

NO. 23-2922

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

JEAN-PAUL WEG LLC, DBA The Wine Cellarage; LARS NEUBOHN
Plaintiffs-Appellants

v.

DIRECTOR OF THE NEW JERSEY DIVISION OF ALCOHOLIC
BEVERAGE CONTROL; ATTORNEY GENERAL NEW JERSEY
Defendants-Appellees

FEDWAY ASSOCIATES; ALLIED BEVERAGE GROUP LLC; OPICI
FAMILY DISTRIBUTING; NEW JERSEY LIQUOR STORE ALLIANCE
Intervenors-Defendants-Appellees

*APPEAL FROM UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY,
CASE NO.: 2:19-cv-14716*

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

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United States Court of Appeals for the Third Circuit

**Corporate Disclosure Statement and
Statement of Financial Interest**

No. 23-2922

JEAN-PAUL WEG LLC, DBA The Wine Cellarage; LARS NEUBOHN

v.

DIRECTOR OF THE NEW JERSEY DIVISION OF
ALCOHOLIC BEVERAGE CONTROL et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Wine & Spirits Wholesalers of America, Inc.
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
Not applicable

/s/ Frederick Yarger
(Signature of Counsel or Party)

Dated: 4/12/2024

United States Court of Appeals for the Third Circuit

**Corporate Disclosure Statement and
Statement of Financial Interest**

No. 23-2922

JEAN-PAUL WEG LLC, DBA The Wine Cellarage; LARS
NEUBOHN

v.

DIRECTOR OF THE NEW JERSEY DIVISION OF
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In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, American Beverage Licensees
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not Applicable

/s/ Frederick Yarger
(Signature of Counsel or Party)

Dated: April 12, 2024

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STATEMENT OF AMICI¹

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 State-based three-tier regulatory system for the beverage-alcohol market and in protecting the public health benefits that flow from it. This case challenges New Jersey’s alcohol regulations and threatens nationwide disruption of States’ ability to regulate alcohol within their borders. *Amici* have an

¹ All parties consent to the filing of this 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.

interest in addressing (1) the challenged New Jersey 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 the Supreme Court’s framework for evaluating the constitutionality of State alcohol regulation.

ARGUMENT

Appellants ask the Court to strike down two of New Jersey’s alcohol regulations—specifically, the requirement that retailers maintain a brick-and-mortar store in the State and the requirement that retailers purchase their inventory from a New Jersey-licensed wholesaler. Appellants’ Br. at 35. Those two features are essential to the functioning of a three-tier system of alcohol regulation, and, as Appellants recognize, they are common to States that have adopted a three-tier system. *See id.* at 9 (“It is impossible for most out-of-state retailers to comply with this rule because they are required to buy their wine from wholesalers in their home states.”).

The Supreme Court and courts across the country have held that the three-tier system is “unquestionably legitimate” under the Twenty-

first Amendment. Simply put, by asking the Court to eliminate two essential features of the three-tier system, Appellants ask this Court to invalidate the three-tier system itself—and the measurable benefits that flow from it—in contravention of the Twenty-first Amendment.

I. Section 2 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, New Jersey relies on a three-tier regulatory system to control the distribution and sale of alcohol. *See Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2457 (2019). Under their three-tier systems, States separately license alcohol producers, wholesalers, and retailers. *Id.* Although limited exceptions exist, alcohol sold within these systems, including wine, moves from licensed 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).

The Twenty-first Amendment alters the usual dormant Commerce Clause rule. Generally, under the dormant Commerce Clause, States may not engage in “differential treatment of in-state and out-of-state economic interests.” *Or. Waste Systems, Inc. v. Dep’t of Env’t Quality*, 511 U.S. 93, 99 (1994). Yet under the dormant Commerce Clause, 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 have uniformly upheld State alcohol regulation when, as here, the challenged law is an

“essential feature” of the three-tier system. *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 227 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 567 (2023); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1184 (8th Cir. 2021); *Tenn. Wine*, 139 S. Ct. at 2471 (recognizing essential features of the three-tier system are protected).

