
No. 21-2068

United States Court Of Appeals
FOR THE SEVENTH CIRCUIT

CHICAGO WINE CO., STAN SPRINGER, CYNTHIA SPRINGER, DENNIS
NEARY, AND DEVIN WARNER,

Plaintiffs–Appellants,

v.

ERIC HOLCOMB, GOVERNOR OF INDIANA, THEODORE E. ROKITA, ATTORNEY
GENERAL OF INDIANA, AND JESSICA ALLEN, CHAIRWOMAN OF THE INDIANA
ALCOHOL AND TOBACCO COMMISSION, IN THEIR OFFICIAL CAPACITIES

Defendants–Appellees

AND

WINE AND SPIRITS DISTRIBUTORS OF INDIANA,

Intervening Defendant–Appellee

*On appeal from the United States District Court for the Southern District of
Indiana, No. 1:19-cv-02785, Hon. Tanya Walton Pratt, District Judge*

**BRIEF OF WINE & SPIRITS WHOLESALERS OF AMERICA, INC.,
AND AMERICAN BEVERAGE LICENSEES AS AMICI CURIAE IN
SUPPORT OF APPELLEES**

Jo Moak
Jacob Hegeman
WINE & SPIRITS WHOLESALERS OF
AMERICA, INC.
805 15th St. NW, Ste. 1120
Washington, DC 20005

Frederick R. Yarger
Theresa Wardon Benz
Teresa G. Akkara
WHEELER TRIGG O'DONNELL LLP
370 17th St., Suite 4500
Denver, CO 80202
(303) 244-1800
yarger@wtotrial.com

*Counsel for Amici Curiae Wine & Spirits Wholesalers of America, Inc.,
and American Beverage Licensees*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
CORPORATE DISCLOSURE STATEMENT	1
INTEREST OF AMICI CURIAE.....	2
ARGUMENT	5
I. The Indiana statutes at issue are in the mainstream of alcohol regulations nationwide.	5
II. Forcing States to bypass the wholesale tier through judicial deregulation, as Appellants urge, would severely compromise the three-tier system and destroy its regulatory, economic, and consumer benefits.	16
A. The wholesale tier increases consumer choice and availability.....	19
B. The wholesale tier creates economies of scale and other efficiencies that benefit producers, retailers, and the overall market.....	23
C. States’ ability to effectively regulate their alcohol marketplaces and keep citizens safe depends on the integrity of the three-tier system.	26
III. Section 2 of the Twenty-first Amendment grants States more freedom to regulate the market for alcohol than for any other article of commerce.	31
CONCLUSION	38
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)	39

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	35
<i>Arnold's Wines, Inc. v. Boyle</i> , 571 F.3d 185 (2d Cir. 2009)	10
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	34
<i>Bridenbaugh v. Freeman-Wilson</i> , 227 F.3d 848 (7th Cir. 2000)	7, 33, 34
<i>Brooks v. Vassar</i> , 462 F.3d 341 (4th Cir. 2006)	17
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	37
<i>Byrd v. Tenn. Wine & Spirits Retailers Ass'n</i> , 883 F.3d 608 (6th Cir. 2018)	10
<i>Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.</i> , 445 U.S. 97 (1980)	32, 33
<i>City of Renton v. Playtime Theatres, Inc.</i> , 475 U.S. 41 (1986)	37
<i>Granholm v. Heald</i> , 544 U.S. 460 (2005)	passim
<i>Lebamoff Enters. v. Huskey</i> , 666 F.3d 455 (7th Cir. 2012)	7, 34
<i>Lebamoff Enters. v. Rauner</i> , 909 F.3d 847 (7th Cir. 2018)	5, 28
<i>Lebamoff Enters. v. Whitmer</i> , 956 F.3d 863 (6th Cir. 2020)	11, 17, 18, 31

Maine v. Taylor,
477 U.S. 131 (1986) 34

Nixon v. Shrink Mo. Gov’t PAC,
528 U.S. 377 (2000) 37

North Dakota v. United States,
495 U.S. 423 (1990) 6, 17, 19

Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality,
511 U.S. 93 (1994) 32

Sarasota Wine Market, LLC v. Schmitt,
987 F.3d 1171 (8th Cir. 2021) 9, 11, 26, 33

Swedenburg v. Kelly,
232 F. Supp. 2d 135 (S.D.N.Y. 2002) 36

Tenn. Wine & Spirits Retailers Ass’n v. Thomas,
139 S. Ct. 2449 (2019) passim

Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n,
935 F.3d 362 (5th Cir. 2019) 35

Wine Country Gift Baskets.com v. Steen,
612 F.3d 809 (5th Cir. 2010) 10

STATUTES

235 Ill. Comp. Stat. 5/6-29.1 (West 2021)..... 8

Ariz. Rev. Stat. Ann. § 4-205.13 (2021) 8

Ark. Code Ann. § 3-4-107 (West 2021)..... 8

Cal. Bus. & Prof. Code § 23660 (West 2021) 8

Colo. Rev. Stat. § 44-3-409 (West 2021) 8

Del. Code Ann. tit. 4 § 701 (2021) 8

Fla. Stat. Ann. § 561.545 (West 2021) 8

Ga. Code Ann. § 3-3-31, (West 2021) 8

Ind. Code § 7.1-3-12-5 (2021) 6

Ind. Code § 7.1-3-15-3 (2021)..... 7, 8

Ind. Code § 7.1-3-26-12 (2021)..... 12

Ind. Code § 7.1-3-26-5 (2021)..... 6

Ind. Code § 7.1-3-26-9 (2021) 12

Ind. Code § 7.1-4-2-2 (West 2021) 29

Ind. Code § 7.1-4-3-2 (West 2021) 29

Ind. Code § 7.1-5-11-1.5 (West 2021) 6, 8, 29

Ky. Rev. Stat. Ann. § 244.165 (West 2021) 8

La. Stat. Ann. § 26:359 (2021)..... 8

Mont. Code Ann. § 16-3-402 (West 2021) 8

N.C. Gen. Stat. § 18B-102 (West 2021) 8

Okla. Stat. tit. 37A § 2-161 (West 2021)..... 8

Or. Rev. Stat. § 471.282 (West 2021) 9

Or. Rev. Stat. § 471.404 (West 2021) 8

S.C. Code Ann. § 61-6-2900 (2021) 8

S.D. Codified Laws § 35-4-66 (2021)..... 8

U.S. Const. amend. XXI 32, 33, 34, 35

Utah Code Ann. § 32B-4-401 (West 2021) 8

Va. Code Ann. § 4.1-212.1 (West 2021)..... 9

Va. Code Ann. § 4.1-310 (West 2021)..... 8

Vt. Stat. Ann. tit. 7 § 226 (West 2021)..... 8
 W. Va. Code § 60-6-13 (West 2021)..... 8
 W. Va. Code § 60-8-6b (West 2021)..... 8
 Wis. Stat. § 125.58 (West 2021) 8

