United States Court of Appeals

for the

Third Circuit

Case No. 23-2922

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,

Intervenor-Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY IN CASE NO. 2-19-CV-14716, HONORABLE JULIEN X. NEALS, DISTRICT JUDGE

BRIEF FOR INTERVENOR-DEFENDANTS-APPELLEES ALLIED BEVERAGE GROUP LLC AND OPICI FAMILY DISTRIBUTING

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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, et al,

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, Allied Beverage Group LLC 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.

N/A.

/s/Deborah A. Skakel Dated: 12/06/2023

(Signature of Counsel or Party)

United States Court of Appeals for the Third Circuit

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

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Opici Family Distributing 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.

N/A

/s/Deborah A. Skakel Dated: 12/06/2023

(Signature of Counsel or Party)

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STANDARD OF REVIEW

By its Opinion (App 005-031) and Order dated August 22, 2023, as modified on October 13, 2013 (App 003) (the "Opinion"), the district court denied Plaintiffs' motion for summary judgment and granted the cross-motions for summary judgment of Defendants Director of the New Jersey Division of Alcoholic Beverage Control and Attorney General of New Jersey (the "State Defendants"), Intervenor-Defendants Allied Beverage Group, LLC and Opici Family Distributing ("Allied/Opici"), and Intervenor-Defendant Fedway Associates, Inc. ("Fedway") (collectively, "Defendants").

This Court "'exercise[s] plenary review over an order resolving cross-motions for summary judgment,' applying the same standard that the lower court was obligated to apply under Rule 56." *Auto-Owners Ins. Co. v. Stevens & Ricci Inc.*, 835 F.3d 388, 402 (3d Cir. 2016) (internal citations omitted) (affirming grant of insurer's summary judgment motion and denial of cross-motion):

> Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences in favor of that party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Appelmans v. City of Phila.*, 826 F.2d 214, 216 (3d Cir. 1987). "This standard does not change when the issue is presented in the context of cross-motions for summary judgment." *Appelmans*, 826 F.2d at 216. When both parties move for summary judgment, "[t]he court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in

> accordance with the Rule 56 standard." 10A Charles Alan Wright et al., *Federal Practice & Procedure § 2720* (3d ed. 2016).

Id.

STATEMENT OF RELATED CASES

This case has not been before this Court previously.

There is no other related case or proceeding in this Court or any district court in this circuit.

The following cases are pending in other circuits in which the plaintiffs (all represented by the same attorneys representing Plaintiffs-Appellants) challenge the constitutionality of state laws prohibiting out-of-state retailers from shipping wine to in-state consumers.

1. *Chicago Wine Co. v. Holcomb*, No. 21-2068 (pending before 7th Circuit)
2. *Day v. Henry*, No. 23-16148 (fully briefed in 9th Circuit)
3. *Block v. Canepa*, 2:20-cv-03686 (S.D. Ohio), on remand from 74 F.4th 400 (6th Cir. 2023) (renewed summary judgment cross-motions briefing ongoing)
4. *Anvar v. Dwyer*, 1:19-cv-00523 (D.R.I.), on remand from 82 F.4th 1 (1st Cir. 2023) (supplemental disclosures regarding submission of supplemental evidence ongoing)
5. *Freehan v. Berg*, No. 1:22-cv-04956 (N.D. Illinois) (parties' respective motions to strike experts pending)

STATEMENT OF THE CASE

The Twenty-first Amendment of the United States Constitution empowers States to pass laws concerning the sale and distribution of alcohol within their

borders. *See* U.S. Const. Amend. 21, Sec. 2.[1] "[U]nder § 2, States 'remai[n] free to pursue' their legitimate interests in regulating the health and safety risks posed by the alcohol trade" (*Tennessee Wine and Spirits Retailers Assoc. v. Thomas*, 588 U.S. ___, 139 S. Ct. 2449, 2472 (2019) (internal citations omitted)), because "§ 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens" (*id.* at 2474).

A. The Challenged Provisions

Pursuant to the power granted by § 2 of the Twenty-first Amendment, New Jersey, like most other states, has adopted a three-tier system for the distribution and sale of alcohol. The Supreme Court has recognized that the three-tier system is "'unquestionably legitimate.'" *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990)); *see also Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J. concurring) ("The Twenty-first Amendment empowers [the State] to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler."). So too has this Court:

> In *Granholm v. Heald*, the Supreme Court reaffirmed the view expressed by five justices in *North Dakota v. United States*, that such a "three-tier system . . . is ·unquestionably legitimate." *Granholm*, 544

[1] Section 2 of the Twenty-first Amendment states: "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. at 489 *(*citing *North Dakota, 495 U.S. at 432* (plurality op.) & *id.* at 447 *(*Scalia, J., concurring in the judgment)).

Freeman v. Corzine, 629 F. 3d 146, 151 (2010).

Under New Jersey's three-tier statutory scheme, New Jersey licensed retailers must purchase alcohol products (including wine) from New Jersey licensed wholesalers (N.J. Admin. Code 13:2-23.12(a)), who in turn must purchase from New Jersey licensed suppliers. Licensed in-state retailers may sell and deliver to New Jersey consumers the alcohol products purchased from the licensed in-state wholesalers. N.J.S.A. § 33:1-12(3a), N.J. Admin. Code § 13:2-20.1.

New Jersey does not have any residency requirement to obtain a retailer license (App 477 (Declaration of Andrew R. Sapolnick ("Sapolnick Decl.") ¶ 9), but all licensed retailers must be physically present in the State (N.J.S.A. § 33:1-50(a)). Likewise, all licensed wholesalers must be physically present in the state. N.J.S.A § 33:1-19, -26.

Because New Jersey makes it unlawful for anyone in the business of selling alcohol products (including wine) in another state to ship any alcohol product directly to anyone other than a licensed New Jersey wholesaler, Plaintiffs challenge the retailer presence requirement and the in-state wholesaler purchase requirement, claiming the requirements violate the dormant Commerce Clause, U.S. Const., art. I, § 8, cl. 3.

B. Factual Background

In establishing the New Jersey Alcoholic Beverage Law, N.J.S.A. 33:1-1, et seq. (the "NJ ABC Law"), the Legislature's primary purpose was to "strictly regulate alcoholic beverages to protect the health, safety, and welfare of the people of this State." N.J.S.A. 33:1-3-3.1(b). The provisions of New Jersey's regulatory system (which the district court referred to as "the New Jersey System" (Opinion at 2, App 006)) reflect that purpose:

- Suppliers must register with the New Jersey Division of Alcoholic Beverage Control ("NJ ABC") every product they wish to sell in the State. Licensed New Jersey wholesalers may purchase only brand registered products – preventing the diversion of alcohol products from the regulated distribution channels and thereby preventing the sale of bootlegged alcohol or products not approved for sale by the State. Certain products are banned under the NJ ABC Law. Sapolnick Decl. ¶ 15, App 479.
- New Jersey retail-licensee applicants undergo a thorough review and screening process, including an on-site inspection of the premises to be licensed. Tia Johnson Dep. Tr. at 6:18-23, App 435.
- New Jersey retailers and wholesalers are subject to on-site inspections of their licensed premises in New Jersey and their books and records.

Declaration of Robert Harmelin ("Harmelin Decl.") ¶ 11, App 241-242; Declaration of Robert D. Sansone ("Sansone Decl.") ¶ 4, App 246-247. It is only through on-site inspections and investigations that NJ ABC is able to detect a myriad of violations. Sapolnick Decl. ¶¶ 16-23, App 479-483.

- New Jersey retailers may purchase alcohol products only from licensed New Jersey wholesalers. N.J. Admin. Code 13:2-23.12.
- Because New Jersey wholesalers and retailers maintain licensed premises in the State and New Jersey retailers may purchase only from New Jersey wholesalers, the recall of any alcohol product that is unsafe is able to be effectuated, including by the New Jersey wholesaler picking up from the New Jersey retailers' premises any defective product sold to the retailers. Harmelin Dec. ¶¶ 12-14, App 242-244; Sansone Dec. ¶¶ 5-10, App 247-249.
- NJ ABC's enforcement efforts depend on having the licensed wholesalers and retailers in the State. Sapolnick Decl. ¶ 19, App 480-481 (undercover investigation at retailer's premises finding illegal sales to minors subjects retailer to disciplinary penalties including license suspension or revocation) and ¶ 23, App 482-483 (Enforcement Bureau's unannounced warrantless searches of licensed retail premises

resulting in charges of failing to maintain accurate invoices on the premises and having alcohol product on the premises that was purchased from a prohibited source).

