No. 21-01906

IN THE 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 United States District Court for the Western District of North Carolina, No. 3:20-cv-00099, Hon. Frank D. Whitney, District Judge

BRIEF OF THE CENTER FOR ALCOHOL POLICY AND THE NORTH CAROLINA ASSOCIATION OF ABC BOARDS AS AMICI CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE

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STATEMENT OF INTEREST[1]

Amici are submitting this brief in support of the North Carolina laws at issue here, and thus in support of the appellee who is defending them—A.D. Guy, Jr., the Chair of North Carolina's Alcoholic Beverage Control Commission.

One of these amici, the Center for Alcohol Policy, is a 501(c)(3) entity with a mission to educate policymakers and regulators like the Commission, as well as courts and the public, about the unique considerations that factor into the government's regulation of alcohol. By conducting research and highlighting initiatives that maintain the appropriate state-based regulation of alcohol, the Center promotes safe and responsible consumption, fights underage drinking and drunk driving, and informs key entities and the public about the personal and societal effects of alcohol consumption.

The other amicus on this brief, the North Carolina Association of ABC Boards, is an organization of over 140 member municipal and

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[1] No party's counsel authored this brief in whole or in part, and no person, party or party's counsel contributed money intended to fund the preparation or submission of this brief.

county ABC Boards that are responsible for retail sales of spirituous liquor throughout North Carolina. A result favoring appellants would adversely impact the ability of the State of North Carolina to effectively regulate the consumption of alcohol – specifically spirituous liquor – within its borders. The Association is gravely concerned that a decision that favors appellants and authorizes direct shipment of wine to North Carolina consumers would present an immediate and almost identical challenge with respect to direct shipment of spirituous liquor, and thus undermine North Carolina's control model for spirituous liquor products.

In their efforts, amici have relied on considerable research about the effectiveness of state laws designed to combat problems associated with alcohol—research that has shown that state laws have played a crucial role, ever since the adoption of the Twenty-first Amendment, in controlling the problems that gave rise to both Prohibition and its repeal. The North Carolina laws challenged in this case are among those laws. The State's brief has shown that these laws promote alcohol-related health-and-safety goals. Amici submit this brief to elaborate on the historical context in which States developed their unique systems of regulation and implemented three-tier systems and laws like the ones at issue

here. The concerns that led the States to adopt these systems after Prohibition ended help to explain why these North Carolina laws serve legitimate goals under the Twenty-first Amendment.

ARGUMENT

When the country chose to amend the Constitution in 1933 and give individual States near-plenary authority to regulate alcohol within their borders, it was reacting to powerful forces that caused social harm on a national scale. In the pre-Prohibition era, alcohol manufacturers exerted pressure on retailers to sell their products at prices that encouraged over-consumption. Local communities suffered the consequences—poverty, crime, domestic strife, and more—while the manufacturers, often not present in these communities, watched their profits pile up. The American people's frustration with that system eventually led to the Eighteenth Amendment and Prohibition. With the Twenty-first Amendment, the people gave States the authority to create systems that promoted moderation, severed ties between manufacturers and retailers, and promoted the unique interests and values of their local communities.

The laws at issue here are an integral part of North Carolina's system. They require retailers that want to sell North Carolinians wine to be present in the State and—just as important—that those retailers do so only through a North Carolina wholesaler that complies with North Carolina's regulatory system. *See* N.C. GEN. STAT. §§ 18B-900(a)(2), 18B-

102.1, 18B-109, 18B-1006(h). The State has persuasively explained why these requirements do not discriminate against interstate commerce. The State has also persuasively explained why these requirements serve legitimate public health and safety goals, such that they are justified under the dormant Commerce Clause and the Supreme Court's decision in *Tennessee Wine & Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449 (2019). The history that gave rise to these laws in the immediate wake of Prohibition and the Twenty-first Amendment—which has been a crucial area of study for amici—bolsters the points the State has made. If States lacked discretion to order their three-tier systems as North Carolina has done, they would be vulnerable to the dangers that initially gave rise to Prohibition, which the framers of the Twenty-first Amendment sought to guard against when alcohol sales resumed in 1933.

