

No. 21-1906

United States Court Of Appeals
FOR THE FOURTH CIRCUIT

B-21 WINES, INC., MIKE RASH, JUSTIN HAMMER,
LILA RASH and BOB KUNKLE,
Plaintiffs–Appellants,

v.

A.D. GUY, JR., CHAIR OF THE NORTH CAROLINA ALCOHOLIC BEVERAGE
CONTROL COMMISSION, IN HIS OFFICIAL CAPACITY,
Defendant–Appellee

*On appeal from the U.S. District Court, W.D.N.C.,
No. 3:20-cv-00099, Hon. Frank D. Whitney, District Judge*

**BRIEF OF WINE & SPIRITS WHOLESALERS OF AMERICA,
INC., AMERICAN BEVERAGE LICENSEES, AND NORTH
CAROLINA BEER & WINE WHOLESALERS ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF APPELLEE**

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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

Amici represent both the wholesale and retail tiers of the three-tier alcohol regulatory system under attack in this case.

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 wine or spirits wholesalers, large and small, in all 50 states and the District of Columbia. WSWA’s state-level analog, the North Carolina Beer & Wine Wholesalers Association (“NCBWWA”), was founded in 1936 as a non-profit trade association to promote and protect business interests of beer and wine distributors in North Carolina. American Beverage Licensees (“ABL”) is an association representing approximately 12,000 licensed off-premises alcohol retailers (such as package liquor stores) and on-premises alcohol retailers (such as bars and restaurants) across the nation.

The wholesalers and retailers represented by amici have a strong

¹ All parties consent to 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 the brief; and no person, other than amici, their members, or their counsel, contributed money intended to fund this brief. *See* Fed. R. App. P. 29(a)(4)(E).

interest in maintaining the integrity of the three-tier state regulatory system for the beverage-alcohol market and protecting the regulatory stability and public health benefits that flow from it. This case presents a challenge to North Carolina's system of alcohol regulation and, more concerning, threatens nationwide disruption of States' ability to regulate alcohol within their borders. Amici have an interest in addressing through this brief (1) the challenged North Carolina statutes and how they fit within the national regulatory landscape, (2) the negative effects of judicial deregulation of State-based alcohol marketplaces, and (3) the correct application of the Supreme Court's framework for evaluating the constitutionality of state alcohol regulation.

ARGUMENT

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

Like nearly every other State, North Carolina relies on a three-tier regulatory system to control the distribution and sale of alcohol products.² *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.

² Unlike retail sales of unfortified wine and beer, retail sales of liquor in North Carolina are channeled through state-controlled Alcoholic Beverage Control stores, which serve the same function as

Ct. 2449, 2457 (2019). Under their three-tier systems, States separately license and regulate alcohol producers, wholesalers, and 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 Dec. 2, 2021). Although exceptions exist, wine and beer sold within these systems travel from licensed producers to licensed wholesalers to licensed retailers and, finally, to consumers. These systems ensure retailers, producers, and wholesalers are independent from one another. See *Tenn. Wine*, 139 S. Ct. at 2463 n.7.

At issue in this appeal are two North Carolina statutes that, like similar laws across the country, preserve the integrity of the three-tier regulatory regime. Statutes such as these serve an important end: the three-tier system efficiently promotes important State interests, including increasing consumer choice, fostering public health and safety, and ensuring tax collection. If pathways outside the three-tier

state-licensed wine and beer wholesalers and retailers. N.C. Gen. Stat. §§ 18B-800, -804, -1001(10). North Carolina's liquor regulations—although they significantly mirror North Carolina's wine and beer regulations—are not directly at issue in this appeal.

system are widened, States will be left without an effective means of accomplishing these objectives.

Within the three-tier system, the wholesale tier serves as a regulatory lynchpin and “play[s] a key role” as the “in-state path through which all alcohol passes before reaching consumers.” *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 868 (6th Cir. 2020). The North Carolina statutes challenged here secure the function of the wholesale tier and its relationship to the retail tier. First, out-of-state sellers are affirmatively required to route alcohol through North Carolina’s wholesale tier (the “Distribution Statute”). N.C. Gen. Stat. § 18B-102.1.³ Second, in-state consumers are prohibited from receiving alcohol that has not *already* passed through North Carolina’s wholesale tier (the “Receipt Statute”). N.C. Gen. Stat. § 18B-109.⁴

³ There are exceptions for some wineries and related third-party consolidators and delivery services, which, subject to strict limits, may ship directly to consumers. N.C. Gen. Stat. § 18B-1001.1–.3.

