

No. 23-2922

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

JEAN-PAUL WEG, LLC, d/b/a The Wine Cellarage; LARS NEUBOHN,
Plaintiffs-Appellants,

v.

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

**FEDWAY ASSOCIATES, INC.; ALLIED BEVERAGE GROUP, LLC;
OPICI FAMILY DISTRIBUTING; NEW JERSEY LIQUOR STORE
ALLIANCE,**
Intervenor Defendants-Appellees.

**On Appeal from the United States District Court for the
District of New Jersey (No. 2:19-cv-14716)**

**BRIEF OF INTERVENOR-DEFENDANT-APPELLEE
FEDWAY ASSOCIATES, INC.**

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CORPORATE DISCLOSURE STATEMENT

Intervenor-Defendant-Appellee Fedway Associates, Inc. (“Fedway”) does not have a parent corporation. No publicly held company owns 10% or more of Fedway’s stock.

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SUMMARY OF ARGUMENT¹

Although the record on appeal is voluminous, the essential nature of Plaintiffs-Appellants' claim can be described succinctly.

Plaintiffs wish to sell retail wine products to New Jersey consumers. JA41-42 (Third Amended Complaint, ¶3). However, Plaintiffs do not possess a New Jersey retail license to sell wine in New Jersey. JA42, 43 (¶¶4, 13). Plaintiffs do not wish to enter New Jersey and procure a New Jersey retail license and thereafter establish licensed retail premises in New Jersey – as required by current New Jersey law. JA446-47 (Pl. Answer to Def. Request for Admission No. 8, 10 and 11). Plaintiffs do not wish to operate within New Jersey's three-tier system. Plaintiffs do not wish to purchase their products from a licensed New Jersey wholesaler. *See id.*

By this action Plaintiffs sought declaratory and injunctive relief against the State of New Jersey based on their claim that New Jersey's alcoholic beverage licensing laws violate the Commerce Clause. JA40-45 (Third Amended Complaint, ¶¶11-32). One of the Plaintiffs (*i.e.*, Jean Paul Weg LLC d/b/a The Wine Cellarage) is a New York-licensed wine retailer. JA41-42. The other Plaintiff (*i.e.*, Lars

¹ In the interest of brevity and in order to avoid unnecessary repetition, Appellee Fedway hereby adopts, and incorporates by reference, the following sections of the briefs of the State Appellees and the Allied Beverage Group Appellees: (1) the Jurisdictional Statement; (2) the Statement of the Issues; (3) the Statement of the Case; (4) the Statement of the Standard of Review; and (5) the elements of LAR 28.1(a)(2)(b) and (c).

Neubohn) is the owner of the Wine Cellarage and is a resident of Connecticut. JA42.

Under New Jersey law, an in-state licensed retailer is required to buy from an in-state licensed wholesaler – a legal requirement that is the central pillar of New Jersey’s three-tier system governing the distribution of alcoholic beverages. Under decades of Supreme Court precedent, the essential elements of a three-tier system (such as New Jersey’s) constitute a valid exercise of a State’s power to regulate alcoholic beverages under the authority of the Twenty-first Amendment. *See e.g., Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2472 (2019); *Granholm v. Heald*, 544 U.S. 460, 466 (2005). Against this backdrop, the relief sought by Plaintiffs in their Complaint would allow out-of-state retailers to sell directly to New Jersey consumers and bypass New Jersey’s wholesalers. This is *a privilege that New Jersey retailers do not themselves possess under current law.*

A. The record on summary judgment conclusively established that New Jersey’s physical-presence requirement and wholesaler purchaser requirement serve a critical public health and safety function -- thereby satisfying the *Tennessee Wine* test of the validity of State alcoholic beverage control regulations.

Applying the test of the validity of state liquor regulation recognized by the Supreme Court in *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019), the District Court determined that New Jersey’s requirement that licensed retailers be physically present in the State and purchase product from State licensed wholesalers is necessary to address vital health and safety concerns.

JA26-28. The court correctly held that “the New Jersey [three-tier] System, and the challenged provisions therein, are valid exercises of the State’s power under the Twenty-first Amendment and are justified by the legitimate nonprotectionist ground of promoting public health and safety.” JA22-23.

The record amply supports the District Court’s findings of fact and conclusions of law on summary judgment. Licensed retailers in New Jersey are subject to a rigorous regulatory scheme. The New Jersey Division of Alcoholic Beverage Control (“ABC”) and municipal issuing authorities employ a comprehensive review and screening process for retail-license applicants and consider several factors in determining whether to license a particular retail location, including the applicant’s management experience, its general business reputation and moral character, and the opinions of local residents, government, and law enforcement, including fingerprinting and criminal background checks. *See* N.J.A.C. 13:2-3.2; 13:2-9.2; *see also* JA328-29, 330 (Kerr Report, ¶¶19-21; 28-30); JA345 (Erickson Report, ¶5). The comprehensive screening of all liquor-license applicants requires significant time, personnel, and resources of the ABC and the municipal authorities. *See id.*

In addition, once licensed, retailers have a continuing obligation to allow inspection of their records and to make the licensed premises available for inspection by ABC or municipal investigators. A vital part of licensee monitoring consists of on-site interviews with retail-licensee employees. ABC investigators

may also make unannounced visits or visit retail licensees to conduct “decoy” operations involving minors who, under ABC supervision, attempt to purchase alcohol. JA352-53 (deposition of Andrew Sapolnick, Deputy Attorney General and Investigator, NJ ABC, June 8, 2021, 12:2 to 14:13)

The role of the wholesaler is also a critical element of the three-tier distribution system. In New Jersey’s system, the wholesaler tracks all products and can quickly identify any products that were manufactured in an unsafe manner and where those products were distributed. JA247-48, 249 (Sansone Decl. ¶¶5-7, 10). In addition, inspections conducted by ABC investigators and local law enforcement of wholesaler premises can detect adulterated or misbranded spirits or liquor purchased by retailers from unauthorized sources. *See id* Specifically, if investigators find a suspicious bottle of alcohol, they will ask the retailer for a record of which wholesaler it purchased the alcohol from. That record can be checked against the record of a licensed wholesaler. Furthermore, New Jersey law requires the retailer and wholesaler to provide that information to the ABC, and either license could be suspended or revoked if they fail to do so. JA247-48 (Sansone Decl. ¶¶5-7); JA241-43 (Harmelin Decl. ¶¶11-13); JA334 (Kerr Report, ¶48).

But if out-of-state retailers are permitted to sell alcohol that they did not purchase from New Jersey wholesalers, this product-safety function is lost. The ABC cannot enforce removal of adulterated or dangerous products from retailer

shelves if the retailer's premises is not in the State and subject to inspection. Nor can it help effectuate a recall of a product if it does not know from where the product has been sold or delivered into this state. JA330-32 (Kerr Report, ¶¶29, 32-34, 36-37); JA312-13 (Maroney Report, at 14-15).²

New Jersey also encourages temperance and orderly markets by regulating wholesalers and manufacturers. Wholesalers must post Current Price Lists of the prices at which they sell wine to retailers for a certain period. The purpose of this requirement is to prevent wholesalers from discriminating among retailers. Allowing consumers to obtain wines for lower prices than in-state retailers pay would frustrate the rule's purpose of promoting temperance by not over-stimulating consumption. JA332-33 (Kerr Report, ¶¶40-44); JA314 (Maroney Report, at 16).

Based on the foregoing undisputed facts, the District Court below determined that New Jersey's requirement that licensed retailers be physically present in the

² The concern over the integrity of alcoholic beverages sold by out-of-state retailers is heightened by certain statements made by Plaintiff Lars Neubohn at his deposition. Neubohn testified that approximately 20 percent of Plaintiff Wine Cellarage's inventory consists of the purchase of wines owned by private individuals. JA371-72 (Neubohn Dep. 65:3-9, 70:6-18). Although the resale of wine owned by private individuals is apparently legal in New York, such resale is not legal in New Jersey. One reason that such resale is prohibited in New Jersey is the potential for fraud. For example, an Internet search of empty wine bottles for sale discloses the easy availability of such bottles. JA252-92. Quite obviously, an unscrupulous seller could use these readily available empty bottles to effectuate fraudulent on-line sales to unwitting New Jersey consumers. Thus, an out-of-state retailer's direct sale of privately purchased wine to New Jersey consumers poses a very real threat of fraud -- for which New Jersey regulators would lack the enforcement tools that are otherwise applicable to in-state New Jersey retailers.

State and purchase product from State licensed wholesalers is necessary to address vital health and safety concerns, including excessive alcohol consumption, alcohol adulteration, product fraud, tax avoidance and criminal infiltration of the industry.

JA22-23. The holding of the court below is manifestly correct and should not be disturbed. *See* Point I, *infra*.

B. In the alternative, affirmance of the judgment below is also warranted because: (1) the relief sought in Plaintiffs’ complaint amounts to a direct challenge to the validity of New Jersey’s three-tier system; and (2) under the Supreme Court’s decision in *Granholm*, three-tier systems are immune from challenge under the commerce clause and are “unquestionably legitimate” pursuant to the states’ authority conferred by the Twenty-first Amendment.

