumptively invalid—do not undermine this Court's decisions addressing nondiscriminatory state alcohol laws.

Apart from the *Huskey* and *Bridenbaugh* holdings, neither the Importation Statute nor the Delivery Statute offends the Constitution. Both statutes are nondiscriminatory in that they apply to all retailers irrespective of residence. As a result, under dormant Commerce Clause doctrine, they are presumptively constitutional

unless Plaintiffs can show that their incidental burdens on interstate commerce far outweigh their legitimate local benefits or that they are completely irrational. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130–31 (7th Cir. 1995). The Twenty-first Amendment certainly does nothing to add to the State's burden in this situation—indeed, it almost certainly renders the laws categorically constitutional. *See Huskey*, 666 F.3d at 467–68 (Hamilton, J., concurring in judgment).

In any case, Plaintiffs cannot carry their burden under *Pike* balancing or rational-basis review to condemn either law. The Importation Statute furthers the State's unquestionably legitimate and important interests in facilitating tax collection, promoting temperance, and preventing the introduction of unsafe products into Indiana. And the Delivery Statute furthers the State's powerful interest in policing underage drinking, as well as its interest in promoting temperance, by requiring that those who make alcohol deliveries are trained on Indiana's alcoholic beverage laws and age verification.

What is more, even if the rule of presumptive invalidity applies and the State bears the burden of justifying its law in accordance with *Tennessee Wine*, the concrete evidence presented below establishes that the laws are predominantly nonprotectionist measures that are reasonably necessary to achieving the State's legitimate public health and safety goals. For instance, the Importation Statute ensures that Indiana collects excise tax on the vast majority of wine sold to Indiana consumers, and those funds are used to offset the social costs of alcohol consumption. Moreover,

imposing taxes at the wholesale level increases the cost of wine, thereby reducing consumption. With respect to the Delivery Statute, the evidence shows that allowing out-of-state retailers to ship alcohol into Indiana by common carrier would lead to easier access to wine and other alcohol for minors and drive down prices for everyone, leading to increased consumption.

ARGUMENT

I. The Court Lacks Appellate Jurisdiction

This Court lacks appellate jurisdiction because Plaintiffs dismissed their privileges-and-immunities claim without prejudice, so the district court's judgment is not final. Under 28 U.S.C. § 1291, the Court has "jurisdiction of appeals from all final decisions of the district courts of the United States," unless the decision is immediately appealable to the Supreme Court. *Hall v. Hall*, 138 S. Ct. 1118, 1123 (2018). A final decision is one that "ends the litigation on the merits and leaves nothing to do but execute the judgment." *Id.* at 1123–24 (citation omitted). The finality requirement advances the "strong preference for resolving all disputed issues as to all parties in one appeal," and reflects "a legislative judgment that permitting multiple, piecemeal appeals from a single action in the district court will have a 'debilitating effect' on the efficient administration of justice." *West v. Louisville Gas & Elec. Co.*, 920 F.3d 499, 503 (7th Cir. 2019) (citations omitted).

Parties may not conditionally dismiss claims to manufacture a final judgment. *Id.* A conditional dismissal, where a claim may be revived following the appeal, is "smoke and mirrors" and "the reality is that the case is ongoing in the district court,"

so an appeal may not be taken except as provided by Rule 54(b). *South Austin Coalition Community Council v. SBC Communications Inc.*, 191 F.3d 842, 844 (7th Cir. 1999). Because parties may not avoid the finality requirement by consent, *West*, 920 F.3d at 504, this Court has consistently dismissed for lack of appellate jurisdiction appeals from manufactured judgments. *Id.* at 506; *see also, e.g., West v. Macht*, 197 F.3d 1185, 1189–90 (7th Cir. 1999); *Union Oil Co. of Cal. v. John Brown E&C*, 121 F.3d 305 (7th Cir. 1997).

The voluntary dismissal of a claim without prejudice after the district court enters judgment on other claims is a manufactured final judgment. *Macht*, 197 F.3d at 1188. In *Macht*, for example, after the district court granted a prisoner leave to proceed in forma pauperis on some claims but not others, the prisoner dismissed the claims where he was granted pauper status to appeal the denial of pauper status as to his other claims. *Id.* But because denial of pauper status is not appealable as of right and because the prisoner could revive his voluntarily dismissed claims after the appeal, *id.* at 1187–89, this Court held there was no final judgment and dismissed the appeal for lack of appellate jurisdiction, *id.* at 1190. This Court reached the same result after a district court entered summary judgment on the plaintiff's complaint and dismissed without prejudice the defendant's counterclaims. *ITOFCA, Inc. v. MegaTrans Logistrics, Inc.*, 235 F.3d 360, 364–66 (7th Cir. 2000).