I. The historical factors giving rise to the three-tier system justify North Carolina's laws

Three historical developments help provide context about why States like North Carolina developed systems that require retailers and wholesalers to be present in the State:

(1) the rise of vertical integration in the industry, and the tied-house saloon that accompanied it, before Prohibition and the Eighteenth Amendment's adoption in 1919;

(2) the collapse of nationwide Prohibition between the adoption of the Eighteenth Amendment in 1919 and the adoption of the Twenty-first Amendment in 1933, due to the country's failure to adopt local solutions to this inherently local problem; and

(3) the plan of regulatory action, for the post-Prohibition, pro-temperance era, that governments developed to prevent vertical integration and other problems associated with alcohol in conjunction with the Twenty-first Amendment's adoption in 1933.

The following pages discuss these developments in turn.

A. Vertical integration in the alcohol industry was a substantial cause of the excessive consumption that gave rise to Prohibition in 1919

The three-tier systems States enacted with the adoption of the Twenty-first Amendment in 1933 arose from concerns about vertical integration in the industry—and the undesirable consumption habits it

caused—during the pre-Prohibition era. Ever since the Founding of the United States, alcohol consumption has been a significant social problem. "Between 1780 and 1830, Americans consumed 'more alcohol, on an individual basis, than at any other time in the history of the nation,' with per capita consumption double that of the modern era." *Tenn. Wine*, 139 S. Ct. at 2463 n.6 (quoting RICHARD MENDELSON, FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA 11 (2009)). The century that followed "prompted waves of state regulation" to address the "myriad social problems" associated with alcohol. *Id.* at 2463.

Much of the blame fell on the vertically integrated institution known as the "tied-house" saloon. *See id.* at n.7. These were retail establishments that were economically tied to alcohol manufacturers and sold "exclusively the product of [that] manufacturer." RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 29 (Ctr. for Alcohol Policy 2011) (1933). Manufacturers pressured saloonkeepers to make big profits by selling more alcohol, at more locations, and at prices so low that it "encouraged irresponsible drinking." *Tenn. Wine*, 139 S. Ct. at 2463 n.7 (citing THOMAS R. PEGRAM, BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800–1933, at 95 (1998)). As the State's expert observed

during the proceedings in this case, this market structure caused a "proliferation of excessive consumption" that had "damaging effects" on the social order, which "devastated local communities." J.A. 280–281, ¶¶14–15.

Making matters worse, while the saloon was tied to the manufacturer, the manufacturer was not tied to local values. *See* FOSDICK & SCOTT, *supra*, at 29. Commentators at the time observed that "[t]he manufacturer knew nothing and cared nothing about the community" in which its saloon operated. *Id.* "He saw none of the abuses, and as a nonresident he was beyond local social influence." *Id.* "All he wanted was increased sales." *Id.* This "system had all the vices of absentee ownership." *Id.*

B. Nationwide Prohibition failed because it did not account for regulatory interests unique to each State

Intemperance and tied-house saloons ultimately led the people of North Carolina to elect to become a "dry" state in 1908. *See* State Br. 6–7. A little more than a decade later the country chose to adopt nationwide Prohibition. The Eighteenth Amendment imposed an outright, national

ban on the manufacture, sale, transportation, and importation of alcoholic beverages across the entire country. *See* U.S. CONST. amend. XVIII, §1. But the experiment did not last long, and the Eighteenth Amendment was repealed in 1933 by the Twenty-first Amendment. *See* U.S. CONST. amend. XXI, §1.

A publication commissioned at that time by John D. Rockefeller Jr.—and, more recently, republished by the Center for Alcohol Policy—provides crucial context about why Prohibition failed and about what the country envisioned as the regulatory plan moving forward. This book serves, in other words, much like a Federalist Paper for the Twenty-first Amendment. The book, *Toward Liquor Control*, is a 1933 publication by Raymond B. Fosdick and Albert L. Scott. *See* FOSDICK & SCOTT, *supra*. It underscored, more than anything else, that the problems American governments had faced in regulating alcohol had stemmed from a failure to account for different needs of different States—and that the Twenty-first Amendment would not only repeal nationwide Prohibition, but also authorize States to develop their own unique regulatory systems to address those inherently local issues in the future.

