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 STATE APPELLEES

LYNDSAY V. RUOTOLO
Acting Attorney General of New Jersey

JEREMY M. FEIGENBAUM
Solicitor General

MICHAEL L. ZUCKERMAN
Deputy Solicitor General

PETER D. WINT
Assistant Attorney General

LIZA B. FLEMING
NICOLAS G. SEMINOFF
AMANDA I. MOREJÓN
CONOR W. KENNEDY
Deputy Attorneys General

Office of the New Jersey Attorney General
R.J. Hughes Justice Complex
25 Market Street, PO Box 080
Trenton, New Jersey 08625
Liza.Fleming@njoag.gov
(862) 350-5800
Attorney for State Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Court Rules

Other Authorities

INTRODUCTION

The Twenty-first Amendment grants the States considerable leeway to regulate the sale of alcohol within their borders. While the dormant Commerce Clause limits this power, it does so narrowly: though States may not regulate alcohol for protectionist purposes, even alcohol regulations that discriminate against interstate commerce are valid so long as they can be justified as a public health or safety measure, or on some other legitimate, nonprotectionist ground. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2474 (2019). As multiple circuits have held, physical-presence and wholesaler-purchase requirements like New Jersey's easily satisfy this standard. That result is especially clear where, as here, the State put forth concrete evidence, which the district court in turn properly weighed.

Since the end of Prohibition, New Jersey—like most States—has controlled the distribution of alcohol through a regulatory structure known as the "three-tier system." In a three-tier system, producers sell to wholesalers, wholesalers sell to retailers, and retailers sell to consumers; in New Jersey, participants in each tier are (subject to exceptions not relevant here) granted distinct licenses by the State's Division of Alcoholic Beverage Control (ABC). And because a three-tier system only works if alcohol actually flows through it, New Jersey prohibits all retailers—including out-of-state retailers—from shipping alcohol directly to New Jersey consumers unless the retailer maintains a physical presence in the State, N.J. Stat.

Ann. §§ 33:1-19, -26, and purchases their alcohol from a New Jersey–licensed wholesaler, N.J. Admin Code § 13:2-23.12(a).

These provisions are nondiscriminatory—they apply equally to would-be retailers who reside in New Jersey and those who reside elsewhere—and serve important health and safety interests. And in addition to fostering moderation more generally, they enable the State to investigate retailers, including through unannounced inspections, to ensure that the products they are selling are uncontaminated, unadulterated, and legal in New Jersey—and to trace the distribution of alcohol if issues arise. These provisions help the State to combat fraud—as when sellers pass off bottom-shelf liquor for top-shelf prices. They allow the State to detect undisclosed financial interests and other financial violations—like the time inspectors discovered $400,000 in unaccounted-for cash. And they help the State prevent sales to minors, including through undercover operations.

The Wine Cellarage and Lars Neubohn, a New York licensed retail wine shop and its owner, nevertheless believe that the dormant Commerce Clause requires New Jersey to allow out-of-state retailers to ship alcohol directly to New Jerseyans, bypassing New Jersey's three-tier system. But in doing so, Appellants are asking this Court not only to overlook the concrete evidence that the district court properly weighed, but also to part ways with six other circuits that have rejected functionally identical challenges, several after *Tennessee Wine*. *See B-21 Wines, Inc. v. Bauer*,

36 F.4th 214 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 567 (2023); *Sarasota Wine Mkt., LLC v. Schmidt*, 987 F.3d 1171 (8th Cir.), *cert. denied*, 142 S. Ct. 335 (2021); *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1049 (2021); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010), *cert. denied*, 562 U.S. 1270 (2011); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied*, 532 U.S. 1002 (2001). That broad consensus is unsurprising. As the Supreme Court has repeatedly held, three-tier systems like New Jersey's are "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005). And because the physical-presence and wholesaler-purchase requirements are not only key components of the three-tier system as a whole, but also plainly serve significant health and safety interests that the State demonstrated with concrete evidence, these provisions are likewise legitimate. After all, "[o]pening up the State to direct deliveries from out-of-state retailers necessarily means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all," which would "create a sizeable hole in the three-tier system" and, with it, "the public-health interests the system promotes." *Lebamoff*, 956 F.3d at 872-73.

The district court rightly held that New Jersey's physical-presence and wholesaler-purchase requirements further legitimate interests and thus do not violate the Commerce Clause. This Court should affirm its judgment.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291 of the appeal of both the district court's August 22, 2023, order granting summary judgment to State Defendants-Appellees and its October 13, 2023, order modifying the order to grant summary judgment to Wholesaler Defendants-Appellees as well.

ISSUES PRESENTED

Whether the dormant Commerce Clause, interpreted in light of the Twenty-first Amendment, prohibits New Jersey from requiring anyone who wishes to sell alcohol directly to New Jersey residents (1) to establish a physical presence in New Jersey and (2) to purchase that alcohol from a State-licensed wholesaler.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before the Court. State Defendants-Appellees are unaware of any related cases.

STATEMENT OF THE CASE

A. State Alcohol Regulation, The Twenty-First Amendment, And Adoption Of The Three-Tier System.

Alcohol is not just another consumer product—and state efforts to regulate it are as old as the country itself. "The country's early years were a time of notorious hard drinking," with per capita amounts "double that of the modern era." *Tenn. Wine*, 139 S. Ct. at 2463 & n.6. And "the problems that this engendered prompted States

to enact a variety of regulations, including licensing requirements, age restrictions, and Sunday-closing laws." *Id.* at 2463.

These challenges increased in the postbellum period, which "saw a great proliferation of saloons, and myriad social problems were attributed to this development." *Id.* Those social problems were exacerbated by "the introduction of the English 'tied-house' system," under which "an alcohol producer, usually a brewer, would set up saloonkeepers, providing them with premises and equipment, and the saloonkeepers, in exchange, agreed to sell only that producer's products and to meet set sales requirements." *Id.* at 2463 n.7. The arrangement drove retailers to push alcohol in a way that "often encouraged irresponsible drinking." *Id.* This alcohol abuse "caused 'a greater amount of crime and misery' than 'any other source.'" *B-21 Wines*, 36 F.4th at 218 (quoting *Crowley v. Christensen*, 137 U.S. 86, 91 (1890)); *see also Arnold's Wines*, 571 F.3d at 187 (linking tied-house system to organized crime); *Grand Union Co. v. Sills*, 204 A.2d 853, 857 (N.J. 1964) ("The tied house system contributed to sales stimulations which ran counter to the goal of temperance …. " (citation omitted)). And "[b]ecause those producers served only as 'absentee' owners, they 'knew nothing and cared nothing' about the resulting social ills." *B-21 Wines*, 36 F.4th at 218 (quoting Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 33 (Ctr. for Alcohol Pol'y, ed. 2011)).

Moreover, for a long period, "States could ban the production and sale of alcohol within their borders, but those bans 'were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package.'" *Tenn. Wine*, 139 S. Ct. at 2465 (quoting *Granholm*, 544 U.S. at 478). In response, in 1913, Congress passed the Webb-Kenyon Act to try "to patch this hole" and "give each State a measure of regulatory authority over the importation of alcohol." *Id.* at 2466.

In 1919, the continuing social problems from alcohol consumption led to the ratification of the Eighteenth Amendment, which prohibited the manufacture, sale, or transportation of alcohol. U.S. Const. amend. XVIII. While "Prohibition technically resolved the 'tied-house' issue, it led to a myriad of other social problems." *B-21 Wines*, 36 F.4th at 219. As a result, by 1933, "support for Prohibition had substantially diminished but not vanished completely," and 38 states "eventually ratified the Twenty-first Amendment." *Tenn. Wine*, 139 S. Ct. at 2467. Under the Twenty-first Amendment, it would be up to each State to choose "whether to permit sales of alcohol within its borders and, if so, on what terms and in what way." *Lebamoff*, 956 F.3d at 868. Thus, Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment, and Section 2 provided that "[t]he transportation or importation into any State, Territory, or possession of the United

States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI.