Plaintiffs have not appealed a final judgment because they dismissed their privileges-and-immunities claim after the district court entered summary judgment against them on their commerce-clause claim. Crucially, neither Plaintiffs nor the

district court specified the nature of the dismissal, R.91; R.93; R.94, so by rule the claim was dismissed without prejudice, *see* Fed. R. Civ. P. 41(a); *Macht*, 197 F.3d at 1188. Because a claim dismissed without prejudice may be revived after appeal, Plaintiffs have not appealed a final judgment and this Court lacks appellate jurisdiction. *West*, 920 F.3d at 506; *Macht*, 197 F.3d at 1188–90.

This Court has allowed similarly situated appellants to rectify this jurisdictional defect by disavowing any right to pursue the revivable claim. *West*, 920 F.3d at 506; *ITOFCA, Inc.*, 235 F.3d at 365. That disavowal may come during briefing or oral argument, but until Plaintiffs do so, this Court lacks appellate jurisdiction. *West*, 920 F.3d at 506.

II. Indiana's Importation and Delivery Statutes Are Constitutional under the State's Power to Regulate the Importation and Distribution of Alcoholic Beverages

The district court correctly granted summary judgment to the State because neither the Importation Statute nor the Delivery Statute violates the Constitution. This Court reviews de novo the district court's grant of summary judgment, viewing the facts and reasonable inferences in favor of the nonmovant. *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 681 (7th Cir. 2017). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

This case should be simple. Plaintiffs say that the Importation Statute and the Delivery Statute discriminate against out-of-state retailers because in-state retailers can deliver wine (and other alcohol) to consumers but out-of-state retailers cannot. Yet this Court has already upheld both the Importation Statute and the Delivery Statute against identical dormant Commerce Clause challenges. *See Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455, 460–62 (7th Cir. 2012); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851–54 (7th Cir. 2000). And as the district court determined, a straightforward application of those precedents forecloses Plaintiffs' challenges here.

Even if the Court examines the statutes anew, they still pass constitutional muster. None of the challenged requirements discriminates against interstate commerce, and so as a matter of ordinary dormant Commerce Clause doctrine they are at most subject to balancing under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), or rational-basis review. *See Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130–31 (7th Cir. 1995). The Twenty-first Amendment certainly does not impose a greater burden on the State; if anything, in the alcohol context nondiscriminatory laws burdening interstate commerce are categorically permitted, without any need for *Pike* balancing. In any event, the challenged requirements easily satisfy *Pike* balancing and rational-basis review. In fact, they also satisfy the more demanding Twenty-first Amendment standard under *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), which, unlike *Pike* balancing, requires the

State to marshal concrete evidence that a *discriminatory* law is reasonably necessary to further a legitimate, nonprotectionist interest.

A. *Bridenbaugh* and *Huskey* foreclose Plaintiffs' commerce-clause challenges to the Importation Statute and the Delivery Statute

This Court has already considered and rejected challenges under the dormant Commerce Clause to both the Importation Statute and the Delivery Statute. *See Huskey*, 666 F.3d at 460–62; *Bridenbaugh*, 227 F.3d at 851–54. And contrary to Plaintiffs' conclusory assertions, those cases both remain good law.

More than 20 years ago, the Court upheld the Importation Statute against a challenge brought by Indiana oenophiles who wanted to receive direct shipments of wine from out-of-state vintners. *Bridenbaugh*, 227 F.3d at 849, 854. The statute at that time made "unlawful all direct shipments from out of state to Indiana consumers by any 'person in the business of selling alcoholic beverages in another state or country.'"[4] *Id.* at 849 (citation omitted). *Bridenbaugh* held that the Importation Statute did not discriminate against interstate commerce because "Indiana insists that *every* drop of liquor pass through its three-tier system and be subjected to taxation." *Id.* Because all wine had to pass through that system—whether from Indiana or elsewhere—there was no "functional discrimination." *Id.* In short, the Importation

[4] The only change in the importation requirement since *Bridenbaugh* is that the provision now states explicitly that it applies to both in-state and out-of-state persons "in the business of selling alcoholic beverages." Ind. Code §7.1-5-11-1.5(a). Even before this change, when read in the context of other provisions of Title 7.1 (*e.g.*, Ind. Code §§7.1-3-15-3 and 7.1-3-13-3), the importation requirement was a typical and basic requirement of most three-tier systems; namely, except in limited circumstances, such as wineries holding a direct seller's permit, alcoholic beverages must be imported into the state only by means of selling and transporting the alcoholic beverages to a licensed, in-state wholesaler.

Statute "has one real economic effect on out-of-state sellers who neither have nor seek Indiana permits: it channels their sales through Indiana permit-holders, enabling Indiana to collect its excise tax equally from in-state and out-of-state sellers. As the history of the twenty-first amendment confirms, this is precisely what §2 is for." *Id.* at 854.

Nearly 10 years ago, the Court upheld the Delivery Statute against a challenge brought by an Indiana retailer and two consumers who claimed that the statute violated the dormant Commerce Clause because it forbids retailers from shipping to consumers via common carrier. *Huskey*, 666 F.3d at 460–62. Because the Delivery Statute does not directly regulate or discriminate against interstate commerce, the Court subjected the law to *Pike* balancing and concluded that the statute did not have even an incidental effect on interstate commerce. *Id.* at 460–62.

