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

and

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

On appeal from the United States District Court for the District of New Jersey, No. 2:19-cv-14716, Hon. Julien X. Neals, District Judge

BRIEF *AMICI CURIAE* FOR THE NATIONAL BEER WHOLESALERS ASSOCIATION AND BEER WHOLESALERS' ASSOCIATION OF NEW JERSEY IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici do not have parent corporations and do not issue any stock.

TABLE OF CONTENTS

Corporate Disclosure Statement i

Table of Contents ii

Table of Authorities iii

Statement of Interest 1

Argument 4

A. The Twenty-first Amendment empowers each State to develop its own system for regulating alcohol 5

B. Each State has its own system for separating and regulating the tiers of alcohol distribution 8

C. Physical-presence laws are justified because a State cannot effectively enforce its alcohol laws as to transactions that occur wholly outside its borders 12

Conclusion 18

Certificate of Compliance 19

TABLE OF AUTHORITIES

JUDICIAL DECISIONS

324 Liquor Corp. v. Duffy,
479 U.S. 335 (1987) 6

B-21 Wines, Inc. v. Bauer,
36 F. 4th 214 (4th Cir. 2022) 4, 6

Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980) 13, 17

Coyle v. Smith,
221 U.S. 559 (1911) 12

Family Winemakers v. Jenkins,
592 F.3d 1, 5 (1st Cir. 2010) 9

Healy v. Beer Inst.,
491 U.S. 324 (1989) 15

Lebamoff Enterprises Inc. v. Whitmer,
956 F.3d 863 (6th Cir. 2020) 4, 6, 11, 15

Nat'l Pork Producers Council v. Ross,
143 S. Ct. 1142 (2023) 15

New State Ice Co. v. Liebman,
285 U.S. 262 (1932) 8

North Dakota v. United States,
495 U.S. 423 (1990) 14

Tennessee Wine & Spirits Retailers Association v. Thomas,
139 S. Ct. 2449 (2019) 4

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XXI, § 2 ..... 6, 16

STATUTES

N.J. STAT. ANN. § 33:1-2 11

N.J. STAT. ANN. § 33:1-35 14

REGULATIONS AND ADMINISTRATIVE MATERIALS

N.J. ADMIN. CODE § 13:2-24.8 11

TREATISES AND JOURNALS

Fosdick Raymond B. & Scott, Albert L.
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STATEMENT OF INTEREST[1]

The National Beer Wholesalers Association has been the national membership organization of American beer wholesalers since 1938. Many of its over 3,000 members are family-owned and have operations in a single State. The Beer Wholesalers' Association of New Jersey was founded in 1933 as a trade association of independently owned and operated beer distributors throughout New Jersey. Amici make this submission to provide additional perspective about how Plaintiffs' legal theory threatens the sound regulation not only of wine, but also of beer and alcohol more generally—and not only in New Jersey, but throughout the country.

These issues are critical to Amici and their members, who occupy the wholesale tier of systems that States have used to effectively regulate beer importation and distribution since the adoption of the Twenty-first Amendment. While these systems are sometimes referred to collectively as "*the* three-tier system," this "system" is, in fact, numerous systems—

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

and, indeed, 50 different ones, each attended by a web of regulations tailored to the unique needs of a given State. Amici's members have built their businesses to operate within the confines of these systems in their respective States.

A critical component of these systems' success is the requirement in many States that all wholesalers and retailers involved in alcohol distribution within their borders have physical presences there. Plaintiffs are now asking this Court to adopt a nationwide constitutional rule under which it would be illegal for any State to impose these physical-presence requirements. Taken to its logical conclusion, that rule could even require States to allow sales by out-of-state retailers that did not first purchase their alcohol from independent wholesalers—and the rule could apply not only to wine, but to liquor and beer as well.

That result would threaten the livelihood of wholesalers who play an essential role in these systems, so Amici are submitting this brief. Amici agree with the Appellees that the plaintiffs' proposed rule would threaten these systems of regulation that have long stemmed the social ills associated with alcohol. Indeed, the threat may be greatest to the

market for beer, given that it has even more retailers nationwide than either the wine or spirits market has.