Affirmance of the judgment below is also warranted on an entirely distinct ground. Under the Supreme Court’s decision in *Granholm*, three-tier systems – separate state regulation of alcoholic beverage producers, wholesalers and retailers – are “unquestionably legitimate” pursuant to the states’ authority conferred by the Twenty-first Amendment. *See Granholm v. Heald*, 544 U.S. 460, 466, 489 (2005). Here, as described below, the relief sought in Plaintiffs’ Complaint amounts to a direct challenge to the validity of New Jersey’s three-tier system – thereby triggering the *Granholm* principle.

On the summary judgment record below, the District Court determined that Plaintiffs sought “to be treated differently -- not the same -- to in-state wine retailers by seeking to invalidate the licensing, physical presence, and wholesaler wine purchase requirements.” JA24. In other words, the relief sought by Plaintiffs would

“prohibit the New Jersey [three-tier] System from applying to Plaintiffs.” *Ibid.* In turn, the challenged “licensing, physical presence, and wholesaler wine purchase requirements go to the root of the New Jersey System.” *Ibid.* (emphasis added). The court concluded: “Were the Court to grant the relief sought, it would greatly favor out-of-state wine retailers to the disadvantage of in-state wine retailers who must adhere to New Jersey’s three-tier regulations. This is clearly not what the court in *Granholm* intended.” JA28-29.

Indeed, as the Court in *Granholm* explained, nothing stops States from “funnel[ing] sales through the three-tier system,” *id.* at 489, a practice that is “unquestionably legitimate,” *ibid.* Significantly, the *Granholm* Court underscored that “[w]e have previously held that States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment.” *Id.* at 466 (citing *North Dakota v. U.S.*, 495 U.S. 423, 432 (1986) (Scalia, J., concurring in the judgment)).

In short, the *Granholm* principle precludes the relief sought in Plaintiffs’ Complaint. After all, the relief sought by Plaintiffs in their Complaint would allow out-of-state retailers to sell directly to New Jersey consumers and bypass New Jersey’s wholesalers – a privilege that New Jersey retailers do not themselves possess under current law. JA28-29. As the court below correctly found, *see id.*, the relief sought by Plaintiffs is antithetical to the essential elements of the New Jersey System itself -- *i.e.*, which, under *Granholm*, is designed to “funnel sales [of

alcoholic beverages] through the ... system,” by mandating that retailers purchase the product for sale in the State from “licensed in-state wholesaler[s].” *Granholm*, 544 U.S. at 489. Hence, the Twenty-first Amendment precludes Plaintiffs’ proposed relief. *See* Point II, *infra*.

C. In the alternative, affirmance of the judgment below is also warranted because: (1) under the Commerce Clause, an essential element of proof is a showing that in-state and out-of-state entities are “similarly situated”; and (2) here, out-of-state retailers and in-state retailers within the three-tier system are not similarly situated

Plaintiffs contend that New Jersey’s ABC statute discriminates against out-of-state wine retailers because they are barred from delivering wine to New Jersey customers. But before a court considers whether a state law violates the dormant Commerce Clause, it must first consider the threshold question of whether the in-state and out-of-state entities are “similarly situated” for constitutional purposes. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). Only then can the Court determine that the distinction drawn in the state law constitutes “discrimination.”

“[A] statute impermissibly discriminates **only** when it discriminates between two similarly situated in-state and out-of-state interests.” *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm.*, 935 F.3d 362, 376 (5th Cir. 2019). Persons are similarly situated when “they are alike in all relevant aspects.” *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3rd Cir. 2009) (equal protection case). For purposes of dormant Commerce Clause analysis, to be considered similarly

situated, the supposedly favored and disfavored entities must compete within a single market. *Gen. Motors Corp. v. Tracy*, 519 U.S. at 300.

Here, the District Court below found that the relief sought by Plaintiffs in their Complaint would -- if granted -- allow out-of-state retailers: (1) to avoid New Jersey's physical-presence requirement; and (2) to bypass New Jersey's wholesalers. *See* JA24, 28-29. Crucially, this is a privilege that New Jersey retailers do not themselves possess under current law. *See* N.J.A.C. 13:2-24.6(a)(3) - (6); *see also* JA246-47 (Sansone Decl., ¶¶4-5); JA240-41 (Harmelin Decl., ¶¶6-11).

The relief sought by Plaintiffs is decidedly not a "level playing field" between in-state and out-of-state retailers; it is, rather a playing field tilted heavily in favor of out-of-state retailers. In such a system, out-of-state retailers could skip the wholesaler tier completely. Other circuit courts of appeal have concluded that in-state retailers subject to that state's three-tier system are not "similarly situated" with out-of-state retailers that are not subject to that state's three-tier system. *See, e.g., Wine Country Gift Baskets v. Steen*, 612 F.2d 809 (5th Cir. 2010); *Brooks v. Vasser*, 462 F.3d 341, 352 (4th Cir. 2006). Hence, because Plaintiffs are *not* "similarly situated" with New Jersey licensed retailers, Plaintiffs' Commerce Clause claim fails for this reason alone.³

³ The following is a brief note regarding the procedural history in the court below as it applies to Fedway's participation on this appeal. Fedway is a licensed New Jersey wholesaler of alcoholic beverages. JA246 (Sansone Decl., ¶4). Fedway intervened in the action below as a defendant and was a full participant in the

LEGAL ARGUMENT

POINT I

THE DISTRICT COURT BELOW PROPERLY GRANTED SUMMARY JUDGMENT BASED ON THE APPLICATION OF THE *TENNESSEE WINE* FACTORS TO THE UNDISPUTED FACTS IN THE CASE

Plaintiffs allege in their Complaint that allowing only retailers within New Jersey's three-tier system to deliver alcohol to New Jersey's consumers violates the Commerce Clause. Plaintiffs do not hold a New Jersey retailer license and do not want to operate within New Jersey's three-tier system or purchase their wine from a licensed New Jersey wholesaler. JA41, 43 (Third Amended Complaint, ¶¶3, 12). Plaintiffs do not wish to procure a New Jersey retail license or establish licensed retail premises in New Jersey – as required by current New Jersey law. Instead, Plaintiffs wish to transact business directly with New Jersey consumers by selling products that: (1) have not passed through New Jersey's three-tier system of distribution of alcoholic beverages; and (2) have not been subject to pre-sale

District Court proceedings. *See* JA67-74 (Fedway's Answer to Plaintiffs' Complaint). When all parties filed dispositive motions in the proceedings below, Fedway brought a cross-motion for summary judgment seeking dismissal with prejudice of Plaintiffs' Commerce Clause claim. (ECF No. 112). The District Court's 8/22/23 opinion states that "Fedway's cross-motion for summary judgment ... is DENIED as moot." JA31. However, as a result of subsequent motion practice brought by Fedway and co-defendant Allied (*see* docket entries 159-163), the District Court modified its opinion and order, and entered a corrected order (dated 10/13/23) stating that Fedway's (and Allied's) cross motions for summary judgment are granted. JA4. Along with the State parties and certain other intervenors in the District Court action, Fedway is an appellee on this appeal.

inspection in licensed premises. JA446-47 (Pl. Answer to Def. Request for Admission No. 8, 10, 12).

In addressing Plaintiffs' claim, the District Court below applied the test of the validity of certain state alcoholic beverage regulations (under the Commerce Clause) that was enunciated by the Supreme Court in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). The *Tennessee Wine* test asks whether the challenged alcoholic beverage regulation is "appropriate to address the public health and safety effects of alcohol use and ... other legitimate [State] interests." *Tennessee Wine*, 139 S. Ct. at 2474.

Applying the *Tennessee Wine* test, the District Court found that "the New Jersey [three-tier] System, and the challenged provisions therein, are valid exercises of the State's power under the Twenty-first Amendment and are justified by the legitimate nonprotectionist ground of promoting public health and safety, which, on these facts, cannot be adequately served by reasonable nondiscriminatory alternatives." JA22-23. More particularly, the District Court concluded that New Jersey's requirement that licensed retailers be physically present in the State and purchase product from State licensed wholesalers is necessary to address vital health and safety concerns. JA22-31. As fully discussed below, the record below amply supports the District Court's findings of fact and conclusions of law on summary judgment.

A. The record on summary judgment conclusively established that New

Jersey’s retailer physical-presence requirement serves a critical public health and safety function.

1. New Jersey’s retailer physical-presence requirement enables New Jersey to conduct unannounced inspections of licensed premises.