The book's foreword stresses the complexity and magnitude of a problem that is difficult to conceive of today. In that foreword Rockefeller—businessman and philanthropist, and son of the Standard Oil founder—explained that he "was born a teetotaler" and had stayed that way all his life. JOHN D. ROCKEFELLER, JR., *Foreword* to TOWARD LIQUOR CONTROL, *supra*, at xiii. He thus held the "earnest conviction that total abstinence is the wisest, best, and safest position for both the individual and society." *Id.* But "the regrettable failure of the Eighteenth Amendment" had persuaded him that "the majority of the people of this country are not yet ready for total abstinence, at least when it is attempted through legal coercion." *Id.* He explained that "[i]n the attempt to bring about total abstinence through prohibition, an evil even greater than intemperance resulted—namely, a nation-wide disregard for law, with all the attendant abuses that followed in its train." *Id.* These rule-of-law concerns had moved Rockefeller from supporting prohibition to favoring "repeal of the Eighteenth Amendment." *Id.*

Building on Rockefeller's argument, Fosdick and Scott explained that the Eighteenth Amendment's "mistake"—and cause of the lawlessness that led to its repeal—had not been the policy choice it embodied of

banning alcohol *per se*. The mistake had been the assumption that the country was "a single community in which a uniform policy of liquor control could be enforced." FOSDICK & SCOTT, *supra*, at 6; *see also id.* at 14. "When the citizens of the United States" adopted the Eighteenth Amendment, "they forgot that this nation is not a social unit with uniform ideas and habits." *Id.* at 6. "They overlooked the fact that in a country as large as this, racially diversified, heterogeneous in most aspects of its life and comprising a patchwork of urban and rural areas, no common rule of conduct in regard to a powerful human appetite could possibly be enforced." *Id.* at 6–7. The divergence between the nationwide rule established by the Eighteenth Amendment and the specific values of particular communities had, in Fosdick and Scott's assessment, destroyed public respect for the rule of law. *Id.* at 5. And that lack of respect for the rule of law was what made it imperative for Prohibition to end.

C. The Twenty-first Amendment's Framers envisioned that each State would develop its own unique regulatory system, reflecting its own values, to prevent vertical integration of the industry and the problems alcohol can cause

While the Eighteenth Amendment's repeal eliminated the rule-of-law problem and Prohibition's failure to account for State-specific interests, *Toward Liquor Control* also explained that the Twenty-first Amendment's aim was emphatically not to end alcohol regulation altogether. Rockefeller, for his part, explained that "with repeal," the problems the country faced were "far from solved." ROCKEFELLER, *supra*, at xiii. If abstinence could not be achieved through Prohibition, the "next best thing" would be "temperance." *Id.* Without it, he emphasized, "the old evils against which prohibition was invoked" could "easily return." *Id.* The only way to achieve a stable equilibrium between those social ills and the lawlessness that Prohibition had brought would be what Fosdick and Scott called a "fresh trail," *see* FOSDICK & SCOTT, *supra*, at 11, which Rockefeller described as "carefully laid plans of control" by each individual State, *see* ROCKEFELLER, *supra*, at xiii.

Those observations highlighted an important reality about the constitutional amendment the country then "anticipated." FOSDICK & SCOTT, *supra*, at xvii. The Twenty-first Amendment did not wave the white flag

on the goals the Eighteenth Amendment had sought to achieve. It instead effectuated a balance between the need to limit alcohol's deleterious effects and the need to acknowledge the limits of law enforcement. As Fosdick and Scott would put it, the Twenty-first Amendment reflected American sentiment "that there is some definite solution for the liquor problem—some method other than bone-dry prohibition—that will allow a sane and moderate use of alcohol to those who desire it, and at the same time minimize the evils of excess." *Id.* at 10–11. But to ensure that the solution would have a rule-of-law legitimacy that nationwide Prohibition had lacked, the Amendment provided that the solution would be catered to the interests and desires of the citizens in each individual State. So immediately after its first section repealing Prohibition, the new amendment's second section made it a constitutional violation for someone to break any given State's laws regarding "[t]he transportation or importation" of alcohol into that State "for delivery or use therein." U.S. CONST. amend. XXI, §2.