Bridenbaugh and *Huskey* control here because the Importation and Delivery Statutes have not changed in any way such that they somehow now discriminate against interstate commerce. And neither *Tennessee Wine* nor *Granholm v. Heald*, 544 U.S. 460 (2005), abrogated this Court's precedents: Both of those cases involved *facially discriminatory* laws that the respective States could not justify on legitimate, nonprotectionist grounds. *See Tennessee Wine*, 139 S. Ct. at 2474–76; *Granholm*, 544 U.S. at 489–93. Likewise, this Court's decisions in *Huskey* and *Bridenbaugh* acknowledged that the Twenty-first Amendment does not allow States to violate the dormant Commerce Clause's nondiscrimination principle merely to protect in-state interests from out-of-state competition. *Huskey*, 666 F.3d at 460;

Bridenbaugh, 227 F.3d at 853. In those decisions this Court simply held that the laws at issue—the very same laws at issue here—did not implicate the nondiscrimination principle because they did not actually discriminate against interstate commerce; and at all events, the importation requirement in *Bridenbaugh* and the delivery requirement in *Huskey* served plainly legitimate state interests. *Huskey*, 666 F.3d at 460–62; *Bridenbaugh*, 227 F.3d at 853–54.

Because *Bridenbaugh* and *Huskey* remain good law, they foreclose Plaintiffs' challenges to the Importation Statute and the Delivery Statute.

B. The Importation Statute and the Delivery Statute pass muster under any potentially applicable constitutional standard

Even if the Court is inclined to look past *Bridenbaugh* and *Huskey* and subject the challenged statutes to renewed judicial scrutiny, those statutes still easily satisfy any potentially applicable standard. Neither statute actually discriminates against interstate commerce, so the presumption of invalidity applicable under the dormant Commerce Clause is not implicated. At most, the statutes are subject to (and satisfy) *Pike* balancing or rational-basis review under the Commerce Clause, and the Twenty-first Amendment certainly does not impose any *greater* burden on the State. And even if the statutes were deemed to discriminate, they would still survive under the Twenty-first Amendment as construed in *Tennessee Wine* because the evidence shows that they are predominantly nonprotectionist laws that are reasonably necessary to achieving the State's legitimate interests in public health and safety.

1. The Statutes are nondiscriminatory and thus not subject to heightened scrutiny under *Tennessee Wine*

i. The Importation and Delivery Statutes do not discriminate against interstate commerce

The Importation Statute and the Delivery Statute do not discriminate against interstate commerce, either by their terms or by their impact. Both apply to in-state and out-of-state firms equally. The Importation Statute explicitly applies both to all sellers of alcohol. And the Delivery Statute bans all retailers from directly shipping to customers via common carrier, requiring all retailers to make deliveries themselves or through their trained employees. Because neither statute discriminates against interstate commerce on its face, the presumption of invalidity for facially discriminatory laws under traditional dormant Commerce Clause doctrine does not apply. *See Nat'l Paint*, 45 F.3d at 1131.

Nor do the Importation and Delivery Statutes have a "powerful" and discriminatory effect on interstate commerce. *See id.* (explaining that when a facially neutral law has a "powerful" effect on interstate commerce, "acting as an embargo on interstate commerce without hindering intrastate sales, the Court treats it as equivalent to a statute discriminating in terms"). Again, under the Importation Statute, nearly all alcohol that eventually makes its way to consumers must pass through Indiana's three-tier system—that is, it must be sold by a producer to an Indiana wholesaler, and then sold by the Indiana wholesaler to a retailer satisfying the physical-presence requirement for sale to Hoosiers. Ind. Code §§7.1-5-11-1.5, 7.1-4-4-3,

7.1-3-15-3, 7.1-3-13-3. The Importation Statute treats interstate and intrastate commerce the same.

The Delivery Statute also does not have a "powerful" and discriminatory effect on interstate commerce—it does not, contrary to Plaintiffs' belief, impose an embargo of any sort. *Contra* Appellants' Br. 36. As this Court explained in both *Huskey* and *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008),[5] any negative impact caused by the Delivery Statute's prohibition on using common carriers is solely a function of distance, not borders, such that the delivery statute often negatively impacts in-state retailers more than out-of-state retailers. *Huskey*, 666 F.3d at 461–62; *Baude*, 538 F.3d at 613.

ii. Because the statutes are nondiscriminatory, they are subject to either *Pike* balancing or rational-basis review under the dormant Commerce Clause

Nondiscriminatory laws that have an incidental burden on or merely affect interstate commerce are presumptively valid and may be invalidated only if the challenger overcomes that presumption. If the law incidentally burdens interstate commerce, then the challenger must show that under *Pike* balancing the law's burden on interstate commerce outweighs the local benefits of the law. *See, e.g.*, *Regan v.*

[5] Plaintiffs mischaracterize *Baude*. They describe *Baude* as determining that a "ban affecting 93% of out-of-state wine was an embargo." Appellants' Br. 37. That "ban" was a prohibition against wineries with direct seller's permits also engaging in wholesaling, which prevented most wineries in California, Oregon, and Washington from obtaining direct seller's permits and shipping wine to Indiana customers. 538 F.3d at 612. Importantly, *Baude* did *not* determine that the law was a facially neutral yet discriminatory law subject to the presumption of invalidity and instead invalidated the law under *Pike* balancing. Moreover, while *Baude* invalidated that "ban," which the State itself did not defend, the Court affirmed the face-to-face meeting requirement, which is akin to the Delivery Statute at issue here. *Id.* at 615.