⁴ Below, Appellants explicitly challenged a third statute, N.C. Gen. Stat. § 18B-900(a)(2), which requires that retailers either maintain an in-state physical presence or designate a North Carolina resident as manager. On appeal, Appellants focus on the Distribution and Receipt Statutes. Appellants’ Br. 3 (“Plaintiffs challenge *two* statutory provisions.” (emphasis added)). But the physical presence requirement is a key part of the regulatory framework, and other courts have repeatedly acknowledged the importance (and constitutionality) of

The Distribution and Receipt Statutes are two sides of the same coin. Together, they prevent consumer receipt of alcohol that has not passed through the wholesale tier of the three-tier system. In conjunction with other aspects of North Carolina's regulatory framework, these Statutes permit in-state retailers to ship wine to in-state consumers, while prohibiting out-of-state retailers—which operate *outside* North Carolina's regulatory framework—from doing the same.

Treating regulated in-state retailers differently from unregulated out-of-state retailers is neither novel nor constitutionally problematic. Doing so is a function of a regulatory asymmetry that Appellants ignore: In-state retailers are one link in a continuous regulatory chain of custody, because they are *required* to purchase alcoholic beverages from in-state wholesalers and therefore work with wholesalers to ensure regulatory compliance. Out-of-state retailers, on the other hand, do not purchase stock from in-state wholesalers and are outside the regulatory chain. N.C. Gen. Stat. § 18B-1006(h). Because Appellants ignore this reality, they erroneously rely on cases like *Beskind v. Easley*,

physical-presence requirements in rejecting challenges to laws like North Carolina's Distribution and Receipt Statutes. *E.g.*, *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1185 (8th Cir. 2021).

325 F.3d 506 (4th Cir. 2003), to assert that North Carolina’s Distribution and Receipt Statutes are unconstitutional. In *Beskind*, however, this Court was faced with *similarly situated entities*—in-state wineries that were permitted to sell directly to consumers, and out-of-state wineries that wished to do the same. The question was whether the state was required to extend the very same direct-sale privilege to a similarly situated entity, not whether, as here, the state should be required to create a novel, crippling exemption to its regulatory framework for alcohol distribution.

Here, Appellants seek to create a new regulatory loophole that would require North Carolina to allow out-of-state retailers to ship directly to in-state consumers. Following *Tennessee Wine*, other circuits have refused to do exactly that. In *Whitmer*, for example, the Sixth Circuit evaluated a set of provisions that, like the challenged Statutes, permitted Michigan retailers to deliver alcohol via common carrier but prohibited non-Michigan retailers from doing the same. Reasoning “that Michigan-based retailers”—unlike their non-Michigan counterparts—“purchase only from Michigan wholesalers,” “operate within [Michigan’s] three-tier system,” and “comply with other [Michigan]

regulations,” the Sixth Circuit found that Michigan and non-Michigan retailers “operate[d] in distinct regulatory environments,” which defeated any theory of discrimination because the two were *not* “substantially similar entities.” 956 F.3d at 870 (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997)). In *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171 (8th Cir. 2021), the Eighth Circuit similarly declined to invalidate Missouri’s near-identical statutory provisions because doing so would destroy “core provisions” of and “create a sizeable hole in [Missouri’s] three-tier system.” *Id.* at 1183.

Neither the statutes discussed in *Whitmer* and *Schmitt*, nor the North Carolina Statutes challenged here, are outliers. Thirty-four States prohibit out-of-state retailers from shipping wine to in-state consumers.⁵ A greater number, 43, prohibit out-of-state retailers from shipping spirits to in-state consumers.⁶ Forty-four States prohibit

⁵ *E.g.*, Del. Code Ann. tit. 4, § 701; Ga. Code Ann. § 3-3-31, -32; 235 Ill. Comp. Stat. 5/6-29.1; Ind. Code § 7.1-5-11-1.5; Ky. Rev. Stat. Ann. § 244.165; Mont. Code Ann. § 16-3-402; N.Y. Alco. Bev. Cont. Law § 102; N.C. Gen. Stat. § 18B-102.