Appellees' comprehensive briefs have provided this Court multiple reasons to affirm, and Amici will not burden the Court with a brief that repeats those arguments. Instead, this brief takes a deeper dive into the history and original understanding of the Twenty-first Amendment, and explains that the Amendment affirmatively encourages each State to enact its own, unique alcohol laws, tailored to the needs of its own, unique community. Because the plaintiffs would require a State like New Jersey to allow its citizens to purchase alcohol that has not been subject to those laws, the plaintiffs' proposed rule is contrary to the text, history, and original understanding of the Twenty-first Amendment.

ARGUMENT

Appellees have explained and other Circuits have rightly held that physical-presence requirements are "justified as a public health or safety measure or on some other legitimate nonprotectionist ground" and thus constitutional under *Tennessee Wine & Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449, 2474 (2019). *See* N.J. Br. 37–51 (citing *B-21 Wines, Inc. v. Bauer*, 36 F. 4th 214, 227–29 (4th Cir. 2022); *Lebamoff Enters. v. Whitmer*, 956 F.3d 863, 870–72 (6th Cir. 2020)). In addition to what the evidence shows about the specific need for these laws in the New Jersey wine market, laws of this sort are justified in every State and as to every type of alcohol, including beer, for a more fundamental reason—one that is based in the federalism principles that underlie the Constitution generally and the Twenty-first Amendment specifically.

The text, history, and original understanding of the Twenty-first Amendment show that it entitles each State to enforce its own sourcing, pricing, and safety laws as to all the alcohol sold within its borders. That is not a controversial proposition, but it is critical to the question before this Court. Common sense and the Constitution show that a State cannot

effectively enforce its own alcohol laws against the retailers and wholesalers involved in the three-tiered chain of distribution of alcohol to that State's residents unless both the retailer and the wholesaler have a physical presence within that State. The Twenty-first Amendment, of its own accord, thus justifies all state laws requiring all such retailers and wholesalers to be physically present within a State's borders.

A. The Twenty-first Amendment empowers each State to develop its own system for regulating alcohol

It matters a great deal, to the question before the Court, that the Twenty-first Amendment is at its core a federalism provision. The State has accurately recounted the developments that gave rise to the Twenty-first Amendment: the problems of overconsumption that led to the Eighteenth Amendment and Prohibition, and the intervening years that ultimately led to the other "social problems"—including criminal activity and manifest disregard for the law—that ultimately prompted the Eighteenth Amendment's repeal. *See* N.J. Br. 4–7. But as the State suggests, the Twenty-first Amendment did not wave the white flag on governmental regulation seeking to stem alcohol consumption. Not at all. It instead encouraged each State to adopt its own, diverse regulatory approach that

promoted alcohol-industry competition while heading off the social ills alcohol had caused. The Amendment's second section therefore underscored that alcohol regulation would be the domain of each State, making it unconstitutional for anyone to break any given State's laws regarding "[t]he transportation or importation" of alcohol "for delivery or use therein." U.S. CONST. amend. XXI, § 2.

The spirit of federalism that animated this provision is evident from a study commissioned at that time by John D. Rockefeller Jr., called *Toward Liquor Control*, that has become a leading resource for courts on the original understanding of the Twenty-first Amendment. *See B-21 Wines,* 36 F. 4th at 218; *Lebamoff*, 956 F.3d at 867; *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 357 (1987) (O'Connor, J., dissenting); *Tenn. Wine*, 139 S. Ct. at 2480 (Gorsuch, J., dissenting). The study's authors, Raymond Fosdick and Albert Scott, explained that the Eighteenth Amendment's "mistake" had not necessarily been the policy choice it embodied of banning alcohol *per se*, but rather the assumption that the United States was "a single community in which a uniform policy of liquor control could be enforced." RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 6 (1933) (republished by the Center for Alcohol Policy

in 2011). When the nation's citizens adopted the Eighteenth Amendment, the authors observed, they "overlooked the fact that in a country as large as this, racially diversified, heterogeneous in most aspects of its life and comprising a patchwork of urban and rural areas, no common rule of conduct in regard to a powerful human appetite could possibly be enforced." *Id.* at 6–7.