City of Hammond, 934 F.3d 700, 703 (7th Cir. 2019); *Baude*, 538 F.3d at 613; *Nat'l Paint*, 45 F.3d at 1131.

If, on the other hand, the law merely affects interstate commerce but does not confer any benefit on intrastate commerce in relation to interstate commerce, then it will be upheld unless the challenger can demonstrate that the law is not rationally related to any legitimate government interest. *Regan*, 934 F.3d at 703–05; *Nat'l Paint*, 45 F.3d at 1131. In either case, the State does not bear the burden of production or persuasion; that occurs only when the law is presumptively *invalid* and thus subject to heightened scrutiny, such as where it discriminates against interstate commerce. *Baude*, 538 F.3d at 613.

iii. The Twenty-first Amendment does not impose any *added* burdens on the State

Although this case arises in the shadow of *Tennessee Wine*, the Twenty-first Amendment standard applied in that case does not apply to laws that are subject to *Pike* balancing or rational-basis review under ordinary dormant Commerce Clause doctrine.

Tennessee Wine involved application of the Twenty-first Amendment to a state law that facially discriminated against interstate commerce. 139 S. Ct. at 2461–62; *see also Granholm*, 544 U.S. at 472–73; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). Ordinarily—that is, outside the context of alcohol regulation—such laws are presumptively invalid under the dormant Commerce Clause, unless the State can show that the law "is narrowly tailored to advance a legitimate local purpose," *Tennessee Wine*, 139 S. Ct. at 2461, "that cannot be adequately served by reasonable

nondiscriminatory alternatives," *Granholm*, 544 U.S. at 489. But because §2 of the Twenty-first Amendment empowers "each State . . . to address alcohol-related public health and safety issues in accordance with the preferences of its citizens," courts "engage in a different inquiry" when the discriminatory law regulates alcohol, "ask[ing] whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Tennessee Wine*, 139 S. Ct. at 2474. So under *Tennessee Wine*, the Twenty-first Amendment can "save" a discriminatory (and otherwise invalid) law if the State demonstrates that the law is reasonably necessary to further its legitimate, nonprotectionist interests. *Id.* at 2470, 2474–76; *Granholm*, 544 U.S. at 489–93.

The *Tennessee Wine* standard does not apply to laws that are subject only to *Pike* balancing or rational-basis review. Applying it in those contexts would have the perverse result of imposing a greater burden on the State to justify its law under the Twenty-first Amendment than it already has under the Commerce Clause. Even though the *Tennessee Wine* standard is less demanding than strict scrutiny, it still requires the State to justify its laws with "concrete evidence" to overcome the presumption of invalidity. 139 S. Ct. at 2474–76. But laws subject only to *Pike* balancing or rational-basis review are presumptively *valid*, and the challenger bears the burden of production and persuasion. *Baude*, 538 F.3d at 613.

Rather than adding more burdens, §2 of the Twenty-first Amendment itself categorically authorizes nondiscriminatory state alcohol regulations that have nothing more than an incidental burden on interstate commerce. It explicitly provides

that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, §2. Over time, the Supreme Court has limited the seemingly broad reach of the constitutional text on the ground that §2 did not displace the nondiscrimination principle, which the Court has deemed critical to the Constitution's overall plan. *Tennessee Wine*, 139 S. Ct. at 2459–70. But the Court has never held that the plain text of §2 must give way when a nondiscriminatory state alcohol regulation incidentally burdens interstate commerce, for such a law does not implicate the nondiscrimination principle. *See Huskey*, 666 F.3d at 467–68 (Hamilton, J., concurring in judgment). Moreover, as this Court explained in *Bridenbaugh*, "[*e*]*very* use of §2 could be called 'discriminatory' . . . because every statute limiting importation leaves intrastate commerce unaffected," but "[i]f that were the sort of discrimination that lies outside state power, then §2 would be a dead letter." 227 F.3d at 853.

Although this Court has engaged in *Pike* balancing of nondiscriminatory alcohol laws in the past, *see Huskey*, 666 F.3d at 460–62; *Baude*, 538 F.3d at 611–14, it has acknowledged that the applicability of *Pike* to laws that fall "within the Twenty-first Amendment's gravitational field" has not been settled. *Huskey*, 666 F.3d at 461–62. And as Judge Hamilton explained in his *Huskey* concurrence, subjecting the State to *Pike* interest-balancing and the uncertainty it entails is itself a significant intrusion upon the State's §2 power to regulate the importation and distribution of alcohol. 666 F.3d at 467–68.