- The authority of and means available to NJ ABC concerning enforcement of the State's regulatory system is also dependent on the licensed retailers and wholesalers having their premises within the State because NJ ABC relies on the assistance (and resources) of local law enforcement, and neither NJ ABC nor local enforcement has authority outside of New Jersey. As Andrew Sapolnick, the New Jersey Deputy Attorney General assigned to NJ ABC's Enforcement Bureau states:

> Because ABC's jurisdiction is limited to New Jersey, it has no practical means by which to conduct warrantless searches and seizures of evidence and property located outside of New Jersey. ABC's legal authority to conduct warrantless searches and seizures of evidence in property outside of New Jersey is also in question. ABC would have to rely upon the willingness of out-of-state agencies to conduct the on-site inspections and investigations to which New Jersey alcoholic beverage licensees are subjected. There are several obstacles to be overcome even if those agencies wanted to assist ABC including, but not limited to: (1) whether specific out-of-state agencies have legislative approval to assist in enforcing New Jersey's alcoholic beverage laws, (2) whether those agencies would be able to divert limited resources to assist ABC, as well as (3) whether they would be able to conduct adequate investigations under the ABC Act because they are untrained regarding New Jersey alcoholic beverage laws, etc.

Sapolnick Decl. ¶ 24, App 483.

- And the fact that the New York States Liquor Authority (New York's alcohol beverage licensing and enforcement body and that to which Plaintiff is subject) refused to assist NJ ABC concerning an investigation of a retailer underscores the obstacles NJ ABC would face in seeking to investigate and take enforcement measures against an out-of-state retailer. *Id*. at ¶¶ 26-27, App 484-485.
- Plaintiff Jean-Paul Weg, LLC d/b/a Wine Cellerage is a licensed New York retailer who does not want to set up premises in New Jersey and cannot under the terms of its New York license buy from a New Jersey wholesaler. Instead, Wine Cellerage may buy from a New York wholesaler *and*, under New York's alcohol beverage law, may buy "private collection" wine from an individual; approximately 20% of Wine Cellerage's wine inventory is purchased from private collections. Lars Neuborn Dep. Tr. at 70:14-23, App 398. That "private collection" wine is not purchased through the wholesaler channel in New York. "Private collection" wine sales are not allowed in New Jersey. Sapolnick Decl. ¶ 33, App 487.

C. Procedural History

In Plaintiffs' Third Amended Complaint, which was filed on May 6, 2021 (App 040), Wine Cellerage and its owner Lars Neubohn assert a dormant Commerce Clause claim, contending that they are unconstitutionally discriminated against because only retailers with a physical presence in New Jersey who agree to the in-state wholesaler purchase mandate are able to obtain a license to sell and deliver alcohol products to New Jersey consumers.[2]

After fact and expert discovery, Plaintiffs moved for summary judgment, and the State Defendants, Allied/Opici, and Fedway each cross-moved for summary judgment.

D. The District Court's Decision

In its Opinion and Order entered August 22, 2023, as modified on October 13, 2023 (App 003), the district court found that the challenged laws and regulations do not violate the dormant Commerce Clause, are constitutional, and are a permissible exercise of New Jersey's Twenty-first Amendment authority. It therefore denied Plaintiffs' motion for summary judgment and granted the motions for summary judgment of the State Defendants, Allied/Opici, and Fedway (*id.* at 031). The district court held as follows:

[2] Allied/Opici intervened in this case by consent order dated July 29, 2020. App 034; Dkt 55.

1. Plaintiffs challenge New Jersey's in-state retailer presence requirement and in-state wholesaler purchase requirement – provisions that "go [to] the root of the New Jersey [three-tier] System" (Opinion at 24, App 028). Plaintiffs' challenge is therefore to "the validity of the New Jersey [three-tier] System" itself (*id*.), which is "'unquestionably legitimate'" (*id.* at 19, App 023 (citing *Granholm v. Heald*, 544 U.S. at 489 and *Freeman v. Corzine*, 629 F.3d at 158)); the district court found that the challenged provisions and New Jersey's three-tier system did not violate the dormant Commerce Clause and were valid (*id.* at 27, App 031).

2. Because this case involves a dormant Commerce Clause challenge to alcohol regulations, the "'different inquiry'" test set out in *Tennessee Wine* applies (*id.* at 11, App 015) under which the State must show that "the challenged requirement must be justified as a 'public health or safety measure or on some other legitimate nonprotectionist ground'" (*id.* at 16, App 020 (citing *Tennessee Wine*, 139 S. Ct. at 2474)), and that the State's showing must consist of "'concrete evidence'" that the challenged statute 'actually promotes public health or safety[,]' or 'evidence that nondiscriminatory alternatives would be insufficient to

further those interests'" (*id.* at 16, 25-27, App 020, 029-031 (*Tennessee Wine*, *id.* at 2474)).

3. New Jersey's requirement of an in-state presence for retailers "advances the legitimate local purpose of promoting public health and safety" as shown by concrete evidence regarding on-site inspections and in-state enforcement investigations. *Id.* at 26-27, App 030-031.

4. New Jersey's requirement that retailers buy alcohol only from in-state licensed wholesalers also serves the public's health and safety as shown by concrete evidence of the on-site inspections to which the wholesalers are subject and the facilitation of product recalls and other actions regarding unsafe products made possible by the wholesalers' in-state presence and the requirement that retailers purchase "'through an authorized distribution network.'" *Id.* at 26-27, App 027, 030-031.

5. The nondiscriminatory alternatives would "'prove unworkable'" because the New Jersey [three-tier] System's challenged requirements are necessary to "on-site inspections, unannounced visits, and ABC-led investigations" and cannot be replaced or substituted where the NJ ABC's jurisdiction is limited to New Jersey (*id.* at 23, 25, App 027, 029); and while the State provides a license to an out-of-state winery for certain direct sales to consumers, that does not mean providing a

similar license to an out-of-state retailer is a nondiscriminatory alternative mandated by the Commerce Clause where doing so would "invalidate the New Jersey [three-tier] System" (*id*. at 25-26, App 029-030).[3]

RULINGS PRESENTED FOR REVIEW[4]

1. The challenged New Jersey laws require licensed in-state alcohol retailers to have a physical presence in the State and to buy wine only from licensed in-state alcohol wholesalers. Should this Court affirm the district court's Opinion that the challenged retailer presence and in-state wholesaler purchase requirements do not violate the dormant Commerce Clause on the grounds that those requirements are essential features that "go [to] the root" of the State's three-tier system of alcohol regulation? *See* Opinion at 18-19, 24-25; App 022-23, App 028-29.

[3] The district court correctly noted that the nondiscriminatory alternatives prong of the *Tennessee Wine* analysis is a disjunctive one. Opinion at 16, App 020 ("This is demonstrated by 'concrete evidence' that the law 'actually promotes public health or safety[,]' or 'evidence that nondiscriminatory alternatives would be insufficient to further those interests.' *Ibid.* (citations omitted)."). Thus, while the district court, having found that there was the requisite concrete evidence that the challenged laws actually promoted public health and safety, need not have gone on to assess the insufficiency of Plaintiffs' proposed alternatives, its ruling that such nondiscriminatory alternatives were not workable should be affirmed.

[4] This Court should not agree to Plaintiff's request to consider the remedy issue (Appellants' Brief at Point IX) where "the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation," *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995), and no constitutional violation has been proven.

2. Should this Court affirm the district court's Opinion which held that New Jersey's requirement that retailers have a physical presence in the State to be licensed is a permissible exercise of the State's Twenty-first Amendment authority and is not a violation of the dormant Commerce Clause because: (a) the challenged retailer presence requirement can be justified as a public health or safety measure, and (b) there is concrete evidence that the retailer presence requirement actually promotes public health and safety under the Supreme Court's governing standard set forth in *Tennessee Wine*, and Plaintiffs did not produce sufficient countervailing evidence? *See id.* at 20-24, App 024-028.