RULES

Fed. R. App. P. 29 2

OTHER AUTHORITIES

Amy Lombard, *The Cutthroat World of \$10 Ice Cream*,
 N.Y. Times 21

Center for Alcohol Policy,
National Alcohol Regulation Sentiment Survey (2021) 19, 23, 31

Center for Alcohol Policy, *Combatting Fake, Counterfeit, and Contraband Alcohol Challenges in the United Kingdom through the Alcohol Wholesaler Registration Scheme (AWRS) (2017)* 18, 30

David S. Sibley & Padmanabhan Srinagesh,
Dispelling the Myths of the Three-Tier Distribution System (2008) 5, 22, 25

Debbi Beavers,
Kansas Alcoholic Beverage Control Division: Legislative Briefing (Jan. 19, 2021) 13

Marc Sorini,
Understanding the Three-Tier System: Its Impacts on U.S. Craft Beer and You, Craftbeer.com..... 22

Mich. Beer & Wine Wholesalers Assoc.,
More than 250,000 bottles of wine illegally shipped into Michigan during final three months of 2019 13

N.Y. Alco. Bev. Cont. Law § 102 (McKinney 2021)..... 8

Neil Houghton and Marin Gjaja,
For Small and Large Brewers, the U.S. Market Is Open,
 Boston Consulting Group, June 19, 2014..... 21

Pamela S. Erikson, *Safe and Sound: How the Three-Tier System of
 U.S. Alcohol Regulations Helps Ensure Safe Products and
 Protects against Revenue Loss,*
 Campaign for a Healthy Alcohol Marketplace..... 20

Roni Elias,
*Three Cheers for Three Tiers: Why the Three-Tier System
 Maintains Its Legal Validity and Social Benefits After
 Granholm*, 14 DePaul Bus. & Com. L.J. 209 (2016) 25

Size and Shape of the Global Illicit Alcohol Market,
 Euromonitor (Nov. 6, 2018)..... 18

State Liquor Authority Divisional Order No. 714 (Aug. 31, 1976) 36

The Alcohol Tobacco Trade and Tax Annual Report,
Fiscal Year 2020 22

Tim Stockwell, et al.,
*Government Options to Reduce the Impact of Alcohol
 on Human Health: Obstacles to Effective Policy Implementation,*
 NUTRIENTS, 2021 (Aug. 19, 2021)..... 27, 29

Wines Vines Analytics,
U.S. Wineries—By State, January 2021 12

*Yost Looks to Curb Illegal Liquor and Wine Shipments and Funnel Lost
 Tax Revenue Back to Ohio*..... 14

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici* state that they do not have parent corporations, nor do they issue any stock.

INTEREST OF AMICI CURIAE¹

Wine & Spirits Wholesalers of America, Inc. (“WSWA”) is a national trade organization and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents more than 350 companies—large and small—in all 50 states and the District of Columbia that hold federal permits and state licenses as wine or spirits wholesalers or brokers. Wholesalers directly account for more than 88,000 jobs paying more than \$7.5 billion in wages. WSWA members represent a part of the thousands of wine and spirits wholesalers operating in the U.S. today.

American Beverage Licensees (“ABL”) is an association representing licensed off-premises alcohol retailers (such as package liquor stores) and on-premises alcohol retailers (such as bars, taverns, and restaurants) across the nation. ABL was created in 2002 after the merger of the National Association of Beverage Retailers and the

¹ All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2). No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund preparing or submitting the brief; and no person, other than WSWA and ABL, their members, or their counsel, contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

National Licensed Beverage Association. ABL has about 12,000 members in 35 States. Many of ABL's members are independent, family-owned operations who ensure that beverage alcohol is sold and consumed responsibly by adults in conformity with the laws of the State in which each member does business. ABL monitors federal legislation, judicial decisions, and trends of concern to beverage alcohol retailers. ABL is strongly committed to working with others under effective regulation toward the responsible sale of beverage alcohol products. ABL supports state laws concerning the structure of a State's beverage alcohol distribution system.

The alcohol wholesalers and retailers represented by WSWA and ABL have a strong interest in stable regulatory environments and public safety. This case presents a challenge to Indiana's system of alcohol regulation and, more concerning, threatens nationwide disruption of the States' ability to regulate alcohol within their borders. As a result, WSWA and ABL have an interest in addressing through this brief (1) the Indiana statutes at issue in this appeal and how they fit within the mainstream of state alcohol regulation across the United States, (2) the negative effects of judicial deregulation of the alcohol

industry and the effect on States of a judicial decision that would require them to bypass their regulatory systems for alcohol, and (3) the correct articulation and application of the Supreme Court's framework for evaluating state alcohol regulation.

ARGUMENT

I. The Indiana statutes at issue are in the mainstream of alcohol regulations nationwide.

As this Court has acknowledged, navigating the intersection of the dormant Commerce Clause and the Twenty-first Amendment requires line-drawing that, without an understanding of the proper context, can be “difficult to follow.” *Lebamoff Enters. v. Rauner*, 909 F.3d 847, 849 (7th Cir. 2018). Thus, in navigating this terrain, context is critical.

Like nearly every other State, Indiana relies on a three-tier regulatory system to control the distribution and sale of alcohol products. *See Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2457 (2019). Under their three-tier systems, States separately license and regulate (1) alcohol producers, (2) alcohol wholesalers, and (3) alcohol retailers. *Id.*; *see also* David S. Sibley & Padmanabhan Srinagesh, *Dispelling the Myths of the Three-Tier Distribution System* at 4 (2008), <https://perma.cc/2EW3-68XU> (last visited Sept. 29, 2021). Although exceptions exist, most alcohol sold within these systems travels from licensed producers to licensed wholesalers to licensed retailers and, finally, to consumers. These systems are specifically designed to ensure retailers are independent from producers and

wholesalers, which are in turn independent from each other. *See Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2463 n.7. This independence, among other things, allows for and enhances regulatory accountability at each tier of the supply chain. By isolating the distinct functions of each tier, a State can hold each licensee responsible for regulations tailored to the licensee's particular role in the overall system.