Moreover, even apart from the Supreme Court's various standards of review, it is black-letter law that laws that constitute the essential features of the three-tier system are categorically allowed under the Twenty-first Amendment. In *Tennessee Wine* the Court reiterated that the basic three-tier system itself is "unquestionably legitimate," 139 S. Ct. at 2471, which means the essential components of that system are in turn clearly constitutional, *see id.* at 2471–72; *see also Lebamoff Enterprises, Inc. v. Rauner*, 909 F.3d 847, 855 (7th Cir. 2018) (explaining "that most aspects of the three-tier system pass constitutional muster" and that a State can, among other things, "require licenses at each tier of the system or route liquor through wholesalers 'to promote temperance or to carry out any other purpose of the Twenty-first Amendment'" (quoting *Bacchus*, 468 U.S. at 276)). For that reason, both the Sixth and Eighth Circuits have, post-*Tennessee Wine*, upheld (without interest balancing) state laws prohibiting out-of-state retailers from shipping directly to consumers because doing so would circumvent the wholesale tier and thus the three-tier system itself. *See Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171, 1184 (8th Cir. 2021); *Lebamoff Enterprises, Inc. v. Whitmer*, 956 F.3d 863, 871 (6th Cir. 2020).[6]

[6] Of course, discriminatory modifications to the three-tier system may violate the Commerce Clause and are subject to the *Tennessee Wine* standard. *See Tennessee Wine*, 139 S. Ct. at 2471–72, 2474–76; *Granholm*, 544 U.S. at 492–93; *see also Rauner*, 909 F.3d at 855–56 (reversing dismissal of challenge to Illinois law allowing in-state retailers to ship via common carrier, both because the method of transporting alcoholic beverages to consumers by retailers is not an essential component of a three-tier system, and because permitting face-to-face sales for in-state retailers was arguably inconsistent with the purposes of the Twenty-first Amendment while excluding out-of-state retailers). But where the challenged requirement is "an essential feature of a three-tiered scheme" and does not constitute a discriminatory modification of that scheme, it is categorically authorized by the Twenty-first Amendment.

Because the Importation Statute and Delivery Statute do not discriminate against interstate commerce, they are categorically authorized by §2 of the Twenty-first Amendment. *See Huskey*, 666 F.3d at 467–68 (Hamilton, J., concurring in judgment). The Importation Statute is also categorically permitted because it is an essential component of Indiana's three-tier system. So too is the physical-presence requirement for retailers. Together, those requirements ensure that alcohol sold in Indiana passes through all three tiers of the system. *See* Ind. Code §7.1-5-11-1.5(a); *see also* Ind. Code §§7.1-3-15-3, 7.1-3-13-3 (requiring retailers selling wine to Indiana customers to purchase wine from Indiana wholesalers). Absent those requirements, sellers and importers could bypass the wholesale tier of Indiana's three-tier system altogether. As the Sixth Circuit has explained, "[o]pening up the State to direct deliveries from out-of-state retailers necessarily means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all," which "would create a sizeable hole in the three-tier system" and "leave[] too much room for out-of-state retailers to undercut local prices and to escape the State's interests in limiting consumption." *Whitmer*, 956 F.3d at 872; *see also Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 819 (5th Cir. 2010) ("Because of *Granholm* and its approval of three-tier systems, we know that Texas may authorize its in-state, permit-holding retailers to make sales and may prohibit out-of-state retailers from doing the same.").

iv. The challenged statutes easily survive rational-basis review and *Pike* balancing

a. The Importation Statute and the Delivery Statute merely affect interstate commerce and are thus subject only to rational-basis review. The statutes treat all wine importers and retailers the same. Other than wine from farm wineries (irrespective of their location) with direct wine-seller's permits, all wine must pass through Indiana's three-tier system before it is made available for sale to Indiana consumers. Ind. Code §§7.1-5-11-1.5(a), 7.1-3-15-3, 7.1-3-13-3. And all retailers are forbidden from using common carriers to ship alcohol—they may only deliver alcohol via their trained employees. Ind. Code §7.1-3-15-3(d). It is of course true that an out-of-state retailer that does not have a permit to be a retailer in Indiana cannot deliver at all, whereas in-state permitted retailers may deliver through their employees. But that is beside the point because a retailer who is not permitted to sell alcohol within Indiana's three-tier system is not similarly situated to a retailer who is subject to that system—allowing only retailers who are permitted under a State's three-tier system to sell alcohol is not discrimination against retailers who are not permitted under that system. *See Wine Country*, 612 F.3d at 820; *Bridenbaugh*, 227 F.3d at 853 (explaining that "every statute limiting importation leaves intrastate commerce unaffected").