A. *Tennessee Wine’s “Different Inquiry”*

In the context of the Twenty-first Amendment, the dormant Commerce Clause analysis is more deferential than usual because States possess “regulatory authority that they would not otherwise enjoy” if not for Section 2 of the Twenty-first Amendment. *Tenn. Wine*, 139 S. Ct. at 2474. 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 Imports, 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*, 139 S. Ct. at 2474). 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”); *Anvar v. Dwyer*, 82 F.4th 1, 11 (1st Cir. 2023) (“[T]he mere existence of possible alternatives does not, for purposes of a Twenty-first Amendment inquiry, necessarily invalidate a challenged law.”).

Concrete Evidence. A State fails the “concrete evidence” step 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. ECF No. 70, 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.”). *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. And, 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. The second step in the *Tennessee Wine* analysis—the “nondiscriminatory alternatives” inquiry—need be considered only if, unlike here, a State provides *no* concrete evidence supporting a contested regulation. *See B-21 Wines, Inc.*, 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.”).

The First, Fourth, Sixth, and Eighth Circuits have rejected efforts to read *Tennessee Wine*’s “nondiscriminatory alternatives” analysis as synonymous with or approaching strict scrutiny.² 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*, 139 S. Ct. at 2476 (emphasis added).

B. Courts Routinely Uphold State Laws and Regulations that Constitute “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

² See, e.g., *Anvar*, 82 F.4th at 11; *B-21 Wines*, 36 F.4th at 225; *Sarasota Wine*, 987 F.3d at 1180; *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 873 (6th Cir. 2020).

challenges to the “essential features” of States’ three-tier system.” *B-21 Wines*, 36 F.4th at 229 (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, e.g., Sarasota Wine*, 987 F.3d at 1184 (“essential feature” of the three-tier system did not violate the dormant Commerce Clause).

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—such that eliminating that feature would change the character of or undermine 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). Thus, courts have upheld even purportedly “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.

II. The wholesale tier and physical-presence requirements are essential features of New Jersey’s three-tier system and therefore do not offend the dormant Commerce Clause.

Appellants challenge two “essential features” of the three-tier system: the wholesale tier and physical presence requirements.

A. The wholesale tier

Appellants ask the Court to invalidate the entire second tier of New Jersey’s three-tier system—the wholesale tier—by mandating sales from out-of-state retailers who do not utilize New Jersey’s regulatory system. Appellants’ Br. at 35. The Supreme Court has already held that such challenges are meritless.

Under the Twenty-first Amendment, States can 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.*, *Wine Country Gift Baskets.com*, 612 F.3d at 817 (“[R]equiring wholesalers and retailers to be present in and licensed by New York, were fundamental components of the three-tier system authorized in *Granholm*”); *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.”).

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 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, as appellants recognize, regulations requiring retailers to purchase product from state-licensed wholesalers are ubiquitous in States that have adopted a three-tier system of alcohol regulation. Appellants’ Br. at 9. Thirty-six States require retailers to purchase inventory from a licensed, in-state wholesaler.³ That commonality is

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;

additional evidence that the wholesale tier is an essential feature of those systems. *See Wine Country Gift Baskets.com*, 612 F.3d at 817.

B. Physical presence requirements

Physical presence requirements are also an essential feature of three-tier systems, and they too have been repeatedly upheld. *E.g.*, *B-21 Wines*, 36 F.4th at 228 (allowing “direct shipping of alcoholic beverages . . . by out-of-state retailers” would “undermin[e] the . . . three-tier system and the established public interest of safe alcohol consumption that it promotes”); *Lebamoff*, 956 F.3d at 872 (“Opening up the State to direct deliveries from out-of-state retailers necessarily means opening it up to alcohol that passes through out-of-state

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).

wholesalers or for that matter no wholesaler at all . . . creat[ing] a sizeable hole in the three-tier system.”); *Sarasota Wine*, 987 F.3d at 1184 (the rules governing shipments of liquor were an “essential feature of [Missouri’s] three-tiered scheme.”).