As Rockefeller discussed in the introduction to *Toward Liquor Control*, the only way to achieve a stable equilibrium after Prohibition's repeal was a diverse array of "carefully laid plans of control" by individual States and even individual communities within them. *See* ROCKEFELLER, *supra*, at xiii. The study's authors urged States to utilize their new discretion to pass alcohol laws that promoted temperance while reflecting "[w]hat" their particular "Community want[ed]." FOSDICK & SCOTT, *supra*, at 8. Fosdick and Scott emphasized that if "the new system is not rooted in what the people of each state sincerely desire at this moment, it makes no difference how logical and complete it may appear as a statute—it cannot succeed." *Id.* at 98. The original understanding was thus that the Twenty-first Amendment promoted a hyper-federalist approach, under which, to paraphrase what Justice Brandeis said of federalism in

another context, each State could, "if its citizens choose, serve as a laboratory" for unique and novel forms of alcohol regulation. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

B. Each State has its own system for separating and regulating the tiers of alcohol distribution

States responded to the Twenty-first Amendment by creating their three-tier systems. These systems have many core provisions in common. But more than anything else, it is their differences—and each State's prerogative to subject the alcohol in that State to the unique three-tier regulations that the State has chosen—that justify physical-presence requirements like the ones at issue here.

As New Jersey's brief explains, the general principle that prompted States to adopt their three-tier systems was a desire to prevent the oversaturation of the market with alcohol that had been caused by the vertically integrated "tied houses." *See* N.J. Br. 5. States ultimately addressed this problem not only by mandating separation of manufacturers from retailers, but also by "interposing a wholesaler level between the supplier and retailer." Evan T. Lawson, *The Future of the Three-Tiered System as*

a Control of Marketing Alcoholic Beverages, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 33.

This aspect of these systems creates two distinct regulatory advantages. The first is that it provides an additional layer of separation between producers and retailers, further ensuring that the over-saturation associated with the "tied house" does not recur and that smaller businesses are not foreclosed from entering the market. The second is that it allows for more efficient regulation that promotes public health and safety. That is because these systems create an "hourglass" structure. *Family Winemakers v. Jenkins*, 592 F.3d 1, 5 (1st Cir. 2010). There are "thousands of producers nationwide" on one end of the hourglass and even more "licensed retailers" on the other, but only "a handful of licensed . . . wholesalers" in the middle. *Id.* at 5–6. By targeting pricing and safety regulation at the relatively small number of wholesalers who populate the middle of this "hourglass," States have more effectively collected taxes, tracked alcohol, and recalled unsafe products that threaten public health. *See* N.J. Br. 41; Fedway Intervenor Br. 4, 17.

But the critical point for present purposes is this: while the three-tier systems found in States across the country generally have those attributes in common, the hyper-federalist structure of the Twenty-first Amendment led each State to also make its own unique choices about how its three-tier system would work. Some States have mandated more restrictive barriers between the tiers, more careful monitoring of these wholesaler-to-retailer transactions, or more stringent safety requirements. Meanwhile, other States have exercised their own sovereign prerogatives to opt for more lenient approaches.

Examples of the different choices abound, and many are apparent from the specific context which this case has arisen. Plaintiff The Wine Cellarage is a New York retailer that purchases its alcohol through New York's regulatory system but wishes to sell that alcohol to consumers in New Jersey. Because that alcohol will have come through a New York wholesaler rather than a New Jersey one, it will not have been subject to numerous regulations that New Jersey policymakers have chosen, in their efforts to create a system that best fits New Jersey's needs.

One difference is in the way these two States regulate the prices wholesalers charge to retailers. New Jersey generally precludes wholesalers from selling alcohol to retailers "at a price below 'cost.'" N.J. ADMIN. CODE § 13:2-24.8. Much like the three-tier system's elimination of the tied house, this provision helps prevent over-saturation of the market with cheap alcohol and the excessive consumption that can flow from it. But New York has no such rule. That would "leave[] . . . room," to paraphrase what the Sixth Circuit said in analyzing similar discrepancies between Michigan and Indiana law, for a retailer like The Wine Cellarage to purchase its alcohol below cost and then sell it below cost to New Jersey residents, which would undermine the New Jersey "interest[] in limiting consumption" that the ban on below-cost sales is meant to promote. *Lebamoff*, 956 F.3d at 872.