Rockefeller therefore asked Fosdick and Scott to develop a "program of action" for States based on a "study of the practice and experience

of other countries" as well as "experience in this country" regulating alcohol. ROCKEFELLER, *supra*, at xiv. That study was embodied in *Toward Liquor Control*, which "became the most important proposal for post-Repeal regulation" because it "articulated commonly accepted ideas and packaged them in a form that demanded respect in a post-Progressive world." Stephen Diamond, *The Repeal Program*, *in* SOCIAL & ECONOMIC CONTROL OF ALCOHOL 100 (Carole L. Jurkiewicz & Murphy J. Painter eds., CRC Press 2008). "Many of Fosdick and Scott's recommendations for prohibition's repeal have been enacted by state and local governments," including in North Carolina. Mark R. Daniels, Toward Liquor Control*: A Retrospective*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 230; J.A. 296 (1937 North Carolina ABC Commission study referring with approval to *Toward Liquor Control*). Courts thus have cited the book as an authoritative guide to, as Justice O'Connor once wrote, "[c]ontemporaneous[]" views of the Twenty-first Amendment's meaning. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 357 (1987) (O'Connor, J., dissenting); *accord Tenn. Wine*, 139 S. Ct. at 2480 (Gorsuch, J., dissenting) (calling *Toward Liquor Control* "a leading study").

The most crucial teaching of *Toward Liquor Control*—and the one that matters most for the purposes of this case—was that alcohol was a local problem that would require local solutions. Whereas Prohibition had failed because it failed to account for the diversity of viewpoints across the nation, Fosdick and Scott envisioned a post-Prohibition world in which each State would tailor its regulatory system to the unique interests of its own citizens. Accordingly, Fosdick and Scott recommended that States pass alcohol laws that reflect "[w]hat" their particular "Community want[s]." FOSDICK & SCOTT, *supra*, at 8. They suggested that States follow "the principle of 'local option,'" which placed "the determination of how the liquor problem shall be handled as close as possible to the individual and his home." *Id.* Doing so would "place[] behind all the local officials who administer the system the same public opinion that determines the system." *Id.* They emphasized that if "the new system is not rooted in what the people of each state sincerely desire at this moment, it makes no difference how logical and complete it may appear as a statute—it cannot succeed." *Id.* at 98.

The understanding that each State would need to have its own system provides critical insight as to why the North Carolina laws at issue

here are, to paraphrase what the Supreme Court has said of three-tier systems generally, "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). Given the role that vertical integration played in causing excessive consumption, there was a national consensus that, as President Roosevelt said in announcing the Twenty-first Amendment's adoption, "no State" should "authorize the return of the saloon either in its old form or in some modern guise." Franklin D. Roosevelt, *Proclamation 2065—Repeal of the Eighteenth Amendment* (Dec. 5, 1933).

Fosdick and Scott's study detailed various ways in which states could regulate alcohol post-Prohibition. They studied two primary models for consideration in the event a state elected to authorize alcohol sales. One was a licensing model, which North Carolina adopted with respect to wine (and beer) that is directly implicated in the challenge presented here. FOSDICK & SCOTT, *supra*, at 24-40. The other (and preferred) option was a control model or "Authority Plan" that North Carolina adopted with modifications with respect to spirituous liquor. FOSDICK & SCOTT, *supra*, at 41-60. North Carolina, through the ABC Commission, oversees the wholesaling of spirits, and local governments, through ABC boards

and stores, are the exclusive retailers of spirits. *See* N.C. GEN. STAT. § 18B-204; *id.* § 18B-700-701; *id.* § 18B-800.[2]