Both statutes easily satisfy rational-basis review. The Importation Statute rationally furthers the State's interest in collecting taxes, among other things. Indiana law requires wholesalers to collect excise taxes, which guards against fraud and non-

payment because nearly all wine passes through the wholesale tier. Moreover, requiring wine to pass through the wholesale tier increases the cost of wine, which rationally leads to less consumption. *See Monarch Beverage Co.*, 861 F.3d at 684–85. For its part, the Delivery Statute rationally furthers the legitimate state interest in policing underage drinking, for requiring retailers to use employees trained in age verification is rationally more likely to avoid underage sales than using untrained personnel employed by common carriers.

b. Even if the statutes have an incidental burden on interstate commerce, they still survive *Pike* balancing because Plaintiffs have not submitted any evidence that the burden on interstate commerce outweighs the laws' significant local benefits in collecting taxes, promoting temperance, and policing underage drinking.

By funneling nearly all alcohol sold in Indiana through the three-tier system, the Importation Statute facilitates the collection of excise taxes, increases the costs for alcohol and thus reduces consumption, and safeguards against tainted and unsafe products, each of which is unquestionably a legitimate government interest. *See, e.g.*, *Bridenbaugh*, 227 F.3d at 853–54; *Whitmer*, 956 F.3d at 871–72. Moreover, those local benefits are of the highest order because they ensure a safe and orderly alcohol-distribution system. Plaintiffs have simply provided no evidence that the Importation Statute imposes such a heavy burden on interstate commerce so as to overcome these weighty state interests.

The Delivery Statute also survives *Pike* balancing. Requiring face-to-face sales—either on the premises of the store or by requiring that deliveries be made by

trained employees—serves the legitimate state interest "in preventing the sale of alcoholic beverages to minors." *Huskey*, 666 F.3d at 461. Indeed, in *Baude*, this Court held that a statute similar to the Delivery Statute, which required a face-to-face meeting before a winery holding a direct seller's permit could ship to a consumer to confirm the consumer's age, passed *Pike* balancing because of the "legitimate, indeed . . . powerful, interest" in "keeping alcohol out of minors' hands." 538 F.3d at 614. The *Baude* plaintiffs had failed to condemn the statute under *Pike* because "[t]he face-to-face requirement makes it harder for minors to get wine," even if some minors would "find a way to beat [the] system," for "a legal system need not be foolproof in order to have benefits." *Id.*

Just as the face-to-face requirement in *Baude* survived *Pike* balancing, so too does the Delivery Statute owing to the State's "powerful" interest in preventing underage drinking. Like the statute in *Baude*, the statute serves that goal by preventing effectively anonymous deliveries and instead requiring employees trained in age verification to deliver to the consumer. Plaintiffs have come nowhere close to condemning the Delivery Statute under *Pike*.

2. If necessary, the Importation Statute and the Delivery Statute also satisfy heightened scrutiny under *Tennessee Wine*

At all events, the Importation Statute and the Delivery Statute, even when coupled with the physical-presence requirement, satisfy the *Tennessee Wine* test because they are predominantly nonprotectionist measures that further legitimate state interests.

The Importation Statute and the physical-presence requirement further the State's legitimate, nonprotectionist interests in collecting excise taxes, controlling the flow of alcohol into Indiana, promoting temperance, and guarding against unsafe and counterfeit products.

By requiring nearly all wine sold to Indiana consumers to pass through an Indiana wholesaler, the Importation Statute significantly reduces the risk of tax evasion because excise taxes are collected at the wholesale tier. Ind. Code §7.1-3-26-9; R.63-1 at 2 (¶5(b)). Raising revenue is a long-recognized legitimate state interest under the Twenty-first Amendment "because it serves to partially offset the costs of alcohol use and abuse." R.63-2 at 17 (¶48). Even under the current system, "tax revenues received from the collection of excise taxes do not cover the considerable social costs from alcohol use and abuse," with the total amount of collected excise and sales taxes covering roughly "10% of the total costs resulting from alcohol use." R.63-2 at 17–18 (¶51). Invalidating the Importation Statute and allowing out-of-state retailers to bypass Indiana wholesalers would cause Indiana to "lose substantial tax revenue" and "further burden the State by reducing recovery" of the costs incurred by alcohol consumption. *Id.* at 17–18 (¶¶50–51).

Taxation also reduces social costs and promotes temperance by increasing the price of alcohol. R.63-2 at 19 (¶58), 20 (¶62). The social costs of alcohol use and abuse include traffic accidents, crime, alcohol-related mortality, risky sexual behavior, and lost productivity. *Id.* at 19–21 (¶¶58–69). Considerable evidence demonstrates that excise taxes on alcoholic beverages are "one of the most effective policies for reducing

alcohol-related harm." *Id.* at 19 (¶58). A meta-analysis of the available studies revealed the mean negative price elasticity for alcoholic beverages to be -0.5, which means that a 10% increase in price results in a 5% reduction in consumption. *Id.* at 19 (¶60).