3. The challenged New Jersey law also requires that licensed in-state alcohol retailers buy wine only from licensed in-state alcohol wholesalers. This means that retailers located outside of New Jersey who have not purchased wine from a licensed New Jersey wholesaler may not import that wine into New Jersey for sale and delivery to a New Jersey consumer. Should this Court affirm the district court's Opinion which held that New Jersey's requirement that retailers purchase wine from an in-state wholesaler having a physical presence in the State is a permissible exercise of the State's Twenty-first Amendment authority and is not a violation of the dormant Commerce Clause because: (a) the challenged requirement of purchasing from a wholesaler having a presence in the State likewise can be justified as a public health or safety measure, and (b) there is also concrete evidence

that the in-state wholesaler purchase requirement actually promotes public health and safety under the *Tennessee Wine* test, and Plaintiffs did not produce sufficient countervailing evidence? *See id.*

4. Should this Court affirm the district court's Opinion which held that Plaintiffs' proffered nondiscriminatory alternatives would prove unworkable because (i) the State's jurisdiction is limited to New Jersey, and it has no practical means to engage in enforcement measures against out-of-state retailers, and (ii) New Jersey is not required to make a direct shipping license available to an out-of-state retailer simply because it makes such a license available to an out-of-state winery where doing so would invalidate the State's three-tier system? *See id.* at 23-24, 25-26; App 027-028, App 029-030.

SUMMARY OF THE ARGUMENT

The district court's rulings in rejecting the dormant Commerce Clause challenge to the retailer presence requirement and in-state wholesaler purchase requirements of the New Jersey three-tier system should be affirmed.

This Court should affirm the district court's Opinion on the grounds that the retailer presence and in-state wholesaler purchase requirements "go [to] the root" of New Jersey's three-tier system and must be maintained to enable the State to preserve the integrity of its "'unquestionably legitimate'" three-tier system of alcohol regulation. (Point II.)

The district court correctly held that the applicable standard for assessing a dormant Commerce Clause challenge to an alcohol-related regulation was the "different inquiry" set forth in *Tennessee Wine* under which the States must establish that "the challenged requirement can be justified as a public health or safety measure" and do so through "'concrete evidence'" that the challenged law "actually promotes public health or safety." *Tennessee Wine*, 139 S. Ct. at 2474 (quoting *Granholm v. Heald,* 544 U.S. at 492). (Point III.)

The district court correctly held that the challenged retailer presence requirement meets *Tennessee Wine*'s test because its predominant effect is the protection of New Jesey citizens' health and safety that would otherwise be at risk were the presence requirement eliminated. Additionally, in accordance with *Tennessee Wine*, Defendants-Appellees provided concrete evidence that the retailer presence requirement promotes public health and safety, including evidence that on-site inspections and investigations to ensure compliance actually take place and the State's inspections and enforcement efforts promote public health and safety by investigating, penalizing, and effectively curtailing noncompliant conduct. (Point III.A.)

The district court also correctly held that the challenged in-state wholesaler purchase requirement meets the predominant effect and concrete evidence prongs of *Tennessee Wine*'s test as reflected in the Sapolnick Declaration as well as the

declarations of two licensed New Jersey wholesalers explaining the numerous and various on-site inspections to which they are subject and the critical function of the in-state wholesaler and in-state retailer in ensuring that only alcohol products registered with the state are sold through an authorized distribution network and in addressing issues of unsafe alcohol products (including wine) in a time-sensitive manner to protect the health and safety of New Jerseyans. (Point III.B.)

This Court should affirm the district court's Opinion upholding the retailer presence and in-state wholesaler purchase requirements on the grounds that, Plaintiffs' proposed nondiscriminatory alternative – compelling New Jersey to adopt a permit system like that used for out-of-state winery direct shipping – is neither workable nor required, particularly where to do so would effectively invalidate New Jersey's three-tier system. (Point III.C.)

ARGUMENT

I. LEGAL FRAMEWORK FOR ASSESSING A COMMERCE CLAUSE CHALLENGE TO AN ALCOHOL REGULATION

In *Tennessee Wine*, the Supreme Court initially reviewed the "long and complicated history" of the dormant Commerce Clause (139 S. Ct. at 2459-2462), "the history of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment" (*id.* at 2461-2467), and the interplay of the dormant Commerce Clause and § 2 of the Twenty-First Amendment, focusing on its then most recent case, *Granholm* (*id.* at 2467-2473).

The Supreme Court then "appl[ied] the § 2 analysis dictated by the provision's history and our precedents," finding:

> [B]ecause of § 2, we engage in a different inquiry. Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy, but as we pointed out in *Granholm*, "mere speculation" or "unsupported assertions" are insufficient to sustain a law that would otherwise violate the Commerce Clause. 544 U.S. at 490, 492, 125 S. Ct. 1885. Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2.

Id. at 2474. The "different inquiry" requires states to show that "the predominant effect of a law" is the protection of public health and safety (or some other legitimate state interests) – not protectionism (*id.* at 2474), and to proffer "'concrete evidence'" – not "'mere speculation' or 'unsupported assertions'" that the challenged law "actually promotes public health or safety" (*id.* (quoting *Granholm*, 544 U.S. at 490)).

Just as the Supreme Court in *Tennessee Wine* based its articulation of the different inquiry on the principles set out in *Granholm*, so too did this Court apply *Granholm*'s analytical approach in determining that the State did not carry its burden

of showing through concrete evidence that the challenged alcohol regulation at issue in *Freeman v. Corzine* served a legitimate nonprotectionist purpose.[5]

As the district court noted, the challenges in *Freeman* and the case at bar differ significantly. In *Freeman*, this Court struck down an exception to New Jersey's three-tier system by which in-state wineries (but not out-of-state wineries) were allowed to sell directly to retailers and consumers, thereby "'skip[ping] the first two tiers'" (wholesalers and retailers). Opinion at 15, App 019 quoting *Freeman*, 629 F. 3d at 159. No such exception exists for in-state retailers; licensed New Jesey retailers must purchase wine from licensed New Jersey wholesalers – all wine to be sold by the in-state retailer must therefore pass through the supplier and wholesaler tiers.

Courts in multiple jurisdictions that have assessed a dormant Commerce Clause challenge to an alcohol-related regulation since the *Tennessee Wine* decision in 2019 have applied the "different inquiry" standard. *See Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863, 869 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1049 (2021) ("When faced with a dormant Commerce Clause challenge to an alcohol regulation,

[5] *See Freeman*, 629 F.3d at 160 ("Neither defendant nor intervenors attempts to save the provisions of the ABC Law allowing in-state wineries to make direct sales to consumers and retailers by arguing that they are necessary to serve some legitimate local purpose."). The record in *Tennessee Wine* was similarly devoid of any "'concrete evidence'" showing that the residency statute promotes public health and safety. *Tennessee Wine*, 139 S. Ct. at 2474.

as a result [of § 2], we apply a 'different' test. Rather than skeptical review, we ask whether the law 'can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." (internal citations omitted); affirming denial of plaintiffs' summary judgment motion and grant of defendants' summary judgment motion regarding retailer presence requirement and prohibition of out-of-state retailer delivery); *B-21 Wines, Inc. v. Bauer*, 36 F. 4th 214, 222 (4th Cir. 2022), *cert. denied*,143 S. Ct. 567 (2023) (under *Tennessee Wine*, the court must assess "'whether the challenged [regime] can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground'" (internal citations omitted); affirming denial of plaintiffs' summary judgment motion and grant of defendants' summary judgment motion regarding prohibition on out-of-state retailer direct shipping); *Chicago Wine Co. v. Holcomb*, 532 F. Supp. 3d 702, 713 (S.D. Ind. 2021) (citing *Tennessee Wine*'s different inquiry test and denying plaintiffs' summary judgment motion and granting defendants' summary judgment motion regarding retailer presence requirement and in-state wholesaler purchase requirement); *Tannins of Indianapolis v. Cameron*, No. 3:19-CV-504-DJH-CHL, 2021 WL 6126063, at *3-4 (W.D. Ky. Dec. 28, 2021) (following *Lebamoff* and dismissing complaint); *Day v. Henry*, 2023 WL 5095071, at *5 (D. Ariz. Aug. 9, 2023) (applying *Tennessee Wine* standard and denying plaintiffs' summary

judgment motion and granting defendants' summary judgment motion regarding retailer premises requirement).