At issue in this appeal are two Indiana statutes that, like similar laws across the country, support the State's "unquestionably legitimate" three-tier regulatory system. *See North Dakota v. United States*, 495 U.S. 423, 432, (1990) (explaining that a State's interest in "ensuring orderly market conditions" through a three-tier system is "unquestionably legitimate"). First, shipments of alcoholic beverages into Indiana—whether originating in-state or out-of-state—must be received by a licensed Indiana wholesaler (the "Importation Statute"). Ind. Code § 7.1-5-11-1.5(a) (2021).² Second, retail delivery of alcohol (i.e.,

² The only exception is for "farm wineries," which, subject to strict limits, may ship directly to consumers or, in other limited circumstances, directly to retailers. Ind. Code §§ 7.1-3-26-5 (2021), 7.1-3-12-5(a)(14) (2021). This exception applies identically to both in-state and out-of-state farm wineries.

local deliveries from state-licensed retailers to nearby Indiana consumers) must be made by licensed retailers themselves or by trained, permit-holding employees of licensed retailers (the “Delivery Statute”). Ind. Code § 7.1-3-15-3(d) (2021).

As this Court has already held in two previous cases, the Importation and Delivery Statutes at issue here are consistent with both the Twenty-first Amendment and the dormant Commerce Clause. *Lebamoff Enters. v. Huskey*, 666 F.3d 455 (7th Cir. 2012); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000). These statutes are not outliers. They mirror similar provisions, common nationwide, that preserve the integrity of the States’ three-tier distribution systems, which promote accountability in and effective State oversight of the alcohol supply chain.

What Appellants urge here—allowing out-of-state retailers to ship or deliver³ alcohol to in-state consumers—is permitted in only a small minority of States. Thirty-four States prohibit out-of-state retailers

³ “Shipment” (also called “importation”) typically refers to the out-of-state transfer of a product to an in-state consumer using a common carrier. “Delivery” typically refers to local transfer of a product from a nearby retailer to a consumer in the same state.

from shipping wine to in-state consumers.⁴ A greater number, 43, prohibit out-of-state retailers from shipping spirits to in-state consumers.⁵ As for retail delivery, a number of States prohibit that practice altogether. Among those that allow it, at least 13 States, like Indiana, require the in-state licensed retailer itself (or a trained and permitted employee) to make the deliveries.⁶ Very few States—*only two*—allow out-of-state retailers to deliver alcohol to in-state

⁴ See, e.g., Del. Code Ann. tit. 4, § 701 (2021); Ga. Code Ann. § 3-3-31, -32 (West 2021); 235 Ill. Comp. Stat. 5/6-29.1 (West 2021); Ind. Code § 7.1-5-11-1.5 (West 2021); Ky. Rev. Stat. Ann. § 244.165 (West 2021); Mont. Code Ann. § 16-3-402 (West 2021); N.Y. Alco. Bev. Cont. Law § 102 (McKinney 2021); N.C. Gen. Stat. § 18B-102 (West 2021); S.C. Code Ann. § 61-6-2900 (2021); Utah Code Ann. § 32B-4-401(2) (West 2021); Wis. Stat. § 125.58 (West 2021).

⁵ See, e.g., Cal. Bus. & Prof. Code § 23660, -61 (West 2021); Del. Code Ann. tit. 4 § 701 (West 2021); Fla. Stat. Ann. § 561.545(1) (West 2021); Ga. Code Ann. § 3-3-31, -32 (West 2021); 235 Ill. Comp. Stat. 5/6-29.1 (West 2021); La. Stat. Ann. § 26:359 (2021); N.Y. Alco. Bev. Cont. Law § 102 (McKinney 2021); N.C. Gen. Stat. § 18B-102 (West 2021); Or. Rev. Stat. § 471.404 (West 2021); S.D. Codified Laws § 35-4-66, -67 (2021); Va. Code Ann. § 4.1-310(A) (West 2021); W. Va. Code § 60-6-13 (West 2021).

⁶ See, e.g., Ark. Code Ann. § 3-4-107 (West 2021); Ariz. Rev. Stat. Ann. § 4-205.13 (2021); Colo. Rev. Stat. § 44-3-409 (West 2021); Ind. Code § 7.1-3-15-3 (West 2021); Okla. Stat. tit. 37A, § 2-161 (West 2021); Vt. Stat. Ann. tit. 7, § 226 (West 2021); W. Va. Code § 60-8-6b (West 2021).

consumers. And those two outlier delivery regimes are strictly limited.⁷

The Importation and Delivery Statutes, and similar laws across the country, are two sides of the same coin: the former requires that shipments of alcohol move through the wholesale distribution tier, while the latter guarantees that alcohol delivered locally by in-state retailers has *already* traveled through that tier. Appellants take issue with the fact that to qualify as an in-state retailer that may make in-state retail deliveries, a retailer must actually be located in the relevant State. But the fact that retailers must have an in-state presence is a necessary part of the equation—and a key part of the “unquestionably legitimate” three-tier system. *See Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171, 1183 (8th Cir. 2021).

States have an interest in an effective, well-regulated marketplace composed of state-licensed alcohol producers, distributors, and retailers. The Supreme Court has recognized that when retailers are “physically located within the State . . . the State can monitor the stores’ operations through on-site inspections, audits, and the like,” in furtherance of this objective. *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2475.

⁷ Va. Code Ann. § 4.1-212.1 (West 2021); Or. Rev. Stat. § 471.282 (West 2021).

These legitimate interests do not evaporate when a licensed in-state retailer, in addition to making sales at brick-and-mortar locations, makes those same sales by in-state delivery.

Before and after *Granholm v. Heald*, 544 U.S. 460 (2005), and *Tennessee Wine*, various circuits have acknowledged that physical-presence requirements are essential components of “unquestionably legitimate” three-tier systems. *See, e.g., Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 623 (6th Cir. 2018), *aff’d sub nom. Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019) (“requiring wholesaler or retailer businesses to be physically located within Tennessee may be an inherent aspect of a three-tier system”); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 818–20 (5th Cir. 2010) (“Because of *Granholm* and its approval of three-tier systems, we know that . . . wholesalers and retailers may be required to be within the State.”); *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009) (equating a challenge to a requirement that “retailers be present in and licensed by the state” to a “frontal attack on the constitutionality of the three-tier system itself”).

