

No. 25-3305

United States Court Of Appeals For The Sixth Circuit

DEREK BLOCK

Plaintiff

KENNETH M. MILLER; HOUSE OF GLUNZ, INC.

Plaintiffs-Appellants

v.

**JAMES V. CANEPA, Superintendent of Liquor Control, Ohio Division of
Liquor Control**

Defendant

DAVE YOST, Attorney-General of Ohio

Defendant-Appellee

WHOLESALE BEER & WINE ASSOCIATION OF OHIO

Intervenor Defendant-Appellee

*On Appeal From The United States District Court For The Southern District Of
Ohio at Columbus Case No. 2:20-cv-03686 The Hon. Sarah D. Morrison*

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A),
amici Wine & Spirits Wholesalers of America, Inc. and American Beverage
Licensees state that they do not have parent corporations, nor do they issue any
stock.

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STATEMENT OF AMICI CURIAE¹

Wine & Spirits Wholesalers of America, Inc. (“WSWA”) is a national trade organization and the voice of the wine and spirits wholesale industry. Founded in 1943, WSWA represents more than 370 wine or spirits wholesalers in all 50 states and the District of Columbia. 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 interest in maintaining the integrity of the three-tier system for the beverage-alcohol market and protecting the public health benefits that flow from it. This case challenges Ohio’s alcohol regulations and threatens nationwide disruption of States’ ability to regulate alcohol within their borders. *Amici* have an interest in addressing (1) the challenged Ohio statutes and their province in the national regulatory landscape; (2) the role of physical presence requirements; (3) the negative effects of judicial deregulation of State-based alcohol marketplaces; and (4) the correct application of

¹ All parties consent to the filing of this Amicus Brief.

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 *amici*, their members, or their counsel, contributed money intended to fund the preparation or submission of this brief.

the Supreme Court’s framework for evaluating the constitutionality of State alcohol regulation.

ARGUMENT AND AUTHORITIES

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

Like nearly every other State, Ohio relies on a three-tier regulatory system to control the distribution and sale of wine. *See Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 588 U.S. 504, 510 (2019). Under their three-tier systems, States separately license 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>. Although limited exceptions exist, alcohol sold within these systems, including wine, moves from producers to licensed wholesalers to licensed retailers and, finally, to consumers.

The three-tier system is enabled by the Twenty-first Amendment, which made two key 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).

Because of the Twenty-first Amendment, the usual dormant Commerce Clause rule, under which States may not engage in “differential treatment of in-state and out-of-state economic interests,” *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality*, 511 U.S. 93, 99 (1994), does not operate with equal force when it comes to alcohol regulation. As a result, 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), and they can treat licensed retailers (which operate within a state’s three-tier system and maintain a physical premise in the State) differently from unlicensed retailers (which do not). Courts apply two separate analyses when considering whether State alcohol regulations run afoul of the Dormant Commerce Clause.

A. Courts routinely uphold essential features of the three-tier system.

Because the three-tier system itself is constitutional, *Granholm v. Heald*, 544 U.S. 460, 489 (2005), courts have repeatedly rejected challenges to the “essential features” of States’ three-tier system without conducting further analysis. *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 228-29 (4th Cir. 2022), *cert. denied*, 143 S. Ct.

567 (2023) (challenging a “statute that permitted only in-state retailers to sell alcoholic beverages to consumers was ‘nothing different than an argument challenging the three-tier system itself’” (citation omitted)); *see also Day v. Henry*, No. 23-16148, 2025 WL 2573046, at *10 (9th Cir. Sept. 5, 2025) (“Simply put, allowing direct shipment of wine to Arizona consumers from out-of-state retailers would cut so many holes in the state’s ‘unquestionably legitimate’ three-tier system that the system would functionally cease to exist.”); *Jean-Paul Weg LLC v. Dir. of N.J. Div. of Alcoholic Beverage Control*, 133 F.4th 227, 239 (3d Cir. 2025) (“As essential features, [the wholesale and physical presence requirements] are unquestionably legitimate and constitutional.”); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1184 (8th Cir. 2021); *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009).