New Jersey law allows ABC inspectors and law enforcement officers to inspect licensed retail premises at any time. N.J.S.A. 33:1-35. These inspections enable regulators to ensure responsible business practices, including the promotion of product integrity, proper labeling, and the reduction of alcohol related crimes. *See* JA247-48 (Sansone Decl. ¶¶5-7); JA241-43 (Harmelin, Decl. ¶¶11-13). Once a retailer license is issued, every retail licensee is required to make its licensed premises available for inspection by ABC investigators or local law enforcement officials. *See* JA330 (Kerr Report, ¶¶28-29); JA345 (Erickson Report, ¶5); JA312-13 (Maroney Report, at 14-15). New Jersey law also expressly provides the ABC the opportunity to inspect alcohol at the licensed wholesaler’s premises before it is delivered to a retailer, further protecting the public from illegal alcohol. *See* JA332 (Kerr Report, ¶38); JA247-48 (Sansone Decl. ¶¶5-7); JA241-43 (Harmelin Decl. ¶¶11-13).

The District Court below expressly found that the retailer “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.” JA26 (stating that “an in-state physical presence allows the ABC to conduct random site visits without prior notice to the particular licensee.”).

2. New Jersey’s retailer physical-presence requirement enables enforcement to prevent unauthorized purchase by minors.

A vital part of licensee monitoring consists of on-site interviews with retail-licensee employees. Safeguarding against underage purchase of alcohol is critical. ABC investigators visit retail licensees to conduct “decoy” operations involving minors who, under ABC supervision, attempt to purchase alcohol. JA352-53 (Deposition of Andrew Sapolnick, 12:2 to 14:13).

The District Court found this aspect of in-state enforcement activity to be significant. Reviewing the evidence presented on summary judgment, the District Court determined that “[random] visits [to in-state retailer] premises assist in determin[ing] whether retailers are engaged in illegal sales, such as sales to minors.” JA26.

3. New Jersey’s retailer physical-presence requirement enables seizure of alcoholic beverages stored on New Jersey licensed premises.

The Supreme Court in *Tennessee Wine* recognized that a state can ensure the health and safety of its citizens by revoking the license of an in-state retailer that does not comply with State law. *Tennessee Wine*, 139 S. Ct. at 2475. In addition to this important power, a state (including New Jersey) also has the authority by statute to seize all alcoholic beverages in the custody of a noncompliant licensee. JA331 (Kerr Report, ¶34). The latter power is “[o]ne of the most effective economic tools available to New Jersey regulators [because] a retailer will be stranded with product it cannot sell once its license it revoked or suspended.” *Ibid.*

Those remedies are not available against 400,000 nationwide retailers, including Plaintiffs. New Jersey cannot revoke an out-of-state retailer's license to sell alcohol in another state where it presumably makes the majority of its sales. Moreover, New Jersey cannot seize alcohol from an out-of-state retailer - even if that alcohol is deemed to be dangerous, adulterated, or not approved for sale in New Jersey. JA331 (Kerr Report, ¶¶33-34). In fact, any attempt by New Jersey to enforce its own laws outside its territory would run afoul of the Supreme Court's extraterritorial jurisprudence. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989) (holding that a state law requiring out-of-state shippers to affirm their posted prices in Connecticut were no higher than prices posted in bordering state had an impermissible extraterritorial effect). New Jersey cannot rely on another state (like New York) to revoke its own retailer's license for that retailer's violation of New Jersey's law.

The District Court below so found. The court determined that “the ABC’s jurisdiction is limited to New Jersey” and “the State has no practical means by which to conduct warrantless searches and seizures of evidence and property located outside of New Jersey.” JA27 (citing Sapolnick Decl., at ¶ 24). The court further noted:

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.” 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. As a result, exempting Plaintiffs from the New Jersey System “would render it beyond New Jersey’s regulatory purview.” [JA28 (citations omitted)]

Thus, as the District Court found, New Jersey’s retailer physical-presence requirement enables seizure of alcoholic beverages stored on New Jersey licensed premises – a vitally important State power to ensure the health and safety of New Jersey consumers.

Simply put, a three-tier system cannot exist if retailers are not physically present in the state and subject to the inspection regime highlighted by the Supreme Court in *Tennessee Wine*. See *Tennessee Wine*, 139 S. Ct. at 2475 (noting that a requirement that a retailer be physically present “in the State provides strong incentives not to sell alcohol in a way that threatens public health and safety”). If the relief sought by Plaintiffs were granted by this Court, the practical effect of the Court’s ruling would allow unregulated shipments of alcohol to flood into New Jersey in clear contradiction of the State’s authority to control the flow of alcohol in its borders under § 2 of the Twenty-first Amendment.⁴

⁴ Against this backdrop of “concrete evidence” establishing substantial health and safety objectives secured by retailers’ physical presence in New Jersey, Plaintiffs purport to rely on their own counsel’s cursory state public record requests to ABC agencies in certain states (that allow direct-to-consumer shipping by out-of-state retailers) in an effort to show that these states have not encountered any “public health or safety problems” with direct-to-consumer shipping. JA171-196. But emails consisting of a few lines issued by particular State ABC officials in response

B. The record on summary judgment also conclusively established that New Jersey’s wholesaler purchase requirement (*i.e.*, the requirement that New Jersey licensed retailers purchase alcohol from a licensed New Jersey wholesaler) is also amply justified by substantial public health and safety considerations.

1. New Jersey’s wholesaler purchase requirement enables the State to monitor and detect counterfeit alcoholic beverages by requiring in-state storage of

to counsel’s requests are hardly conclusive as to the existence of various public health and safety issues arising from direct shipment of alcohol by out-of-state sellers. Indeed, there is no evidence that the states contacted by Plaintiffs’ counsel are aggressively monitoring compliance by out-of-state sellers with State liquor laws.

By contrast, the experience of those states that have aggressively monitored compliance by out-of-state sellers tell a quite different story. As reported by Defendants’ alcohol policy expert, Pamela Erickson, the Illinois Liquor Control Commission issued over 100 cease-and-desist letters to retailers, wineries, and fulfillment houses in just one year based on evidence of non-compliance with licensing and shipping laws. *See* JA345-46 (Erickson Report, ¶6). A study conducted by Rebecca Williams and Kurt Ribisl of the University of North Carolina concluded that “[a]ge verification procedures used by Internet alcohol vendors do not adequately prevent online sales to minors.” *Id.* (citing “*Internet Alcohol Sales to Minors*,” *Archives of Pediatric Adolescent Medicine*, September 2012, at 166) In Michigan, a management consultant, The Hill Group, conducted a series of 26 controlled interstate shipment buys. They found an “unexpectedly low level of compliance.” *Id.* (citing “*Wine Direct Shipping and Analysis*,” November 2015, prepared by The Hill Group, Inc.) For example, only 1 of 15 unlicensed vendors refused to ship wine to a Michigan consumer, none of the deliveries had the appropriate labeling on the delivered package, and individuals under the age of 21 were able to order and receive shipments of alcohol.” *Ibid.* More recently, the State of Vermont issued a report on its direct shipping pilot project. *See Vermont Department of Liquor and Lottery DTC Shipping Pilot Compliance Program*, 1/24/24, <https://legislature.vermont.gov/Documents/2024/WorkGroups/House>. The report concluded, “Of the 116 attempted online purchases of beverage alcohol, 40 shipments in total were received. Of the 40 shipments received, **no purchase was delivered completely lawfully.**” (emphasis added). As to this last source, it is to be noted that “published reports of administrative bodies” are “matters of public record of which the court can take judicial notice.” *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014).

alcoholic beverages prior to sale.

The role of the wholesaler is a critical element of the three-tier distribution system. In New Jersey's system, the wholesaler tracks all products and can quickly identify any products that were manufactured in an unsafe manner and where those products were distributed. JA247-49 (Sansone Decl. ¶¶5-7, 10).

By way of example, when an ABC inspection detects a suspicious, adulterated or misbranded liquor purchased by retailers, the inspector will ask the retailer for a record of which wholesaler it purchased the alcohol from. That record can be checked against the record of a licensed wholesaler. New Jersey law requires the retailer and wholesaler to provide that information to the ABC, and either license could be suspended or revoked if they fail to do so. JA247-49 (Sansone Decl. ¶¶5-7); JA241-43 (Harmelin Decl. ¶¶11-13); JA334 (Kerr Report, ¶48). But if out-of-state retailers are permitted to sell alcohol that they did not purchase from New Jersey wholesalers, this product-safety function is lost.⁵

⁵ Plaintiff Lars Neubohn testified at deposition that approximately 20 percent of Plaintiff Wine Cellarage's inventory consists of the purchase of wines owned by private individuals. JA398 (Neubohn Dep. 70:14-19). Notably, although the resale of wine owned by private individuals is apparently legal in New York, such resale is not legal in New Jersey.

One reason that such resale is prohibited in New Jersey is the potential for fraud. For example, an Internet search of empty wine bottles for sale discloses the easy availability of such bottles. JA252-92. Quite obviously, an unscrupulous seller could use these readily available empty bottles to effectuate fraudulent on-line sales to unwitting New Jersey consumers.