Indeed, the Eighth Circuit recently applied *Tennessee Wine* to a

regime functionally identical to the one at issue here and upheld it, finding that the challenged Missouri regulation was a fundamental aspect of its three-tier system. *Sarasota Wine Market, LLC*, 987 F.3d at 1183. The Sixth Circuit came to the same conclusion regarding another similar regime in Michigan. *Lebamoff Enters. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020). The Eighth and Sixth Circuits were persuaded by the fact that *Tennessee Wine* explicitly distinguished between durational-residency requirements and physical-presence requirements. See 139 S. Ct. at 2475 (explaining that when stores “are physically located within the State . . . State[s] can monitor the stores’ operations”). Unlike durational-residency requirements (which are not at issue in this case), physical-presence requirements have been acknowledged by the Supreme Court to have an innate, intuitive connection to a State’s regulatory interests. *Id.*

Opponents of the three-tier system, like Appellants here, often point to the fact that a majority of States (Indiana included) allow a particular player in the alcohol market—wineries—to ship directly to consumers in other States. Opponents claim that this limited exception to the three-tier system necessitates that an additional, massive

exception—for every wine retailer in the United States—must be made as a matter of constitutional law. *E.g.*, Appellants’ Br. 41–43.

Wineries, however, are limited in number: there are only around 11,000 in the country.⁸ With strict limitations on their ability to ship directly to consumers,⁹ wineries were likely carved out as a manageable exception to the three-tier systems in force in most States.

But even that limited exception has created opportunities for noncompliance and illicit activity. Several states or state-affiliated entities have found that out-of-state retailers regularly attempt to exploit the winery direct-to-consumer exception, resulting in increases in, among other things: (1) unauthorized shipments; (2) evasion of taxes; and (3) receipt of alcohol by minors. For example, Kansas, which permits direct-to-consumer shipments by licensed wineries, investigated vendors that targeted residents with unsolicited alcohol-

⁸ Wines Vines Analytics, *U.S. Wineries—By State*, January 2021, <https://winesvinesanalytics.com/statistics/winery> (last visited Sept. 29, 2021).

⁹ Indiana, for example, imposes overall and per-customer volume limitations annually for direct shipments from farm wineries. Ind. Code §§ 7.1-3-26-12, 7.1-3-26-9.

related advertisements on social media.¹⁰ Kansas found that:

- 95% of these vendors sold and shipped spirits, rather than wine, into the State, which is prohibited.
- 100% shipped beer to Kansas consumers, which is also prohibited.
- 71% shipped wine to Kansas consumers without the required special-order state shipping license, and, of those, 50% also lacked any federal license.
- Unmarked packages containing alcohol products were delivered to or collected by minors as young as seven years old.

Kansas is not alone in its findings. In Michigan, a comparison of excise tax data and reports from the Michigan Liquor Control Commission found that *one in three* bottles of wine shipped into Michigan in 2019 was shipped illegally by out-of-state retailers who were not licensed and who did not pay the required tax.¹¹ Ohio's Division of Liquor Control similarly found that repeat offenders of its

¹⁰ Debbi Beavers, *Kansas Alcoholic Beverage Control Division: Legislative Briefing* (Jan. 19, 2021), http://www.kslegislature.org/li/b2021_22/committees/ctte_s_fed_st_1/misc_documents/download_testimony/ctte_s_fed_st_1_20210127_01_testimony.html (last visited Oct. 1, 2021).

¹¹ See Mich. Beer & Wine Wholesalers Assoc., *More than 250,000 bottles of wine illegally shipped into Michigan during final three months of 2019*, <https://www.mbwwa.org/News/10180053> (last visited Oct. 1, 2021).

regulations illegally shipped nearly 700,000 pounds—or 350 tons—of wine to Ohio residents, again, all without paying Ohio taxes.¹² This evasion of state regulations exists even in States that affirmatively permit out-of-state retailers to ship alcohol to in-state consumers. In Virginia, for instance, a study by the Commonwealth’s Alcoholic Beverage Control Authority revealed that, in just a four-month period, 39% of shipments from out-of-state retailers were unauthorized, causing a significant loss in excise and retail tax revenue.

Out-of-state vendors engaging in the practices Appellants seek to force Indiana to accept have, therefore, demonstrably failed to self-police. Indeed, in some instances they have *intentionally* flouted state law, forcing States to pursue expensive, time-consuming federal lawsuits against out-of-state entities with no physical presence in the jurisdiction—rather than the efficient state administrative proceedings available to enforce alcohol regulations against in-state licensees.¹³

¹² *Yost Looks to Curb Illegal Liquor and Wine Shipments and Funnel Lost Tax Revenue Back to Ohio*, <https://www.ohioattorneygeneral.gov/Media/News-Releases/July-2020/Yost-Looks-to-Curb-Illegal-Liquor-and-Wine-Shipmen> (last visited Oct. 1, 2021).

¹³ *See Attorney General Nessel, Michigan Liquor Control Commission Crack Down on Illegal Wine Shipments in Michigan*,

Retailers with an in-state physical presence, in contrast to out-of-state shippers, have a stake in their communities and their own state laws, and they have more to lose should they run afoul of those laws: they can lose their licenses and their businesses.

Thus, if out-of-state retailers were permitted to join wineries in direct-to-consumer delivery or shipping, as Appellants seek, the exception would swallow the three-tier scheme whole. Containing the tax losses and public safety concerns that stem from exploitation of winery direct-shipment exceptions already poses a challenge. Yet the number of domestic wine retailers is, as Appellants admit, dozens of times *larger* than the relatively small number of wineries: “[t]here are approximately *400,000 outlets* across the country that sell wine at retail.” Appellants’ Br. 7 (emphasis added). Granting this massive universe of wine retailers a constitutional right to exploit the limited winery exception, as Appellant urges, is like letting an elephant in through the dog door.

<https://www.michigan.gov/ag/0,4534,7-359--541736--,00.html> (“Despite receiving demands to cease and desist the illicit importation, Go to Gifts Inc. and Vintner’s Collective LLC refuse to comply and continue to threaten the public health, safety and welfare.”) (last visited Oct. 1, 2021).

II. Forcing States to bypass the wholesale tier through judicial deregulation, as Appellants urge, would severely compromise the three-tier system and destroy its regulatory, economic, and consumer benefits.

The three-tier system leverages economies of scale not only to bring a variety of products to the alcohol marketplace but also to ensure States can effectively oversee and regulate that marketplace.

Wholesalers are fewer in number than suppliers and retailers and are physically located in-state. Consequently, by requiring alcohol products to pass through wholesalers and then in-state retailers, and by imposing tax collection and other requirements on those in-state licensees, States can more efficiently oversee and regulate the products that end up in consumers' hands. It is, therefore, not an oversimplification to equate the success of the wholesale distribution tier with the success of the entire three-tier regulatory scheme.