In *Sarasota Wine*, for example, the Eighth Circuit considered whether “Missouri’s requirements that licensed liquor retailers be residents of Missouri, have a physical presence in the state, and purchase liquor sold in the State from licensed in-state wholesalers” violated the dormant Commerce Clause. *Id.* at 1182. The court rejected that argument because the licensing requirements, which include a physical premise requirement, are “an essential feature of” the three-tier system. *Id.* at 1184. That conclusion, applicable here, defeated any theory of discrimination.

Neither the statutes discussed in *Lebamoff*, *Sarasota Wine*, and *B-21 Wines* nor the New Jersey statutes challenged here are outliers. Thirty-seven States prohibit out-of-state retailers from shipping wine to

in-state consumers.⁴ Even more States, 43, prohibit out-of-state retailers from shipping spirits to in-state consumers.⁵

New Jersey’s physical presence requirement thus mirrors the systems upheld in other states. These provisions, common nationwide, preserve the integrity of three-tier systems. As other Circuits have 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 a “challeng[e] [to] the three-tier system itself.” *Brooks*, 462 F.3d at 352 (dictum).

* * *

Because Appellants challenge two separate essential features of the three-tier system, their claims fail outright. The Court need not conduct a full dormant Commerce Clause analysis. *Wine Country Gift*

⁴ *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 Ann. § 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.

⁵ *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.

Baskets.com, 612 F.3d at 821; *B-21 Wines*, 36 F.4th at 228; *Sarasota Wine*, 987 F.3d at 1185.

III. Requiring retailers to maintain a physical presence and purchase inventory from a New Jersey wholesaler as part of a licensing framework that is open to everyone is nondiscriminatory and therefore does not violate the dormant Commerce Clause.

If the Court does engage in a dormant Commerce Clause analysis, Appellants' claim fails because New Jersey's physical-presence requirement is nondiscriminatory. The dormant Commerce Clause bans "differential treatment of in-state and out-of-state economic interests" between "entities who are similarly situated." *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010). If, however, the entities are not similarly situated, they can be treated differently.

As the district court recognized, "the New Jersey system does not have different licenses for in-state vs out-of-state wine retailers."⁶ ECF

⁶ The court ruled that the New Jersey System is "arguably" non-discriminatory "because it requires that in-state and out-of-state wine retailers sell and deliver wine through the New Jersey System." ECF No. 157 at 20. Yet it also ruled that some of New Jersey's requirements "may be discriminatory," and it proceeded to the concrete evidence analysis. *Id.* at 21-22. Doing so was unnecessary. The district court's ruling that the New Jersey law is not discriminatory was correct, and there is no reason for this Court to go any further. *Blake v. JP Morgan*

No. 157 at 25. “[B]oth in-state and out-of-state wine retailers are subject to the same procedures and requirements to sell wine to New Jersey customers.” *Id.* To be licensed, no matter where it is headquartered or incorporated, a retailer must “purchase their wine from licensed New Jersey wholesalers” and “open a store in New Jersey.” *Id.* at 20.

Thus, although New Jersey treats “licensed” and “unlicensed” retailers differently, it treats in-state and out-of-state retailers the same.⁷ Retailers who submit to the licensing requirements, including by opening a brick-and-mortar store in New Jersey, “must satisfy the same requirements, obtain the same licenses, and be subject to the same inspections, audits, and investigations.” Order, ECF No. 157 at 25.

In that way, although New Jersey’s three-tier system differentiates between two groups of retailers that are *not* similarly situated, it is evenhanded in its treatment of similarly situated in-state retailers versus out-of-state retailers. The “rules governing direct shipments of wine to [New Jersey] consumers apply evenhandedly to all

Chase Bank NA, 927 F.3d 701, 705 (3d Cir. 2019) (this Court can “affirm for any reason in the record”).