The experience of Intervenor-Defendant Fedway – as a licensed wholesaler – is illustrative of the broad scope of New Jersey’s authority to conduct on-site inspections of the premises of its licensed wholesalers. For example, in 2017 and 2018, New Jersey officials were on-site to perform an inspection of Fedway’s warehouse facility in Elizabeth, New Jersey. Additional inspections were performed by the New Jersey Department of Health, the New Jersey Division of Fire Safety, and the Port Authority of New York and New Jersey. NJ ABC also conducted on-site inspections on multiple occasions in both the Elizabeth warehouse and Fedway’s corporate offices in Basking Ridge, New Jersey. Further, NJ ABC conducts frequent inspections of Fedway’s trucks and sales personnel when they are on the road. JA246-47 (Sansone Decl., ¶4).

New Jersey’s broad authority over the distribution of alcoholic beverages in the state (by and through New Jersey’s direct regulation of licensed in-state wholesalers) would be lost if the relief sought by Plaintiffs were granted and out-of-state retailers could direct-ship their product to New Jersey consumers without the requirement to procure their product through New Jersey licensed wholesalers. There are thousands of alcohol products available over the internet. In the absence

Thus, an out-of-state retailer that seeks to sell to New Jersey consumers a wine product purchased from private individuals – as Plaintiffs seek to do – would present substantial product safety issues in which documentation regarding production, storage and inspection by producers and wholesalers would be unavailable.

of a requirement that a product be approved by the ABC and enter the state through a licensed wholesaler, there would be little ability to determine the authenticity of that product. JA247-49 (Sansone Decl. ¶¶6-9).

For example, some products -- such as methanol in spirits -- have been determined to be too dangerous to sell. JA332 (Kerr Report, ¶37). However, bans of products deemed to be dangerous are not nationwide. Therefore, a retailer from a state that does not carefully monitor these dangerous products would be allowed to ship them into New Jersey. *Id.* At ¶¶37-38. The ABC cannot stop the importation of a product if it does not know the product has been shipped and delivered into the state. *Ibid.*

Under the current three-tier system, the ABC can act quickly to recall the product, get it off New Jersey retail shelves, and inform the public of the dangers of the product. JA247-49 (Sansone Decl. ¶¶6-9); JA241-42 (Harmelin Decl., ¶¶11-13). But this system requires that the ABC have knowledge of and control over alcoholic products imported into New Jersey. Mere reliance on electronic transmittal of data regarding the authenticity or integrity of an out-of-state product is insufficient – since such data may well prove to be inaccurate. Instead, the ability to get dangerous products off of wholesaler or retailer shelves necessarily depends on an in-state wholesaler and retailer presence. JA330-32 (Kerr Report, ¶¶29, 32-34, 36-37).

2. New Jersey's wholesaler purchase requirement enables the State to promote

its policy of temperance through alcohol price stability regulation enforced at the wholesale level.

Furthermore, the relief sought by Plaintiffs – permitting out-of-state retailers to ship alcohol to New Jersey while bypassing New Jersey’s three-tier system – would hinder the ABC’s consumer protection role. New Jersey encourages temperance and orderly markets through regulation enforced at the wholesale level. *See* N.J.A.C. 13:2–24.6(a)(3). Wholesalers must post Current Price Lists of the prices at which they sell wine to retailers for a certain period. JA240-41 (Harmelin Decl., ¶¶6-10).

The purpose of this requirement is to prevent wholesalers from discriminating among retailers. *See id.* Allowing consumers to obtain wines for lower prices than in-state retailers pay would frustrate the rule’s purpose of promoting temperance by not over-stimulating consumption. JA332-33 (Kerr Report, ¶¶40-44).

3. New Jersey’s wholesaler purchase requirement enables the State to enforce its policies through license suspension and revocation of wholesalers and retailers within the jurisdiction of the State.

Just as New Jersey law allows the ABC to revoke retailer licenses and seize product in the custody of retailers for violations of law, these same enforcement actions are also applicable to licensed wholesalers. *See* N.J.S.A. 33:1-35 In particular, New Jersey’s ABC statute requiring retailers to purchase alcohol from a licensed New Jersey wholesaler allows the State to enforce its alcohol health and

safety policies through the suspension or revocation of the license of a wholesaler that is within the jurisdiction of the State.

By routing the flow of alcohol through the various tiers of distribution, New Jersey regulatory agencies can cut off the distribution of alcohol to New Jersey retailers at various levels. New Jersey wholesalers that continue to supply a New Jersey retailer whose license has been suspended or revoked are subject to sanctions by the State. By contrast, New Jersey regulators do not have the same ability to cut off the supply of alcohol to non-compliant out-of-state retailers who do not purchase alcohol products from licensed New Jersey wholesalers. JA331 (Kerr Report, ¶33).

C. As the District Court below correctly found, the health and safety objectives embodied in New Jersey’s three-tier distribution system cannot be achieved “by reasonable nondiscriminatory alternatives.”

In *Granholm*, the Court held that “State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.” *Granholm*, 544 U.S. at 489. The *Granholm* Court further held that – with respect to a State policy that has been found to discriminate between in-state and out-of-state interests – such a policy *nevertheless* will be upheld under the Twenty-first Amendment if the policy “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives” *Ibid.* (citing *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)).

Thus, under *Granholm*, a state policy will be upheld if it satisfies *either* prong of the two-part test.

Applying the first prong of the *Granholm* test, the District Court below found: “Were the Court to grant the relief sought, it would greatly favor out-of-state wine retailers to the disadvantage of in-state wine retailers who must adhere to New Jersey’s three-tier regulations. This is clearly not what the court in *Granholm* intended.” JA28-29. In other words, the court found no impermissible discrimination under the first prong of the *Granholm* test. That being so, the court need not have even reached the second prong of the *Granholm* test.

Nevertheless, the court went on to apply the second prong of the *Granholm* test. The court found that “the State Defendants’ goal of protecting health and safety through these provisions as outlined, cannot be achieved “by reasonable nondiscriminatory alternatives”... because the 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.” JA27. The court determined that “the ‘reasonable nondiscriminatory alternatives’ discussed in *Granholm* would prove ‘unworkable’ here.” JA29 (citing *Granholm*, 544 U.S. at 489, 92-93). The court was referring to the *Granholm* Court’s general observation that “improvements in technology have eased the burden of monitoring out-of-state wineries” because “[b]ackground checks can be done electronically[,]” [f]inancial records and sales data can be mailed, faxed, or submitted via email.”

Granholm, 544 U.S. at 492. Here, however, the court below found that the “technology improvements [identified in *Granholm*] do not address the State of New Jersey’s goal of performing unannounced on-site inspections and investigations.” JA29. The court explained that “the electronic transmission of materials do not tell the entire story without on-site inspections, unannounced visits, and ABC-led investigations.” *Ibid*. Thus, review by the ABC of “electronic materials sent from Plaintiffs can neither replace nor substitute the New Jersey System’s challenged requirements.” *Ibid*.

Thus, applying the second prong of the *Granholm* test, the court determined that “the State Defendants have demonstrated at summary judgment, ‘based on [the] concrete record evidence,’ that the State’s “nondiscriminatory alternatives will prove unworkable.” JA29-30 (quoting *Granholm*, 544 U.S. at 492-93).

In short, under *Granholm*, a state policy will be upheld if it satisfies *either* prong of the two-part test. *Granholm*, 544 U.S. at 489. Here, the court found that the record evidence satisfied both prongs of the *Granholm* test. JA27, 29-30.

D. In the alternative, the conclusion (that a state statute requiring the in-state physical presence of each alcoholic beverage retailer is amply justified by substantial public health and safety considerations) is *compelled by the opinion in Tennessee Wine itself* – wherein the Court stated that the in-state physical presence of licensed retailers makes possible: (1) the state’s “monitor[ing] of the stores’ operations through on-site inspections, audits, and the like”; (2) the state’s ability to “revoke [the] operating license [of a noncompliant retail licensee]; and (3) “strong incentives not to sell alcohol in a way that threatens public health and safety”

In the alternative, the conclusion (that a state statute requiring the in-state physical presence of each alcoholic beverage retailer is amply justified by substantial public health and safety considerations) is compelled by the opinion in *Tennessee Wine* **itself**.

As previously noted, Plaintiffs allege in their Complaint that allowing only retailers within New Jersey's three-tier system to deliver alcohol to New Jersey's consumers violates the Commerce Clause. Plaintiffs do not hold a New Jersey retailer license and do not want to operate within New Jersey's three-tier system or purchase its wine from a licensed New Jersey wholesaler. Plaintiffs seek to sell alcohol to New Jersey consumers *without maintaining a presence in New Jersey*. JA446 (Pl. Answer to Def. Request for Admission No. 8). Furthermore, Plaintiffs seek to sell beverage alcohol *stored outside of New Jersey to New Jersey consumers*. JA447 (Pl. Answer to Def. Request for Admission No. 10).