Many States, including North Carolina, followed Fosdick and Scott's general recommendation by "interposing a wholesaler level between the supplier and retailer, as the best method of correcting past abuses, establishing an orderly system of distribution and control of alcoholic beverages and preventing the evil of the 'tied house.'" Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 33; *see also* Act of Mar. 24, 1939, ch. 158, §§ 550-528, 1939 N.C. Sess. Laws 176, 332-50 (North Carolina 1939 law adopting three-tier system for beer and wine sales). But consistent with Fosdick and Scott's view that "this nation is not a social unit with uniform ideas and habits," each State was free to adopt its own, unique means of keeping manufacturers separate from retailers and heading off the problems associated with vertical integration. FOSDICK & SCOTT, *supra*, at 6.

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[2] Since laws governing North Carolina's control model for spirituous liquor are implicated but are not directly challenged here, the remaining references herein to alcohol generally refer to wine regulated in the license model.

The context of this case provides examples of how the States' individual choices played out. North Carolina makes it unlawful for any "manufacturer, bottler, or wholesaler of any alcoholic beverages" to "either directly or indirectly" have a "financial interest in the business of any alcoholic beverage retailer" in the State. *See* N.C. GEN. STAT. § 18B-1116; *id.* § 18B-1119; 14B NCAC § 15C.0706. North Carolina likewise precludes manufacturers and wholesalers from giving retailers any "thing of value," including "money, service, equipment, furniture, and fixtures." N.C. GEN. STAT. § 18B-1116(a)(3); 14B NCAC § 15C.0709; *see also id.* § 15C.0707 (regulations prohibiting wholesalers and other industry members from bribing retailers).

North Carolina also heads off vertical integration between wholesalers and retailers by requiring wholesalers to "collect the full amount of the sale price in cash or bona fide check at the time of or prior to delivery of alcoholic beverages to a retailer," and by specifically prohibiting wholesalers from "extend[ing] credit for any period of time to any retailer who purchases … wine from him." 14B NCAC § 15C.0604(a). In addition, North Carolina precludes wholesalers from "giv[ing] any retailer a quan-

tity discount on the price of … wine." *Id.* § 15C.0704. Each of these provisions reflects North Carolina's judgment about what laws are necessary and workable in light of values and interests particular to what Fosdick and Scott would call the North Carolina "[c]ommunity." FOSDICK & SCOTT, *supra*, at 8.

It is no doubt true that other States have made some of the same choices in configuring their own three-tier laws. But many have not. For example, Florida—the State where B-21 Wines operates—does not prohibit wholesalers from offering volume discounts to retailers on sales of wine. *See* FLA. STAT. ANN. § 561.42(6) ("Nothing herein shall be taken to forbid the giving of trade discounts in the usual course of business upon wine and liquor sales."). Florida also does not prohibit wholesalers from selling liquor to retailers on credit. *See id.* § 561.42(2). The Twenty-first Amendment gives States like North Carolina and Florida freedom to head off vertical integration within their borders in different ways—and to create their own, uniquely tailored three-tier systems that best meet the needs of their own citizens. But that is reason, by itself, to justify state laws requiring alcohol sold to consumers in that particular State to go through that State's own three-tier system.

North Carolina, in other words, has an imperative interest in ensuring that the retailers that sell alcohol to its citizens are free from vertical integration in the manner North Carolina—rather than some other State—sees fit. The only way for North Carolina to be certain that this will happen is to require the alcohol to have come through North Carolina retailers and wholesalers that are subject to North Carolina's three-tier system—including its prohibitions on credit sales, volume discounts, and other provisions.

As the Sixth Circuit has suggested, North Carolina cannot impose those requirements on wholesalers in States like Florida because "[t]he extraterritoriality doctrine, also rooted in the dormant Commerce Clause, bars state laws that have the 'practical effect' of controlling commerce outside their borders." *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863, 872 (6th Cir. 2020) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). So although North Carolina "may regulate the business relationship and prices between *in-state* wholesalers and retailers, it may not do the same for *out-of-state* wholesalers and retailers." *Id.* at 872–73. That is why, as the Supreme Court has explained, "[t]he Twenty-first Amendment empowers [States] to require that all liquor sold for use in

the State be purchased from a licensed in-state wholesaler." *Granholm*, 544 U.S. at 489 (alteration adopted) (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)).