⁶ *E.g.*, Cal. Bus. & Prof. Code § 23660, -61; Del. Code Ann. tit. 4 § 701; Fla. Stat. Ann. § 561.545(1); Ga. Code Ann. § 3-3-31, -32; 235 Ill. Comp. Stat. 5/6-29.1; N.Y. Alco. Bev. Cont. Law § 102; W. Va. Code § 60-6-13.

distillers from doing the same.⁷ These provisions, common nationwide, preserve the integrity of three-tier distribution systems. As this Court has acknowledged, “an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart”—is no different from “challenging the three-tier system itself.” *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006).

II. Physical presence requirements are key to advancing state regulatory objectives.

Appellants’ criticism of the in-state presence requirement as mere “economic protectionism” ignores its purpose. *See* Appellants’ Br. 34. In-state presence is an indispensable means to an important end—it allows States to achieve policy, regulatory, and marketplace objectives through wholesaler and retailer participation—and is a key part of the “unquestionably legitimate” three-tier system. *Schmitt*, 987 F.3d at 1183. Courts, recognizing this, have traditionally extended deference to presence requirements. Indeed, even the Supreme Court has

⁷ *E.g.*, Ala. Code § 28-1-4(b); Cal. Bus. & Prof. Code § 23660, -61; Ind. Code Ann. § 7.1-5-11-1; Md. Code. Ann., Al. Bev. § 6-327; Or. Rev. Stat. Ann. § 471.404.

acknowledged 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*, 139 S. Ct. at 2475. 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 shipment.⁸

Seeking to downplay the regulatory importance of in-state presence requirements, opponents of the three-tier system, like Appellants here, often point to the fact that a majority of States (North Carolina included) allow a particular player—wineries—to ship directly to consumers, regardless of their location. Opponents claim that this limited exception to the three-tier system and related presence requirements necessitates an additional, massive exception—for every wine retailer in the United States—as a matter of constitutional law. *E.g.*, Appellants’ Br. 43. Wineries, however, are limited in number: there are only around 11,000 in the country, and the vast majority are

⁸ See also, *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 623 (6th Cir. 2018), *aff’d sub nom. Tenn. Wine*, 139 S. Ct. 2449 (2019); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 818–20 (5th Cir. 2010); *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009).

small businesses.⁹ With strict limitations on their ability to ship directly to consumers,¹⁰ wineries were 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: Several states or state-affiliated entities auditing common carriers have found that out-of-state retailers regularly exploit the winery direct-to-consumer exception, resulting in increases in, among other things: (1) unauthorized shipments; (2) tax evasion; 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-related advertisements on social media.¹¹ Kansas found that:

⁹ Wines Vines Analytics, *U.S. Wineries—By State*, January 2021, <https://winesvinesanalytics.com/statistics/winery> (last visited Dec. 2, 2021).

¹⁰ North Carolina, for example, imposes overall annual volume limitations, and age verification, signature, and package marking requirements on direct shipments from wineries. N.C. Gen. Stat. § 18B-1001.1 (WEST 2021).

¹¹ 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 Dec. 2, 2021).

- 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. This evasion of state regulations exists even in States that intentionally 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.¹²

North Carolina is no exception. Like its sister States, North

¹² Travis Hill, *Virginia Alcoholic Beverage Control Division: Update on Direct Shipment of Beer and Wine (License and Tax Compliance)* (Jan. 8, 2019), http://sfac.virginia.gov/pdf/Public%20Safety/2019/010819_No1_ABC.pdf (last visited Dec. 2, 2021).

Carolina grapples with underage receipt of direct alcohol shipments.¹³ Further, Appellants *themselves* have failed to collect North Carolina taxes when shipping to North Carolina consumers,¹⁴ evading both the wholesaler-enforced excise tax, N.C. Gen. Stat. § 1,05-113.80 (West 2021), *and* the retail-level sales tax.

Out-of-state vendors engaging in the practices Appellants seek to force North Carolina to accept have, therefore, demonstrably failed to self-police. Indeed, in some instances they *intentionally* flout state law, forcing States to pursue expensive, time-consuming federal lawsuits against out-of-state entities, rather than the efficient state administrative proceedings available against in-state licensees.¹⁵

¹³ Rebecca S. Williams & Kurt M. Ribisl, *Internet Alcohol Sales to Minors* (2012) (explaining that 45% of sampled underage purchase orders were successfully received by underage buyers and concluding that “vendors do not adequately prevent online sales to minors”), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/1149402>, (last visited Dec. 3, 2021).