The relief sought by Plaintiffs flies in the face of the *Tennessee Wine* Court's analysis of the constitutional validity of a State's physical presence requirement for retailers of alcoholic beverages. The *Tennessee Wine* Court determined that "since the [retailers'] stores at issue are physically located within the State," the State can "monitor the stores' operations through on-site inspections, audits, and the like... Should the State conclude that a retailer has 'failed to comply with state law,' it may revoke its operating license.... **This 'provides strong incentives not to sell alcohol' in a way that threatens public health and safety.**" *Tennessee Wine*, 139

S. Ct. at 2475 (emphasis added). Thus, the Court expressly recognized that a state’s retailer physical-presence requirement makes possible: (1) the state’s “monitor[ing of] the stores’ operations through on-site inspections, audits, and the like”; (2) the state’s ability to “revoke [the] operating license [of a noncompliant retail licensee]; and (3) “strong incentives not to sell alcohol in a way that threatens public health and safety.” *Ibid.*

Thus, the *Tennessee Wine* test (of public health and safety of state liquor regulations) is self-executing as applied to the retailer physical presence requirement -- by reference to the *Tennessee Wine* Court’s own legal conclusions. *Ibid.* The Court’s express recognition of the important public health and safety interests underlying the retailer physical-presence requirement conclusively establishes that the requirement is a valid exercise of the State’s power under the Twenty-first Amendment.

POINT II

IN THE ALTERNATIVE, AFFIRMANCE OF THE JUDGMENT BELOW IS ALSO WARRANTED BECAUSE: (1) THE RELIEF SOUGHT IN PLAINTIFFS' COMPLAINT AMOUNTS TO A DIRECT CHALLENGE TO THE VALIDITY OF NEW JERSEY'S THREE-TIER SYSTEM; AND (2) UNDER THE SUPREME COURT'S DECISION IN *GRANHOLM*, THREE-TIER SYSTEMS ARE IMMUNE FROM CHALLENGE UNDER THE COMMERCE CLAUSE AND ARE "UNQUESTIONABLY LEGITIMATE" PURSUANT TO THE STATES' AUTHORITY CONFERRED BY THE TWENTY-FIRST AMENDMENT.

A. The District Court below correctly found that Plaintiffs' Complaint challenged the validity the New Jersey three-tier distribution system itself.

As previously noted, Plaintiffs allege in their Complaint that allowing only retailers within New Jersey's three-tier system to deliver alcohol to New Jersey's consumers violates the Commerce Clause. Plaintiffs do not hold a New Jersey retailer license and do not want to operate within New Jersey's three-tier system or purchase its wine from a licensed New Jersey wholesaler. JA41-42, 43 (Third Amended Complaint, ¶¶3, 12). Plaintiffs do not wish to procure a New Jersey retail license or establish licensed retail premises in New Jersey – as required by current New Jersey law. Instead, Plaintiffs wish to transact business directly with New Jersey consumers selling products that: (1) have not passed through New Jersey's three-tier system of distribution of alcoholic beverages; and (2) have not been subject to pre-sale inspection in licensed premises. JA446-47 (Pl. Answer to Def. Request for Admission No. 8, 10, 12)

On this record, the District Court below correctly found that Plaintiffs'

Complaint challenged the validity the New Jersey three-tier distribution system itself. JA28. In particular, the court determined that Plaintiffs sought “to be treated differently -- not the same -- to in-state wine retailers by seeking to invalidate the licensing, physical presence, and wholesaler wine purchase requirements.” *Ibid.* In other words, the relief sought by Plaintiffs would “prohibit the New Jersey System from applying to Plaintiffs.” *Ibid.* In turn, the challenged “licensing, physical presence, and wholesaler wine purchase requirements *go to the root of the New Jersey System.*” *Ibid.* (emphasis added). The court concluded: “Were the Court to grant the relief sought, it would greatly favor out-of-state wine retailers to the disadvantage of in-state wine retailers who must adhere to New Jersey’s three-tier regulations. This is clearly not what the court in *Granholm* intended.” JA28-29.

B. Plaintiffs’ Commerce Clause claim (challenging the validity of New Jersey’s three-tier system) is precluded by decades of precedent that confirm that a three-tier system for the distribution of alcoholic beverages is a constitutionally valid exercise of the State’s powers conferred by the Twenty-first Amendment.

As the court below correctly found, Plaintiffs’ claim challenges the validity of the New Jersey System *itself*. JA28-29. That being so, it follows that Plaintiffs’ claim is precluded by well-settled Supreme Court precedent that confirms that a state’s three-tier system of alcoholic beverage distribution is a constitutionally valid exercise of the State’s powers conferred by the Twenty-first Amendment and is not subject to challenge under the Commerce Clause. *See, e.g., Granholm v. Heald*, 544 U.S. at 466, 489 (“[w]e have previously held that States can mandate a three-

tier distribution scheme in the exercise of their authority under the Twenty-first Amendment” ... a practice that is “unquestionably legitimate”), *see id.* at 466 (noting 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”); *Tennessee Wine*, 139 S. Ct. at 2472 (noting that the alcoholic beverage control regulation there at issue is subject to challenge under the Commerce Clause because it “is **not** the basic three-tiered model of separating producers, wholesalers and retailers”) (emphasis added).

Following *Granholm*, circuit courts of appeal consistently have held that the Twenty-first Amendment permits a three-tier system of alcohol distribution, and the Commerce Clause does not impliedly prohibit it. *See e.g. 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 “if they are an inherent aspect of the three-tier system.”); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, ⁸18-20 (5th Cir. 2010) (“Because of *Granholm* and its approval of three-tier systems, we know that Texas may authorize its in-state, permit-holding retailers to make sales and may prohibit out-of-state retailers from doing the same”); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009) (“Requiring out-of-state liquor to pass through a licensed in-state wholesaler and retailer ... mandates that both in-state and out-of-state liquor pass through the same three-tier system before ultimate delivery to the consumer”); *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.”).

In 2019, the Supreme Court decided *Tennessee Wine*. In the context of the *Granholm* principle that holds that three-tier systems are unquestionably legitimate,” *Granholm*, 544 U.S. at 489, it is instructive to consider carefully once more the scope of the *Tennessee Wine* Court’s analysis. There, the Court invalidated a durational residency requirement for retail license applicants (as a condition precedent to qualifying for an initial retail license) as “not an essential feature of a three-tiered scheme.” *Tennessee Wine*, 139 S. Ct. at 24“2. The Court expressly distinguished between the two-year residency requirement at issue and a State’s requirement that retail liquor stores be physically located within the State. *Ibid.* (stating that “at issue in the present case is **not** the basic three-tiered model of separating producers, wholesalers, and retailers, but the durational-residency requirement that Tennessee has chosen to impose on new applicants for liquor store licenses. Such a requirement is **not** an essential feature of a three-tiered scheme.”) (emphasis added).⁶ Nor does New Jersey have such a residential requirement.

⁶ Here, unlike in *Tennessee Wine*, Plaintiffs challenge the core provisions of New Jersey’s three-tiered system – i.e., the requirement that a retailer have a physical presence in the state and that the retailer receive its product from a licensed in-state wholesaler. JA28; JA446-47 (Pl. Answer to Def. Request for Admission No. 8, 10

Importantly, the Court in *Tennessee Wine* declared that a state’s requirement that retail establishments be physically present in the state is a permissible exercise of power under the Twenty-first Amendment. *Tennessee Wine*, 139 S.Ct. at 2475. As the Court explained, a physical presence requirement allows the State to undertake an inspection regime necessary to protect the health and safety of the public. *Ibid.* (stating that “[s]hould the State conclude that a retailer [with a physical presence in the State] fail[ed] to comply with state law,” it may revoke its operating license [which, in turn,] provides strong incentives not to sell alcohol in a way that threatens public health or safety”).

Thus, the Court’s decision in *Tennessee Wine* left undisturbed – indeed reaffirmed – the Court’s prior decision in *Granholm* that under well-settled authority, a state is permitted to have a three-tier system that requires all alcohol sales to run through its in-state wholesalers and is also permitted to require retailers to have a physical presence in the State. *See Granholm*, 544 U.S. at 466, 489. It necessarily follows that New Jersey may also limit *retailers’ home delivery of alcoholic beverages to in-state retailers only and exclude out-of-state retailers from such home delivery*. Any other result would signal the end of New Jersey’s three-tier system and would negate decades of settled precedent that confirm that the

and 11). Critically, these requirements are central to the three-tier system – which the Court in *Tennessee Wine* declared to be an appropriate exercise of State power under the Twenty-first Amendment. *Tennessee Wine*, 139 S.Ct. at 2475.

three-tier system is a constitutionally valid exercise of the State's powers conferred by the Twenty-first Amendment.

C. The great weight of authority in post-*Tennessee Wine* circuit court decisions reaffirm that a three-tier system for the distribution of alcoholic beverages is a constitutionally valid exercise of the State's powers conferred by the Twenty-first Amendment.

Since *Tennessee Wine* was decided, several circuit courts of appeals have addressed Commerce Clause challenges (based in part on the holding in *Tennessee Wine*) to retailer-licensing statutes similar to the New Jersey statute here at issue. As discussed below, the great weight of authority in post-*Tennessee Wine* circuit court decisions reaffirm that a three-tier system for the distribution of alcoholic beverages is a constitutionally valid exercise of the State's powers conferred by the Twenty-first Amendment.