The District Court's ruling that "§ 2 of the Twenty-first Amendment requires that courts 'engage in a different inquiry' when facing challenges to a state's alcohol beverage laws," citing *Tennessee Wine* (Opinion at 11, App 015), is therefore correct and should be affirmed.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE CHALLENGED LAWS ARE REGULATORY REQUIREMENTS THAT GO TO THE ROOT OF THE STATE'S THREE-TIER SYSTEM AND THEREFORE PROPERLY REJECTED PLAINTIFFS' DORMANT COMMERCE CLAUSE CLAIM

The district court held that the retailer physical presence and in-state wholesaler purchase requirements "go to [the] root of the New Jersey [three-tier] System" of alcohol regulation (*id.* at 24, App 028), a three-tier system that does not violate the dormant Commerce Clause (*id.* at 18-19, App 022-023). The district court pointed to the Supreme Court's decision in *North Dakota v. U.S.*, 495 U.S. at 431, 433 for the propositions that "states have 'virtually complete control over the importation and sale of liquor and the structure of the liquor distribution system,'" and "[w]hen a state 'has established a comprehensive system for the distribution of liquor within its borders[,] [t]hat system is unquestionably legitimate." Opinion at 11, 19, App 15, 23. In *Granholm*, the Supreme Court reaffirmed that the three-tier system is '"unquestionably legitimate,'" *id*. at 489 (quoting *North Dakota*, 495 U.S.

at 432), and cited to *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring), for the principle that "[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*," 544 U.S. at 489 (emphasis added); *see also Freeman v. Corzine*, 629 F.3d at 151 ("In *Granholm v. Heald*, the Supreme Court reaffirmed the view expressed by five justices in *North Dakota v. United States*, that such a three-tier system . . . is unquestionably legitimate.'") (internal citations omitted).[6]

[6] Plaintiffs contend that "it is doubtful that New Jersey or most other states have a three-tier system for wine," having "abandoned it" by allowing out-of-state wineries to sell directly to consumers without going through a wholesaler and retailer. Appellants' Br. at 29. Plaintiffs are incorrect and conflate two concepts. That there may be an *exception* to New Jersey's three-tier system that allows out-of-state wineries to bypass the system entirely (i.e., their wine does not pass through the in-state wholesalers or the in-state retailers) does not negate the existence of that three-tier system. *See Granholm*, 544 U.S. at 474 ("subjecting out-of-state wineries, but not local ones, to the three-tier system" violated the dormant Commerce Clause); *Freeman v. Corzine*, 629 F.3d at 160 (allowing in-state but not out-of-state wineries "to circumvent portions of the three-tier system" is discrimination,); *see also Cherry Hill Vineyard, LLC v. Baldacci*, 505 F. 3d 28, 31 (1st Cir. 2007) (Maine's three-tier system "admits of an exception for small vintners"); *accord Lebamoff Enterprises, Inc. v. Whitmer*, 956 F. 3d at 863 (noting that a two-tier system exists in Utah for wine because Utah is the sole importer and main retailer and then underscoring that *Granholm* concerned "a discriminatory exception to a three-tier system" regarding wine (not an elimination of the three-tier system for wine)); *B-21 Wines, Inc. v. Bauer*, 38 F. 4th at 226 ("we have no reason to rule today that the limited statutory exception made available by North Carolina to in-state and out-of-state wineries means that the State has abandoned its three-tier system"); *Day v. Henry*, 2023 WL 5095071, at *9 (plaintiffs' "argument that Arizona has abandoned its three-tier system for wine specifically by allowing certain wineries to ship directly to consumers in incorrect. Creating an exception is not abandoning the entire system.").

Based on this view of the three-tier system, the Supreme Court has distinguished between a regulatory provision that is an "essential feature" of a three-tier system and one that is not. *See, e.g., Tennessee Wine,* 139 S. Ct. at 2471-72 (durational residency requirement is "not an essential feature of a three-tiered scheme"); *accord* Opinion at 16, App 020. Following *Tennessee Wine*, the courts that have addressed the "essential feature" question have uniformly held that the regulatory requirements at issue here are essential to the State's three-tier system. *See, e.g., Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171, 1183 (8th Cir.), *cert. denied,* 142 S. Ct. 335 (2021) (plaintiff "without question attacks core provisions of Missouri's three-tiered system that the [Supreme] Court . . . described as 'unquestionably legitimate'"; Missouri's retailer and wholesaler physical presence requirements and its mandate to purchase only from in-state wholesalers "are an essential feature of its three-tiered scheme"; dismissal of plaintiffs' Commerce Clause complaint affirmed); *Lebamoff Enterprises v. Whitmer*, 956 F.3d at 872 (upholding Michigan's requirement that retailer be in-state to make deliveries because "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 wholesalers or for that matter no wholesaler at all" (emphasis added)); *B-21 Wines, Inc. v. Bauer,* 38 F.4th at 228 ("the direct shipping of alcoholic beverages to North Carolina consumers by out-of-state retailers would completely exempt those out-of-

state retailers from the three-tier requirement. That would open the North Carolina wine market to less regulated wine, undermining the State's three-tier system and the established public interest of safe alcohol consumption that it promotes. . . . Eliminating the role of North Carolina's wholesalers in this way would create what the court of appeals in [*Lebamoff Enterprises, Inc. v.] Whitmer* appropriately called 'a sizeable hole' in the State's three-tier system."; affirming decision upholding North Carolina's retailer presence requirement, denying plaintiffs' summary judgment motion and granting state defendants' motion); *Tannins of Indianapolis v. Cameron*, 2021 WL 6126063, at *4 ("In short, *Lebamoff* confirmed that states with a three-tier system can prohibit direct-to-consumer alcohol deliveries by out-of-state retailers without violating the Commerce Clause. And Kentucky is no different. Like Michigan in *Lebamoff*, Kentucky regulates alcohol distribution within its borders via a three-tier system. Like Michigan, Kentucky has a legitimate interest in preserving the integrity of its three-tier system. Like Michigan, 'there is no other way' Kentucky 'could preserve the regulatory control provided by the three-tier system' other than by prohibiting direct-to-consumer alcohol deliveries by out-of-state retailers. And thus, like Michigan's, Kentucky's ban on such deliveries is constitutionally permissible under both the Commerce Clause and the Twenty-first Amendment.") (internal citations and quotations omitted); *Day v. Henry*, 2023 WL 5095071, at *9 ("contrary to Plaintiffs' assertion, the Supreme Court has not rejected physical

presence requirements nor found that they are not essential to a three-tiered scheme."). *See also Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) ("[A]rgument challenging the three-tier system itself . . . is foreclosed by the Twenty-First Amendment and . . . *Granholm*."); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016) ("Distinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system.") (citation omitted), *cert. denied sub nom., Tex. Package Stores Ass'n v. Fine Wine & Spirits of N. Tex.*, 137 S. Ct. 494 (2016); *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008) (a State's "decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds").

As in the recent cases of *Sarasota Wine*, *Lebamoff*, *B-21 Wines*, *Tannins of Indianapolis*, and *Day*, Plaintiffs seek the elimination of the retailer presence requirement *and* the State's mandate to purchase from an in-state wholesaler. Indeed, Plaintiffs effectively challenge the constitutionality of the in-state wholesaler purchaser requirement in "all 50" states (Appellants' Br. at 35), conceding that Plaintiffs do not intend to (and cannot) comply with that essential feature of the New Jersey three-tier system (*id*. at 9). Plaintiffs' proffered expert agrees that the in-state wholesaler purchase mandate is "an essential part of the three-tier system" (Wark Dep. Tr. 115:15-25, App 470), and asserts that New Jersey's in-

state wholesaler purchase mandate should be eliminated – and the mandate should be eliminated "in *every* state" (*id.* at 92:3-10 (emphasis added), App 467). As in *Lebamoff*, if Plaintiffs are successful, that will "effectively eliminate the role" of New Jersey's wholesalers and "create a sizeable hole in the three-tier system." *Lebamoff*, 956 F.3d at 872; *accord B-21 Wines*, 36 F.4th at 228.