Shortly after the Twenty-first Amendment's ratification, many States passed three-tier licensing structures for alcohol sale and distribution, mainly to "preclude the existence of a 'tied' system between producers and retailers." *Arnold's Wines*, 571 F.3d at 187; *see also Tenn. Wine*, 139 S. Ct. at 2463 n.7 (making this same observation); *Grand Union*, 204 A.2d at 857 ("New Jersey's Control Act expressly outlawed the tied house system[.]"). And indeed today, "most States retain three-tier systems." *Lebamoff*, 956 F.3d at 868.

B. New Jersey's Three-Tier System.

"Since prohibition, New Jersey"—like most States—"has utilized a three-tier alcoholic beverage distribution system." *R&R Mktg., L.L.C. v. Jim Beam Brands Co.*, 891 A.2d 1204, 1206 (N.J. Super. Ct. App. Div. 2006); *B-21 Wines*, 36 F.4th at 218 ("The basic framework of the three-tier system has been in place for the better part of a century."). Under this system, producers (the first tier) sell alcohol to wholesalers (the second tier), and wholesalers sell to retailers (the third tier), who sell to consumers. *See* JA476 ¶ 4 (Sapolnick Decl.);[1] N.J. Stat. Ann. § 33:1-3.1(b)(8).

[1] Declaration of Andrew Sapolnick, Deputy Attorney General, New Jersey ABC, Enforcement Bureau (Dec. 6, 2021).

Through its three-tier system, New Jersey comprehensively regulates distribution and sale of alcohol to New Jersey consumers.

With limited exceptions not relevant here, to participate in any tier of New Jersey's system, an entity must obtain a license. *See* JA476 ¶ 5 (Sapolnick Decl.). And to prevent vertical integration and the tied-house problem, licensees in one tier cannot hold a license in another tier or possess a financial interest in a business licensed in another tier. *Id*.; *see also* N.J. Stat. Ann. § 33:1-43.

Two of those tiers—wholesalers (or "Class B" licensees) and retailers (or "Class C" licensees)—are particularly relevant. Wholesalers "consolidate and warehouse alcoholic beverage productions from around the world in [the] state, ensuring compliance with the state[']s laws and regulations, and ... distribute these products to in-state licensed retail establishments." JA328-29 (Kerr Expert Report).[2] In this way, New Jersey controls what kinds of products wholesalers may sell to retailers (which retailers could then pass on to New Jersey customers). For example, New Jersey has banned the sale of alcohol-infused energy drinks, JA479 ¶ 15 (Sapolnick Decl.), and the sale of powdered or crystalline alcohol, *id.*; N.J. Stat. Ann. § 33:1-2(f). Likewise, wholesalers are authorized to sell only alcoholic beverages that are brand-registered with ABC, N.J. Stat. Ann. § 33:1-2(c); JA479 ¶ 15 (Sapolnick Decl.), which helps to ensure that illegal, counterfeit, and dangerous

[2] Expert Report of William C. Kerr, Ph.D. (July 28, 2021).

alcohol products do not make their way to New Jersey consumers, *see e.g.*, JA479 ¶ 13 (Sapolnick Decl.); JA492-96 (Notice of Product Recall); N.J. Stat. Ann. § 33:1-2(f) (prohibiting sale of powdered or crystalline alcohol).

New Jersey also heavily regulates retailers. Retailers must participate in New Jersey's three-tier system to sell alcoholic beverages to New Jersey consumers. In other words, with limited inapposite exceptions, such retailers can only sell alcohol obtained from State-licensed wholesalers. *See* JA477 ¶ 8 (Sapolnick Decl.). As a result, all alcohol sold by State-licensed retailers must be brand-registered in New Jersey; sales of private collections or non-brand-registered products are prohibited—a practice that is permitted in New York, where Appellants operate their wine shop. *See* JA486-87 ¶¶ 32-33 (Sapolnick Decl.). Moreover, New Jersey law requires "Class C" retailers to maintain a physical presence in New Jersey. N.J. Stat. Ann. §§ 33:1-19, -26; *see also Essex Cnty. Retail Liquor Stores Ass'n v. Mun. Bd. of Alcoholic Beverage Control of City of Newark*, 165 A.2d 834, 837-38 (N.J. Super. Ct. App. Div. 1960). New Jersey does not, however, impose any residency requirement for obtaining a retail license. *See* N.J. Stat. Ann. § 33:1-25; N.J. Admin. Code § 13:2-9.2. Thus, while New Jersey law requires all retailers to maintain a physical presence in New Jersey, nothing in New Jersey law prevents a resident of another State from establishing a location in New Jersey and obtaining a New Jersey retail license.

The ability to sell alcohol for off-premise consumption—including through "shipping"—is included within the existing New Jersey retail licenses, subject to other regulatory constraints. *See* N.J. Stat. Ann. § 33:1-12(3a); JA477 ¶ 8 (Sapolnick Decl.).[3] In other words, there is no general "New Jersey shipping" retail license available; the ability to ship directly to New Jersey consumers is, as a general matter, simply conditioned on the usual requirements for obtaining a retail license. *See* JA444 (Johnson Rule 30(b)(6) Dep. at 15:1-8).[4] Those license requirements include, of course, the two—(1) maintaining a physical premises, and (2) purchasing from a New Jersey–licensed wholesaler—that Appellants have challenged in this case.

[3] For instance, a retailer can deliver alcoholic beverages to a customer in New Jersey using its own vehicles as long as the retailer has obtained a transit insignia. N.J. Stat. Ann. § 33:1-28; N.J. Admin Code § 13:2-20.1; JA441-42 (Tia Johnson, New Jersey ABC, Rule 30(b)(6) Dep. at 12:15-13:1). A New Jersey–licensed retailer can also use a common carrier with a transportation license to deliver alcoholic beverages to a customer in New Jersey. N.J. Stat. Ann. § 33:1-13.

[4] One exception—raised in the context of this case, *see* JA30—allows both in-state and out-of-state wineries (who are themselves producers, in the language of the three-tier system) to sell their own wine directly to retailers and consumers on a limited basis. *See* N.J. Stat. Ann. § 33:1-10(2). This direct-shipment winery license, enacted following this Court's decision in *Freeman v. Corzine*, 629 F.3d 146, 159-60 (3d Cir. 2010) (striking down New Jersey's law allowing only in-state wineries to make direct sales to retailers and consumers) is limited to smaller wineries—ones that produce 250,000 or fewer gallons of wine per year—and allows such wineries to "ship not more than 12 cases of wine per year" to consumers who are "over 21 years of age for personal consumption and not for resale." N.J. Stat. Ann. § 33:1-10(2). These same wineries may also distribute the wine they produce to New Jersey–licensed retailers. *Id.*

C. New Jersey's Regulatory Oversight And Interests.

New Jersey law authorizes ABC to inspect any licensed premises at any time. N.J. Stat. Ann. § 33:1-35. The State uses unannounced inspections, monitoring, and audits, to ensure compliance with its laws. JA479-83 ¶¶ 16, 19-23 (Sapolnick Decl.). But because ABC's jurisdiction is of course limited to New Jersey, the State lacks the legal authority or practical ability to conduct inspections, audits, and proactive investigations, or to seize evidence or property, located outside of New Jersey, including Appellants' premises in New York. JA483 ¶ 24 (Sapolnick Decl.).

Such inspections and investigations allow the State to maintain oversight over licensees to promote product safety, to combat fraud and organized crime, to prevent concealment of undisclosed financial interest, and to protect against illegal sales to minors. If a retailer were located outside of New Jersey and/or could purchase its alcohol from any source, ABC's regulatory oversight of that retailer would be substantially diminished if not eliminated.

Product Safety. ABC's ability to investigate retailers (and wholesalers) helps ensure the safety of alcohol products in the State. Limiting the sourcing of alcohol to State-licensed wholesalers allows ABC to track all products, quickly identify products manufactured in an unsafe manner, and learn where they were distributed. *See* JA479 ¶ 13 (Sapolnick Decl.). Additionally, ABC's oversight of wholesalers can detect adulterated or misbranded spirits or liquor purchased by retailers from

unauthorized sources. *See* JA482 ¶ 22 (Sapolnick Decl.). Such investigations and oversight thus enable the State to ensure responsible business practices, including the promotion of product integrity, proper labeling, and the reduction of alcohol-related crimes, *see* JA479 ¶ 13 (Sapolnick Decl.), and helps protects the public from illegal alcohol, *see id.*; JA332 ¶ 38 (Kerr Expert Report).