Put simply, three-tier systems of alcohol regulation fall within Section 2’s “virtually complete” regulatory authority. *Cal. Retail Liquor Dealers Ass’n*, 445 U.S. at 110. Once a court determines that a plaintiff is challenging an essential feature of the three-tier system—and, thus, eliminating the feature would change the character of the three-tier system itself—the court need not conduct a full commerce clause analysis because “*Granholm* already worked out the answer.” *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010). Courts have therefore upheld state alcohol regulations, even assertedly “discriminatory

requirements,” where the challenged statutory provisions are “essential features of the three-tier system . . . authorized by the Twenty-first Amendment.” *B-21 Wines*, 36 F.4th at 227.

B. *Tennessee Wine* introduced a “different inquiry.”

Even outside of the essential features of the three-tier system, the dormant Commerce Clause analysis is more deferential in the Twenty-first Amendment context than usual because States enjoy “regulatory authority that they would not otherwise enjoy” if not for Section 2 of the Twenty-first Amendment. *Tenn. Wine and Spirits Retailers Ass’n v. Thomas*, 588 U.S. 504, 539 (2019). Only when States discriminate against out-of-state interests through egregious methods—by engaging 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 Imps., Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

Once a court determines that a state law discriminates against out-of-state goods or companies, the court “must look for ‘concrete evidence’ that the statute ‘actually promotes [a State’s legitimate interest, including] public health or safety.’” *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, 945 F.3d 206, 213 (5th Cir. 2019) (quoting *Tenn. Wine*, 588 U.S. at 540). If, and only if, the State fails to provide concrete evidence, then the court considers whether there is any evidence that “nondiscriminatory alternatives would be insufficient to further those

interests.” *Id.*; see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 256 (1986) (using “concrete evidence” as “some evidence”).

Concrete Evidence. A State fails the “concrete evidence” step only if it cannot provide *any* evidence that the statute promotes public health or safety. For example, the Supreme Court determined that the State in *Tennessee Wine* presented *no* concrete evidence at all. Tr. of Oral Argument at 42, *Tenn. Wine*, 588 U.S. 504 (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.”). *Granholm* turned on a similar dearth of evidence—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)).

The lesson from *Granholm* and *Tennessee Wine* is that alcohol regulation survives constitutional scrutiny if the State offers *any* evidence that tends to show the “predominant effect” of a challenged regulation is the promotion of a State’s legitimate interest. As they are “entitled” to do in other constitutional contexts, States can “rely on the experiences” of other States for evidence supporting their regulatory scheme. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986). In practice, this means States need not “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.

Nondiscriminatory Alternatives. Courts undertake the “nondiscriminatory alternatives” inquiry only if a State provides *no* concrete evidence supporting a contested regulation. *See B-21 Wines*, 36 F.4th at 224–25 (under *Granholm* and *Tennessee Wine*, “the availability of nondiscriminatory alternatives” is not “central” to the analysis and need be discussed only if a state’s “discriminatory regime[] contravene[s] the dormant Commerce Clause and [is] not saved by the Twenty-first Amendment.” (emphasis added)).

This Circuit, along with the First, Fourth, and Eighth Circuits have rejected efforts to read *Tennessee Wine*’s “nondiscriminatory alternatives” analysis as synonymous with or approaching strict scrutiny. *See, e.g., Lebamoff Enter. Inc. v. Whitmer*, 956 F.3d 863, 874; (upholding Michigan’s statute even if “Michigan could protect minors and ensure retailer accountability in other ways”); *Anvar v. Dwyer*, 82 F.4th 1, 11 (1st Cir. 2023); *B-21 Wines*, 36 F.4th at 225; *Sarasota Wine*, 987 F.3d at 1180. Strict scrutiny and its “narrow tailoring” is *never* appropriate, even if a State regulation plainly differentiates between in-state and out-of-state businesses. While strict scrutiny requires States to consider *every* 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*, 588 U.S. at 542-43 (emphasis added).