Consistent with the several courts that have decided this same issue, the district court held:

> Plaintiffs' contention [that the validity of the New Jersey three-tier system is not at issue] is unavailing given the relief that they seek . . . Veritably, Plaintiffs . . . seek[ ] to invalidate the . . . physical presence and wholesaler wine purchase requirements; and to prohibit the New Jersey [three-tier] System from applying to Plaintiffs. . . . The . . . physical presence and wholesaler wine purchase requirements go [to] the root of the New Jersey [three-tier] System.

Opinion of 24-25, App 028-029.

The district court's conclusion on this issue is correct, and the Opinion should be affirmed.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE CHALLENGED LAWS ARE CONSTITUTIONAL UNDER *TENNESSEE WINE*'S DIFFERENT INQUIRY TEST

The district court correctly held that the challenged provisions in the New Jersey System are "valid exercise of the State's power under the Twenty-first Amendment and are justified by the legitimate nonprotectionist ground of promoting

public health and safety" (Opinion at 18-19, App 022-023), as shown by "'concrete evidence'" required under *Tennessee Wine* (*id.* at 26-27, App 030-031).[7]

Initially, to the extent that Plaintiffs argue that the challenged laws discriminate against out-of-state retailers because in-state consumers have fewer wines available to purchase (Appellants' Brief at 13-15, 34), that argument is unsupported factually and legally.

The unrefuted record evidence concerning the unavailability issue shows that New Jersey wholesalers can fulfill the requests of all their New Jersey retailer customers for wines – including those that are not currently on the retailer's or wholesaler's shelves. *See* Harmelin Decl. ¶ 15, App 244; Sansone Decl. ¶ 11-13, App. 249-251. Of course, given that neither of the two Plaintiffs is a New Jersey wine consumer, it is not surprising that Plaintiffs lack any evidence to establish the

[7] Plaintiffs argue that Defendants have not established a Twenty-first Amendment defense by claiming that "the Amendment has proven fairly impotent over the years." Appellants' Br. at 37. That argument is based on older cases concerning tax exemptions and price affirmation statutes, a myopic view of *Tennessee Wine* (where the State put forth no defense based on the predominant effect and concrete evidence prongs of the *Granholm* test), and an avoidance of the multiple circuit court cases that followed *Tennessee Wine* and upheld challenged alcohol beverage statutes based on a Twenty-first Amendment defense – cases in which the Supreme Court denied certiorari. *See Lebamoff Enterprises, Inc. v. Whitmer*, 141 S. Ct. 1049 (2021); *Sarasota Wine Market, LLC v. Schmitt*, 142 S. Ct. 335 (2021); and *B-21 Wines, Inc. v. Bauer*, 143 S. Ct. 567 (2023).

requisite discrimination arising from the claimed unavailability of wines for New Jersey consumers.

Regardless, other courts that have grappled with this issue have held that no Commerce Clause violation exists under comparable circumstances. *See Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d at 1178-84 (holding consumers who alleged that direct shipment prohibition prevented them from purchasing wines not available in Missouri had standing, but ultimately rejecting Commerce Clause challenge); *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d at 874-75 ("What of the consumer plaintiffs, the Michigan wine purchasers who cannot buy the types of wine they want without inconvenience? The record for one suggests these concerns may be exaggerated. Wine wholesalers have their own profit incentive to carry enough brands to meet consumer demand and answer requests for more.").

A. Concrete Evidence In The Record Shows The Retailer Presence Requirement Promotes New Jerseyans' Health and Safety

It is *Tennessee Wine*'s adoption of *Granholm*'s governing principles that provides express guidance for the assessment of New Jersey's retailer presence requirement. After setting out its "predominant effect" test ("whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground"), the Supreme Court in *Tennessee Wine* acknowledged that retailers are presumptively present in the state. In discussing reasonable alternatives to a durational residency requirement, the Supreme Court

distinguished between presence and residence, emphasizing that Tennessee retailers were already physically located in the state, which was sufficient for the state to maintain oversight such that residency was unnecessary:

> In this case, the argument [in support of residency] is even less persuasive since the stores at issue are physically located within the State. For that reason, the State can monitor the stores' operations through on-site inspections, audits, and the like . . . Should the State conclude that a retailer has 'fail[ed] to comply with the state law,' it may revoke its operating license. *Granholm*, 544 U.S. at 490, 125 S. Ct. 1885. This 'provides strong incentives not to sell alcohol' in a way that threatens public health or safety. *Ibid*.

139 S. Ct. at 2475.

Plaintiffs turn the Supreme Court's analysis of physical presence on its head by wrongly arguing that –

> The Supreme Court has already held that states may not require an out-of-state firm to have a physical presence in the state in order to compete on equal terms. *Granholm v. Heald*, 544 U.S. at 474-75. A state's interests in regulatory accountability and maintaining oversight over alcohol distribution are "insufficient" to justify residency and physical-presence requirements, *Tennessee Wine*, 139 S. Ct. at 2475, because "these objectives can also be achieved through the alternative of an evenhanded licensing requirement." *Granholm v. Heald*, 544 U.S. at 492.

Appellants' Brief at 22. Plaintiffs likewise improperly conflate residency laws and physical presence requirements (*id*. at 35-36), thereby further distorting the Supreme Court's analysis in *Granholm* and *Tennessee Wine*.

Consistent with the Supreme Court's analysis of the retailers' physical presence in the State, New Jersey's retailer presence requirement functions to enable

the State to "monitor the [retailer] stores' operations through on-site inspections, audits, and the like" and thereby protect New Jersey's citizens from the retailers' "'fail[ure] to comply with the state law'" by selling alcohol products "in a way that threatens public health or safety." *Tennessee Wine*, 139 S. Ct. at 2475 (quoting *Granholm*, 544 U.S. at 490).

The district court correctly relied upon the Supreme Court's observations concerning the public health and safety benefits of a physical presence requirement when assessing the concrete evidence demonstrating the attributes of the challenged statute within New Jersey's three-tier system, particularly the Declaration of Deputy Attorney General, NJ ABC Enforcement Division, Andrew Sapolnick:

> Mr. Sapolnick argues in pertinent part that due to the New Jersey System, the State Defendants can exercise their oversight prerogatives over licensed premises and protect the public health and safety by requiring licensees to have a New Jersey store and purchase alcoholic beverages from licensed New Jersey wholesalers. The Court agrees.
>
> First, Mr. Sapolnick states that the New Jersey System's "physical presence requirement" allows the ABC "to conduct its regulatory oversight of alcoholic beverage activity within the State to protect the public health, safety[,] and welfare." *Id.*, at ¶ 10. Such a requirement "advances" the "legitimate local purpose" *(see Granholm*, 544 U.S. at 489), of protecting public health and safety because it "ensures that [all] alcohol sold to New Jersey consumers passes through New Jersey's three-tier system." Sapolnick Decl., at ¶¶ 10-11. For example, having an in-state physical presence allows the ABC to conduct "random site visits without prior notice to the particular licensee." *Id.*, at ¶ 16. Such visits assist in "determin[ing] whether retailers are engaged in illegal sales, such as sales to minors. . . ." *Id.*, at ¶ 19. . . .

> Relatedly, unannounced inspections, which are authorized by statute *(see* N.J.S.A. 33:1-35), and ABC investigations of licensees have uncovered undisclosed interests in licensed premises, including by organized crime, and "afford [the] ABC the opportunity to inspect the licensee's contemporaneous records. . . ." Sapolnick Decl., at ¶¶ 20-21. Investigations have also "uncovered large sums of unaccounted-for cash[,]" unlawful acquisition of beverage alcohol from prohibited sources, specifically other than a New Jersey licensed wholesaler[,]" and have led to numerous prosecutions for related violations. *Id.*, at ¶¶ 22- 23. Fedway further supports this assertion by describing instances in 2017 and 2018, where "State officials" performed on-site inspections of its warehouse and corporate offices, as well as "trucks and sales personnel when they are on the road." Robert D. Sansone's December 2, 2021 Declaration (ECF No. 112-2).

Opinion at 22-23, App 026-027.