In *Lebamoff Ents. Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), the Sixth Circuit rejected a Commerce Clause challenge by an Indiana wine retailer and several Michigan wine consumers to an amendment of the Michigan Liquor Control Code allowing in-state retailers to deliver direct to consumers using licensed "facilitators" or common carriers. The court noted the Supreme Court in *Granholm* said that nothing stops the States from "funnel[ing] sales through the three-tier system" that is "unquestionably legitimate." Courts also have permitted States "to regulate wholesalers (the second tier) ... to control the volume of alcohol sold in a State and the terms on which it is sold," and have "require[d] retailers to

be physically based in the State.” *Id.* at 869-70 The court concluded that “[t]he purpose of the [three-tiered] system, for better or worse, is to make it harder to sell alcohol by requiring it to pass through regulated in-state wholesalers.... [T]he Twenty-first Amendment leaves these considerations to the people of Michigan, not to federal judges.”⁷ *Id.* at 875.

In *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171 (8th Cir. 2021), the Eighth Circuit similarly rejected a Commerce Clause challenge by a Florida retailer and Missouri consumers to a Missouri statute that permits licensed in-state retailers to deliver alcohol directly to Missouri consumers. The Court “agree[d] with the Sixth Circuit [in *Lebamoff*] that the Supreme Court in *Granholm* and *Tennessee Wine* did **not** decide that essential elements of the three-tiered system are subject to frontal attack under the dormant Commerce Clause.” *Id.* at 1185. Rather, the three-tier system is the product of “the extraordinary constitutional status given to state alcoholic beverage laws in the Twenty-first Amendment was the compromise that allowed the repeal of Prohibition.” *Ibid.* Therefore, those seeking to change the regulated structure of the alcoholic beverage industry must instead “turn to state-by-state political action on behalf of consumers who are hurt by these laws.”

⁷ However, in *Block v. Canepa*, 74 F.4th 400, 414(6th Cir. 2023), a different panel of the Sixth Circuit determined that the District Court in that case should not have granted summary judgment in favor of Defendants “without ... consider[ing] how that evidence stacks up against the *Tennessee Wine* test.” *Id.* at 414. Of course, in our case, the District Court fully considered and applied the *Tennessee Wine* test in light of the evidence proffered on summary judgment. *See* Point I, *supra*.

Ibid.

In *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214 (4th Cir. 2022), the Fourth Circuit rejected a Commerce Clause challenge of North Carolina’s alcoholic beverage control statutes brought by a Florida-based wine retailer and North Carolina residents. Here again, the plaintiffs challenged a statute that prohibits out-of-state retailers -- but not in-state retailers -- from shipping wine directly to consumers in North Carolina. *Id.* at 216. The court found that “[u] nlike the discriminatory licensing requirement for retailers that the Supreme Court reviewed in *Tennessee Wine*, the [North Carolina] Retail Wine Importation Bar is an integral part of North Carolina's three-tier system.” *Id.* at 228. The court concluded that the plaintiffs’ challenge was “nothing different than an argument challenging the three-tier system itself.” *Id.* at 229 (quoting *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006)). So viewed, “[plaintiffs’] challenge was foreclosed by the *Granholm* decision, which described the three-tier system as ‘unquestionably legitimate.’” *Ibid.* (quoting *Granholm*, 544 U.S. at 489).⁸

⁸ In *Anvar v. Dwyer*, 82 F.4th 1 (1st Cir. 2023), the First Circuit found that the District Court in that case should not have granted summary judgment in favor of Defendants without giving consideration of whether the retailer “physical presence” requirement of a Rhode Island statute was “supported by ‘concrete evidence’ demonstrating that its predominant effect advances the goals of the Twenty-first Amendment.” *Id.* at 11. Note that, even if the First Circuit’s cramped view of the *Granholm* principle were to be accepted by this Court, the record in our case demonstrates that the District Court below fully considered and applied the *Tennessee Wine* test in light of the evidence proffered on summary judgment. See Point I, *supra*.

To sum up: the District Court correctly determined that Plaintiffs' Complaint challenged the validity the New Jersey System itself. JA28-29. That is: the relief sought by Plaintiffs in their Complaint would -- if granted -- allow out-of-state retailers to sell directly to New Jersey consumers and bypass New Jersey's wholesalers. Crucially, this is *a privilege that New Jersey retailers do not themselves possess under current law. Ibid.* Although Plaintiffs had contended that the relief sought in their Complaint merely "levels the playing field" in the retail wine direct-shipping marketplace between New Jersey licensed retailers and out-of-state retailers, the District Court concluded that Plaintiffs' contention would do no such thing. JA28-29. Far from "leveling the playing field" between in-state and out-of-state retailers, the relief sought in Plaintiffs' Complaint would actually tilt the playing field *in favor of out-of-state retailers. Ibid.*

The Twenty-first Amendment precludes Plaintiffs' proposed relief – since three-tier systems are "unquestionably legitimate" by operation of the grant of authority conferred on the States by that Amendment. *See Granholm*, 544 U.S. at 466, 489 (reaffirming that "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment")

That being so, the judgment of the District Court below – dismissing Plaintiffs' Complaint -- should be affirmed for this reason alone.

D. Plaintiffs mischaracterize and misapply the principles enunciated by the Supreme Court in *Granholm* and *Tennessee Wine* and by the Third Circuit in *Freeman*

Notwithstanding the clear holdings of the Supreme Court in *Granholm* and *Tennessee Wine*, Plaintiffs here seek precisely to rely on *Granholm* and *Tennessee Wine* in their attempt to establish the viability of their Commerce Clause claim as applied to New Jersey's retailer-licensing statute. *See* Pl. Opening Br., at 2, 22-23. In light of the foregoing, we address the facts and circumscribed holdings of *Granholm* and *Tennessee Wine* decisions at greater length.

As discussed below, the Commerce Clause challenges in *Granholm* and *Tennessee Wine* were not – as here – to the core elements of the three-tier distribution system but rather were challenges to other State regulations that were wholly distinct from the core features of the three-tier system. Hence, *Granholm* and *Tennessee Wine* are of no help to Plaintiffs in establishing the validity of their Commerce Clause claim.

1. *Granholm*

Although the Supreme Court's decision in *Granholm* resulted in the striking down of certain state alcoholic beverage control laws on Commerce Clause grounds, the laws at issue in *Granholm* are readily distinguishable from the New Jersey statute at issue in this case.

In *Granholm*, the Supreme Court considered the validity of Michigan's and New York's liquor licensing laws under the Commerce Clause as applied to claims

brought by out-of-state wine producers seeking to ship wine directly to Michigan and New York customers. *Granholm*, 544 U.S. at 465-66. Michigan and New York, by statute, had exempted in-state wine producers from shipping their product through state-licensed wholesalers and retailers. *Id.* at 467. The out-of-state producers did not hold retail licenses in Michigan and New York. *Id.* at 468. The Supreme Court held that the Michigan and New York licensing laws -- as applied to out-of-state wine producers -- violated the Commerce Clause and are not saved by §2 of the Twenty-first Amendment. *Id.* at 493.

Of critical significance, the Court in *Granholm* held invalid under the Commerce Clause a discriminatory *exception* to a three-tier system: *i.e.*, under Michigan and New York law, in-state wineries could avoid in-state wholesalers and retailers and thus deliver directly to consumers, while out-of-state wineries could not. *Id.* at 466. ***Michigan's and New York's statutory exception to the three-tier system was the Commerce Clause violation in Granholm.*** *Id.* at 467.

Stated differently, in *Granholm* the constitutional infirmity was the legislative carve-out of the three-tier system that was limited to in-state producers and that excluded out-of-state producers. *Id.* at 466-67. By contrast, in this case there is no legislative carve-out: all product delivered to consumers by in-state retailers has passed through the three-tier system. That is the constitutional difference between *Granholm* and this case.

As previously discussed in Point IIC, *supra*, numerous Federal appellate

courts have characterized the reach of *Granholm* as described above and have rejected challenges that are virtually identical to our case. *See, e.g., Lebamoff Enterprises, Inc. v. Whitmer*, 956 F.3d 863, 874 (6th Cir. 2020) (upholding state law that permitted in-state, but not out-of-state, retailers to deliver alcohol to consumers' homes and finding *Granholm*'s holding to be inapplicable because it "concerned a discriminatory exception to a three-tier system" rather than the workings of the three-tier system itself); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1185 (8th Cir. 2021) (same); *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 228-29 (4th Cir. 2022) (same); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190-91 (2d Cir.2009) (same); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 818-19 (5th Cir. 2010) (same). There is no appellate decision to the contrary that characterizes the *Granholm* holding as allowing out-of-state retailers to ship product directly to in-state consumers (bypassing the three-tier system) merely because in-state retailers are permitted to ship in-state product directly to consumers.