Appellants contend that Indiana's Importation and Delivery Statutes offend the dormant Commerce Clause. But while Appellants characterize the combined force of these provisions as a "ban on deliveries by out-of-state retailers," their focus on *delivery* is a red herring. Appellants' challenge really amounts to an attack on the requirement that nearly every drop of alcohol sold in Indiana be routed

through the state-regulated system, which includes an Indiana-licensed wholesaler. Thus, Appellants' challenge amounts to an attempt to radically undermine Indiana's entire alcohol distribution model. If Appellants' desire to receive shipments or deliveries from out-of-state retailers is made mandatory through judicial deregulation, it would threaten the integrity of similar models nationwide. *See Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (explaining that challenging the requirement that out-of-state retailers sell through Virginia's three-tier system "is nothing different than an argument challenging the three tier system itself").

The Supreme Court has long understood the benefits to public health and safety that are promoted by the three-tier system of alcohol regulation. *See Granholm*, 544 U.S. at 489 (citing *North Dakota*, 495 U.S. at 432 (plurality)). The system is premised on the principle that all alcohol sold within a state, regardless of its origin, passes through a wholesaler subject to the oversight of a state alcohol regulator. *Whitmer*, 956 F.3d at 868 ("Wholesalers play a key role in three-tier systems. Typically few in number and often state-owned, they are the in-state path through which all alcohol passes before reaching

consumers.”). This system has many regulatory benefits, aptly demonstrated by the effect of its absence in international markets.¹⁴ In those markets, unchecked competition for market share drives down prices, which in turn increases excess consumption.¹⁵ Similarly, markets with inadequate oversight of distribution channels are more susceptible to illicit or tainted alcohol.¹⁶ Additionally, less-regulated markets ultimately result in less choice for consumers as the business environment becomes much easier for only a few suppliers to dominate (an example is the market for carbonated soft drinks, which is overwhelmingly dominated by just a few players).

In recent years, other countries have recognized the importance of distribution tiers,¹⁷ illustrating why the legal system in this county has not been quick to cast wholesalers aside. Indeed, if the wholesale tier is

¹⁴ *Size and Shape of the Global Illicit Alcohol Market*, Euromonitor (Nov. 6, 2018), https://www.tracit.org/uploads/1/0/2/2/102238034/illicit_alcohol_-_white_paper.pdf (last visited Sept. 29, 2021).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See, e.g.*, Center for Alcohol Policy, *Combatting Fake, Counterfeit, and Contraband Alcohol Challenges in the United Kingdom through the Alcohol Wholesaler Registration Scheme (AWRS)* (2017), <https://www.centerforalcoholpolicy.org/wp-content/uploads/2017/09/Combatting-Fake-Counterfeit-and-Contraband-Alcohol-Challenges-in-the-United-Kingdom.pdf> (last visited Sept. 29, 2021).

routinely bypassed, little would remain of the “orderly market conditions” created by the three-tier system. *North Dakota*, 495 U.S. at 432.

While the wholesale distribution tier is in many ways a vital component of the three-tier regulatory framework, its function has also generated substantial *economic* benefits to States, producers, retailers, and consumers. Those benefits, however, are contingent upon its continued *regulatory* function. Put simply, if out-of-state retailers are permitted to bypass wholesalers and moot their regulatory role—as Appellants urge this Court to hold—the economic benefits wholesalers have provided will dissipate.

A. The wholesale tier increases consumer choice and availability.

The three-tier regulatory system works: 85% Americans are satisfied with alcohol regulations in their state, and 88% are satisfied with the variety of products available.¹⁸ Lawsuits like this one—which seek to undermine the wholesale tier and the role of in-state licensees

¹⁸ Center for Alcohol Policy, *National Alcohol Regulation Sentiment Survey* (2021), at 4, https://www.centerforalcoholpolicy.org/wp-content/uploads/2021/04/CAP-2021-Survey-Report_4-30-21-2.pdf (last visited Sept. 29, 2021).

in the market for alcohol—harm the very consumers whose interests they purport to advance.

The wholesale distribution tier is the mechanism that maintains consumer choice and the competitiveness of small craft breweries, wineries, and distilleries. The wholesale tier “prevents marketplace domination by large companies that would seek to greatly increase alcohol sales through aggressive practices, or by controlling the entire alcohol distribution chain.”¹⁹ In doing so, wholesalers serve as a bulwark protecting consumer choice.

The United States Department of Justice’s Antitrust Division acknowledged this market principle in its challenge of Anheuser-Busch InBev’s acquisition of SABMiller. There, DOJ explained that “[e]ffective distribution is important for a brewer to be competitive in the beer industry”²⁰ and expressed concern that a merger between large industry

¹⁹ Pamela S. Erikson, *Safe and Sound: How the Three-Tier System of U.S. Alcohol Regulations Helps Ensure Safe Products and Protects against Revenue Loss*, Campaign for a Healthy Alcohol Marketplace, https://www.nabca.org/sites/default/files/assets/publications/research_studies/SafeandSound.pdf (last visited Sept. 29, 2021).

²⁰ Competitive Impact Statement at 8, *United States v. Anheuser-Busch InBev and SABMiller, plc*, No. 16-cv-01483 (D. D.C. July 20, 2016), ECF No. 3.

players would increase the incentive and ability to disadvantage rivals by impeding their distribution.²¹

These concerns reach beyond the market for beer. The independence of wholesale distributors is critical to the continued success of not just craft brewers, but vintners and distillers as well. There is a reason retail *soda* aisles are dominated by Coca-Cola and Pepsi, while retail *alcohol* shelves are stocked with offerings beyond a handful of large alcohol producers. When products rely on direct-store delivery—as do soda, ice cream,²² and snacks—scale matters, and industry titans are able to elbow smaller players out of the way.²³

But because wholesale distributors are *not* dominated or captured by the industry’s goliaths, and because each wholesaler represents

²¹ Compl. at 3, 12, ¶¶ 7, 45–47, *United States v. Anheuser-Busch InBev and SABMiller, plc*, No. 16-cv-01483 (D. D.C. July 20, 2016), ECF No. 1.

²² Amy Lombard, *The Cutthroat World of \$10 Ice Cream*, N.Y. TIMES (Aug. 13, 2021), <https://www.nytimes.com/2021/08/13/business/ice-cream-premium-competition.html> (last visited Oct. 1, 2021) (“The truth of the matter is that you have two world giants that will spend a fortune to protect what they have . . .”).