Another of these differences, highlighted in the parties' briefs, is in the New Jersey provision specifying that "wholesalers are authorized to sell only alcoholic beverages that are brand-registered with" the New Jersey Alcoholic Beverage Commission. N.J. Br. 8 (citing N.J. STAT. ANN. § 33:1-2(c)). The State enforces that provision to help "ensure that illegal, counterfeit, and dangerous alcohol products do not make their way to

New Jersey consumers." N.J. Br. 8–9. New York, on the other hand, allows "sales of private collections or non-brand-registered products." N.J. Br. 9; *accord* Fedway Intevernor Br. 5 n.2. This means that any wine The Wine Cellarage attempted to ship into New Jersey would not be subject to New Jersey's brand-registration safeguards.

These are not the only material differences between the laws in these States. Importantly, New Jersey generally prohibits wholesalers from selling alcohol to retailers unless they "have been stored in [their] warehouse for at least a period of 24 continuous hours," N.J. ADMIN. CODE § 13:2-25.3, whereas New York has no apparent analogue. These examples represent just a few of the existing, and potential, variances among different States' three-tier systems.

C. Physical-presence laws are justified because a State cannot effectively enforce its alcohol laws as to transactions that occur wholly outside its borders

The differences in these States' laws do not mean that one of these systems is more legitimate than the other. Far from it. "[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle v. Smith*, 221 U.S. 559, 580 (1911). The Twenty-first Amendment entitles New Jersey

and New York to make different choices about how to exercise what the Supreme Court has deemed the "virtually complete control" each has regarding "whether to permit importation or sale of liquor" within its respective borders and "how to structure the liquor distribution system" there. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

But there is a flip side to that proposition. The Twenty-first Amendment cannot fulfill its promise of giving each State power to choose the system of alcohol regulation *within* its jurisdiction unless each of these States also has the power to bring all retailers and wholesalers who wish to participate in that market *into* the State's jurisdiction. The Twenty-first Amendment, in other words, can only be understood as empowering each State to require that its three-tier system participants are physically present within its borders, so those participants will be subject to that State's unique laws governing alcohol therein. That is a critical reason why Justice Scalia was correct to write, more than 30 years ago now, that the Twenty-First Amendment "empowers" each State "to require that all liquor sold for use in the State be purchased from a licensed in-

state wholesaler." *North Dakota v. United States*, 495 U.S. 423, 447 (1990) (Scalia, J., concurring the judgment).

The parties' briefs demonstrate why it is impossible for a State like New Jersey to enforce many of its three-tier regulations against entities that do not have physical presences within the State. Three-tier regulations that apply only to retailers—such as those providing for "unannounced inspections"—are at the very least impractical for New Jersey officials to enforce against out-of-state entities. *See* N.J. Br. 40 (citing N.J. STAT. ANN. § 33:1-35). The parties have cogently explained why, and there is no need to repeat those arguments in this brief. *See* N.J. Br. 11, 40–43; Allied Intervenor Br. 30–34; Fedway Intervenor Br. 4–5, 14–15, 18–21.

What bears emphasis here is that the impediments to out-of-state enforcement are even more substantial when it comes to a State's regulations that govern the terms on which retailers purchase their alcohol from wholesalers—such as, for example, New Jersey's prohibition on purchases by a wholesaler from a private collection, or sales by a wholesaler to a retailer of prices below cost. *See supra* at 10–12. As the Sixth Circuit

has observed, the very concept of a State regulating an out-of-state transaction between two out-of-state entities is in tension with the principle, which courts historically have located in the dormant Commerce Clause, known as the "extraterritoriality doctrine." *Lebamoff*, 956 F.3d at 872 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)); *accord* Fedway Intervenor Br. 14. The Supreme Court has since emphasized that the dormant Commerce Clause may not limit a State's ability to pass nondiscriminatory laws that merely have "effects" outside its borders, but the Court has cast no doubt on the proposition that the "Constitution's horizontal separation of powers" preclude a State from enforcing laws "that *directly* regulate[] out-of-state transactions by those with *no* connection to the State." *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1153, 1157 n.1 (2023).