II. The challenged laws should be upheld under the Twenty-first Amendment.

Appellants seek to overturn two sections of Ohio’s law. First, Appellants ask the Court to strike down a law limiting the amount of wine that a customer can transport into the state. Ohio Rev. Code Ann. § 4301.20(L). Second, Appellants challenge an Ohio law that requires retailers to have an in-state presence. Appellants’ Br. at 2. Both Ohio requirements survive commerce clause scrutiny.

A. The wholesale tier is an essential feature of Ohio’s three-tier system and therefore does not offend the dormant Commerce Clause.

Appellants package their appeal as a challenge to “transportation” and “shipping” limitations. Appellants’ Br. at 2. In reality, Appellants seek judicial permission to “buy wine from out-of-state retailers,” *id.* at 4, who, in turn, are not required to purchase from Ohio wholesalers. In that way, Appellants ask the Court to eliminate an “essential feature” of the three-tier system: the wholesale tier. *See* Order ECF 133 at 16-17 (“Allowing out-of-state retailers to deliver wine directly to Ohio’s consumers would effectively eliminate the role of Ohio’s wholesalers and ‘create a sizeable hole in the three-tier system.’” (*quoting Lebamoff*, 956 F.3d

at 872.)). The Court can reject Appellants’ attempts to invalidate the three-tier system without conducting the full *Tennessee Wines* analysis.

Under the Twenty-first Amendment, States are constitutionally empowered to implement three-tier systems, including requiring a retailer to purchase from a state-licensed wholesaler. *Granholm*, 544 U.S. at 489. Following *Granholm*, courts around the country have likewise upheld the three-tier system—including the wholesale tier. *E.g.*, *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (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,” which *Granholm* upheld as “unquestionably legitimate”); *see also Lebamoff*, 956 F.3d at 870 (“The courts also have permitted States to regulate wholesalers (the second tier) as a way to control the volume of alcohol sold in a State and the terms on which it is sold.”).²

The Fourth Circuit recently considered this precise issue in *B-21 Wines*. A wine retailer challenged North Carolina’s prohibition on out-of-state retailers

² In the first appeal of this case, the Panel held that although *Lebamoff* is “controlling,” it is not “dispositive” in this case as to whether direct shipping requirements violate *Tennessee Wine*. *Block v. Canepa*, 74 F.4th 400, 413 (6th Cir. 2023). However, the Panel did not state that Appellants could permissibly challenge the legitimacy of the *wholesale* tier. They cannot do so. The legitimacy and constitutionality of the wholesale tier are beyond dispute. *Lebamoff*, 956 F.3d at 869; *see also Jean-Paul Weg LLC*, 133 F.4th at 239 (holding that the “wholesale ... requirement[]” is “unquestionably legitimate and constitutional”).

shipping wine directly to North Carolina consumers, specifically the requirement that retailers “purchase their wine from an in-state wholesaler.” 36 F.4th at 217. The court rejected that argument, recognizing that bypassing the wholesale tier would essentially gut the three-tier system of alcohol regulation. *Id.* at 228.

Moreover, regulations requiring retailers to purchase their products from state-licensed wholesalers are ubiquitous in States that have adopted a three-tier system of alcohol regulation. Thirty-six States require retailers to purchase inventory from a licensed, in-state wholesaler.³ That commonality is additional evidence that the wholesale tier is an essential feature of those systems. *See Wine Country Gift Baskets.com*, 612 F.3d at 817.