²³ Neil Houghton and Marin Gjaja, *For Small and Large Brewers, the U.S. Market Is Open*, Boston Consulting Group, June 19, 2014, available at <https://www.bcg.com/publications/2014/consumer-products-for-small-large-brewers-us-market-open.aspx> (last visited Oct. 1, 2021).

competing brands, they are able to (and in fact do) provide industry newcomers access to retailer outlets that they would be unable to garner themselves.²⁴ Additionally, wholesalers support smaller brands through efforts beyond providing distribution access, sometimes redirecting profits made on previously developed brands to finance development for in-need brands.²⁵

Three-tier regulatory systems, in turn, have resulted in high levels of product diversity and the overwhelming satisfaction of consumers. According to data from the most recent U.S. Alcohol Tobacco Tax and Trade Bureau (“TTB”) Annual Report,²⁶ the TTB approved over

²⁴ See, e.g., Marc Sorini, *Understanding the Three-Tier System: Its Impacts on U.S. Craft Beer and You*, at 4, Craftbeer.com, <https://www.craftbeer.com/craft-beer-muses/three-tier-system-impacts-craft-beer> (“Craft brewers and importers, in particular, would have a hard time affording all the warehouses and trucks needed to distribute beer over wide territories on their own. In a world without independent distributors, small brewers would mostly be limited to distributing in a very limited geographic area.”) (last visited Sept. 29, 2021).

²⁵ David S. Sibley & Padmanabhan Srinagesh, *Dispelling the Myths of the Three-Tier Distribution System*, Wine and Spirit Wholesalers of America at 15 (2008), <https://perma.cc/2EW3-68XU> (explaining that wholesalers play an important role in determining in which retail markets products will be most successful) (last visited Sept. 29, 2021).

²⁶ The Alcohol Tobacco Trade and Tax Annual Report, *Fiscal Year 2020*, <https://www.ttb.gov/images/pdfs/ttbar2020.pdf>.

175,000 new labels, an increase of 0.6%, representing a large range of new products. Wine product registrations grew 23%. These new label applications do not represent the number of products actually available to consumers in the U.S. market, which is a significantly smaller amount, but it is a strong indication of the optimistic market-access expectations that brewers, vintners, and distillers hold under the current regulatory regime.

The three-tier regime, and the brand diversity it cultivates, has led to high levels of consumer choice, variety, and access. And consumers understand how well the existing system works for them; the vast majority believe state regulations are “just right.”²⁷ Indiana and other States have a legitimate interest in continuing to advance consumers’ expressed preference for variety—but they cannot do so without the wholesale tier.

B. The wholesale tier creates economies of scale and other efficiencies that benefit producers, retailers, and the overall market.

Wholesale distributors are crucial intermediaries that aid the

²⁷ Center for Alcohol Policy, *National Alcohol Regulation Sentiment Survey* (2021), at 4, https://www.centerforalcoholpolicy.org/wp-content/uploads/2021/04/CAP-2021-Survey-Report_4-30-21-2.pdf (last visited Sept. 29, 2021).

business processes of their industry counterparts. The diversity and variety of alcohol products, fluctuations in market demand, and challenges of marketing across geographic areas create unique difficulties for both producers and retailers. To combat these challenges, wholesalers aggregate and disseminate data that inform the work of producers and retailers alike.²⁸

Relatedly, wholesalers—by virtue of their intermediate position in the distribution chain—reduce the number of players that need to transact with one another. This in turn increases information-system interoperability and reduces retailer costs to the tune of approximately \$7.2 billion dollars each year.²⁹

In addition, wholesalers frequently problem-solve retail-level logistics for producers and retailers using their infrastructure, which includes complex software and hardware, rolling stock, refrigerated and

²⁸ David S. Sibley & Padmanabhan Srinagesh, *Dispelling the Myths of the Three-Tier Distribution System*, Wine and Spirit Wholesalers of America at 12 (2008), <https://perma.cc/2EW3-68XU> (explaining that wholesalers play an important role in determining in which retail markets products will be most successful) (last visited Sept. 29, 2021).

²⁹ *Id.* at 14 (finding that wholesaler activities reduce retailers' costs by almost \$52.00 for every \$1,000.00 in retailer sales, creating annual national savings of \$7.2 billion).

unrefrigerated warehouses, sales forces, delivery forces, promotional marketing material, and retail-advisory staff.³⁰ Few producers have access to these capabilities, and to most, it would be prohibitively expensive to assemble and ship individual orders in compliance with applicable state regulations.³¹ Wholesalers leverage their capabilities to manage the “shipping and handling” function for suppliers. In the process, they also assist retailers by providing packaging, marketing, and promotional materials, which serve vital functions at the retail level.³²

But wholesalers do not just improve the processes of producers and retailers; they also improve consumers’ day-to-day shopping experiences. Consumers often turn to retailers to help them navigate

³⁰ Roni Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DePaul Bus. & Com. L.J. 209, 212 (2016), <https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1341&context=bclj> (last visited Sept. 29, 2021).

³¹ David S. Sibley & Padmanabhan Srinagesh, *Dispelling the Myths of the Three-Tier Distribution System*, Wine and Spirit Wholesalers of America at 15 (2008), <https://perma.cc/2EW3-68XU> (explaining that wholesalers play an important role in determining in which retail markets products will be most successful) (last visited Sept. 29, 2021).

³² *Id.* at 16.

the wide variety of choice on retail shelves. Much of the information retailers provide comes from wholesale distributors who educate retail staff and, where allowed, help with promotional displays and the sampling of products.³³ In this way, wholesalers help the entire market: producers, retailers, and consumers.

Wholesalers are, therefore, far from inert conduits in the three-tier regulatory supply chain. Enabling out-of-state retailers to evade the wholesale tier would diminish the commercial efficiencies that flow from wholesalers' regulatory and economic role.

C. States' ability to effectively regulate their alcohol marketplaces and keep citizens safe depends on the integrity of the three-tier system.

Consumers who want to advocate for changes to the existing market regulatory structure should turn to “state-by-state political action,” *Sarasota Wine Market, LLC*, 987 F.3d at 1185, instead of attempting to demolish the three-tier system and impose their policy preferences through litigation. Regulation of alcohol is not simple or straightforward. Alcohol plays an important cultural role—a glass of beer can be the perfect complement to an afternoon spent watching a

³³ *Id.* at 19-20 (explaining that regional wholesalers sometimes spend upwards of \$10 million annually to support retailers and brands).

favorite sports team, while champagne can be a central part of the celebration for a special occasion. On the other hand, alcohol is an intoxicant that, when abused, can cause serious societal problems.

Sensible regulation of the market for alcohol products must consider a range of perspectives, including public health, youth protection, public revenue, responsible consumption, and economic considerations.