Because out-of-state wholesalers have no connection to New Jersey, any attempt to enforce New Jersey's laws as to transactions involving them would run afoul of this principle. Indeed, in another recent matter challenging Arizona's physical-presence requirements, counsel for the plaintiffs in this case conceded that "it is doubtful [a State] could consti-

tutionally regulate how retailers in other states must acquire their inventory." Reply Brief at 12, *Day v. Henry*, No. 23-16148, DktEntry: 39, Page 12 (9th Cir. March 29, 2024). The upshot is that New Jersey would have no means of ensuring that any wine sent into New Jersey by a New York retailer like The Wine Cellarage complied with the sourcing, safety, and pricing regulations on wholesaler-to-retailer transactions that New Jersey has deemed to be essential.

Even if there were some practicable way for New Jersey to apply its laws in those situations, the very notion that New Jersey should be put in a position where it must referee wholesaler-to-retailer transactions outside its borders would offend the federalism precepts undergirding the Twenty-first Amendment. The Amendment's text speaks not to a State's authority to pass laws regulating *other* alcohol markets, but instead a State's authority to pass laws regulating transportation or importation into *that* State, for delivery or use "*therein*." U.S. CONST. amend. XXI, § 2 (emphasis added). The Amendment's framers believed that the distribution system in any given State needed to reflect what the "Community want[s]" not in neighboring States, but in *that* State. FOSDICK & SCOTT,

supra, at 8. The Supreme Court has said that the Twenty-first Amendment grants each State "virtually complete control over" distribution within its borders, but New York's control over its system would be illusory if New Jersey were to try to dictate the terms under which Buffalo wholesalers could sell alcohol to retailers in the Bronx. *Cal. Retail Liquor Dealers*, 445 U.S. at 110.

That cannot be, and is not, the law. The Twenty-first Amendment authorizes States to implement carefully laid plans of control that, as Fosdick and Scott put it at the time, succeed when they are "rooted in what the people *of each state* sincerely desire at this moment." Fosdick & Scott, *supra*, at 98 (emphasis added). No State is authorized to impose its own plan on people and business in another State, and no State is required, under the guise of the dormant Commerce Clause, to accept alcohol within its border that has not been subjected to its own, unquestionably legitimate control plan. The only way a State can ensure that the alcohol within its borders has been subjected to that plan is if the retailers and wholesalers who participate in its markets are physically present in that State and subject to its laws. The physical-presence laws on the

books in New Jersey and numerous other states are thus, as a *per se* matter, justified as a public health or safety measure and constitutional under *Tennessee Wine*.

CONCLUSION

For these reasons and those given by the Appellees, this Court should affirm the District Court's judgment.

Respectfully submitted,

s/ John C. Neiman, Jr.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(g)(1) and L.A.R. 31.1(c), I certify that:

This brief is an **amicus** brief and complies with the word limit Fed. R. App. P 29(a)(5) because the brief contains 3,321 words, including zero words manually counted in any visual images, and excluding the items exempted by Fed. R. App. P 32(f).

This brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I am the attorney for the amicus, and I am a member of the bar of this court, pursuant to L.A.R. 28.3(d).

This brief complies with L.A.R. 31.1(c) in that prior to being electronically filed with the Court today, it was scanned by the following virus detection software and found to be free from computer viruses: CrowdStrike Falcon.

This brief complies with L.A.R. 31.1(c) in that the text of the electronic brief is identical to the text of the paper copies.

Signature: s/ John C. Neiman, Jr.

Date: April 15, 2024

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 23-2922

JEAN-PAUL WEG, LLC, 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, National Beer Wholesalers Association makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: The National Beer Wholesalers Association does not have any parent corporations.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
The National Beer Wholesalers Association does not issue any stock.

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:
N/A

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/ John C. Neiman, Jr. Dated: April 15, 2024
(Signature of Counsel or Party)

United States Court of Appeals for the Third Circuit

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N/A

s/ John C. Neiman, Jr. Dated: April 15, 2024
(Signature of Counsel or Party)