Because, at bottom, Appellants challenge an essential feature of the three-tier system, their claims fail outright. The Court can affirm without conducting a

³ Ala. Code § 28-7-20; Ariz. Rev. Stat. § 4-243.01; Ark. ABC Division Rules Title 3 Subtitle C § 3.7; Cal. Bus. & Prof. Code § 23402; Colo. Rev. Stat. §§ 44-3-409 and 44-3-410; Conn. Gen. Stat. § 30-76; Del. Code Ann. tit. 4, § 511; Ga. Code Ann. § 560-2-3-.08; Hi. Stat. Title 16. Sec. 281-31(t); Ind. Code § 7.13-14-4; IA Admin Code 185.4.21(123); Iowa Code § 123.178; Kan. Stat. Ann. § 41-708; Ky. Rev. Stat. Ann. § 243.240(2); LA Stat. Ann. § 26.85; ME. Rev. Stat. Ann. tit. 28-A § 1201, § 1401(9); MD. Code Reg. 14.23.01.02; Mass. Gen. Laws ch. 138, § 23; Miss. Code Ann. § 67-1-41; Mo. Rev. Stat. § 311.280; Neb. Rev. Stat. § 53-175; Nev. Rev. Stat. § 369.487; NH Rev. Stat. Ann. § 177:6; N.J. Admin Code § 13:2-23.12; N.M. Stat. § 60-7A-11; N.D. Admin. Code 10-08-03-01; Ohio Rev. Code § 4305-35; Okla. Stat. tit. 37A § 6-108; R.I. Gen. Laws § 3-7-18; S. C. Code § 7-702; S.D. Codified Laws § 35-4-60; Tenn. Code Ann. § 57-3-404; Tex Alco. Bev. §§ 22.01; §§ 23; §§ 24.01; §§ 25.01; §§ 26.01; §§ 61.71(19); Va. Code § 4.1-326; W. Va. Code § 175-1-3.2; Wis. Stat. § 125.69(6).

full dormant Commerce Clause analysis. *Wine Country Gift Baskets.com*, 612 F.3d at 821; *B-21 Wines*, 36 F.4th at 228; *Sarasota Wine*, 987 F.3d at 1185.

B. The challenged laws do not offend the dormant Commerce Clause under the *Tennessee Wine* analysis because they advance legitimate State policies.

Even if the Court proceeds to the second step of the *Tennessee Wine* analysis, the result is the same because Ohio produced concrete evidence that its law advances legitimate State interests. *Tenn. Wine*, 588 U.S. at 539.

1. The wholesale tier advances legitimate state policies.

Ohio’s wholesale tier advances a legitimate state interest, unrelated to economic protectionism. Order, ECF No. 133 at 16. As the district court recognized, the wholesale tier protects public health and safety by allowing Ohio to impose price controls through the “efficient collection of an excise tax at the wholesaler level.” *Id.* at 19. Through this mode of supply-side regulation, which is exceedingly common throughout the country, the State is able to moderate consumption, serving public health goals. *Id.* at 19-20. Additionally, losing out on those (entirely legal and unchallenged) excise taxes through illegal interstate shipments can cost a State tens-of-millions of dollars in tax revenue a year.⁴

⁴ Wine & Spirits Wholesalers of America, *Texas Alcoholic Beverage Commission Finds Severe Non-Compliance Within Direct-to-Consumer Wine Market*, <https://www.wswa.org/news/texas-alcoholic-beverage-commission-finds-severe-non-compliance-within-direct-consumer-wine> (last visited, August 7, 2025) (“[U]nreported shipments are not collecting the appropriate excise or sales tax.”)

Ohio's wholesale tier also serves other functions that, consistent with the experience of other States, provides significant benefits and avoids serious harm to the public. Like Ohio, other states have used wholesalers' role as physically present market intermediaries to track product and recall tainted or illicit products, protecting consumers from dangers that plague other countries lacking an active middle tier.⁵ Without the wholesale tier, recalls would be near-impossible, given the universe of retailers around the country.⁶

Wholesalers also promote safe sale and distribution of alcohol by only being eligible to sell, with limited exception, to licensed, in-state retailers. A recent study reported that 25% of adults who purchase alcohol through online vendors or directly from manufacturers do not have their identification checked when that

[Texas] estimates that the total loss of tax revenue ranges from \$15-20 million per year.”).