In short, the Commerce Clause claim in *Granholm* arose from statutory carve-outs to the three-tier system; by contrast, the Commerce Clause claim in this case amounts to a direct and facial challenge to the essential features of the three-tier system -- a legal regime that the Court has repeatedly held to be "unquestionably legitimate." *Granholm*, 544 U.S. at 466 ("States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-

first Amendment”). Hence, the law at issue in *Granholm* is readily distinguishable from the New Jersey statute at issue in this case.

2. *Tennessee Wine*

Although we already have addressed at length the scope of the Court’s analysis in *Tennessee Wine*, see Point ID, *supra*, we briefly reiterate certain key elements of *Tennessee Wine* in order to address and refute Plaintiffs’ mischaracterization of that decision. Like *Granholm*, the Supreme Court’s decision in *Tennessee Wine* resulted in the striking down of certain state alcoholic beverage controls laws on Commerce Clause grounds. *Tennessee Wine*, 139 S. Ct. at 2476. But here again, the laws at issue in *Tennessee Wine* also are readily distinguishable from the New Jersey statute that is at issue in this case.

The Commerce Clause claim in *Tennessee Wine* arose from Tennessee’s two-year residency requirement for individuals and businesses seeking a Tennessee retail license. *Id.* at 2456-57. To be clear: this residency requirement applied to individuals and businesses that had not yet even received a license, and therefore, were not authorized to distribute or sell alcoholic beverages in Tennessee.⁹

⁹ Notably, in *Tennessee Wine*, the issue was a *residency* requirement for retail licensees, not a “*physical presence*” requirement for retail licensees. See *Tennessee Wine*, 139 S. Ct. 2449, 2475 (noting that “the stores at issue are physically located within the State”). In other words, a residency requirement and a physical presence requirement are distinct concepts and should not be conflated (as Plaintiffs have sought to do). Indeed, as discussed in the text above, the *Tennessee Wine* Court declared that a state’s *physical presence* requirement for retailers of alcoholic

Satisfaction of the two-year residency requirement was a condition precedent to qualifying for a Tennessee retail license. *Ibid.*

The Court concluded that the residency requirement had no relationship to the essential features of the three-tier system of alcoholic beverage distribution.

The Court was emphatic:

Although *Granholm* spoke approvingly of that basic model [of the three-tier distribution system], it did not suggest that § 2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme. **At issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers**, but the durational-residency requirement that Tennessee has chosen to impose on new applicants for liquor store licenses. Such a requirement is **not an essential feature** of a three-tiered scheme. Many such schemes do not impose durational-residency requirements—or indeed any residency requirements—on individual or corporate liquor store owners.

[*Id.* at 2471-72 (emphasis added)]

In contrast to Tennessee, New Jersey does not have a durational residency requirement for license applicants. Furthermore, all licensed retailers are treated the same regardless of the state of residency of their owners. Once any person or entity obtains a retail license, the licensee is free to purchase alcohol from a New Jersey wholesaler and to deliver that alcohol to New Jersey consumers. Critically different from *Tennessee Wine*, nothing in New Jersey's Alcoholic Beverage Control Law

beverages enables the State to undertake an inspection regime necessary to protect the health and safety of the public. *Id.* at 2475 For further discussion of this point, see note 10, *infra*.

creates a barrier for out-of-state companies or persons to obtain a retail license as long as the licensed premises (and therefore the alcohol being sold to consumers) is located in New Jersey. *See* N.J.S.A. 33:1-12.

Moreover, as previously discussed, *Tennessee Wine* declared that a state's requirement that retail establishments be physically present in the state is a permissible exercise of power under the Twenty-first Amendment. *Tennessee Wine*, 139 S.Ct. at 2475. As the Court explained, a physical presence requirement allows the State to undertake an inspection regime necessary to protect the health and safety of the public. *Ibid.* (stating that “[s]hould the State conclude that a retailer [with a physical presence in the State] fail[ed] to comply with state law,” it may revoke its operating license [which, in turn,] provides strong incentives not to sell alcohol in a way that threatens public health or safety”).¹⁰

¹⁰ In their brief to this Court, Plaintiffs -- citing *Granholm* -- state: “The Supreme Court has... 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.” Pl. Br., at 22 (citing *Granholm*, 544 U.S. at 474-75). Plaintiffs thus appear to be suggesting that – under *Granholm* – an in-state “physical-presence” requirement for retailers of alcoholic beverages is presumptively unconstitutional. But *Granholm* did not so hold – nor can it be construed to support this proposition.

As discussed in the Point IID(1), *supra*, *Granholm* arose from a challenge to state regulation of wine producers – not wine retailers. *Granholm*, 544 U.S. at 465. The constitutional infirmity in *Granholm* was a legislative carve-out of the three-tier system that was limited to in-state producers and that excluded out-of-state producers. *Id.* at 466-67. By contrast, in this case there is no legislative carve-out: all product delivered to consumers by in-state retailers has passed through the three-tier system – a system which the *Granholm* Court itself held to be “unquestionably legitimate.” *Id.* at 489. (continued...)

3. *Freeman*

Plaintiffs also rely on this Court’s decision in *Freeman v. Corzine*, 629 F.3d 158 (3d Cir. 2010) – a decision applying the *Granholm* principles to New Jersey’s then extent-prohibitions on direct shipping from out-of-state wineries. In *Freeman*, the court invalidated a provision of New Jersey’s ABC law that “allow[ed] in-state, but not out-of-state, wineries to sell directly to consumers.” *Id.* at 159. The constitutional infirmity of the New Jersey law at issue in *Freeman* was that “[i]nstate wineries are ... allowed to skip the first two tiers—wholesalers and retailers—while out-of-state wineries must involve both of these tiers in order for

(... continued) Furthermore, as noted in the text immediately above, the Supreme Court’s subsequent decision in *Tennessee Wine* makes clear that Plaintiff’s contention (that a “physical presence” requirement for alcoholic beverage retailers is presumptively unconstitutional) is wholly without merit. Quite to the contrary: the *Tennessee Wine* Court underscored that a state’s physical presence requirement for retailers of alcoholic beverages enables the State to undertake an inspection regime necessary to protect the health and safety of the public. *Tennessee Wine*, 139 S.Ct. at 2475 (stating that “[s]hould the State conclude that a retailer [with a physical presence in the State] fail[ed] to comply with state law,” it may revoke its operating license [which, in turn,] provides strong incentives not to sell alcohol in a way that threatens public health or safety”). Hence, in the context of state regulation of alcoholic beverages through a three-tier system, a “physical presence” requirement is most certainly **not** a violation of the Commerce Clause but rather is a permissible exercise of a state’s powers under the Twenty-first Amendment -- in that the “physical-presence” requirement promotes “public health and safety” in connection with the distribution and sale of alcoholic beverages. *See Tennessee Wine*, 139 S.Ct. at 2475; *Granholm*, 544 U.S. at 466, 489.

their wine to reach consumers.”¹¹ *Ibid.*

Thus, *Freeman* is merely a straightforward application of *Granholm* to a New Jersey law that was virtually identical to the laws at issue in *Granholm*. In both *Granholm* and *Freeman*, the courts struck down statutory exceptions to three-tier systems that provided direct-shipping privileges to in-state wineries but denied these privileges to similarly situated out-of-state wineries.

In stark contrast, the laws at issue in his case do not involve any statutory exception to the three-tier system that would favor in-state retailers. Here, in-state licensed retailers are required by law to buy from in-state licensed wholesalers – a legal requirement that is the central pillar of the three-tier system itself. Furthermore, the relief sought by Plaintiffs in their Complaint would allow out-of-state retailers to sell directly to New Jersey consumers and bypass New Jersey’s

¹¹ *Freeman* arose from the New Jersey’s efforts to help its fledgling local wine industry. Following *Freeman*, the Legislature revised the law to allow small wineries -- both in-state and out-of-state -- to ship directly to New Jersey consumers, with limitations on the total gallonage that could be shipped in a given year as well as the total gallonage that can be shipped to an individual customer. See L. 2010, c. 207 (codified at N.J.S.A. 33:1-10). This post-*Freeman* modest legislative carve-out of the three-tier system is a far cry from the relief sought by Plaintiffs in this litigation: i.e., an entirely new regime in derogation of the three-tier system that would allow any retailer in the country to entirely bypass New Jersey wholesalers and retailers and to ship any amount of wine (or other alcoholic beverage) to any New Jersey consumer. If the relief sought by Plaintiffs were granted by this Court, the practical effect of the Court’s ruling would allow unregulated shipments of alcoholic beverages to flood into New Jersey in clear contradiction of the State’s authority to control the flow of alcohol in its borders under § 2 of the Twenty-first Amendment.

wholesalers – a privilege that New Jersey retailers do not possess under current law. JA28-29 (Opinion, at 24-25); JA446-47 (Pl. Answer to Def. Request for Admission No. 8, 10, 12). This is far from “leveling the playing field” between in-state and out-of-state retailers; quite the contrary, it is tilting the playing field in favor of out-of-state retailers. Hence, contrary to Plaintiffs’ contention, the decision in *Freeman* is entirely inapposite to this case.