Inspections and oversight of retailers further protect product safety. As noted, New Jersey regulates the types of alcohol that can be sold in the State and has banned the sale of alcohol-infused energy drinks and powdered or crystalline alcohol. JA479 ¶ 15 (Sapolnick Decl.). But investigations of retailers have uncovered alcohol acquired from prohibited sources. JA482 ¶ 22 (Sapolnick Decl.). In fact, ABC prosecuted 104 charges in 2017, 53 charges in 2018, 49 charges in 2019, and 13 charges in 2020 involving prohibited sales of alcohol or the purchase of alcohol from prohibited sources. JA482-83 ¶ 23 (Sapolnick Decl.). Moreover, if product-tampering or contamination occurs, ABC is able to track particular products back through the distribution system to identify the source of contamination, to facilitate product recalls, and to take other action in response. JA479 ¶ 13 (Sapolnick Decl.).

Fraud. ABC's investigations of retailers' physical premises also combat fraud. For example, "Operation Swill," a large-scale ABC investigation, identified 29 licensees that defrauded consumers by substituting cheap distilled spirits for premium spirits while charging consumers premium prices. JA485-86 ¶¶ 28-29

(Sapolnick Decl.); JA497-99 (Press Release). One large restaurant chain paid ABC $500,000 rather than face the possibility that its licenses would be suspended in response to its misconduct. JA485-86 ¶ 29 (Sapolnick Decl.); JA500-01 (Press Release). Another ABC investigation resulted in a $23,000 penalty after a warrantless on-site inspection uncovered evidence proving that the licensee served customers cheaper vodka than they paid for. JA486 ¶ 30 (Sapolnick Decl.); JA502-03 (Press Release).

Appellants' business—the sale of premium wine—is hardly immune from fraud. The largest economic fraud involving alcohol ever recorded involved wine sales from a private collection sold through New York. JA486-87 ¶ 32 (Sapolnick Decl.). In that fraud, which included $35 million in wine sold at auction in 2006 alone, the perpetrator collected empty bottles, refilled them with cheaper wine, and then forged labels for some of the most rare and valuable wines ever produced.[5]

Undisclosed Financial Interests. State law tightly regulates who may possess a financial interest in a licensed retailer, and requires licensees to disclose interested parties. N.J. Stat. Ann. § 33:1-25; JA481 ¶ 20 (Sapolnick Decl.). Yet ABC investigations frequently uncover undisclosed interests in licensed retailers held by persons who are legally disqualified from holding such an interest. JA481 ¶ 20

[5] *See* Mosi Secret, *Jury Convicts Wine Dealer in Fraud Case*, N.Y. Times (Dec. 18, 2013), https://tinyurl.com/5c2f76t8.

(Sapolnick Decl.). For example, undercover investigations have revealed members of organized crime that held unlawful, undisclosed interests in retailers. *Id.* Investigations have also revealed violations of New Jersey's law prohibiting persons who hold licenses in one tier from holding licenses in another tier as well (*e.g.*, a retailer who also holds a wholesaler license). JA482 ¶ 22 (Sapolnick Decl.). ABC prosecuted 119 charges in 2017, 103 charges in 2018, 89 charges in 2019, and 25 charges in 2020 involving undisclosed interests. JA481 ¶ 20 (Sapolnick Decl.).

Inaccurate Or Incomplete Financial Records. Retail licensees are required to keep accurate records of all receipts and disbursements, taxes paid, and records of investment in their licensed business. N.J. Admin. Code § 13:2-23.32; JA481-82 ¶ 21 (Sapolnick Decl.). Random unannounced inspections afford ABC the opportunity to inspect and seize the licensee's contemporaneous records before the licensee has an opportunity to sanitize them. JA481-82 ¶ 21 (Sapolnick Decl.). These investigations frequently disclose that licensees fail to keep accurate records. *Id.* Investigations have uncovered large sums of unaccounted-for cash—indeed, one case revealed more than $400,000 in cash. JA482 ¶ 22 (Sapolnick Decl.). In recent years, ABC has prosecuted hundreds of cases involving failures to maintain accurate records on the licensed premises. *Id.* ¶ 23.

Illegal Sales To Minors. ABC investigators frequently perform undercover investigations at physical premises to determine whether retailers are engaged in

illegal sales, such as sales to minors. JA480-81 ¶ 19 (Sapolnick Decl.). The unlawful sale to minors can result in serious consequences, up to and including license suspension and/or revocation. *Id.* But ABC investigators lack the same ability to inspect the premises and records of out-of-state retailers. *Id.* ¶ 16.

Indeed, this case illustrates the danger that would result from allowing out-of-state retailers to sell and directly ship alcohol to New Jersey consumers. Discovery revealed that The Wine Cellarage is less than vigilant in ensuring that wine and other alcohol is not sold to minors. Specifically, when a customer wishes to purchase wine for delivery, The Wine Cellarage merely asks the customer to accurately report their age. JA379 (Neubonn Dep. at 100:20-23).[6] It does not require new customers to show identification or scan their identification to verify their age. JA379-80 (Neubohn Dep. at 100:24-101:2). And any shipment that The Wine Cellarage sends out by common carrier "goes out as an adult signature," meaning The Wine Cellarage leaves verification of the age of those who purchase alcohol to a third-party carrier. JA379 (Neubohn Dep. at 100:20-23).

D. The Instant Case.

Appellants, Jean Paul Weg, LLC d/b/a The Wine Cellarage and its owner Lars Neubohn, sued the ABC Director, the New Jersey Attorney General, and the New

[6] Rule 30(b)(6) Deposition of Lars Neubohn (Feb. 23, 2021).

Jersey Governor in their official capacities under 42 U.S.C. § 1983 in July 2019.[7] In their complaint, Appellants sought a declaration that New Jersey's physical-presence and wholesaler-purchase requirements for alcohol retailers violate the dormant Commerce Clause and the Privileges and Immunities Clause of the U.S. Constitution.[8] ECF No. 83. Following discovery, the parties filed cross-motions for summary judgment. ECF Nos. 102, 114.

On August 22, 2023, the district court granted summary judgment to the State and dismissed the complaint with prejudice. JA01-31. The court concluded that the challenged provisions "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. First, the court stated that New Jersey's licensing scheme "is arguably not 'facially discriminatory' because it requires that in-state and out-of-state wine retailers sell and deliver wine through the [three-tier] System," but that as to Appellants, the scheme "is arguably discriminatory in effect because it sets certain conditions precedent to selling wine

[7] Appellants were originally joined by two consumers, but those plaintiffs were voluntarily dismissed in 2020. ECF No. 36. The same year, Fedway Associates, Allied Beverage Group, Opici Family Distributing, and the New Jersey Liquor Store Alliance moved to intervene to defend the law. The district court granted their motions. ECF Nos. 39, 55, 66.

[8] Appellants are no longer pursuing their privileges and immunities challenge. *See* Br. 5; ECF No. 102-3 at 2.

directly to New Jersey consumers." JA24 (citation omitted). The court added that the requirements that retailers purchase from State-licensed wholesalers and maintain a physical presence in the State were "'additional steps that drive up the cost' of [Appellants'] wine and may be discriminatory." JA24-25 (quoting *Granholm*, 544 U.S. at 474-75).

But the district court agreed that New Jersey's laws are nevertheless valid, explaining that they allow the State to "exercise [its] oversight prerogatives over licensed premises and protect the public health and safety by requiring licensees to have a New Jersey store and purchase alcoholic beverages from licensed New Jersey wholesalers." JA26. For example, "having an in-state physical presence allows the ABC to conduct 'random site visits without prior notice to the particular licensee,'" which assist in determining "whether retailers are engaged in illegal sales, such as to minors." *Id.* (citation omitted). Similarly, "unannounced inspections … and ABC investigations of licensees have uncovered undisclosed interests in licensed premises, including by organized crime, … large sums of unaccounted-for cash," and "unlawful acquisition of beverage alcohol from prohibited sources, specifically other than a New Jersey licensed wholesaler." JA26-27. The court added that the state-law requirement that alcohol be purchased from New Jersey–licensed wholesalers allowed the State to "identify the source of contamination" and "facilitate product recalls." JA27.