⁵ Center for Alcohol Policy, *Combatting Fake, Counterfeit, and Contraband Alcohol Challenges in the United Kingdom*, supra, at 6. See also Nicola Carruthers, *How the Industry is Tackling Fake Alcohol*, The Spirits Business (Apr. 12, 2023) <https://www.thespiritsbusiness.com/2023/04/how-the-industry-is-tackling-fake-alcohol/> (discussing the problems associated with counterfeit alcohol); <https://www.fda.gov/safety/recalls-market-withdrawals-safety-alerts/high-noon-announces-recall-its-vodka-seltzer-beach-pack-12-pack-due-inclusion-celsiusr-astro-vibe-tm> (describing a recent nationwide recall).

⁶ Wine & Spirits Wholesalers of America, *Texas Alcoholic Beverage Commission Finds Severe Non-Compliance Within Direct-to-Consumer Wine Market*, <https://www.wswa.org/news/texas-alcoholic-beverage-commission-finds-severe-non-compliance-within-direct-consumer-wine> (last visited, August 7, 2025) (Texas alone receives hundreds-of-thousands of illegal wine shipments a year).

alcohol is delivered.⁷ Likewise, a recent investigation in Vermont revealed that *none* of the 40 shipments of alcohol purchased through online delivery—mostly ordered directly from out-of-state producers and retailers not subject to the Vermont wholesale tier—complied with Vermont alcohol regulations.⁸ In some cases, no ID was requested (even when the alcohol was received by a minor), the shipment was never reported, or the packages were not properly marked.⁹ Based on the study, the agency determined that direct-to-consumer shipping is “significantly underregulated and would take significant investment to properly regulate and ensure public safety.”¹⁰ Such non-compliance, were it linked to licensed, in-state retailers, would subject the retailer to a penalty structure that is essentially impossible to apply to out-of-state entities.

⁷ Morning Consult and Wine & Spirit Wholesalers of America, *The Sobering Truth About Alcohol Shipping*, <https://www.wswa.org/news/1-4-adults-who-purchase-alcohol-through-online-vendors-or-directly-manufacturers-do-not-get>.

⁸ Vermont Department of Liquor and Lottery DTC Shipping Pilot Compliance Program, <https://liquorandlottery.vermont.gov/sites/liqлот/files/documents/NABCAVTDLLDTCComplianceReportFinalJANTWENTYFOUR.pdf>

⁹ *Id.*

¹⁰ *Id.*

2. Physical presence requirements likewise advance legitimate state policies.

The Supreme Court has acknowledged that physical presence requirements advance legitimate state policies. In particular, when retailers are “physically located within the State . . . the State can monitor the stores’ operations through on-site inspections, audits, and the like.” *Tenn. Wine*, 588 U.S. at 541; *see also Lebamoff*, 956 F.3d at 871 (recognizing that “legitimate state interest” include “promoting temperance and controlling distribution of” alcohol (citation omitted)). Ohio, through its physical presence requirements, has successfully pursued the same legitimate policies. R.133 at 17-18. Because of the in-state requirements, Ohio has been able to quickly eliminate from distribution an improperly-made wine that was making consumers sick. *Id.*

In addition, several States or state-affiliated entities 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 via social media.¹¹ Kansas found that of these vendors:

¹¹ Debbi Beavers, *Kansas Alcoholic Beverage Control Division: Legislative Briefing* (Jan. 19, 2021), https://www.wswa.org/sites/default/files/2021-06/ctte_s_fed_st_1_20210127_01_testimony.html_.pdf.

- 95% illegally sold and shipped spirits into the State;
- 100% illegally shipped beer to Kansas consumers;
- 71% shipped wine to Kansas consumers without the required state licensure, and of those, 50% also lacked a federal license; and
- Unmarked packages containing alcohol products were delivered to or collected by minors as young as seven years old.¹²

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.¹³ Even more troubling, a North Carolina study confirmed that direct shipment of alcohol to consumers increases underage receipt of alcohol.¹⁴ These problems are far from isolated; they exist nationwide, and Ohio is no exception.¹⁵

¹² *Id.*

¹³ 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.