Those principles, of their own accord, render laws like the ones at issue constitutional. The wine that is sold by retailers from other States generally is not—and, as the State's brief highlights, often by law cannot be—wine that was purchased from North Carolina wholesalers, through the North Carolina three-tier system. *See* State Br. 22–23, 36–37. It is instead wine that the out-of-state retailers purchased from wholesalers in their own States, through the three-tier systems that operate there. Because the Twenty-first Amendment was premised on the notion that "this nation is not a social unit with uniform ideas and habits," the Constitution does not require North Carolina to assume that those systems and their governments protect the same interests, with the same degree of force, as its own three-tier system does. FOSDICK & SCOTT, *supra*, at 6. That is a legitimate reason, under the Twenty-first Amendment, for North Carolina to decline to allow B-21 Wines and other out-of-state retailers to sell wine within its borders.

II. The role in-state wholesalers have come to play in promoting health and safety independently justifies North Carolina's laws

While Fosdick and Scott originally proposed separating the distribution tiers to prevent vertical integration, they also recognized that "[o]ur legal prescriptions and formulas must be living conceptions, capable of growing as we grow." FOSDICK & SCOTT, *supra*, at 98. Correspondingly, the three-tier system has developed, in the time since the Twenty-first Amendment's adoption, into an effective tool for promoting health and public safety in ways that go above and beyond the vertical-integration concern.

This product-safety function of the three-tier system is rightly emphasized by the State in its submission to this Court. Just as its brief is right to say that requiring retailers to have an in-state presence promotes health and public safety—for a number of reasons relating to the need for regulators to be able to physically enter a retailer's premises, *see* State Br. 11–12—it is also right to suggest that requiring retailers to purchase alcohol from in-state wholesalers promotes those goals. As the State's expert has testified, "[i]f retailers such as B-21 Wines are not required to purchase alcohol products from a licensed North Carolina wholesaler …

"adverse public health consequences" will result. J.A. 292, ¶70. Amici would add a few words to explain why, in their experience, States have been particularly successful in using in-state wholesalers to achieve those health and public safety goals.

In the years since Fosdick and Scott first proposed plans for state control of alcohol distribution, it has become apparent that focusing certain regulatory efforts on the wholesale tier can make for efficient enforcement. That is so because the three-tier system, by its nature, requires alcohol to be funneled through in-state distributors and operates like an "hourglass." *Family Winemakers v. Jenkins*, 592 F.3d 1, 5 (1st Cir. 2010). On one end is a relatively large number of manufacturers, who are situated across the globe. On the other end are numerous retailers. In between—at what one court has called the "constriction point"—have been a relatively small number of wholesalers in each State. *Family Winemakers*, 592 F.3d at 5; J.A. 314–315 (noting that North Carolina has over 8,474 off-premise unfortified wine retailers and 419 wine wholesalers).

That structure can make for especially smart regulation when policymakers and regulators concentrate their efforts on that relatively

small wholesale tier. With very limited exceptions, all the alcohol distributed in a State generally must pass through those wholesalers on its way from the manufacturers to retailers, so States can effectively regulate all the "sand" in this "hourglass" by focusing on that narrower middle part. States thus typically require wholesalers to have in-state premises and limit their number. *See, e.g.*, N.C. GEN. STAT. § 18B-900(a)(2). States, in turn, regulate this tier extensively. In North Carolina, for example, wholesalers must make available their "entire premises" and their "books and records" for inspection by the Commission and alcohol law-enforcement agents "at any time it reasonably appears that someone is on the premises." N.C. GEN. STAT. § 18B-502(a); 14B NCAC § 15C.0501. North Carolina makes wholesalers responsible for tracking all products and effectuating recalls when needed. *See* J.A. 285–286, ¶¶39–40; State Br. 11. Wholesalers can be subject to audit and must retain records of their sales for three years. *See* 14B NCAC § 15C.0502. By monitoring and imposing reporting requirements on the relatively few entities licensed to serve as wholesalers within their States, regulators can efficiently and effectively monitor and police the activities of all three tiers.