The court also concluded that the record established that the State's "goal of protecting health and safety through these provisions as outlined, cannot be achieved 'by reasonable nondiscriminatory alternatives.'" *Id.* (quoting *Granholm*, 544 U.S. at 489). And it noted that "technology improvements do not address the State of New Jersey's goal of performing unannounced on-site inspections and investigations." JA29. Appellants, the court observed, "request 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; and to prohibit the New Jersey System from applying to Plaintiffs." JA28. Accordingly, the court held that New Jersey's licensing scheme does not violate the dormant Commerce Clause. JA30. This appeal followed.

SUMMARY OF ARGUMENT

The district court correctly held that New Jersey's physical-presence and wholesaler-purchase requirements do not violate the dormant Commerce Clause and are instead a valid exercise of New Jersey's power to regulate the flow of alcohol to its consumers under the Twenty-first Amendment.

A. The test for assessing dormant Commerce Clause challenges to state alcohol laws is clear. *See Tenn. Wine*, 139 S. Ct. 2449. First, a court evaluates whether the challenged law "discriminates" against out-of-state economic interests such that it implicates the dormant Commerce Clause at all. *Id.* at 2469-70. If it does

not discriminate, the analysis ends there. Second, if the law *is* discriminatory, a court then asks "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* at 2474. This analysis—a "different inquiry" from the dormant Commerce Clause analysis applied to products other than alcohol, *id.*—flows from the unique constitutional text and history of alcohol regulation, and multiple courts have used this test in comparable cases in the five years since *Tennessee Wine*. Under this two-step framework, a State need not establish that nondiscriminatory alternatives would be ineffective. Instead, if the law can be justified as a public health or safety measure or on other legitimate nonprotectionist ground, it does not violate the dormant Commerce Clause.

B. New Jersey's physical-presence and wholesaler-purchase requirements are neither facially nor effectively discriminatory against out-of-state retailers and thus do not implicate the dormant Commerce Clause. The challenged provisions are not discriminatory on their face because they are evenhanded as to all would-be New Jersey retailers. That is, to be licensed, *all* retailers must maintain a physical presence in New Jersey, N.J. Stat. Ann. §§ 33:1-19, -26, and *all* retailers must purchase from a New Jersey–licensed wholesaler, N.J. Admin Code § 13:2-23.12(a)—regardless of their residency. Nor are the provisions discriminatory in effect: any relevant costs these provisions impose on would-be retailers fall equally on in-state and out-of-

state applicants. That is, a Jersey City resident who wants to open a liquor store in New Jersey is subject to the same requirements as a Tribeca resident who would like to do the same. Any incidental costs do not evince discrimination, but rather reflect the commonsense principle that *all* laws affect people differently based on their specific circumstances—much as it might be easier for a New Jersey resident to begin practicing law in New Jersey than it would be for a California resident.

C. Even if the physical-presence and wholesaler-purchase requirements were discriminatory, undisputed, concrete evidence—thoroughly considered by the district court below—shows that these requirements are valid because they further multiple legitimate, nonprotectionist interests. To begin with, they ensure that the three-tier system continues to function, thus they safeguard the broader interest in moderation that New Jersey's system lawfully promotes. Moreover, as the State demonstrated through undisputed evidence, these laws allow the State to maintain oversight over licensees, including via physical inspections, and thus to promote product safety, to combat fraud and organized crime, to prevent concealment of undisclosed financial interests, and to protect against illegal sales to minors. By contrast, allowing retailers to ship directly to New Jersey consumers without establishing a physical presence in the State or sourcing their alcohol from State-licensed wholesalers would sharply circumscribe New Jersey's regulatory oversight, disserving the health and safety interests that justify these provisions.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo, viewing the facts and making all reasonable inferences in favor of the nonmovant. *TitleMax of Del., Inc. v. Weissmann*, 24 F.4th 230, 236 n.3 (3d Cir. 2022). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Furthermore, "where, as was the case here, the District Court considers cross-motions for summary judgment 'the court construes facts and draws inferences in favor of the party against whom the motion under consideration is made.'" *Heffner v. Murphy*, 745 F.3d 56, 65 (3d Cir. 2014) (citation omitted).

ARGUMENT

NEW JERSEY'S PHYSICAL-PRESENCE AND WHOLESALER-PURCHASE REQUIREMENTS ARE CONSTITUTIONAL.

The district court correctly held that New Jersey's physical-presence and wholesaler-purchase requirements are valid exercises of the State's authority to regulate alcohol within its borders under the Twenty-first Amendment. Because the challenged requirements apply equally to in-state and out-of-state retailers and impose the same burdens upon each, they do not implicate the dormant Commerce Clause at all, and this Court can affirm on that basis alone. But even if New Jersey's physical-presence and wholesaler-purchase requirements were discriminatory, they are valid not only because they are an essential part of the "unquestionably

legitimate" three-tier system, *Granholm*, 460 U.S. at 489, but also because they further multiple legitimate interests. Like the growing number of circuits that have rejected functionally identical dormant Commerce Clause challenges, this Court should do the same.

A. The Test For Dormant Commerce Clause Challenges To State Alcohol Restrictions Is Well-Established.

In 2019, the Supreme Court clarified the test for assessing whether a state restriction on alcohol violates the dormant Commerce Clause. *See Tenn. Wine*, 139 S. Ct. at 2474. That test asks (1) whether the challenged provision is discriminatory at all and then, only if it is, (2) whether it "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id*. This analysis, the Court explained, follows from the unique and interlocking history and text of the dormant Commerce Clause and the Twenty-first Amendment, and other circuits have uniformly applied this test in the five years since. Appellants seek to change that standard, but their arguments lack merit.

Begin with *Tennessee Wine*, which articulated the governing legal test in the context of a challenge to Tennessee's durational-residency requirements.[9] The Court

[9] Those requirements included a mandate that Tennessee retailers first reside in the State for two years. *Tenn. Wine*, 139 S. Ct. at 2456-57. Those requirements, which were distinct from the provisions challenged here, were struck down. *Id*. One of the Court's chief reasons for rejecting Tennessee's two-year residency requirement was that stores "physically located within the State" could still be "monitor[ed] …

made clear that a court must first ask whether a challenged provision "discriminates" against out-of-state economic interests, such that it would implicate the dormant Commerce Clause at all. *Id.* at 2469-70. If the provision is not discriminatory, the analysis ends there. But if the law *is* discriminatory, a court proceeds to the second step and "ask[s] whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* at 2474. Those justifications must rest on "concrete evidence" rather than "'mere speculation' or 'unsupported assertions'"—after all, a law whose "predominant effect … is protectionism, not the protection of public health or safety," does not qualify for the leeway afforded by the Twenty-first Amendment. *Id.* (citation omitted).

Tennessee Wine's analysis follows from the special interplay between the Commerce Clause and the Twenty-first Amendment. For most goods, the Commerce Clause has been understood to preclude nearly all discrimination against out-of-state goods and sellers. *See id.* at 2461; *see also Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023). But alcohol is different, and the text of the Twenty-first Amendment—which prohibits transporting alcohol "into any State … in violation of the laws thereof"—is broad. *See Tenn. Wine*, 139 S. Ct. at 2462; *Granholm*, 544

through on-site inspections, audits, and the like," no matter whether the corporation itself had been a resident for a sufficient period of time. *Id.* at 2475.