¹⁴ See, e.g., 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>.

¹⁵ Letter from John Yeomans, President, National Liquor Law Enforcement Association, to Senator Michael Bergstrom, Chairman, CIED Task Force (July 29, 2021), available at <https://www.wswa.org/>

Out-of-state vendors engaging in the practices Appellants seek to force Ohio to accept have therefore demonstrably failed to self-police. Indeed, in some cases 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.¹⁶ Unlike their in-state counterparts, out-of-state retailers are hidden from effective oversight and can undermine State alcohol regulations from afar.

If physical presence requirements were invalidated and out-of-state retailers engaged in direct-to-consumer shipping or delivery, as Appellants seek, the exception would exacerbate the tax losses and public safety concerns already seen from the exploitation of winery direct-shipment. For those reasons, “[e]very court of appeals to confront the issue has upheld physical-presence requirements of this

sites/default/files/2021-07/NLLEA%20ALEC%20CIED%20Letter.pdf; *see also* Tennessee Alcoholic Beverage Commission, *TABC Investigation Results in Monetary Penalties and Federal Court Injunction Against Illegal Alcohol Shippers*, <https://www.tn.gov/abc/public-information-and-forms/newsroom/2024/5/28/tabcc-investigation-results-in-monetary-penalties-and-federal-court-injunction-against-illegal-alcohol-shippers.html> (May 28, 2024) (describing a recent lawsuit over illegal alcohol sales in Tennessee).

¹⁶ *See Attorney General Nessel, Michigan Liquor Control Commission Crack Down on Illegal Wine Shipments in Michigan*, <https://www.michigan.gov/ag/news/press-releases/2020/10/07/ag-nessel-michigan-liquor-control-commission-crack-down-on-illegal-wine-shipments-in-michigan>.

sort for retailers of alcoholic beverages.” *Chi. Wine Co. v. Braun*, 148 F.4th 530, 542 (7th Cir. 2025) (J. Scudder, concurring) (collecting cases).

* * *

Ohio has thus presented concrete evidence that the wholesale tier and physical presence requirements advance legitimate state interests. As a result, the Court need not reach the nondiscriminatory alternatives portion of the *Tennessee Wine* test. *B-21 Wines*, 36 F.4th at 224–25 (“[T]he availability of ‘nondiscriminatory alternatives’” is not “central” to the analysis and need be discussed only if a state’s “discriminatory regime[] contravene[s] the dormant Commerce Clause and [is] not saved by the Twenty-first Amendment.” (emphasis added)).

III. Appellants seek to impose their own policy preferences by removing regulations for out-of-state retailers, which would destroy the public health and safety, economic, and consumer benefits of the three-tier system.

State legislatures across the country have made the policy decision to adopt the three-tier system of alcohol regulation based on the legitimate benefits that sort of system provides. The wholesale tier and physical presence requirements inherent in the three-tier system, in particular, allow states to regulate alcohol sales effectively, and in doing so, advance important public health and safety goals, increase consumer choice, and create economies of scale.

Appellants’ attack on the three-tier system and the physical premise

requirements is merely an attempt to impose their own policy preference through the judiciary, instead of through the political process. If nationwide supplier delivery or shipping is authorized through judicial deregulation, the in-state purchase and wholesale requirement of Ohio's alcohol distribution framework would be rendered obsolete and the integrity of similar State systems would be threatened. *See, e.g., B-21 Wines, Inc.*, 36 F.4th at 229. And the citizens of those States would be deprived of the policies they voted for.

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

Alcohol regulation is a unique system that builds on state-specific values and societal interests, and States are constitutionally empowered to determine how best to advance citizen preferences when it comes to alcohol regulation. *Granholm*, 544 U.S. at 484. Alcohol plays an important cultural role—a glass of wine can be the perfect complement to a fine meal, while champagne can be central to 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.