¹⁴ See J.A. 326 (demonstrating that B-21 Wines did not collect the applicable sales tax when processing a North-Carolina-bound direct shipment).

¹⁵ See Attorney General Nessel, *Michigan Liquor Control Commission Crack Down on Illegal Wine Shipments in Michigan*, <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

Unlike their in-state counterparts, out-of-state retailers are hidden from effective oversight and can undermine State alcohol regulations from afar.

Thus, if physical presence requirements were invalidated and out-of-state retailers were permitted to engage in direct-to-consumer shipping, as Appellants seek, the exception would swallow the three-tier structure 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 36 times *larger* than the relatively small number of wineries: there are approximately “*400,000-plus wine retailers* located throughout the United States.” Appellee’s Br. 34 (emphasis added). Granting this massive universe of wine retailers a constitutional right to exploit the limited winery exception, as Appellants urge, is like letting an elephant in through the dog door.

threaten the public health, safety and welfare.”) (last visited Dec. 3, 2021).

III. Forcing States to bypass either the wholesale or retail tier through judicial deregulation, as Appellants urge, would severely compromise the three-tier system and destroy its public health and safety, 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, by design, than suppliers and retailers and are physically located in-state. Consequently, by requiring alcohol products to pass through state-licensed wholesalers and retailers, States can more efficiently regulate intoxicating products. 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 North Carolina's Distribution and Receipt Statutes offend the dormant Commerce Clause. But while Appellants characterize the combined force of these provisions as a "ban on direct shipping by out-of-state retailers," their focus on *shipping* is superficial and a red herring. Appellants' challenge really amounts to an attack on the requirement that wine or beer sold in North Carolina be routed through state-licensed wholesalers. If nationwide direct-to-consumer

shipping is made mandatory through judicial deregulation, that deregulation would effectively dismantle North Carolina's entire alcohol distribution framework and threaten the integrity of similar systems nationwide. *See, e.g., Brooks*, 462 F.3d at 352.

The Supreme Court has long understood the public-health and safety benefits promoted by the three-tier system. *See Granholm*, 544 U.S. at 489. In North Carolina, that system is premised on the principle that, barring certain exceptions, wine and beer pass through wholesalers subject to state oversight. *Cf. Whitmer*, 956 F.3d at 868. This system has many regulatory benefits, demonstrated by the effect of its absence in international markets.¹⁶ In those markets, unchecked competition for market share drives down prices, promotes excess consumption, and increases consumer susceptibility to illicit or tainted alcohol.¹⁷ Additionally, less-regulated markets result in less consumer choice because large suppliers dominate. For these reasons, the legal

¹⁶ *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 Dec. 3, 2021);

¹⁷ *Id.*

system in this country has not been quick to cast wholesalers aside.¹⁸ If it did, the “orderly market conditions” generated by three-tier systems nationwide would crumble. *North Dakota*, 495 U.S. at 432.

While the wholesale tier is vital to the three-tier framework, it also generates 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 provide will dissipate.

A. 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,” *Schmitt*, 987 F.3d at 1185, instead of attempting to demolish

¹⁸ See, e.g., 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 Dec. 3, 2021).

the three-tier system and impose their policy preferences through litigation. Alcohol regulation 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 favorite sports team, while champagne can be a central part of a special celebration. On the other hand, alcohol is an intoxicant that, when abused, can cause serious societal problems, including death. Sensible regulation of the alcohol market must consider a range of perspectives, including public health, youth protection, and public revenue. 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, liquor law enforcement, monitoring and reporting, and public health messaging.¹⁹

This is why, since the end of Prohibition, States have actively engaged with their citizens and other stakeholders on issues of alcohol

¹⁹ *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”) (last visited Dec. 3, 2021).

regulation, and it is why, consequently, state regulatory systems have evolved over the years. But this evolutionary change is for state legislatures, policymakers, and citizens to debate and implement. Deregulation—particularly the sudden and drastic deregulation Appellants advocate—is a weighty decision best made in a legislative setting, not unilaterally decided by a few litigants in a courtroom.

States are constitutionally empowered to determine how best to advance citizen preferences when it comes to alcohol regulation. *Granholm*, 544 U.S. at 484. North Carolina, and States like North Carolina, have exercised their authority to deputize wholesalers as a means of balancing and advancing state-identified objectives. If licensed wholesalers and in-state retailers are routinely evaded by direct-to-consumer sales by out-of-state retailers, States' ability to advance these objectives will be severely curtailed.