U.S. at 488 (observing Twenty-first Amendment gives States "virtually complete control" over the sale of alcohol within their borders). In *Tennessee Wine*, the Court reconciled these twin imperatives and their role as "part of a unified constitutional scheme," by interpreting the history of the Commerce Clause, the Twenty-first Amendment, and alcohol regulation in general. 139 S. Ct. at 2462; *see id.* at 2463-70. In short, the Twenty-first Amendment "allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests," but under the Commerce Clause, laws that have "no demonstrable connection to those interests" are still prohibited. *Id*. at 2474; *see also id*. ("Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2."). That is why the "different," more deferential, "inquiry" described above—asking whether a law is discriminatory and, if it is, whether it "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground"—governs restrictions on alcohol, but not other consumer goods. *See id.*

Consistent with *Tennessee Wine* and the unique text and history on which it was based, courts have had no trouble identifying this "two-step framework" in addressing challenges to alcohol restrictions in the five years since. *B-21 Wines*, 36 F.4th at 222 (detailing this "two-step framework"); *see Anvar v. Dwyer*, 82 F.4th 1, 8 (1st Cir. 2023); *Block v. Canepa*, 74 F.4th 400, 413 (6th Cir. 2023); *Lebamoff*, 956

F.3d at 870-71; *see also Sarasota Wine*, 987 F.3d at 1184 (finding challenged provision not discriminatory in the first place). As above, courts "ask whether the challenged regime discriminates against interstate commerce," and, only where "the inquiry is answered in the affirmative," do courts "proceed[] to the second step and assesses 'whether the challenged [regime] can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground.'" *B-21 Wines*, 36 F.4th at 222 (alteration in original) (quoting *Tenn. Wine*, 139 S. Ct. at 2474).

Appellants urge this Court to adopt a different standard, but misunderstand the Supreme Court's straightforward guidance. *First*, Appellants wrongly state that "[a] liquor law's 'discriminatory character eliminates the immunity afforded by the Twenty-first Amendment.'" Br. 25 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring)). But this misapprehends both the concurrence and the governing standard. Most fundamentally, *Tennessee Wine* expressly instructs that even if an alcohol-related law *is* discriminatory, a court must "ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." 139 S. Ct. at 2474. As for Justice Scalia's 1989 concurrence in *Healy*, it was clear that Connecticut's law was invalid because of "its facial discrimination against interstate commerce" *and* because of "Connecticut's inability to establish that the law's asserted goal of lower consumer

prices cannot be achieved in a nondiscriminatory manner." *Healy*, 491 U.S. at 344. There is no inconsistency.

Second, Appellants claim New Jersey must establish that "nondiscriminatory alternatives" would be ineffective, Br. 2, 27, 31, but that is the test for products *other than* alcohol. *See, e.g.*, *Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (under ordinary dormant Commerce Clause analysis, a discriminatory law "will survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives'" (citation omitted)). Said another way, "considering whether nondiscriminatory alternatives to the challenged laws were available … conflates the proper Twenty-First Amendment inquiry with a traditional analysis under the dormant Commerce Clause." *Anvar*, 82 F.4th at 11; *see also B-21 Wines*, 36 F.4th at 224-25 (same). Because the Twenty-first Amendment "gives the States regulatory authority they would not otherwise enjoy," the question is whether a discriminatory law "can be justified"—based on "concrete evidence"—"as a public health or safety measure or on some other legitimate nonprotectionist ground." *Tenn. Wine*, 139 S. Ct. at 2474. A law that is clearly "ill suited" to promote valid interests and that avoids "obvious alternatives," of course, cannot be justified on legitimate grounds—the "predominant effect" of such a law would be protectionism. *Id.* at 2476. But the fit between the State interest and the law need not be perfect, and a State may show, with meaningful evidence, that an alcohol-related

law "can be justified" on "legitimate nonprotectionist ground[s]" without disproving each and every conceivable alternative. *See id.* at 2474. That is a central part of what makes this a "different inquiry" than the mine run case. *Id.*

In short, binding precedent makes clear the "two-step framework" for lower courts to apply in the unique context of alcohol. *B-21 Wines*, 36 F.4th at 222; *see Tenn. Wine*, 139 S. Ct. at 2474. Here, the judgment below can be affirmed at either step: (1) the provisions that Appellants challenge are nondiscriminatory, and (2) even if that were not so, concrete evidence (which the district court weighed) shows that they serve valid health and safety interests. *See id.*

B. The Challenged Laws Are Not Discriminatory.

At bottom, Appellants' legal theory is that any alcohol seller in the United States has a constitutional right to ship alcohol directly to consumers in New Jersey, regardless of whether they establish physical premises in New Jersey, and regardless of whether they purchase from a New Jersey–licensed wholesaler. *See* Br. 7-10. Consequently, though they focus their briefing largely on New Jersey's physical-presence requirement, they appear to challenge the physical-presence requirement *and* the wholesaler-purchase requirement, which they describe as two "interrelated laws and administrative practices," Br. 7, that preclude them from shipping alcohol

directly to New Jerseyans using their New York wholesaler, Br. 9.[10] But because these requirements are neither facially nor effectively discriminatory against out-of-state sellers, they do not implicate the dormant Commerce Clause at all. This Court can affirm on that basis alone.

1. The physical-presence and wholesaler-purchase requirements do not discriminate against out-of-state applicants. State laws qualify as discriminatory for Commerce Clause purposes "if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm*, 544 U.S. at 472 (citation omitted). A law can qualify if it has either a "discriminatory purpose … or discriminatory effect." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citation omitted). The provisions challenged here have neither, because they apply evenhandedly to all would-be alcohol retailers, whether they are residents of New Jersey or another State. In other words, an entrepreneur who wishes to sell alcohol directly to New Jersey customers must be willing to purchase from a New Jersey–licensed wholesaler, N.J. Admin Code § 13:2-23.12(a),

[10] Indeed, if Appellants do *not* mean to continue challenging the wholesaler-purchase requirement, then they have invited a significant Article III redressability problem, *see Finkelman v. Nat'l Football League*, 810 F.3d 187, 194 (3d Cir. 2016), given their concession that they "could not comply" with the wholesaler-purchase requirement, Br. 9. Put differently, if they do now seek to prevail only on the physical-presence requirement, it is unclear how any victory would actually allow them to lawfully ship to New Jerseyans, given this conceded constraint.

and maintain a physical presence in New Jersey, N.J. Stat. Ann. §§ 33:1-19, -26, whether that entrepreneur lives in Woodbridge or Wyoming.

Other courts have recognized as much, upholding similar requirements as nondiscriminatory against out-of-state retailers and explaining—as the Eighth Circuit recently put it with respect to a Missouri law—that such laws "apply evenhandedly to all who qualify" by "impos[ing] the same licensing requirements on in-state and out-of-state retailers." *Sarasota Wine*, 987 F.3d at 1184; *see also Steen*, 612 F.3d at 820; *Arnold's Wines*, 571 F.3d at 191; *Bridenbaugh*, 227 F.3d at 853; *Chicago Wine Co. v. Holcomb*, 532 F. Supp. 3d 702, 713 (S.D. Ind. 2021), *appeal docketed*, No. 21-2068 (7th Cir. June 9, 2021); *Day v. Henry*, No. 21-cv-1332, ___ F. Supp. 3d. at ___, 2023 WL 5095071, at *6-8 (D. Ariz. Aug. 9, 2023), *appeal docketed*, No. 23-16148 (9th Cir. Aug. 31, 2023). Or, as the Second Circuit explained in *Arnold's Wines*, New York's physical-presence requirement for retailers "treats in-state and out-of-state liquor evenhandedly" because "New York requires all liquor—whether originating in state or out of state—[to] pass through the three-tier system." 571 F.3d at 191. In other words, "[r]equiring out-of-state liquor to pass through a licensed in-state wholesaler and retailer adds no cost to delivering the liquor to the consumer not equally applied to in-state liquor." *Id.*; *see also Bridenbaugh*, 227 F.3d at 853 (holding similar Indiana law did not discriminate because "Indiana insists that *every* drop of liquor pass through its three-tiered system

and be subjected to taxation," whether it originates in-state or out-of-state); *Steen*, 612 F.3d at 820 (noting 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"). Like the Missouri, Texas, New York, Indiana, and Arizona laws at issue in those cases, New Jersey, requires all retailers—whether in-state or out-of-state—to establish an in-state presence and participate in the three-tier system in order to sell directly to New Jersey consumers. Because those requirements "apply evenhandedly to all who qualify" and "impose[] the same licensing requirements on in-state and out-of-state retailers," there is no discrimination. *See Sarasota Wine*, 987 F.3d at 1184.