1. Wholesalers serve an important regulatory function.

As discussed at length above, *supra* at 11-13, wholesalers, which must be physically present in Ohio, are responsible for cataloguing, distributing, and remitting excise tax on nearly every drop of wine that moves through state markets. “[A]lcohol 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.”¹⁷

Wholesalers’ role as physically present market intermediaries similarly enables them to track product in a way producers and retailers cannot. Without the wholesale tier, recalls would be slower and more difficult to orchestrate.

2. Licensed 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 469, licensed in-state retailers play a vital role in both *preserving* the regulatory effects of the wholesale tier and *independently advancing* state regulatory objectives, from preventing underage access to assisting in product recall.

First, because licensed retailers must maintain a brick and mortar store and purchase from in-state wholesalers, they are incentivized to work with regulators—

¹⁷ Tim Stockwell, et al., *Government Options to Reduce the Impact of Alcohol on Human Health: Obstacles to Effective Policy Implementation*, NUTRIENTS, 2021, 13(8), 2846 at 2–3 (Aug. 19, 2021), <https://doi.org/10.3390/nu13082846>, *supra*, at 9.

not against them. States cannot brandish the stick of on-site inspection or permit-revocation (and the resulting inability to sell stocked product) against unlicensed, out-of-state in-state retailers because those retailers are hidden from effective oversight and can continue to sell and restock products in their home states. Licensed retailers have no such failsafe: They are required to operate within the State, preserving wholesalers' regulatory impact and advancing state regulatory objectives in the process.

Second, licensed retailers also generate *independent* regulatory value and increase community safety. These restrictions protect consumers from unscrupulous sales practices and anticompetitive behavior. Without those physical premise requirements, States will be unable to preserve the myriad benefits that stem from in-state retailers' willing regulatory compliance and community investment.

3. Change to the three-tier system is properly made through State legislatures and regulatory agencies.

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.” 588 U.S. at 539. While addressing these concerns is no simple task, public opinion shows that States have

succeeded.¹⁸ That success is jeopardized by the specter of unwarranted judicial deregulation.

Appellants here seek to undermine Ohio’s three-tier regulatory framework because the “local wine stores have limited selections” Appellants’ Br. 5. And, according to Appellants, “[m]ore wine at a greater variety of price points is available online from out-of-state retailers.” *Id.*

This is not the opinion of typical consumers—as explained immediately below, they are highly satisfied with the existing regulatory model for alcohol and the variety of alcohol products available to them. In any event, consumers, like Appellants here, who want changes to the existing market regulatory structure should turn to “state-by-state political action,” *Sarasota Wine*, 987 F.3d at 1185, rather than attempt to demolish the three-tier system and impose their policy preferences through litigation. Unlike courts, policymakers and regulators 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 Deregulation—

¹⁸ Center for Alcohol Policy, *National Alcohol Regulation Sentiment Survey* (2025), at 3, <https://centerforalcoholpolicy.org/wp-content/uploads/2025/03/2025-Center-for-Alcohol-Policy-National-Survey.pdf>

¹⁹ *E.g.*, Stockwell at 2–3.

particularly the sudden and drastic deregulation Appellants advocate—is a weighty decision best made in a legislative setting.

B. The wholesale tier increases consumer choice and availability, and consumers approve of them.

The carefully calibrated three-tier regulatory systems in Ohio, and states like Ohio, are popular among the consumers they protect: 85% of Americans are satisfied with alcohol regulations in their state, and 90% are satisfied with the variety of products available.²⁰ Lawsuits like this one harm the very consumers whose interests they purport to advance.

The independent wholesale distribution tier, and the related regulatory framework, 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.”²¹ In doing so, wholesalers serve as a bulwark protecting consumer choice. In states like Ohio, wholesalers provide an extra layer

²⁰ Center for Alcohol Policy, *Sentiment Survey*, *supra*, at 5.