POINT III

IN THE ALTERNATIVE, AFFIRMANCE OF THE JUDGMENT BELOW IS ALSO WARRANTED BECAUSE: (1) UNDER THE COMMERCE CLAUSE, AN ESSENTIAL ELEMENT OF PROOF IS A SHOWING THAT IN-STATE AND OUT-OF-STATE ENTITIES ARE “SIMILARLY SITUATED”; AND (2) HERE, OUT-OF-STATE RETAILERS AND IN-STATE RETAILERS WITHIN THE THREE-TIER SYSTEM ARE NOT SIMILARLY SITUATED.

A. Under the Commerce Clause, an essential element of proof is a showing that in-state and out-of-state entities are “similarly situated.”

The Commerce Clause both expressly grants Congress the power to regulate commerce among the several states, *see U.S. Const.* art. I, § 8, cl. 3, and implicitly limits the states’ power to discriminate against interstate commerce. *See Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)). The Commerce Clause “encompasses an implicit or ‘dormant’ limitation on the authority of the States to enact legislation affecting interstate commerce.” The dormant Commerce Clause typically applies when a state attempts to regulate or control economic conduct wholly outside its borders with the goal of protecting in-state economic interests from out-of-state competitors. *See New Energy*, 486 U.S. at 273-74.

Here, Plaintiffs contend that New Jersey’s ABC statute discriminates against out-of-state wine retailers because they are barred from delivering wine to New Jersey customers. But before a court considers whether a state law violates the dormant Commerce Clause, it must first consider the threshold question of whether

the in- and out-of-state entities are “similarly situated” for constitutional purposes. Only then can the Court determine that the distinction drawn in the state law constitutes “discrimination.”

“[A] statute impermissibly discriminates **only** when it discriminates between two similarly situated in-state and out-of-state interests.” *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm.*, 935 F.3d 362, 376 (5th Cir. 2019). Persons are similarly situated when “they are alike in all relevant aspects.” *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3rd Cir. 2009) (equal protection case). For purposes of dormant Commerce Clause analysis, to be considered similarly situated, the supposedly favored and disfavored entities must compete within a single market. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997).

In short, before a court may find the challenged statute to be facially discriminatory, it must examine whether the different treatment of out-of-state and in-state retailers under the challenged statute constitutes discrimination.

B. The District Court below correctly found that in-state New Jersey retailers and out-of-state retailers are not similarly situated to the extent that out-of-state retailers seek to bypass New Jersey’s three-tier system and sell directly to New Jersey consumers.

Here, the District Court determined that Plaintiffs sought “to be treated *differently* -- not the same -- to in-state wine retailers by seeking to invalidate the licensing, physical presence, and wholesaler wine purchase requirements.” JA24 (emphasis added). Therefore, the relief sought by Plaintiffs would “prohibit the

New Jersey [three-tier] System from applying to Plaintiffs.” *Ibid.* In turn, the challenged “licensing, physical presence, and wholesaler wine purchase requirements go to the root of the New Jersey System.” *Ibid.* The court concluded:

Were the Court to grant the relief sought, it would greatly favor out-of-state wine retailers to the disadvantage of in-state wine retailers who must adhere to New Jersey’s three-tier regulations. This is clearly not what the court in *Granholm* intended.” [JA28-29]

Thus, the District Court found that the relief sought by Plaintiffs in their Complaint would – if granted – allow out-of-state retailers: (1) to avoid New Jersey’s physical-presence requirement; and (2) to bypass New Jersey’s wholesalers. Crucially, this is a privilege that New Jersey retailers do not themselves possess under current law. *See* N.J.A.C. 13:2-24.6(a)(3) – (6); *see also* JA246-47 (Sansone Decl., ¶¶4-5); JA240-41 (Harmelin Decl., ¶¶6-11).

In short, the District Court determined that in-state New Jersey retailers and out-of-state retailers (seeking to bypass the New Jersey system) are not similarly situated.¹²

C. The District Court’s finding compels the conclusion that out-of-state retailers and in-state retailers within New Jersey’s three-tier system are not similarly situated – which is itself fatal to Plaintiffs’ Commerce Clause claim.

¹² Although the District Court found that in-state New Jersey retailers and out-of-state retailers (seeking to bypass the New Jersey system) are not similarly situated, the court did not conclude that this finding – by itself -- served as an independent ground that mandates dismissal of Plaintiffs’ Commerce Clause claim. However, as discussed in the text above, there exists substantial authority that the court’s finding -- by itself – would serve as an independent ground mandating dismissal of Plaintiffs’ Commerce Clause claim.

We turn to address and apply, at greater length, the “similarly situated” element of Commerce Clause analysis. *See Gen. Motors Corp. v. Tracy*, 519 U.S. at 300. To be in competition with licensed retailers in New Jersey, a retailer’s establishment must (1) be physically located in New Jersey; (2) have a retailer license; and (3) obtain its alcohol from a licensed wholesaler. Plaintiffs fulfill none of these requirements.

As previously discussed, New Jersey’s three-tier system prohibits licensed New Jersey retailers from importing wine into the State from out-of-state sources. Instead, licensed retailers are required to purchase product from licensed New Jersey wholesalers. New Jersey licensed retailers that are subject to this strict regulatory system may sell and deliver alcohol to New Jersey consumers. Retailers located outside of New Jersey that are not subject to this strict regulatory system may *not* sell and deliver alcohol to New Jersey consumers. *See* N.J.A.C. 13:2-24.6(a)(3) – (6); *see also* JA246-47 (Sansone Decl., ¶¶4-5); JA240-41 (Harmelin Decl., ¶¶6-11).

In this case, a New York retailer wants to operate and compete outside of New Jersey’s three-tier highly regulated system, gaining privileges that New Jersey retailers lack. The relief sought by Plaintiffs is decidedly not a “level playing field” between in-state and out-of-state retailers; it is, rather a playing field tilted heavily in favor of out-of-state retailers. In such a system, out-of-state retailers could skip the wholesaler tier completely. Out-of-state retailers are not bound by regulations

that help stabilize New Jersey’s liquor market and promote temperance, such as the requirement that New Jersey retailers purchase from licensed wholesalers. In turn, New Jersey licensed wholesalers are generally prohibited from selling below cost and are required to post their prices with the ABC.

Other circuit courts of appeal – on a virtually identical record – have concluded that in-state retailers subject to that state’s three-tier system are not “similarly situated” with out-of-state retailers that are not subject to that state’s three-tier system. Hence, because Plaintiffs are *not* “similarly situated” with New Jersey licensed retailers, Plaintiffs’ Commerce Clause claim fails for this reason alone. For example, in *Wine Country Gift Baskets v. Steen*, 612 F.2d 809 (5th Cir. 2010), the Fifth Circuit held that an out-of-state retailer (seeking to market alcoholic beverages to Texas consumers) “is not similarly situated to Texas retailers and cannot make a logical argument of discrimination.” *Id.* at 820. As the Court explained, “[t]he illogic is shown by the fact that the remedy being sought in this case - allowing out-of-state retailers to ship anywhere in Texas because local retailers can deliver within their counties - would grant out-of-state retailers dramatically greater rights than Texas ones.” *Ibid.*

Similarly, the Fourth Circuit has held that “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 nothing different than an argument challenging the three-tier system

itself.” *Brooks v. Vasser*, 462 F.3d 341, 352 (4th Cir. 2006), Because a State can require alcohol to pass through its three-tier system, a retailer that does not obtain its alcohol through a licensed wholesaler is not in “competition” with a retailer that does. As such, the two entities are not “similarly situated” for purposes of the Commerce Clause. *Ibid*.

Moreover, because licensed retailers and unlicensed retailers from other states serve different markets, eliminating the “burden” imposed on out-of-state retailers by New Jersey’s retailer-licensing statute “would not serve the Commerce Clause’s fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.” *Gen. Motors Corp. v. Tracy*, 519 U.S. at 299. Here, the relief sought by Plaintiffs is decidedly not a “level playing field” between in-state and out-of-state retailers; it is, rather a playing field tilted heavily in favor of out-of-state retailers. The Commerce Clause most certainly does not require a state to discriminate **against** in-state economic interests and **in favor** of out-of-state economic interests. Yet that is precisely the unsustainable relief here sought by Plaintiffs.

That being so, the judgment of the District Court below – dismissing Plaintiffs’ Complaint -- should be affirmed for this reason alone.

CONCLUSION

For the reasons set forth above as well as the reasons set forth in the briefs of the other Appellees, the judgment of the District Court below (dismissing Plaintiffs' Complaint with prejudice) should be affirmed.

Respectfully submitted,

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Dated: April 8, 2024

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/s/ Leon J. Sokol
Leon J. Sokol, Esq.

Dated: April 8, 2024

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Leon J. Sokol, Esq, certifies as follows:

1. I am the signatory of this Brief and 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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/s/ Leon J. Sokol
Leon J. Sokol, Esq.

Dated: April 8, 2024