⁷ New Jersey also limits the number of retail liquor licenses allowed per capita. N.J.S.A. 33:1-12.14.

who qualify for a [New Jersey] retailers license.” *Sarasota Wine*, 987 F.3d at 1184; *Lebamoff*, 956 F.3d at 870. As the district court recognized, it is the Appellants who “request to be treated differently.” ECF No. 157 at 24.

IV. New Jersey’s three-tier system does not offend the dormant Commerce Clause because, like similar systems across the country, it advances legitimate State policies.

Even if New Jersey’s three-tier system discriminated against out-of-state companies—which, to be clear, it does not—New Jersey produced concrete evidence that the physical presence requirements and the wholesaler tier advance legitimate State interests, so they must be upheld. *Tenn. Wine*, 139 S. Ct. at 2474.

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. This system has many regulatory benefits, demonstrated by the effect of its absence in international markets.⁸ In those markets,

⁸ *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. (“E-commerce is also making it harder for government authorities to control the illicit alcohol market, and for consumers to distinguish between licit and illicit products.”).

unchecked competition for market share drives down prices, promotes excess consumption, and increases consumer susceptibility to illicit or tainted alcohol.⁹ Additionally, less-regulated markets result in less consumer choice because large suppliers dominate.¹⁰ For these reasons, the legal system in this country has sought to preserve the “orderly market conditions” generated by three-tier systems nationwide.¹¹ *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion); see also *Tenn. Wine*, 139 S. Ct. at 2475.

States have adopted the three-tier system—including physical presence requirements—because it is an effective way to achieve policy objectives. The wholesale tier, in particular, serves a vital regulatory function within the three-tier framework, and it also generates substantial *economic* benefits to States, producers, retailers, and

⁹ *Id.*

¹⁰ *Cf.* Competitive Impact Statement at 8, *United States v. Anheuser-Busch InBev SA/NV*, No. 16-cv-01483 (D. D.C. July 20, 2016), ECF No. 3.

¹¹ 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>.

consumers. Those benefits, however, depend on its continued *regulatory* function.

A. The wholesale tier advances legitimate state policies.

New Jersey's wholesale tier advances a legitimate state interest. Order, ECF No. 157 at 22. As the district court recognized, the wholesale tier, among other things, allows States to identify contamination and facilitate recalls. *Id.* at 23. Moreover, the wholesale tier is inherent to the three-tier system, which states have recognized is a legitimate state policy in itself. *B-21 Wines*, 36 F.4th at 229.

New Jersey's experience with the benefits of the wholesale tier matches the experience of other States that maintain a three-tier system for regulating alcohol. Like New Jersey, 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.¹²

¹² 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).

Without the wholesale tier, recalls would be near-impossible, given the universe of roughly 400,000 on- and off-premise retailers around the country. *See* App. 137 (addressing the number of retailers).

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 alcohol is delivered.¹³

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.¹⁴ In some cases, no ID was requested (even when the alcohol was received by a minor), the shipment was never reported, or

¹³ 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>.

¹⁴ Vermont Department of Liquor and Lottery DTC Shipping Pilot Compliance Program, <https://liquorandlottery.vermont.gov/sites/liqplot/files/documents/NABCAVTDLLDTCComplianceReportFinalJANTWENTYFOUR.pdf>

the packages were not properly marked.¹⁵ 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.”¹⁶ 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.

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 forces, delivery forces, promotional marketing material, and retail-advisory-focused staff—all of which is subject to rigid state-by-state regulation.¹⁷ Few producers have these capabilities, and for most, it would be “prohibitively expensive to

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 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>.

assemble orders” in compliance “with applicable regulations.”¹⁸

Wholesalers also increase information-system interoperability and reduce retailer costs nationally to the tune of approximately \$7.2 billion dollars annually.¹⁹

B. Physical presence requirements 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*, 139 S. Ct. at 2475; *see also Lebamoff*, 956 F.3d at 871 (Michigan’s law, which includes physical presence requirements “promotes plenty of legitimate state interests, and any limits on a free market of alcohol distribution flow from the kinds of traditional regulations that characterize this market, not state protectionism.”). New Jersey, through its physical presence requirements, pursues the same legitimate policies. ECF No. 157 at 22.