Policymakers and regulators, meanwhile, must employ a range of tools to create a practical and effective regulatory environment: pricing and taxation, restrictions on alcohol availability in the marketplace, marketing and advertising controls, liquor law enforcement, monitoring and reporting, and public health messaging.³⁴

This is why, since the end of Prohibition, States have been actively engaged with their citizens and other stakeholders on issues of alcohol regulation, and it is why, consequently, state regulatory systems have

³⁴ *E.g.*, Tim Stockwell, et al., *Government Options to Reduce the Impact of Alcohol on Human Health: Obstacles to Effective Policy Implementation*, NUTRIENTS, 2021, 13, 2846 at 2–3 (Aug. 19, 2021), <https://doi.org/10.3390/nu13082846> (summarizing the “considerable obstacles and challenges to the implementation of effective alcohol policies” but discussing “theories and methodologies to inform effective” alcohol regulation that are “available to policy decision makers, the public health field and the broader community of concerned citizens”) (last visited Oct. 1, 2021).

evolved over the years. But this evolutionary change is for state legislatures and policymakers to debate and implement. Deregulation—particularly the kind of sudden and drastic deregulation that Appellants advocate—is a weighty decision that requires a balance of many differing and often competing perspectives. As States are afforded “great[] leeway” to engage in alcohol-related regulation, *Rauner*, 909 F.3d at 849, that balancing is best made in a legislative setting that allows for continuing dialogue and flexibility, not unilaterally decided by a few litigants in a courtroom, as Appellants urge here.

States are constitutionally entitled to determine how best to advance citizen preferences when it comes to alcohol regulation. They have the discretion to balance those preferences against other, potentially competing interests and to determine how to “maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use.” *Granholm*, 544 U.S. at 484. Indiana, and States like Indiana, have exercised their authority to deputize wholesalers as a means of balancing and advancing state-identified objectives. If licensed wholesalers are routinely evaded by direct-to-consumer sales by out-of-state retailers, States’ ability to

advance these objectives will be severely curtailed.

Wholesalers are responsible for cataloguing and distributing nearly every drop of alcohol that moves through state markets.³⁵ As a result, they present a uniquely efficient means of collecting excise tax. Excise taxes raise public revenue, but that is not their sole aim. They are also a primary means of reducing demand and combatting the social costs of alcohol consumption. Indeed, “alcohol taxes [along with other measures have] been shown to be a means of delivering such diverse benefits as improved public health outcomes, increased government revenues and greater industry profits.”³⁶ Wholesalers’ role as a market intermediary similarly enables them to track product in a way that producers and retailers cannot. As a result, they have a singular ability to quickly recall tainted or illicit products, thus protecting consumers from the dangers that have plagued other countries that lack an active

³⁵ *E.g.*, Ind. Code §§ 7.1-5-11-1.5(a), 7.1-4-2-2, 7.1-4-3-2 (West 2021).

³⁶ Tim Stockwell, et al., *Government Options to Reduce the Impact of Alcohol on Human Health: Obstacles to Effective Policy Implementation*, NUTRIENTS, 2021, 13, 2846 at 9 (Aug. 19, 2021), <https://doi.org/10.3390/nu13082846> (last visited Oct. 1, 2021)

middle tier.³⁷ Such a recall process is impossible with a universe of 400,000 retailers, many of whom are not traceable.

As the “final link in the [three-tier] chain,” *Granholm*, 544 U.S. at 469, brick-and-mortar retailers, too, play a vital role in the regulatory system. Because they are required to purchase from state wholesalers and because infractions can result in permit-revocation or other sanctions, in-state retailers are incentivized to work with their regulators—not against them. States cannot brandish the stick of permit-revocation (and the related inability to sell stocked product) against out-of-state retailers because those retailers can continue to sell products in their home States. *See Appellees’ Br.* 37. In-state retailers have no such failsafe; their best option is ensure strict compliance and, as a result, advance state objectives.

As the Supreme Court acknowledged in *Tennessee Wine*, “each State [has] the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens.” *Tenn.*

³⁷ Center for Alcohol Policy, *Combating Fake, Counterfeit, and Contraband Alcohol Challenges in the United Kingdom through the Alcohol Wholesaler Registration Scheme (AWRS)* (2017), <https://www.centerforalcoholpolicy.org/wp-content/uploads/2017/09/Combating-Fake-Counterfeit-and-Contraband-Alcohol-Challenges-in-the-United-Kingdom.pdf> (last visited Sept. 29, 2021).

Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2474. While addressing and balancing these interests is no simple task, States have succeeded, as public opinion shows.³⁸ That success is jeopardized by the specter of unwarranted judicial deregulation through lawsuits like this one.

III. Section 2 of the Twenty-first Amendment grants States more freedom to regulate the market for alcohol than for any other article of commerce.

The States' creation of their three-tier systems for alcohol regulation did not happen by accident. It was facilitated by a constitutional framework that recognizes the States' ability to "treat in-state retailers (who operate within the three-tier system) differently from out-of-state retailers (who do not)." *Whitmer*, 956 F.3d at 867.

The Twenty-first Amendment made two significant changes to the framework for alcohol regulation in the United States. Section 1 repealed the Eighteenth Amendment, ending Prohibition and returning alcohol to lawful commerce. Section 2, meanwhile, replaced Prohibition with a system of strict state-level regulation: "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

³⁸ Center for Alcohol Policy, *National Alcohol Regulation Sentiment Survey* (2021), at 4.

laws thereof, is hereby prohibited.” U.S. Const. amend. XXI, § 2. This language “grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.” *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

Section 2 does not displace the rest of the constitution; it is undoubtedly part of a “unified constitutional scheme.” *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2462. But one constitutional principle, the dormant (or negative) Commerce Clause, is difficult to square with Section 2’s broad grant of state regulatory authority.

Congress’s power to regulate interstate commerce “has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 98 (1994). Thus, States generally may not engage in “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Id.* at 99.

But when it comes to alcohol regulation, the dormant Commerce Clause does not operate with equal force. States have unique interests

in this area, and Section 2 “was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens.” *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2474. Section 2 grants States distinct, “virtually complete” authority to further those interests. *Cal. Retail Liquor Dealers Ass’n*, 445 U.S. at 110. Accordingly, States can burden the interstate flow of alcohol through regulations that they could not impose to, for example, “control cheese.” *See, e.g., Bridenbaugh*, 227 F.3d at 851.

In light of the “extraordinary constitutional status given to state alcoholic beverage laws,” *Sarasota Wine Market, LLC*, 987 F.3d at 1185, the Supreme Court has steadfastly refused to apply typical dormant Commerce Clause doctrine to alcohol regulations. For example, strict scrutiny—and its “narrow tailoring” requirement—is never appropriate even when, unlike here, a state alcohol regulation differentiates between in-state and out-of-state businesses. The Court instead “engage[s] in a different inquiry.” *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2474. This “different inquiry” is targeted only at “arbitrary discrimination against interstate commerce.” *Maine v. Taylor*, 477 U.S.