1. Wholesalers serve an important regulatory function.

Wholesalers are responsible for cataloguing and distributing nearly every drop of wine or beer that moves through state markets.²⁰

²⁰ *E.g.*, N.C. Gen. Stat. § 18B-102.1, N.C. Gen. Stat. § 18B-109, and N.C. Gen. Stat. § 18B-1006(h).

As a result, they present a uniquely efficient means of collecting excise tax. Excise taxes not only raise public revenue but are also a primary means of reducing demand and combatting 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.”²¹

Wholesalers’ role as market intermediaries similarly enables them to track product in a way producers and retailers cannot. Consequently, they have a singular ability to quickly recall tainted or illicit products, protecting consumers from dangers that plague other countries lacking an active middle tier.²² Without the wholesale tier, this recall process would be impossible, given the universe of 400,000 retailers, many of whom are not traceable.

2. In-state retailers create additional, independent regulatory value from which consumers directly benefit.

As the “final link in the [three-tier] chain,” *Granholm*, 544 U.S. at

²¹ Stockwell, *supra*, at 9.

²² Center for Alcohol Policy, *Combating Fake, Counterfeit, and Contraband Alcohol Challenges in the United Kingdom*, *supra*, at 6.

469, brick-and-mortar in-state retailers play a vital role in both *preserving* the regulatory effects of the wholesale tier and *independently advancing* state regulatory objectives.

First, because in-state retailers must purchase from state wholesalers (and because infractions can result in permit revocation, loss of business license, or other sanctions) in-state retailers are incentivized to work with regulators—not against them. States cannot brandish the stick of permit-revocation (and the resulting inability to sell stocked product) against out-of-state retailers because those retailers are hidden from effective oversight and can continue to sell and restock products in their home States. In-state retailers have no such failsafe; their best option is ensure compliance, preserving wholesalers' regulatory impact and advancing state regulatory objectives in the process.

Second, in-state retailers also generate *independent* regulatory value. For example, North Carolina retailers are prohibited from purchasing on credit, 14B N.C. Admin. Code 15C.0604, receiving steep discounts, 14B N.C. Admin. Code 15C.0704, and comingling finances with industry participants, 14B N.C. Admin. Code 15C.0706. This direct

regulation of retailers protects consumers from unscrupulous sales practices and anticompetitive behavior.

Consumers also benefit from in-state retailers' investment in community safety. For example, although in-state retailers are permitted to ship *or* deliver to consumers, most chose to deliver to better prevent underage receipt of alcohol.²³ If in-state retail tiers are routinely evaded, however, States will be unable to preserve the myriad benefits that stem from in-state retailers' willing regulatory compliance and community investment.

3. States are entitled to protect the regulatory benefits that flow from three-tier systems.

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.” 139 S. Ct. at 2474. While addressing these concerns is no simple task, States have succeeded, as public opinion shows.²⁴ That success is jeopardized

²³ *E.g.*, J.A. 317, 325–26, 335.

²⁴ 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 Dec. 3, 2021).

by the specter of unwarranted judicial deregulation through lawsuits like this one. Appellants here seek to undermine North Carolina’s three-tier regulatory framework because they want to sell (or buy) particular “rare and unusual wines” that, purportedly, “usually can only be purchased from a few specialty wine retailers in other states.” Appellants’ Br. at 6, 8. There is no evidence in the record suggesting that Appellants sought to leverage in-state options for obtaining their desired wines. *See, e.g.*, J.A. 320-21 (J. Kerr Decl. ¶¶ 5–9). But even putting that aside, it defies logic to destroy a finely-tuned regulatory regime to better accommodate the idiosyncratic preferences of a few oenophiles.

B. The wholesale tier increases consumer choice and availability.

North Carolina, and States like North Carolina, are not alone in their support for a carefully-calibrated three-tier regulatory regime: 85% of Americans are satisfied with alcohol regulations in their state, and 88% are satisfied with the variety of products available.²⁵ Lawsuits like this one—which seek to undermine the wholesale tier—harm the

²⁵ Center for Alcohol Policy, *Sentiment Survey, supra*, at 4.