Out-of-state online retailers pose additional regulatory challenges because NJ ABC local law enforcement cannot conduct in-person, on-site inspections or confirm that the products for sale have passed through a licensed in-state wholesaler or that the sellers have complied with State tax laws. These out-of-state online retailers also pose additional safety concerns because neither NJ ABC nor law enforcement can verify that the product offered for sale is what it purports to be, that the product is being sold to someone at least 21 years old, or even that the product is fit for human consumption.

The district court noted the difficulties of taking enforcement measures against out-of-state retailers:

> [T]he ABC's "jurisdiction is limited to New Jersey, [and] it has no practical means by which to conduct warrantless searches and seizures of evidence and property located outside of New Jersey." Sapolnick

> Decl., at ¶ 24. Indeed, the State Defendants would need to overcome "several obstacles" in working with agencies outside its borders to investigate out-of-state entities selling alcoholic beverages to New Jersey consumers, including "whether specific out-of-state agencies have legislative approval to assist in enforcing New Jersey's alcoholic beverage laws" and whether out-of-state agencies are "able to conduct adequate investigations under the ABC Act[.]" *Ibid.* This is particularly relevant here because the New York State Liquor Authority (the "NYSLA"), which oversees The Wine Cellarage in New York State, has in the past "refused to assist ABC in regulatory oversight of its licensees." *Id.*, at ¶ 26. In 2018, the NYSLA declined the ABC's request to "obtain the investigation reports, specifications of charges" and "settlement agreement" related to the NYSLA's fine of Wegmans to determine whether the State Defendants "should conduct a similar investigation of Wegmans" in-state. *Ibid.* As a result, exempting Plaintiffs from the New Jersey System "would render it beyond New Jersey's regulatory purview." *Id.* at 25.

Opinion at 23-24, App 027-028.

The State's concrete evidence, consisting primarily of the detailed Sapolnick Declaration, and the concrete evidence of the wholesaler Defendants' declarations provide many, specific examples of the inspections and investigations in which the State actually engages to ensure compliance and the significant enforcement efforts that result in numerous inspections and investigations, fines and penalties, and the curtailing of noncompliant conduct.

The district court also correctly concluded that Plaintiffs' countervailing evidence was "not persuasive." *Id.* at 25, App 025. *See Lebamoff Enterprises v. Whitmer*, 956 F.3d at 879 ("The plaintiffs here have not produced sufficient countervailing evidence showing that these public health concerns are 'mere

speculation' or 'unsupported assertions,' or that the 'predominant effect' of the in-state retailer requirement is not the protection of public health." (McKeague concurring).

B. Concrete Evidence In The Record Shows The In-State Wholesaler Purchase Requirement Promotes New Jerseyans' Health and Safety

The physical presence of the licensed New Jersey wholesaler, which is the predicate for the in-state wholesaler purchase requirement, also has the effect of protecting New Jerseyans' health and safety because – as it does with New Jersey retailers – the State monitors wholesalers' operations through several on-site inspections and audits. The licensed New Jersey wholesaler is subject to various inspections of its licensed premises – all of which are on-site, physical inspections. (Harmelin Decl. ¶ 11, App 441-442; Sansone Decl. ¶ 4, App 446-447) – as well as frequent inspections of the wholesalers' trucks and sales personnel while on the road (Sansone Decl. ¶ 4, App 247). Initially, before a wholesaler license is issued, the premises to be licensed must undergo and pass an inspection by NJ ABC. (*Id.*) The local fire safety agency also conducts an on-site inspection of the licensed premises. (*Id*.) As a condition of its license, the New Jersey wholesaler must make its premises (including its books and records) available for inspection by NJ ABC. (*Id*.) The wholesalers undergo an annual on-site inspection and audit of their total State tax filings, including alcohol-related excise tax and container tax filings. (*Id.*) And if a New Jersey wholesaler refuses to provide NJ ABC or other enforcement officials

with access to its licensed premises, that refusal is grounds for suspension or revocation of the wholesaler's license. (*Id.*)

The licensed in-state wholesalers may purchase only those products that are brand registered with NJ ABC (Sapolnick Decl. ¶ 12, App 478); by mandatory distribution of alcohol through an authorized distribution network, the State "lessens the risk of economic fraud, denigration of quality, deleterious products being sold to consumers" (*id.* at ¶ 13, App 479), and alcohol products being sold illegally outside the authorized regulatory system (*id.* at ¶ 22-23, App 482-483).

Because licensed New Jersey wholesalers may purchase only those alcohol products from the designated brand owner that are registered with NJ ABC, and because those purchased products must be stored in the wholesaler's licensed warehouse prior to resale to a licensed New Jersey retailer, if a product is determined to be defective, the supplier-manufacturer can be tracked through a particular wholesaler, and the defective product recalled. Harmelin Decl. ¶ 2, App 242; Sansone Decl. ¶ 5, App 247. This allows the licensed New Jersey wholesaler, upon receipt of notice concerning a defective product, to act expeditiously (i) to locate all quantities in its possession of the defective product and remove it from distribution until it is either approved for sale or required to be returned to the supplier, and (ii) if necessary, to recover the defective product from the retailers to whom it was sold. *Id.*

In their declarations, the wholesalers describe several recall problems (including those involving wine) that they addressed efficiently. Harmelin Decl. ¶ 13, App 242-243; Sansone Decl. ¶¶ 6-7, App 247-249. The licensed New Jersey wholesalers are able to effectuate a product recall quickly because of the detailed records that they must maintain regarding sales to each of the finite number of licensed New Jersey retailers as well as the ongoing business relationship they have with each of those New Jersey retailers. More importantly, because the licensed New Jersey wholesalers have boots on the ground and feet on the street, they are able to mobilize effectively and then seamlessly retrieve defective product from each retailer in the State before a consumer is injured by or falls ill from that recalled product. Harmelin Decl. ¶ 14, App 243-244; Sansone Decl. ¶¶ 8-10, App 449. Should the magnitude of the recall problem trigger the involvement of the federal Alcohol and Tobacco Tax and Trade Bureau or NJABC, these licensed New Jersey wholesalers would fully comply with any necessary on-site measures (including product seizure) consistent with the obligations under their federal basic permit.[8] They would also cooperate with NJABC to ensure that all recalled product that was already shipped to retailers was identified, located and, if necessary, removed from

[8] While retailers are licensed and regulated by the individual States only, wine wholesalers are required to obtain a federal permit in addition to the requisite license from the States and to comply with federal and state laws. See Federal Alcohol Administration Act of 1935, 27 U.S.C. §§ 201, et seq. ("FAA Act").

the retailers' shelves – again, consistent with their obligations under their New Jersey license. *Id.*

The record is replete with concrete evidence to establish that the retailer presence and in-state wholesaler purchase requirements promote the health and safety of New Jerseyans, particularly where that concrete evidence pertains to the very attributes of a presence requirement that the Supreme Court in *Tennessee Wine* recognized – i.e., enabling the State to "monitor the stores' operations through on-site inspections, audits, and the like" (139 S. Ct. at 2475) and, upon finding a "'fail[ure] to comply with state law,'" revoking the operating license (*id.* (quoting *Granholm*, 544 U.S. at 490)).

Because that concrete evidence demonstrates that on-site inspections and investigations to ensure compliance with the law actually take place and the State's inspection and enforcement efforts promote public health and safety by probing, penalizing, and effectively curtailing harmful noncompliant conduct, and given the lack of persuasive countervailing evidence of Plaintiffs, the district court's Opinion on this issue should be affirmed.

C. This Correctly Found That Plaintiffs' Proposed Nondiscriminatory Alternative – Compelling New Jersey To Adopt A Permitting System For Out-of-State Retainers Like That For Out-of-State Winery Direct Shipping – Is Not Reasonable

Based on their contention that out-of-state winery direct shipping and out-of-state retail direct shipping "pose no threat" to New Jerseyans' health and safety "to

begin with" (Appellants' Br. at 39), Plaintiffs argue that the nondiscriminatory alternative to the retailer presence and in-state wholesaler purchase requirements is to allow out-of-state retail direct shipping and delivery under the same permit used for out-of-state winery direct shipping and delivery (*id.* at 27). Appellants are wrong on both counts. Their evidentiary support for their "pose no threat to begin with" predicate (*id.* at 15-18) is woefully insufficient; and the claimed alternative (*id.* at 27-28) is not reasonable given that (i) the existing licensing system for in-state retailers to which Plaintiffs point is predicated on physical presence in the State (and therefore provides no basis as an "alternative"), and (ii) there are many significant differences between winery and retailer direct shipping.

i. Unsupported "pose no threat" predicate

The evidence upon which Plaintiffs rely in claiming that neither winery nor retail direct shipping poses any threat to public health and safety (i) is inadmissible or entitled to little, if any, weight, (ii) fails to support the point in question, and/or (iii) is not relevant.