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 at 2, https://www.nabca.org/sites/default/files/assets/publications/research_studies/SafeandSound.pdf.

of independent protection for consumers because wholesalers are prohibited from owning retailers or being owned by suppliers and are subject to a host of other laws prohibiting certain trade practices.²²

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”²³ and expressed concern that a merger between large alcohol producers would increase the incentive and ability to disadvantage rivals by impeding their distribution.²⁴ 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.”²⁵ Without the existing regulatory regime, distribution access will contract to the detriment of small players.

²² *E.g.* Ohio Admin. Code Rule 4301:1-1-43 (2024).

²³ 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.

²⁴ 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.

²⁵ 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>.

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 a handful of major brands, while retail *alcohol* shelves are stocked with many offerings from a range of alcohol producers, both large and small. When products rely on direct-store delivery—as do soda, ice cream,²⁶ and snacks—scale matters, and industry titans elbow smaller players out of the way.²⁷

But because wine wholesale distributors are *not* dominated or captured by industry goliaths, and because each wholesaler represents competing brands, they are able to provide industry newcomers access to retailer outlets they would be unable to garner themselves.²⁸

Three-tier regulatory systems, in turn, result in high levels of product diversity, innovation, and customer satisfaction. According to data from a recent U.S. Alcohol Tobacco Tax and Trade Bureau (“TTB”) Annual Report,²⁹ the TTB

²⁶ 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> (“The truth of the matter is that you have two world giants that will spend a fortune to protect what they have . . .”).

²⁷ Houghton, *supra*, *id.*

²⁸ 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>.

²⁹ The Alcohol and Tobacco Tax and Trade Bureau Annual Report, *Fiscal Year 2022*, <https://www.ttb.gov/system/files/2025-01/ttbar2022.pdf> at 16-18

approved over 175,000 new labels in one year, 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 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.”³⁰ Ohio 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

(noting that the organization received 193,000 label applications and approved 93% of them within 15 days).

³⁰ Center for Alcohol Policy, *Sentiment Survey*, *supra*, at 4.

retailers. To combat these challenges, wholesalers routinely inform the work of producers and retailers alike.³¹

In addition, wholesalers often 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 and delivery forces, promotional marketing material, and retail-advisory-focused staff.³² Few producers have these capabilities, and to most, it would be “prohibitively expensive to assemble orders” in compliance “with applicable regulations.”³³ Wholesalers leverage their capabilities to manage the distribution function for suppliers. Wholesalers also increase information-system interoperability and reduce retailer costs nationally to the tune of approximately \$7.2 billion dollars annually.³⁴

But wholesalers do not just improve the processes of producers and retailers; they also improve consumers’ day-to-day shopping experiences. For instance,

³¹ Sibley, *supra*, at 12.

³² 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 Apr. 21, 2023).

³³ Sibley, *supra*, at 15

³⁴ *Id.* at 14.

wholesalers routinely educate retail staff on products and companies. In turn, retailers pass this information onto consumers. 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, who are subject to entirely different laws, to evade the wholesale tier to which Ohio retailers are customers, would diminish the commercial efficiencies that flow from wholesalers' regulatory and economic role.

CONCLUSION

Under the Twenty-first Amendment, State alcohol regulations are afforded “special protection” and “should not be set aside lightly.” *North Dakota v. United States*, 495 U.S. 423, 433. *Amici* ask the Court to affirm the decision below, uphold the challenged statutes, and ensure the continued vitality of the three-tier regulatory regime in Ohio.

Dated: September 26, 2025

Respectfully submitted,

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Dated: September 26, 2025

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I HEREBY CERTIFY that a true and correct copy of **BRIEF OF WINE & SPIRITS WHOLESALERS OF AMERICA, INC. AND AMERICAN BEVERAGE LICENSEES AS AMICI CURIAE IN SUPPORT OF APPELLEES** was served on those registered to receive service via the Court of Appeals' electronic email system this 26th day of September, 2025.

s/ Christine Keitlen

Christine Keitlen