Although the district court properly held that New Jersey's physical-presence and wholesaler-purchase requirements are not discriminatory, the court misunderstood the requirements as being "arguably discriminatory in effect because [they] set[] certain conditions precedent to selling wine directly to New Jersey consumers," including purchasing from a New Jersey–licensed wholesaler and opening a store in New Jersey, which "drive up the cost" of Appellants' wine. JA024-25 (quoting *Granholm*, 544 U.S. at 474-75). The central defect in this reasoning is that these conditions and corresponding costs apply to both in-state and out-of-state retailers. Unlike in *Granholm*, where requiring "all out-of-state wine,

but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers" served to "increase the cost of out-of-state wines to Michigan consumers," 544 U.S. at 474, the relevant costs for opening an alcohol store in New Jersey are the same whether the would-be seller lives in Jersey City or Juneau. Each must satisfy the same requirements.

That opening a shop in New Jersey might be *easier* for someone who already resides in Jersey City than for someone who resides in Juneau, meanwhile, does not change the analysis. "Most laws and regulations affect different people differently, depending on their circumstances"; the "relevant question" is whether the system serves to "favor[] in-state interests of over out-of-state interests." *Tolchin v. Supreme Ct. of N.J.*, 111 F.3d 1099, 1107 (3d Cir. 1997) (citation omitted). Consider, for example, the New Jersey court rules upheld by this Court in *Tolchin*, which required attorneys seeking to practice in the State to maintain a bona fide New Jersey office and to attend New Jersey CLE lectures. *See id.* at 1102-05. As this Court held, neither rule constituted discrimination against out-of-state interests. *Id.* at 1107-08. Rather, while the bona-fide-office requirement might well impose differential burdens and benefits, all attorneys would have to "incur some expense in order to comply," and "[a]ny incidental discrimination" would be "not based on residency status, but on the size and type of an attorney's practice." *Id.* And importantly, while the burdens associated with mandatory attendance were "directly proportional to the distance an

attorney must travel to a skills and methods course site," that impact did not rise to the level of discrimination, either. *Id.* at 1108; *see also, e.g.*, *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040-43 (10th Cir. 2009) (finding Utah law requiring trust-deed trustees to maintain an in-state meeting place to be non-discriminatory).

So too here. While any law will "affect different people differently," *Tolchin*, 111 F.3d at 1107, "[a]ny incidental discrimination caused by the [physical-presence and wholesaler-purchase] requirement[s] is not based on residency status," but instead by the happenstance of that would-be retailer's current circumstances. *Id.* at 1108. Someone who lives in Alaska but already owns property in New Jersey, for example, might well be better positioned than someone who lives in New Jersey and owns property in Alaska—much as someone who lives in Philadelphia might find it easier to take the New Jersey bar exam than someone who lives near High Point State Park. Like any of these established analogs, New Jersey's physical-presence and wholesaler-purchase requirements do not discriminate against non-New Jerseyans.

2. Appellants make four arguments that these requirements are nonetheless discriminatory, Br. 31-36, but all four miss the mark.

First, Appellants' claim that the State "directly discriminates against out-of-state retailers" because it "issues [direct-shipment] licenses to in-state retailers" but not to "out-of-state retailers," Br. 32, misunderstands the law. As noted, New Jersey

imposes the same physical-presence and wholesaler-purchase requirements on *all* retailers—whether the retailer is owned by a New Jersey resident or by an out-of-state resident. N.J. Stat. Ann. §§ 33:1-19, -26 (physical-presence requirement); N.J. Admin Code § 13:2-23.12(a) (wholesaler-purchase requirement). As the district court recognized, "all potential licensees must satisfy the same requirements, obtain the same licenses, and be subject to the same inspections, audits, and investigations." JA029. That observation is consistent with cases before and after *Tennessee Wine* upholding such evenhanded laws and recognizing that they provide both in-state and out-of-state applicants the same opportunity to obtain a retail license if they meet the requirements to do so. *See Sarasota Wine*, 987 F.3d at 1184; *Steen*, 612 F.3d at 819-20; *Arnold's Wines*, 571 F.3d at 187-88, 191; *Bridenbaugh*, 227 F.3d at 853. Though Appellants fail to mention these cases in their opening brief, they concern materially identical requirements.[11]

Second, Appellants also misunderstand the law in arguing that New Jersey's system "favors in-state economic interests and protects them from competition" by giving New Jersey retailers "exclusive access" to online ordering and home delivery of alcohol. Br. 33. New Jersey's licensing scheme does not give in-state retailers

[11] Indeed, Appellants conceded below that the Texas physical-presence requirement at issue in *Steen*, 612 F.3d 809, was "a nondiscriminatory law," ECF No. 121 at 13 n.6—a concession that is fatal to their theory here. *Compare* Tex. Alco. Bev. Code Ann. § 22.03(a) (permit for off-premises deliveries is "issued for a location within a city or town"), *with* N.J. Stat. Ann. §§ 33:1-12(3a), -26.

"exclusive access" to online orders of alcohol. Rather, *all* retailers have access to online orders of alcohol from New Jersey consumers if they fulfill New Jersey's licensing requirements, which include (among other things) maintaining a physical presence and purchasing from a State-licensed wholesaler. A law that gives all sellers the same access to the market pursuant to the same licensing restrictions does not discriminate against out-of-staters. *See Sarasota Wine*, 987 F.3d at 1184; *Steen*, 612 F.3d at 819-20; *Arnold's Wines*, 571 F.3d at 187-88, 191; *Bridenbaugh*, 227 F.3d at 853; *Tolchin*, 111 F.3d at 1107-08. Appellants may dislike this approach as a policy, but that does not make it discriminatory.

Indeed, Appellants' argument underscores a core problem with their position: that they seek not an opportunity to compete in New Jersey on equal terms, but rather a right to sell into New Jersey at their own special advantage. *Cf. Lebamoff*, 956 F.3d at 873 ("Anyone who wishes … can get a Michigan license and face the regulations that come with it. Lebamoff seizes the sweet and wants to take a pass on the bitter."). Appellants' opening brief makes clear that if they were to prevail in their lawsuit, they would sell alcohol that was not sourced through New Jersey's three-tier system at all. *See* Br. 9, 34-35. And their requested relief—to be exempted from New Jersey's three-tier system and thus be able to sell directly to New Jerseyans without

purchasing from a New Jersey–licensed wholesaler—further demonstrates that they seek advantages that no current retailer enjoys.[12]

Third, Appellants argue, citing *Granholm*, that New Jersey's law "denies New Jersey residents access [to] the markets of other states," Br. 34, but that fails too. Most straightforwardly, it is not a claim that either Appellant—as New York wine retailers—have standing to raise. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) (noting that, "[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties," and detailing "limited exceptions" not applicable here); *see also Pa. Psychiatric Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288 (3d Cir. 2002) (similar). Further, Appellants' reliance on *Granholm* is misplaced. *Granholm* made its observation in the context of a law that allowed in-state wineries, but not out-of-state wineries, "to ship directly to consumers," which thus precluded "access to the markets of other States *on equal terms*." 544 U.S. at 473-74 (emphasis added). Here, by contrast, the terms are equal: to ship to New Jersey consumers, any retailer regardless of residency must establish a presence in New Jersey and buy from New

[12] Appellants' arguments lead to particularly absurd results in light of the Second Circuit's decision to uphold New York's own physical-presence requirement for retailers. *See Arnolds Wine*, 571 F.3d at 185. Because New York's law has withstood challenge, a ruling in Appellants' favor would mean that Appellants—who are New York retailers—could sell directly into New Jersey, but that a New Jersey–licensed retailer could not sell directly into New York. "That's no way to … manage cross-border trade." *Lebamoff*, 956 F.3d at 871.

Jersey–licensed wholesalers. *See supra* at 9-10. And finally, any concern that New Jersey residents will be denied access to "rare" and "unusual" "vintage wines" that are typically "obtained from auction houses and specialty wine stores," Br. 34, is a complaint about a requirement to purchase from *wholesalers*—who may not carry all the wines that Appellants wish to sell—rather than a complaint about residency-based discrimination. In other words, it is a quarrel with a cornerstone of the three-tier system—a cornerstone that all retailers undeniably face.