Allowing out-of-state retailers to ship wine that has not passed through an Indiana wholesaler would reduce the price of wine and increase demand because those wine products would not be subject to Indiana's excise tax. *Id.* at 18–19 (¶¶52–57). Even if the wine products had been subjected to excise taxes in another State, there is still a significant risk of price reduction because Indiana's excise tax rates "are higher than some other States, including nearby States such as Missouri and Wisconsin." *Id.* at 18 (¶52), 19 (¶57). The differences in excise-tax rates "would enable out-of-state retailers to sell beer, wine, and spirits at lower prices in Indiana than licensed Indiana retailers" and "could also potentially lower prices generally in Indiana if retailers responded to these lower prices to remain competitive." *Id.* at 18 (¶56). The result overall "would be increased accessibility of cheaper alcohol to Indiana consumers, which increases the risk of excess alcohol consumption and its corollary public health concerns." *Id.*

The Importation Statute also preserves the wholesale tier's gatekeeping role. That is especially true because Indiana retailers are required to purchase wine from Indiana wholesalers. *See* Ind. Code §§7.1-3-15-3, 7.1-3-13-3. These requirements allow the State "to protect Indiana consumers from products that are unsafe." R.63-2 at 16 (¶45). Alcohol that enters Indiana's distribution chain must originate with a

business regulated and licensed by the Tax and Trade Bureau of the U.S. Treasury Department. R.63-1 at 3 (¶8(a)). Out-of-state manufacturers, wholesalers, and importers that intend to introduce products into the Indiana supply chain must register with the Commission as a primary source and provide proof of a federal permit from the Tax and Trade Bureau, *id.* at 4 (¶8(d)), and in-state manufacturers must obtain a manufacturing permit from the Commission and provide proof of licensure from the Bureau, *id.* at 5 (¶10(b)). By funneling wine through wholesalers, the Importation Statute ensures that wine that reaches Indiana consumers has been produced according to approved formulas and labeling standards. *Id.* at 4 (¶8(c)). Because many out-of-state retailers are not federally licensed or regulated by the Tax and Trade Bureau, the Commission "would have no way of knowing whether product direct shipped from an out-of-state retailer complies with federal formula and labeling requirements." R.63-1 at 4 (¶8).

Moreover, requiring that wine pass through wholesalers "allows prompt reaction to tainted, tampered with[,] or dangerous products such as methanol in spirits, improperly labelled products, faulty bottles or cans that could potentially break or explode, and broken glass in containers," R.63-2 at 16 (¶46), because "Indiana regulatory agencies can more easily and quickly trace the products back to the source," *id.* at 17 (¶47). *See also* R.63-4 at 9. But jettisoning the Importation Statute would significantly hinder the Commission's ability to respond to unsafe or counterfeit products effectively. R.63-2 at 17 (¶47). Even if the Commission could identify

the out-of-state retailer as the source of the unsafe products, it "would face jurisdictional and administrative difficulties in enforcing a recall or suspension on these out-of-state entities." *Id.*

For its part, the physical-presence requirement promotes temperance and ensures that the Commission can effectively enforce Indiana's alcohol regulations against those who sell to consumers. Limiting the sale of alcohol to Indiana consumers to retailers with a physical presence in Indiana promotes temperance by controlling the amount of alcohol available for sale. Indiana law imposes limits on the availability of retailer permits in a given locality and also imposes limits on the amount of alcohol that may be sold. *See* Ind. Code §§7.1-3-4-6(c), 7.1-3-2-7(5)(H)–(I), 7.1-3-5-3(d), 7.1-3-9-11(e), 7.1-3-10-7(c), 7.1-5-10-20, 7.1-3-22-4, 7.1-3-15-2, 7.1-3-22-5; R.63-1 at 2–3 (¶6). State law also requires local approval for retail permits, which allows the local citizenry to have a say in the number and location of retail establishments—and thus the amount of alcohol available for sale—in the community. R.63-1 at 6 (¶10(d)). Allowing out-of-state retailers without a physical presence in Indiana to deliver wine and other alcohol to Indiana consumers would eviscerate these limits and controls and increase the potential availability of alcohol exponentially. R.63-4 at 10 (¶5). And that increased supply would lead to reduced prices—especially because of the lack of effective taxation—yielding increased alcohol consumption and all the socials ills associated with it. R.63-2 at 15 (¶36).

Additionally, whereas Indiana regulatory and law enforcement authorities routinely inspect retailers located in Indiana, they lack effective enforcement tools

to use against out-of-state retailers who lack a physical presence in Indiana. Regulatory scrutiny would neither be practical nor financially viable for out-of-state off-premises wine retailers. Sending licensing staff all over the country to inspect the thousands of retailers that may want licenses is highly likely beyond the resources available to Indiana. R.63-2 at 15–16 (¶40); R.63-4 at 7 (¶2). Fines, suspensions, and revocations may be imposed, but the collection of fines and the enforcement of suspensions would be administratively burdensome and likely ineffective against out-of-state retailers. R.63-4 at 9 (¶4). Nor can Indiana cut off the flow of alcohol to a non-compliant out-of-state retailer because it would not be purchasing alcoholic beverages from Indiana wholesalers. R.63-2 at 16 (¶¶41, 42). One of the most effective economic tools available to Indiana regulators—that a retailer will be stranded with product it cannot sell once its permit has been revoked or suspended—is not applicable to out-of-state retailers because they continue to sell products, at least in their home state. *Id.* at 16 (¶43).