¹⁸ David S. Sibley & Padmanabhan Srinagesh, *Dispelling the Myths of the Three-Tier Distribution System* (2008) at 15.

¹⁹ *Id.* at 14.

Seeking to downplay the regulatory importance of in-state presence requirements, Appellants emphasize that many States permit “wine producers” (not retailers) to ship limited amounts of wine directly to consumers, across state borders. *See* Appellants’ Br. 29. Appellants claim this limited exception to the three-tier system and related presence requirement requires an additional, massive exception—for roughly 400,000 wine *retailers* in the United States, App. 137—as a matter of constitutional law. *See* Appellants’ Br. 29.

As an initial matter, States’ legitimate interests, which promote public health and safety goals, do not evaporate when a licensed in-state retailer makes sales by in-state shipping or delivery.²⁰ Nor can a change in how some States treat licensed direct shipments from producers control how all States must treat the retailer tier. Retailers and producers are different entities and they are subject to different regulations and requirements.²¹

²⁰ *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*, 612 F.3d at 818–20; *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009).

²¹ Alcohol and Tobacco Tax and Trade Bureau, *TTB’s Mission – What We Do*, <https://www.ttb.gov/consumer/about-us-what-we-do>.

Appellants compare apples and oranges. Wineries are limited in number: There are only around 11,000 in the entire country, and the vast majority are small businesses.²² Further, wineries, unlike retailers, have Federal permits, giving them another layer of regulatory oversight. Given these limitations, they are a manageable exception to three-tier systems nationwide.

Yet even that limited exception has created opportunities for noncompliance. 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.²³ Kansas found that:

²² Wines Vines Analytics, *U.S. Wineries—By State*, January 2023, <https://winesvinesanalytics.com/statistics/winery>.

²³ 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.

- 95% of these vendors 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; of those, 50% also lacked a 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.²⁴

Even more troubling, a North Carolina study confirmed that direct shipment of alcohol to consumers increases underage receipt of

²⁴ 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.

alcohol.²⁵ These problems are far from isolated; they exist nationwide, and New Jersey is no exception.²⁶

Out-of-state vendors engaging in the practices Appellants seek to force New Jersey 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.²⁷ Unlike their in-state

²⁵ 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>.

²⁶ 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/sites/default/files/2021-07/NLLEA%20ALEC%20CIED%20Letter.pdf>; see also Vermont Department of Liquor and Lottery DTC Shipping Pilot Compliance Program

²⁷ 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>.

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 had a right to engage 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. The number of domestic wine retailers is 36 times *larger* than the few wineries; there are roughly “400,000 *wine retailers* across the country.” App. 137 (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.

* * *

New Jersey has thus presented concrete evidence that the wholesaler 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)).

V. Appellants seek to impose their own policy preferences through the judiciary by eliminating effective state regulatory oversight of beverage alcohol.

Appellants are out-of-state retailers who contend they are harmed because they cannot ship alcohol directly to customers within New Jersey.²⁸ Appellants’ Br. at 12-13. Appellants thus attempt to impose their own policy preferences through the judiciary, instead of through the political process. The federal judiciary is not the proper mechanism for enacting that sort of local policy change; it is far too blunt an instrument. If nationwide supplier delivery or shipping is authorized

²⁸ Appellants contend that collectors in New Jersey are unable to purchase those sorts of vintage and resale wines. App. Br. at 14. Only a handful of States allow retailers to purchase vintage products, and New Jersey is not one of them. CA Business and Professions Code, Division 9, Chapter 2, Section 23104.6; KY K.R.S. Chapter 243, section 243.232, 804 KAR 5:080; TX ABC Code Sec. 22.19; NY ABC Laws Sec. 99-G. Nor does it allow retailers to purchase product at auction for resale. AZ ARS Title 4, Ch. 2, Article 1, Sec. 4-205.05; CA Business and Professions Code, Division 9, Chapter 3, Section 23355.1; IL 235 ILCS 5/1-3.32; MI Code 436.2031; NY ABC Laws Sec. 99-G. Thus, it is not clear that eliminating in-state requirements and the wholesale tier would actually solve this purported harm.

through judicial deregulation, the in-state purchase requirement of New Jersey’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. *Tenn. Wines*, 139 S.Ct. at 2457 (The Twenty-first Amendment “gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable.”).