For example, Plaintiffs rely heavily on federal agency data as purported evidence that States allowing out-of-state retailer direct shipping and delivery report no increased youth access or shipment to minors, citing to the report of their proffered expert, Tom Wark. Report of Tom Wark ¶¶ 34-35, 44(i); App 136-138. Mr. Wark cites to the 2015 Substance Abuse and Mental Health Services

Administration ("SAMHSA") National Survey on Drug Use and Health in his report. *Id*. at ¶ 35, App 136. But the more recent SAMHSA 2020 State Performance and Best Practices report is to the contrary:

> In contrast to the outdated Substance Abuse and Mental Health Services Administration (SAMHSA) survey upon which Mr. Wark relies, SAMHSA's 2020 State Performance & Best Practices for the Prevention and Reduction of Underage Drinking Report states:
>
> "Retailer interstate shipments may be an important source of alcohol for underage people who drink. In a North Carolina study (Williams & Ribisl, 2012), a group of eight 18- to 20-year-old research assistants placed 100 orders for alcoholic beverages using Internet sites hosted by out-of-state retailers. Forty-five percent of the orders were successfully completed, whereas 39 percent were rejected as a result of age verification. The remaining 16 percent of orders failed for reasons believed to be unrelated to age verification (e.g., technical and communication problems with vendors). Most vendors (59 percent) used weak, if any, age verification at the point of order, and, of the 45 successful orders, 23 (51 percent) had no age verification at all. Age verification at delivery was also inconsistently applied.
>
> The North Carolina study reported that there are more than 5,000 Internet alcohol retailers, and that the retailers make conflicting claims regarding the legality of shipping alcohol across state lines to consumers. There were also conflicting claims regarding the role of common carriers. The North Carolina study reported that all deliveries were made by such companies, and many Internet alcohol retailers list well-known common carriers on their websites. Yet carriers contacted by the study researchers stated they do not deliver packages of alcohol except with direct shipping permits. This suggests confusion regarding state laws addressing interstate retail shipments. North Carolina prohibits such shipments, which means that at least 43 percent of the retailers in the study appeared to have violated the state law." *See* https://www.stopalcoholabuse.gov/media/ReportToCongress/2018/report_main/State_Performance_Best_Practices.pdf.

Pamela S. Erickson Rebuttal Report ¶ 7, App 320-321.

Because Mr. Wark ignored the 2020 SAMHSA State Performance and Best Practices for the Prevention and Reduction of Underage Drinking Report and likewise ignored the Williams and Ribisl study referred to in that report, his statement as to the absence of any evidence, report or study on this issue is wrong and should be disregarded by this Court, and Plaintiffs' argument based on this false assertion (Appellants' Br. at 23 ("The State presented no evidence that direct wine shipping increases youth access, and data from federal agencies show that it does not.)) should be rejected.

Other "data" upon which Plaintiffs rely is combined with a "Summary" chart created by Plaintiffs' counsel. *See* "NIH consumption data" and "Summary" chart (App 202-205) and "NHTSA Traffic Safety Facts" and two "Summary" charts (App 208-212). These exhibits in the record should be given little, if any, weight because of the evidentiary issues impairing them. For example, Plaintiffs' NHTSA exhibit (App 208-212) consists of five different documents, including part of the National Highway Traffic Safety ("NHTS") Facts 2019 Data and part of the NHTS Facts 2016 Data, which are combined with two "Summary" charts (prepared by counsel) in a misguided attempt to show that "alcohol-related traffic fatalities" are not higher in States allowing retailer direct shipping. Appellants' Br. at 16. But the "Summary" is factually incorrect in designating Idaho and Nevada as allowing retailer direct

shipping[9] and, in any event, unreliable because the lack of the causality and the comparisons Plaintiffs assert (i.e., because some of the designated direct shipping States have fatality rates *higher* than the "U.S. Average" and the others have rates lower than the "U.S. Average" – which is the same for the States that do *not* allow retail direct shipping) fly in the face of the NHTSA's warning as to the use of its data: "Great caution should be exercised in comparing the levels of alcohol involvement among states. Differences in alcohol involvement can be due to any number of factors. . . ." NHTSA Traffic Safety Facts 2019 Data, App 208. Adding yet another variable – allowance of retail direct shipping – simply exacerbates the difficulty of comparing results among States. This "Summary" is therefore entitled to no weight.[10]

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[9] The "Summary" charts, the Wark Report (¶ 16; App 131), and the chart in Plaintiffs' Exhibit 36 (App 206-207) are all based on the erroneous assertion as to the number of States that allow retail direct shipping. Specifically, Nevada and Idaho do not allow it. The Nevada legislature's passage of Senate Bill 507 was effective July 1, 2021; Nevada thereby prohibited retailer direct shipment (https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7922/Text). And the Idaho Alcohol Control Bureau's advisory clarifies that the amended reciprocity law (Idaho 23-1309A(7)) does not permit out-of-state retailers to direct ship to Idaho consumers (https://www.avalara.com/blog/en/north-america/2021/09/is-idaho-a-reciprocal-state-for-dtc-wine-shipping.html). Plaintiffs' lax approach to this issue compounds their error and further undermines their position that because no problems exist in those States allowing retail direct shipping, New Jersey should follow suit.

[10] Plaintiffs use the same approach ("data" combined with a counsel-prepared "Summary" chart) on the issue of alcohol consumption (App 202-205). This "Summary" chart is likewise entitled to no weight because it also is factually wrong

Plaintiffs also rely heavily on emails between their counsel and regulators from a handful of the States that allow retail direct shipping (App 191-196) to support the supposed fact proffered by counsel that none of the States allowing direct shipping has "experienced any significant alcohol-related public health or safety problems" (Appellants' Br. at 16). Like the federal agency "data" and "Summary" charts, these emails should likewise be given little, if any, weight because none of the regulators indicated what, *if any*, investigation or enforcement measures had been undertaken regarding retail direct shippers' non-compliance. Further, (i) in the case of Connecticut, the regulator specifically caveated his response by noting that the first permit had been issued only five months earlier (App 191); and (ii) Nebraska's regulator noted that "licensees do not report shipments to us" (App 194), undermining Plaintiffs' supposed "fact."

Plaintiffs rely on a 2003 FTC report, *Possible Anticompetitive Barriers to E-Commerce: Wine* (App 095-119), and a 2012 report by the Maryland Comptroller, *Study on the Impact of Direct Wine Shipment* (App 120-128), for the proposition that those States allowing direct shipping reported no related public health or safety problems and no problems with shipments to minors (Appellants' Br. at 16, 17).

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as to the States allowing retail direct shipping, is based on stale data (2016), and makes no effort to establish any causality or lack thereof attributable to the introduced variable of retail direct shipping, resulting in a logically infirm conclusion.

Both reports have evidentiary infirmities. The FTC report (almost 20 years old) was based on a study of the winery direct shipping market in McLean, Virginia – not retailer direct shipping. Additionally, Plaintiffs fail to note that the appendices to the FTC report undermine their purported undisputed fact: Appendix A makes clear that the study was limited to McLean, Virginia, and Appendix B contains the letters from state regulators (including the Hawaiian regulator who noted his concern about "recourse against out-of-state shippers of wine shipping wine illegally into my state or shipping wine to minors in my state" which "has the potential to become a major problem"). The Maryland Report was limited to Maryland consumers, licensed Maryland wholesalers, and out-of-state wineries holding a Maryland winery direct shippers permit – not out-of-state retailers.

Finally, in their Appellants' Brief, Plaintiffs incorrectly point to Arizona as a State that allows "out-of-state retailers to make home deliveries" and regulates them "by requiring the shipper to obtain a direct shipping permit" (citing Ariz. Rev. Stat. § 4-203.04). Appellants' Br. at 40. But that cited Arizona statute provides for an out-of-state *winery* direct shipping permit. And the same attorneys for Plaintiff are suing Arizona for prohibiting out-of-state retailer direct shipping. *See Day v. Henry*, 2023 WL 5095071 (D. Ariz. Aug. 9, 2023).