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.”²⁶ 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 to Anheuser-Busch InBev’s acquisition of SABMiller. DOJ explained that “[e]ffective distribution is important for a brewer to be competitive in the U.S. beer industry”²⁷ and expressed concern that a merger between large industry

²⁶ 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 at 2, https://www.nabca.org/sites/default/files/assets/publications/research_studies/SafeandSound.pdf (last visited Dec. 3, 2021).

²⁷ Competitive Impact Statement at 8, *United States v. Anheuser-Busch InBev SA/NV, 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.²⁸ Other experts have come to the same conclusion: one study, for example, found that smaller beer producers can readily grow their businesses because they have “deep access to large and small retailers.”²⁹ Without the existing regulatory regime, distribution access will contract to the detriment of small players.

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,³⁰ and snacks—scale matters, and

²⁸ Compl. at 3, 12, ¶¶ 7, 45–47, *United States v. Anheuser-Busch InBev SA/NV and SABMiller, plc*, No. 16-cv-01483 (D. D.C. July 20, 2016), ECF No. 1.

²⁹ Neil Houghton and Marin Gjaja., *For Small and Large Brewers, the U.S. Market Is Open*, Boston Consulting Group (June 19, 2014) at 1, <https://www.bcg.com/en-us/publications/2014/consumer-products-for-small-large-brewers-us-market-open> (last visited 12/3/2021).

³⁰ 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 Dec. 3, 2021) (“The

industry titans elbow smaller players out of the way.³¹

But because wine wholesale distributors are *not* dominated or captured by industry goliaths, and because each wholesaler represents competing brands, they are able to (and in fact do) provide industry newcomers access to retailer outlets they would be unable to garner themselves.³²

Three-tier regulatory systems, in turn, result in high levels of product diversity, innovation, and customer satisfaction. According to data from the most recent U.S. Alcohol Tobacco Tax and Trade Bureau (“TTB”) Annual Report,³³ the TTB approved over 175,000 new labels, representing a large range of new products. Wine product registrations, for example, grew 23%. While these label applications over-represent the number of new products that actually enter the U.S. market, they

truth of the matter is that you have two world giants that will spend a fortune to protect what they have”).

³¹ Houghton, *supra*, *id.*

³² 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> (last visited Dec. 3, 2021).

³³ The Alcohol Tobacco Trade and Tax Annual Report, *Fiscal Year 2020*, <https://www.ttb.gov/images/pdfs/ttbar2020.pdf> (last visited Dec. 3, 2021).

nevertheless demonstrate optimistic market-access expectations that brewers, vintners, and distillers hold under the current regulatory regime.

Consumers recognize this and understand how well the existing system works for them; the vast majority believe state regulations are “just right.”³⁴ North Carolina 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.

C. 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 business processes of their industry counterparts. The diversity and variety of alcohol products, fluctuations in demand, prevalence of supply-chain interruptions, ever-changing consumer tastes, and challenges of marketing to different retailers (e.g., restaurants, stores, bars, etc.) create unique difficulties for both producers and retailers. To combat these challenges, wholesalers aggregate and disseminate

³⁴ Center for Alcohol Policy, *Sentiment Survey*, *supra*, at 4.

information that informs the work of producers and retailers alike.³⁵

In addition, wholesalers frequently problem-solve retail-level logistics for producers and retailers using their infrastructure, which includes complex software and hardware, rolling inventory, refrigerated and unrefrigerated warehouses, sales forces, delivery forces, promotional marketing material, and retail-advisory-focused staff.³⁶ Few producers have these capabilities, and to most, it would be “prohibitively expensive to assemble orders” in compliance “with applicable state regulations.”³⁷ Wholesalers leverage their capabilities to manage the distribution function for suppliers. In the process, wholesalers increase information-system interoperability and reduce retailer costs to the tune of approximately \$7.2 billion dollars annually.³⁸

³⁵ Sibley, *supra*, at 12 (2008) (explaining that wholesalers help determine which retail markets products will be most successful).

³⁶ 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 Dec. 3, 2021).

³⁷ Sibley, *supra*, at 15

³⁸ *Id.* at 14.

But wholesalers do not just improve the processes of producers and retailers; they also improve consumers' day-to-day shopping experiences. Much information retailers provide consumers comes from wholesale distributors who educate retail staff on products and companies.³⁹ In this way, wholesalers help the entire market: producers, retailers, and consumers.

Wholesalers are, therefore, far from inert conduits in the three-tier 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.