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. Sensible regulation of the alcohol market must consider a range of perspectives, including public health, youth protection, and public revenue—and those perspectives are best considered by the legislature.

A. Consumers approve of the wholesale tier, which increases consumer choice and availability.

The carefully calibrated three-tier regulatory systems in New Jersey, and states like New Jersey, are popular among the consumers they protect: 85% of Americans are satisfied with alcohol regulations in their state, and 88% are satisfied with the variety of products available.²⁹ Lawsuits like this one harm the very consumers whose interests they purport to advance.

The 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.”³⁰ In doing so, wholesalers serve as a bulwark protecting consumer choice.

²⁹ Center for Alcohol Policy, *Sentiment Survey*, *supra*, at 4.

³⁰ 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.

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”³¹ and expressed concern that a merger between large alcohol producers would increase the incentive and ability to disadvantage rivals by impeding their distribution.³² 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.”³³ Without the existing regulatory regime, distribution access will contract to the detriment of small players.

³¹ 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.

³² 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.

³³ 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,³⁴ and snacks—scale matters, and industry titans elbow smaller players out of the way.³⁵

But wine wholesale distributors are *not* dominated by industry goliaths due to of effective state-level regulation, including presence requirements, and because each wholesaler represents competing brands. Thus, they are able to provide industry newcomers access to retailer outlets they would be unable to garner themselves.³⁶

³⁴ 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 . . .”).

³⁵ Houghton, *supra*, *id.*

³⁶ 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>.

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,³⁷ the TTB received over 197,000 applications for label approval in one year, representing a large range of new products. Wine product registrations, for example, grew 23%.

Consumers recognize this and understand how well the existing system works for them; the vast majority believe state regulations are “just right.”³⁸ New Jersey 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 and its regulatory functions, including in-state presence.

B. 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.” 139 S.

³⁷ The Alcohol and Tobacco Tax and Trade Bureau Annual Report, *Fiscal Year 2023*, <https://www.ttb.gov/images/pdfs/ttbar2023.pdf>.

³⁸ Center for Alcohol Policy, *Sentiment Survey*, *supra*, at 4.

Ct. at 2474. While addressing these concerns is no simple task, States have succeeded, as public opinion shows.³⁹ That success is jeopardized by the specter of unwarranted judicial deregulation.

Appellants here contend that they seek to increase consumer choice, specifically related to foreign, rare, and vintage wines. Appellants' Br. at 14. But, as explained above, consumers within a three-tier system like the one in New Jersey generally approve of those systems. *Supra* at 32-35.

Consumers like Appellants 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

³⁹ 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.

enforcement, monitoring and reporting, and public health messaging.⁴⁰

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

CONCLUSION

Under the Twenty-first Amendment, State alcohol regulations are afforded “special protection” and “should not be set aside lightly.” *North Dakota*, 495 U.S. at 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 New Jersey.

⁴⁰ *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(8), 2846 at 2–3 (Aug. 19, 2021), <https://doi.org/10.3390/nu13082846>.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The undersigned certifies that this brief contains 6,493 words, exclusive of the table of contents, table of authorities, signature block, and certifications, and therefore complies with the limitation stated in Federal Rule of Appellate Procedure 32(a)(7)(B).

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 the brief has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing system in Century Schoolbook font that is at least 14 points

3. The electronic version of this brief filed with the Court was automatically scanned by CrowdStrike Windows Sensor virus scanning version 7.12.18207.0 and found to contain no known viruses.

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Dated: April 12, 2024

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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