The Delivery Statute's chief aims are promoting temperance and policing underage drinking. By requiring that deliveries be performed by employees trained in alcohol sales and age verification, the statute decreases the chance that a retailer will deliver wine or other alcoholic beverages to an already-intoxicated person or a minor. R.63-4 at 9–10 (¶5); *see also Huskey*, 666 F.3d at 461–62; *Baude*, 538 F.3d at 613–15. Yet expanding online ordering and direct shipment to homes by out-of-state retailers provides underage youth an easy way to obtain alcoholic beverages. R.63-4 at 9–10 (¶5). Although Plaintiffs have focused on wine, their desired remedy would

also allow for shipment by out-of-state retailers of beer and liquor, which are often more attractive products for underage drinkers. *Id.* And minors' lack of interest in wine from out-of-state wineries is largely due to the costs of fine wines. *Id.* Further, the state excise police sets a goal of conducting underage-buy investigations at 100% of retail locations each year to ensure that retailers are not selling to minors, R.63-1 at 3 (¶7), which would be impossible to do if out-of-state retailers without a physical presence in Indiana were able to ship wine to consumers.

The fact that Indiana law allows wineries holding a direct seller's permit to sell and ship wine directly to Indiana consumers does not undermine the State's legitimate, nonprotectionist interests. *Contra* Appellants' Br. 41–43. Plaintiffs argue that the same age verification, record keeping, and other requirement applied to farm wineries could be applied to out-of-state retailers. *Id.* at 42. They further contend that Indiana's limited exception for farm wineries undermines the State's position that the Delivery Statute is important for promoting temperance and keeping alcohol out of the hands of minors. *Id.* at 41-43. Plaintiffs are mistaken.

The exception for farm wineries is significantly restricted by Indiana law in ways that promote temperance and deter underage drinking. For example, farm wineries may not direct-ship into Indiana more than 45,000 liters of wine per year. Ind. Code §7.1-3-26-12. And farm wineries may not direct-ship more than 216 liters of wine per year to any one Indiana address. Ind. Code §7.1-3-26-9. The purpose of these restrictions is to limit the amount of wine that can be direct-shipped to Indiana consumer by farm wineries. R.63-4 at 7. Plaintiffs seek, on the other hand, to open

the floodgates to approximately 400,000 potential new sources of wine from across the country. Appellants' Br. 8.

Nor does the existence of the limited exception for farm wineries undermine the importance of the Delivery Statute in policing underage drinking. R.63-4 at 10. Among other things, as explained above, the evidence establishes that the products offered for direct ship sale specifically by farm wineries are not particularly attractive to minors, especially in view of the price of wine from those sources. *Id*. Furthermore, minors are not known to be connoisseurs of fine wine; instead, they consume primarily for the intoxication effect. *Id*. Considerations of price and product type fall away when the source of direct-ship wine is expanded to all in-state and out-of-state off-premises wine retailers, for there would be cheap wine (and other alcohol) available for shipment from out-of-state retailers. *Id.*

The upshot is that even under the most rigorous Twenty-first Amendment scrutiny, the Importation Statute and Delivery Statute are valid because they are predominantly nonprotectionist measures. What is more, it is abundantly clear that what Plaintiffs seek is preferential treatment compared to in-state retailers—they want Chicago Wine to be able to bypass Indiana's three-tier system altogether, even though in-state retailers are subject to that system. In other words, Chicago Wine "seizes the sweet and wants to take a pass on the bitter." *Whitmer*, 956 F.3d at 873. But the Twenty-first Amendment unquestionably allows a State to require that alcohol be imported and distributed through its three-tier system. Indiana's regulatory regime, under which in-state, permitted retailers may deliver alcohol that has

passed through the three-tier system to consumers to the arguable disadvantage of out-of-state retailers who fall completely outside that system, does not violate the dormant Commerce Clause and is in any case authorized by §2 of the Twenty-first Amendment.

CONCLUSION

The Court should either dismiss the appeal for lack of jurisdiction or, if the Court's jurisdiction is secure, affirm the district court's judgment.

Respectfully submitted,

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FED. R. APP. P. 32(g) WORD COUNT CERTIFICATE

1. Pursuant to Fed. R. App. P. 32(g), the undersigned counsel for the appellees certifies that this brief complies with the type-volume limitations of Circuit Rule 32(c) because the brief contains 10,330 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook typeface, font size 12 for the text and font size 11 for the footnotes. *See* Cir. R. 32(b).

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