Plaintiffs based their argument that the New Jersey retailer presence and in-state wholesaler purchase requirements do not promote public health and safety on

the proposition that there is "no threat" to New Jerseyans' health and safety posed by eliminating those laws and allowing out-of-state retailer direct shipping and delivery. Because Plaintiffs failed to establish that proposition, their argument predicated on it must fail.

ii. No reasonable alternative

Even if Defendants did not put forth sufficient concrete evidence that the predominant effect of the State's retailer presence and in-state wholesaler purchase requirements is the protection of public health and safety (Defendants did), and even if Plaintiffs did proffer admissible, reliable, and factually correct evidence that out-of-state retailer direct shipping and delivery "poses no threat" to public health and safety (Plaintiffs did not), Plaintiffs' position that the reasonable alternative to maintaining the State's retailer presence and in-state wholesaler purchase requirements – i.e., simply using the permit system for out-of-state winery direct shipments for out-of-state retailers – was properly rejected by the district court. Opinion at 25-26, App 029-030.

Initially, Plaintiffs contend that, because New Jersey already allows direct shipping by out-of-state wineries and in-state retailers, a permitting system for out-of-state retailers would work as a reasonable nondiscriminatory alternative (Appellants' Br. at 43). Plaintiffs' top-sided tautology ignores the very

constitutional question at issue on this appeal – i.e., the delivery privilege of licensed in-state New Jersey retailers is conditioned on the retailers' presence in the State.

And in equating winery and retailer direct shipping, Plaintiffs fail to address the fundamental differences between out-of-state wineries and out-of-state retailers and the federal and state regulatory schemes in which they operate, including the following:

- Unlike retailers, wineries are required to obtain a federal permit that could fall into jeopardy if they violate state law. There is no *federal* permit available to, or required of, alcohol retailers. Retailers are licensed and regulated by the individual States, under each State's own laws which reflect local needs, local history, and local views on how beer, wine and spirits should be distributed and sold. There is no federal retailer permit that can be revoked or suspended if a retailer fails to comply with New Jersey law. In contrast, wineries *and wine wholesalers* are required to have a federal permit and to comply with federal and state laws. *See* FAA Act, 27 U.S.C. §§ 201, et seq. *See also* Bureau of Alcohol, Tobacco and Firearms ("ATF"), ATF Ruling 2000-1 (available at https://www.ttb.gov/rulings/2000-1.htm) which explains that "[r]etailers are not required to obtain basic permits under the FAA Act," and "while ATF is vested with authority to regulate

interstate commerce in alcoholic beverages pursuant to the FAA Act, the extent of this authority does not extend to situations where an out-of-State retailer is making the shipment into the State of the consumer."). The Alcohol and Tobacco Tax and Trade Bureau ("TTB"), the successor agency to ATF, confirms that ATF Ruling 2000-1 "remains in effect and reflects the policy of TTB today."

- Out-of-state retailers are required to follow the alcohol regulations of the State where they are located. Most instances, they are required to buy product from an in-state wholesaler – a regulatory requirement that has no relevance or application to wineries.
- Wineries register their products with New Jersey.[11] N.J.A.C. 13:2-33.1. In contrast, out-of-state retailers do not register the products they sell and likely carry many products that have not been registered in New

[11] Registration of products plays an essential role in New Jersey's regulatory scheme. It ensures that a product is one that can be sold in New Jersey and enables the State to discover bootlegged (unregistered) products being sold by a retailer, it allows the State to make sure various regulations (e.g., post and hold and the prohibition against below cost sales) are being complied with, and ensures that taxes are being collected and paid (because there is a record that can be traced from supplier to wholesaler to retailer). Plaintiffs wholly ignore this winery brand registration requirement and its function in protecting public health and safety.

> Jersey by the producer/supplier of that product – thus making the product ineligible for sale in New Jersey.[12]

See Day v. Henry, 2023 WL 5095071, at *8 ("Defendants provide several reasons why the exception at the producer level should not expand to the retailer level…. These differences provide sufficient justification for the State's decision to exempt certain wineries from funneling alcohol through the three tiers but require that all retailers must operate within the three-tiered system.").

Plaintiffs' argument that allowing out-of-state retailer direct shipping and delivery will not adversely impact the ability of the State to enforce compliance with its regulatory scheme is likewise factually and legally unsupported. The idea that there will be "a few wine shipments" (Appellants' Br. at 4) by no more than 500-800 retailers who will seek to deliver to New Jersey consumers, as suggested by Plaintiffs' proffered expert (Wark Report ¶ 43, App 137), is speculative at best, and simply sketchy statistics at worst, since it is based on the number of retailers that took orders on a single web site, Winesearcher.com, and makes no effort to assess the number of out-of-state retailers who would engage in direct shipping if more States allow retail direct shipping such that the retailers will be shipping legally

[12] Plaintiffs' overbroad assertion that *Granholm* "endorsed the permit system as a reasonable nondiscriminatory alternative to a total ban on interstate shipping" (Appellants' Br. at 24) likewise fails to note the critical distinction – *Granholm* addressed out-of-state winery – *not out-of-state retailer* – direct shipping.

(Wark Dep. Tr. 135:11-136:4, App 472-473). And the "state reports" on which Plaintiffs rely (App 171-190) for this contention are flawed. Those so-called "state reports" provide an aggregate number and fail to distinguish between the number of winery and retail direct shipping permits.

Equally faulty is Plaintiffs' argument that New Jersey must allow out-of-state retail direct shipping because certain States purportedly allow it. The Supreme Court has consistently underscored that § 2 of the Twenty-first Amendment is predicated on the concept, recognized most recently in *Tennessee Wine*, that "each State [has] the authority to address alcohol-related public health and safety issues in accordance with the preferences of *its citizens*." 139 S. Ct. at 2474 (emphasis added). The New Jersey Legislature's determination that a retailer presence requirement and in-state wholesaler purchase mandate fulfill the public policy of the State and the legislative purpose of the NJ ABC Law – foremost of which is "to strictly regulate alcoholic beverages to protect the health, safety, and welfare of the people of this State" (N.J.S.A. 33:1-3-3.1(b)) – is not to be second-guessed by how loosely some other State chooses to regulate the alcohol products in its State. *See also Lebamoff*, 956 F.3d at 875 ("The purpose of the [three-tier] system, for better or worse, is to make it harder to sell alcohol by requiring it to pass through regulated in-state wholesalers."; "the Twenty-first Amendment leaves these considerations [regarding loosening some regulations] to the people of Michigan, not to federal judges.");

accord Tennessee Wine, 139 S. Ct. at 2484 (Gorsuch, J., dissenting) ("Under the terms of the compromise [those who adopted the Twenty-first Amendment] hammered out, the regulation of alcohol wasn't left to the imagination of a committee of nine sitting in Washington, D.C., but to the judgment of the people themselves and their local elected representatives.").

As the district court correctly held, New Jersey's three tier alcohol regulatory system properly prohibits out-of-state retailers who have no presence in the State and do not purchase their wine from in-state New Jersey wholesalers from direct shipping and delivery to New Jersey consumers, and opening that regulatory system up to out-of-state retailer direct shipping is not a reasonable alternative to maintaining those regulatory requirements.

CONCLUSION

This Court should affirm the district court's Opinion and Order in its entirety.

Dated: April 8, 2024

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d) and L.A.R. 31.1(c), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because the brief contains 11,198 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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3. This brief complies with L.A.R. 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and prior to being electronically submitted, it was scanned by the following virus-detection software and found to be free from computer viruses:

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Dated: April 8, 2024

/s/ Deborah A. Skakel
Deborah A. Skakel

CERTIFICATION OF BAR MEMBERSHIP

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

Dated: April 8, 2024

/s/ Deborah A. Skakel
Deborah A. Skakel

CERTIFICATION OF FILING AND SERVICE

I certify that the foregoing was filed through the CM/ECF system and served on all parties or their counsel of record through the CM/ECF system.

Dated: April 8, 2024

/s/ Deborah A. Skakel
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