Fourth, Appellants' suggestion that *Granholm* held that "physical-presence requirements for liquor licenses are unconstitutional," Br. 35, is flat wrong. Physical presence "restrictions … have been consistently upheld, before and after *Granholm* and *Tennessee Wine*, as essential to a three-tiered system." *Sarasota Wine*, 987 F.3d at 1182; *see also Lebamoff*, 956 F.3d at 872; *Steen*, 612 F.3d at 819-20; *Arnold's Wines*, 571 F.3d at 187-88, 191; *Bridenbaugh*, 227 F.3d at 849. *Granholm* addressed a "discriminatory *exception* to a three-tier system" for in-state wineries. *Lebamoff*, 956 F.3d at 874. But New Jersey retailers enjoy no exception to the physical-presence requirement. As noted, *supra* at 28-36, the physical-presence requirement applies equally to—and imposes the same burdens upon—in-state and out-of-state retailers alike. Instead, *Appellants* demand a "discriminatory exception" to this essential feature of New Jersey's three-tier system. That they have not received such

an exception is not itself discrimination against their out-of-state status—it is simply a function of a level playing field.

* * *

In sum, because New Jersey's physical-presence and wholesaler-purchase requirements are nondiscriminatory in both form and effect, they do not implicate the dormant Commerce clause, and this Court "need not analyze the regulation[s] further." *Arnold's Wines*, 571 F.3d at 191.

C. The Challenged Laws Serve Legitimate, Nonprotectionist Interests.

As courts have consistently held—and as the undisputed evidence in this case establishes—laws like the physical-presence and wholesaler-purchase requirements serve important health and safety goals, and thus serve legitimate, nonprotectionist interests. For that reason, even were the challenged provisions discriminatory (which they are not), both provisions would still pass constitutional muster.

1. New Jersey's practice of "funnel[ing] sales through [a] three-tier system" is an "unquestionably legitimate" use of its Twenty-first Amendment authority. *Granholm*, 544 U.S. at 489 (citation omitted). That is, New Jersey's physical-presence and wholesaler-purchase requirements are "essential feature[s] of a three-tiered scheme," *Tenn. Wine*, 139 S. Ct. 2471, because they ensure "that all liquor sold within the State … pass through [the State's] three-tier regulatory system," *Arnold's Wines*, 571 F.3d at 186; *see B-21 Wines*, 36 F.4th at 228 (explaining that

regulation that "directly relates to [the State's] ability to separate producers, wholesalers, and retailers" is an "integral part" of the three-tier system); *Lebamoff*, 956 F.3d at 868 ("To avoid the tied-house system's 'absentee owner' problem, businesses at each tier must be independently owned, and no one may operate more than one tier."). And, like the three-tier system itself, they further important public health and safety interests—promoting product safety, combating crime and fraud, preventing undisclosed financial interests, and protecting against illegal sales to minors. *See supra* at 11-15.

Although Appellants claim not to challenge the three-tier system directly, Br. 28-29, the three-tier system works only if alcohol moves through it. Opening the market to retail shipments from out of state "necessarily means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all." *Lebamoff*, 956 F.3d at 872. That would create a "sizeable hole in the three-tier system," and once that happens, "the least regulated … alcohol will win." *Id.*; *see also B-21 Wines*, 36 F.4th at 228 (explaining that exempting out-of-state retailers from the three-tier system would "open the North Carolina wine market to less regulated wine, undermining the State's three-tier system and the established public interest of safe alcohol consumption that it promotes"). While the Twenty-first Amendment does not authorize every regulation based on a three-tiered system, as "each variation must be judged based on its own features," *Tenn. Wine*, 139 S. Ct.

at 2472, the undisputed evidence in this case shows that allowing out-of-state sellers like Appellants to ship directly into New Jersey, without establishing any physical presence or buying from New Jersey–licensed wholesalers, would significantly undermine both New Jersey's three-tier system and the legitimate, nonprotectionist interests that it, and these regulations specifically, advance.

First, the physical-presence requirement allows ABC to physically inspect retailers. In order to oversee and regulate its alcohol industry, New Jersey has chosen to rely heavily on physical inspections, monitoring of retail locations, and audits of records physically housed in retail locations. *See* JA479-82 ¶¶ 16-21 (Sapolnick Decl.). These investigations have a proven track record of uncovering fraud on consumers (like adulterated spirits), undisclosed and improper financial interests, tax noncompliance, alcohol sourced outside lawful channels, inaccurate and incomplete financial records, illegal sales to minors, and other unlawful activities. *Id.* As the Supreme Court recognized in *Tennessee Wine*, the ability of a State to "monitor" stores "physically located within the State … through on-site inspections, audits, and the like" gives retailers "strong incentives not to sell alcohol in a way that threatens public health or safety." 139 S. Ct. at 2475 (citation omitted); *see also Lebamoff*, 956 F.3d at 870 (noting Michigan's physical presence rule "ensur[es] compliance with its many regulations," as the state "conducts random inspections … and sting operations" to enforce state law). And the district court properly weighed

this evidence, recognizing that New Jersey's "unannounced inspections," which are authorized by statute (*see* N.J. Stat. Ann. § 33:1-35), and "ABC investigations of licensees have uncovered undisclosed interests in licensed premises, including by organized crime, and 'afford [the] ABC the opportunity to inspect the licensee's contemporaneous records.'" JA26 (alterations in original) (quoting JA481-82 ¶¶ 20-21 (Sapolnick Decl.)). These "[i]nvestigations have also 'uncovered large sums of unaccounted-for cash[,]' unlawful acquisition of beverage alcohol from prohibited sources, specifically other than a New Jersey licensed wholesaler[,] and have led to numerous prosecutions for related violations." JA26-27 (alterations in original) (quoting JA482-83 ¶¶ 22-23 (Sapolnick Decl.)). And they have uncovered fraud on consumers, including retailers substituting cheap distilled spirits for premium spirits while charging consumers premium prices. JA485 ¶ 28 (Sapolnick Decl.); JA497-99 (Press Release).

Second, the requirement that retailers purchase their alcohol from New Jersey–licensed wholesalers, N.J. Stat. Ann. § 33:1-2(b); N.J. Admin. Code § 13:2-25.1, 25.2, likewise furthers significant health and safety interests. Undisputed evidence shows that the wholesaler-purchase requirement protects against "economic fraud, denigration of quality, deleterious products being sold to consumers and helps to preserve the good will of the brand owner in the marketplace." JA479 ¶ 13 (Sapolnik Decl.). For example, if a product is

contaminated or has been tampered with, New Jersey "is able to track particular products back through the distribution system to identify the source of contamination, to facilitate product recalls and to take other prompt action." *Id.* ; *see also* JA27 (noting example of one intervenor-wholesaler being told to place specific cases of wine "on hold because of quality issues" (quoting JA242 ¶ 13 (Harmelin Decl.))). ABC would not be able to track specific products through the distribution system to identify a source of contamination, facilitate product recalls, or take other prompt action if retailers were permitted to obtain their products from any source. *See* JA479 ¶ 13 (Sapolnick Decl.).

In other words, allowing Appellants to ship directly into New Jersey without maintaining a physical premises and without purchasing its inventory from State-licensed wholesalers would substantially diminish the State's oversight powers. Because the jurisdiction of ABC and other New Jersey law enforcement is limited to New Jersey, the State lacks the legal authority to conduct these important regulatory functions outside of New Jersey—leaving aside the practical impediments of inspecting retailers in, say, California, Michigan, or Texas. JA482-84 ¶¶ 22, 24-25 (Sapolnick Decl.). And by a similar token, requiring physical presence allows the State to deter noncompliance through severe sanctions—for instance, revoking a license to operate or cutting off the flow of alcohol to a non-

compliant retailer—that it could not impose outside New Jersey. *See* JA331 (Kerr Expert Report); JA480-81 ¶ 19 (Sapolnick Decl.).