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

³⁹ *Id.* at 19-20 (explaining that regional wholesalers sometimes spend over \$10 million annually to support retailers and brands).

The Twenty-first Amendment made two significant changes to 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 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*, 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 because the Constitution recognizes that States have unique interests in this area. Indeed, 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 they could not impose to, for example, “control cheese.” *See, e.g., Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000).

Accordingly, courts decline to entertain dormant Commerce Clause challenges like this one. *E.g., Schmitt*, 987 F.3d at 1185 (upholding Missouri’s shipping regulations and finding no valid dormant Commerce Clause claim); *Whitmer*, 956 F.3d at 870-71 (concluding that Michigan and non-Michigan retailers are not similarly

situated, upholding shipping regulations, and declining to credit a dormant Commerce Clause claim). These cases demonstrate that the broad authority conferred by Section 2 forecloses all but a narrow set of dormant Commerce Clause claims challenging state alcohol regulation. Put simply, this Court need not even reach a dormant Commerce Clause analysis because, as other courts have held, laws like those here fall squarely within Section 2's "virtually complete" regulatory authority.

Even assuming, however, that this case is not foreclosed by the States' broad authority to regulate alcohol within their borders, under *Tennessee Wine*, any dormant Commerce Clause analysis still necessitates substantial deference. Indeed, in light of the "extraordinary constitutional status given to state alcoholic beverage laws," *Schmitt*, 987 F.3d at 1185, the Supreme Court steadfastly refuses to apply typical dormant Commerce Clause doctrine. Instead, the Court "engage[s] in a different inquiry." *Tenn. Wine*, 139 S. Ct. at 2474. That inquiry requires only that States offer some evidence that "the predominant effect of a law" is "the protection of public health or safety" (or other legitimate state interests). *Id.* 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).

“In conducting the [Section 2] inquiry, courts must look for [1] ‘concrete evidence’ that the statute ‘actually promotes [a State’s legitimate interest, 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*, 139 S. Ct. at 2474). Under this inquiry, however, concrete supporting evidence obviates further analysis. “Nondiscriminatory alternatives” need be considered only if a State fails to provide *any* concrete evidence supporting a contested regulation.

Even then, strict scrutiny—and its “narrow tailoring” requirement—is never appropriate, even if a state regulation plainly differentiates between in-state and out-of-state businesses. 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. *Tenn. Wine*, 139 S. Ct. at 2476 (emphases added).

Put differently, *Tennessee Wine* gives 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 a legitimate interest, they have broad discretion to craft alcohol-regulation policy. And once States come forward with some “concrete evidence” supporting their policy, they meet their burden under *Tennessee Wine*, ending the inquiry. *See Id.* 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 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*, 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, 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 a State’s legitimate interest. 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 States could rely on “evidence and findings accepted in”

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), to support campaign-

finance laws). Here, that means heeding that nearly every State has

independently recognized the regulatory benefits of a three-tier system

for alcohol distribution. Given States’ freedom to adopt unique

regulatory frameworks, this overwhelming consensus reaffirms the

market and regulatory utility that North Carolina offers as support for

the statutory provisions challenged here. *See, e.g.*, Appellee’s Br. 10–18.

Of course, preventing out-of-state retailers from shipping alcohol across

state lines and thereby evading the wholesale tier is part-and-parcel of

this widely adopted regulatory approach.

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.” *Tenn. Wine*, 139 S. Ct. at 2474. This Court must keep that principle in mind in rejecting Appellants’ challenge to the Distribution and Receipt Statutes, which are, as the district court acknowledged, “essential” to North Carolina’s three-tier system. D. Ct. Op. at 9–11.

CONCLUSION

Amici respectfully request that the Court affirm the decision below, uphold the challenged statutes, and ensure the continued vitality of the three-tier regulatory regime in North Carolina and other States.

Dated: December 6, 2021

Respectfully submitted,

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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 6,496 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: December 6, 2021

s/ Frederick R. Yarger

Frederick R. Yarger

CERTIFICATE OF SERVICE

I certify that a true and correct copy of **BRIEF OF WINE & SPIRITS WHOLESALERS OF AMERICA, INC., AMERICAN BEVERAGE LICENSEES, AND NORTH CAROLINA BEER & WINE WHOLESALERS' ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEE** was served on those listed below via the Fourth Circuit Court of Appeals' electronic e-mail and service system this 6 day of December, 2021.

s/ Frederick R. Yarger