131, 151 (1986) (emphasis added). It requires States to show only that “the predominant effect of a law” is “the protection of public health or safety” (or other legitimate state interests). *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2474. Only when States engage in unjustified protectionism do they lose the “deference” generally afforded to “laws enacted to combat the perceived evils of an unrestricted traffic in liquor.” *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

As the district court held below, neither statute at issue in this appeal is “facially discriminatory.” D. Ct. Op. at 15, 17. That is why this Court previously upheld the Importation and Delivery Statutes without reference to any constitutional nondiscrimination doctrine. *Huskey*, 666 F.3d at 460–62; *Bridenbaugh*, 227 F.3d at 853–54. But even if additional constitutional analysis is required to dispose of this appeal, that analysis cannot impede the state regulatory authority enshrined in and protected by Section 2.

“In conducting the [Section 2] inquiry, courts must look for [1] ‘concrete evidence’ that the statute ‘actually promotes [the State’s legitimate interests, including] public health or safety,’ or [2] evidence that ‘nondiscriminatory alternatives would be insufficient to further

those interests.” *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, 935 F.3d 362, 369-70 (5th Cir. 2019) (quoting *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2474). While strict scrutiny penalizes States for ignoring any nondiscriminatory alternative means of regulation, the *Tennessee Wine* test requires only that States demonstrate they are not ignoring “obvious alternatives that better serve” their interests—a far lighter burden. *Id.* at 2476 (emphases added).

Put differently, the *Tennessee Wine* test provides States play in the joints that is absent under strict scrutiny. Section 2 tolerates an imperfect fit between a State’s asserted interest and its chosen means of regulation. While blatant protectionism is prohibited, when States act in furtherance of legitimate interests, they have broad discretion to craft alcohol-regulation policy. And once States come forward with some “concrete evidence” supporting their policies, they fully meet their burden under *Tennessee Wine*, ending the inquiry. *See* 139 S. Ct. at 2474; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 256 (1986) (using “concrete evidence” as “some evidence”).

A State fails to clear this lenient bar only if it declines to provide

any evidence. For instance, the Supreme Court determined that the State in *Tennessee Wine* presented no concrete evidence at all. Tr. of Oral Argument at 42, *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. 2449 (No. 18-96) (“[The State] didn’t—it didn’t file a single affidavit. It didn’t put forward any kind of a witness. It didn’t put on any defense whatsoever.”). Similarly, in *Granholm*, the Court concluded that “the States provide[d] little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries.” 544 U.S. at 492 (emphasis added). In fact, the State of New York “explicitly concede[d]” in the district court that its disparate treatment of out-of-state wineries was “intended to be protectionist.” *Swedenburg v. Kelly*, 232 F. Supp. 2d 135, 146 (S.D.N.Y. 2002) (citing State Liquor Authority Divisional Order No. 714, ¶ 4 (Aug. 31, 1976)); *id.* at 148 (“There is evidence in the record that the direct shipping ban was designed to protect New York State businesses from out-of-state competition.”).

The lesson from *Granholm* and *Tennessee Wine* is that a State may offer any evidence that tends to show the “predominant effect” of a challenged regulation is the promotion of the State’s legitimate interests. And, as they are “entitled” to do in other constitutional

contexts, States can “rely on the experiences” of other States. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986). In practice, this means States would not need “to conduct new studies or produce evidence independent of that already generated by other [States], so long as whatever evidence the [State] relies upon is reasonably believed to be relevant to the problem that the [State] addresses.” *Id.* at 51–52; *see Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 393 & n.6 (2000) (suggesting that States could rely on “evidence and findings accepted in” *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), to support state campaign-finance laws). Here, that means heeding the fact that nearly every State in the nation enforces a three-tier regulatory system and most prohibit out-of-state retailers from shipping or delivering alcohol across state lines and thereby evading the wholesale tier.

At every stage of inquiry, the Tennessee Wine test reflects that “Section 2 gives the States regulatory authority” over alcohol “that they would not otherwise enjoy.” *Id.* This Court must keep that principle in mind in disposing of Appellants’ challenge to the Importation and Delivery Statutes.

CONCLUSION

For the foregoing reasons, WSWA and ABL respectfully request that the Court affirm the decision of the district court, uphold the constitutionality of the challenged statutes, and ensure the continued vitality of both the wholesale tier and the three-tier regulatory regime.

Dated: October 1, 2021

Respectfully submitted,

s/ Frederick R. Yarger

Frederick R. Yarger
Theresa Wardon Benz
Teresa G. Akkara
WHEELER TRIGG O'DONNELL LLP

Jo Moak
Jacob Hegeman
WINE & SPIRITS WHOLESALERS OF
AMERICA, INC.

*Attorneys for Amici Curiae Wine &
Spirits Wholesalers of America, Inc.
and American Beverage Licensees*

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 29 because it contains 6,929 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2016 in Century Schoolbook 14 point font.

Dated: October 1, 2021

s/ Frederick R. Yarger

Frederick R. Yarger

CERTIFICATE OF SERVICE

I certify that a true and correct copy of **BRIEF OF WINE & SPIRIT WHOLESALEERS OF AMERICA, INC., AND AMERICAN BEVERAGE LICENSEES AS AMICI CURIAE IN SUPPORT OF APPELLEES** was served on those listed below via the Seventh Circuit Court of Appeals' electronic e-mail and service system this 1st day of October, 2021.

James A. Tanford
Robert D. Epstein
James E. Porter
Joseph Beutel
Epstein Cohen Seif and Porter,
LLP
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Telephone: 317.639.1326
Facsimile: 317.638.9891
Email: rdepstein@aol.com
tanford@indiana.edu

Aaron T. Craft
Section Chief, Civil Appeals
Office of the Indiana Attorney
General
IGCS, 5th Floor
302 West Washington Street
Indianapolis, IN 46204
Telephone: 371.232.4774
Email: Aaron.Craft@atg.in.gov

*Attorney for Eric Holcomb, Todd
Rokita and Jessica Allen*

Attorneys for Appellants

Michael P. Maxwell, Jr.
Clark Quinn Moses Scott & Grahn
LLP
320 N. Meridian Street, Suite 1100
Indianapolis, IN 46204
Telephone: 317.637.1321
Email: mmaxwell@clarkquinnlaw.com

*Attorney for Wine & Spirits
Distributors of Indiana*

s/ Frederick R. Yarger