The hourglass structure also provides critical tax-collection advantages—advantages that are crucial not only from the perspective of raising revenues, but also for promoting health and public safety. North Carolina, like other States, generally requires wholesalers to collect and pay the excise tax due on alcohol distributed in the State. *See* N.C. GEN. STAT. § 105-113.80; *id.* § 105-113.83. While cooperative out-of-state retailers theoretically could pay the tax in the event that they ship the alcohol across state lines (*see* J.A. 286–287, ¶¶43–44), a State's ability to collect and enforce taxes against uncooperative out-of-state entities is limited. *See id.*; *see also* J.A. 316, ¶10; J.A. 333–334, ¶12; J.A. 365–366, ¶8. That problem would be compounded by the reality that in some States, taxes are collected at the local level rather than the State level. *See* Wash. Nat'l Tax KPMG LLP, *An Analysis of the Structure and Administration of State and Local Taxes Imposed on the Distribution and Sale of Beer* v–vi (2009), http://www.nbwa.org/sites/default/files/NBWA_Report_2009.pdf.

This problem is as much about public health as it is about revenue. As Fosdick and Scott explained and North Carolina has shown in this case, taxation plays a critical role in "limiting consumption" by keeping

prices at a level that encourages moderation. *See* FOSDICK & SCOTT, *supra*, at 82; *see also* State Br. 12–14. If out-of-state retailers avoid taxes and thereby sell their products more cheaply, then the disincentives to overconsumption will disappear. Requiring all alcohol to run through the in-state wholesalers at the middle of the hourglass allows States to more effectively use taxation to this end.

But the hourglass's advantages would disappear if the appellants in this case succeeded in their challenge to these North Carolina laws. The State has shown that, as a practical matter, it would be impossible for North Carolina to directly regulate all the out-of-state retailers who might attempt to ship wine into the State. *See* State Br. 34 (citing J.A. 314–316); J.A. 284, ¶33. That problem would be compounded because those retailers would be shipping alcohol that came from out-of-state wholesalers—and thus would not have been subject to the various health-and-public-safety regulations on the wholesale tier that North Carolina believes to be essential.

Even more so than restrictions on vertical integration, health-and-safety regulations will vary from State to State. Those regulations matter a great deal because multiple health-and-safety concerns associated with

alcohol persist, such as sales to minors and sales of fake alcohol and other products not allowed within a State. *See* J.A. 285–286, ¶¶37–40; J.A. 334–335, ¶¶14–15; J.A. 317–318, ¶¶13–14. So North Carolina's interest in ensuring that the alcohol retailers sell within its borders be subjected to *those* health-and-safety regulations, and thus ultimately comes from wholesalers that were subject to those regulations, stands as an independent health-and-safety justification for North Carolina's choice to prohibit shipments of wine to its citizens from retailers who are not present in the State.

The "predominant effect" of North Carolina's laws—and of numerous other States' three-tier laws that are catered to the needs and desires of those States' citizens related to alcohol—is thus not economic "protectionism." *Tenn. Wine*, 139 S. Ct. at 2474. It is instead the same fundamental goal that Fosdick and Scott sought to promote—the "protection" of the "public health and safety" of each individual State's citizens, through a uniquely drawn system of regulation that is designed to have legitimacy in the unique community in which it operates. *Id.* These laws fall within the heartland of state alcohol regulations that the Twenty-first Amendment renders constitutional.

CONCLUSION

This Court should affirm the District Court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable type-volume limitation under Rule 32(a)(7) of the Federal Rules of Appellate Procedure. According to the word count in Microsoft Word 2010, the relevant parts of this brief contain 5,080 words.

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s/ Brandt P. Hill
OF COUNSEL

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s/ Brandt P. Hill
OF COUNSEL

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNSEL FOR: The Center for Alcohol Policy; North Carolina Association of ABC Boards

_____ as the
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