Appellants themselves make plain that, if they prevail here, they intend to sell wine sourced both from New York wholesalers and private collections (something New Jersey also forbids), Br. 9—and they are only the tip of the iceberg, since their theory could extend to any seller. *See* JA330-32 ¶ 31 (explaining that Appellants' theory would effectively "increase the number of potential retailers" from fewer than 2,000 to roughly 400,000); *see also Lebamoff*, 956 F.3d at 872 ("Once out-of-state delivery opens, the least regulated … alcohol will win."). That is, forcing New Jersey to regulate out-of-state retailers would "increase the number of potential retailers exponentially," from the "1,801 plenary retail distribution licenses" as of July, 2021, to some "400,000 retail stores selling wine in the United States." JA330-32 ¶ 31. This is not "a few wine shipments from out-of-state retailers." Br. 4. Instead, the burden on New Jersey would be overwhelming, effectively precluding its (or any State's) ability to perform effective oversight on the scale that would be needed. JA487 ¶ 35 (Sapolnick Decl.).

Alcohol from illegitimate producers, adulterated alcohol, and illegal alcohol could proliferate, and New Jersey regulators and law enforcement would find it far more challenging to adequately warn residents about contamination or tampering, or to effectuate a recall. Even vertical integration—the tied-house problem at the root

of the three-tier system's history, *Tenn. Wine*, 139 S. Ct. at 2463 n.7—would be hard to avoid. Indeed, if any retailer could ship alcohol directly to New Jersey consumers obtained from any source and without maintaining an in-state premises, it is not clear that the State could even detect, let alone prevent, a tied-house arrangement and all of its attendant dangers. *See Lebamoff*, 956 F.3d at 870 (noting "licensing process for retailers ensures no violations of 'tied-house' rules and no suspect sources of capital"). That is untenable where the Constitution "gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable." *Tenn. Wine*, 139 S. Ct. at 2474.

That explains why a growing consensus of courts following *Tennessee Wine* have agreed that provisions like New Jersey's advance legitimate, nonprotectionist interests. *See B-21 Wines*, 36 F.4th at 227-29; *Lebamoff*, 956 F.3d at 871-74; *Chicago Wine*, 532 F. Supp. 3d at 713-14; *Day*, ___ F. Supp. 3d. at ___, 2023 WL 5095071, at *8-9. In *B-21 Wines*, for instance, the Fourth Circuit upheld North Carolina's corresponding physical-presence and wholesaler-purchase requirements, 36 F.4th at 217, observing that allowing direct shipment to consumers would "completely exempt those out-of-state retailers from the three-tier requirement," *id.* at 228. That would "open the North Carolina wine market to less regulated wine, undermining the State's three-tier system and the established public interest of safe alcohol consumption that it promotes." *Id.*; *see also Lebamoff*, 956 F.3d at 871

(concluding that comparable Michigan law "promotes plenty of legitimate state interests, and any limits on a free market of alcohol distribution flow from the kinds of traditional regulations that characterize this market, not state protectionism"); *id.* at 873 ("Michigan could not maintain a three-tier system, and the public-health interests the system promotes, without barring direct deliveries from outside its borders.").[13] This Court should join that growing consensus, affirming that New Jersey's wealth of "concrete evidence" demonstrates why the challenged provisions advance legitimate, nonprotectionist interests and thus fit well within the State's Twenty-first Amendment discretion. *See Tenn. Wine*, 139 S. Ct. at 2474.

2. Appellants' arguments to the contrary lack merit.

First, Appellants' claim that "[t]hirteen jurisdictions have allowed shipping by out-of-state retailers over the past 15-20 years," and "have not experienced any

[13] Neither the First Circuit's decision in *Anvar*, 82 F.4th 1, nor the Sixth Circuit's decision in *Block*, 74 F.4th 400, are to the contrary. While both remanded to their respective district courts, they did so because of a particular methodological error by the district courts not presented here—those district courts' failures to grapple with the record evidence presented by the parties. *See Anvar*, 82 F.4th at 10 ("At no point did the court engage with any 'concrete evidence' as to how the in-state-presence requirement furthers the legitimate aims of the Twenty-first Amendment." (citation omitted)); *Block*, 74 F.4th at 414 ("The district court failed to consider Plaintiffs' evidence in this case concerning Ohio's Direct Ship Restriction. Instead, it treated *Lebamoff*'s holding—which dealt with a different state's law and involved different evidence—as dispositive."). This case involves no such error: the district court fully grappled with the parties' evidence, ultimately properly recognizing that the State's undisputed evidence showed that New Jersey's regulations advance the legitimate purpose of promoting public health and safety. *See* JA26-31; *see also* JA20, 24, 25, 30 (noting "concrete evidence" requirement).

significant alcohol-related public health or safety problems," Br.39-40, is beside the point. Binding precedent instructs that each State's "variation must be judged based on its own features," *Tenn. Wine*, 139 S. Ct. at 2472, and that each State must be given "leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable," *id.* at 2457. New Jersey has chosen to require retailers to participate in its three-tiered system; some states may be more permissive than New Jersey, while others might be more restrictive. *See Lebamoff*, 956 F.3d at 875 ("[T]he Twenty-first Amendment leaves these considerations to the people of Michigan, not to federal judges."). The only question in this part of the Twenty-first Amendment analysis is whether New Jersey has sufficiently shown, with "concrete evidence," that its regulations advance legitimate, nonprotectionist purposes. *Tenn. Wine*, 139 S. Ct. at 2474. As the district court correctly concluded, it has. JA30-31.

Second, Appellants err in arguing "[t]here is not a shred of evidence that any tainted, contaminated, or dangerous product has ever been received by a consumer through direct shipment from an out-of-state retailer." Br. 40. As an initial matter, the State did introduce undisputed evidence that tainted, contaminated, or dangerous products exist, *see* JA27 (citing JA242 ¶ 13 (Harmelin Decl.) (example of wholesaler segregating products because of "quality issues")), along with undisputed evidence that ABC's investigations and inspections have uncovered other violations and problems, *see* JA481-83 ¶¶ 21-23 (Sapolnick Decl.). Moreover, the proof that

Appellants seek is puzzling—it would be odd to expect many examples of out-of-state retailers shipping tainted products into New Jersey when such retailers are, under the challenged provisions, not permitted to ship alcohol into the State without complying with the three-tier system and its regulatory safeguards. *Cf. Grand Union*, 204 A.2d at 862 ("[T]he Legislature … need not wait until the evils have become flagrant and the State's liquor control policy has been impaired."). And in any event, Appellants' approach flips the burden; the question is whether a law is protectionist or instead has been "justified as a public health or safety measure or on some other legitimate nonprotectionist ground," *Tenn. Wine*, 139 S. Ct. at 2474, not whether a judge agrees that the counterfactual world without those regulations is sufficiently "dangerous." *See B-21 Wines*, 36 F.4th at 227 n.8 ("When, as here, an essential feature of a state's three-tier system is challenged, a court's role is more limited and does not entail an examination of the effectiveness of the three-tier system.").

Third, Appellants misread *Tennessee Wine* as holding that requiring physical presence to facilitate State oversight is unnecessary because "[i]n this age of split-second communications by means of computer networks … there is no shortage of less burdensome, yet still suitable, options." Br. 42 (quoting 139 S. Ct. at 2475). But the Court made that point in reference to a two-year residency requirement—not a physical-presence requirement—because this durational-residency requirement was "not needed to enable the State to maintain oversight over liquor store operators."

139 S. Ct. at 2475. Indeed, in the same paragraph, the Court emphasized that pre-application residency requirements were unnecessary to serve "oversight" interests when "the stores at issue *are physically located within the State*," given that "the State can monitor the stores' operations through on-site inspections, audits, and the like," which "provides [retailers] strong incentives not to sell alcohol in a way that threatens public health or safety." *Id.* (emphasis added). In other words, the precise paragraph Appellants cite proves the error in their theory: the same feature that the Court explained would allow Tennessee to "monitor the stores' operations through on-site inspections, audits, and the like" (and thus to protect public health and safety), *id.*, is the safeguard Appellants seek to eradicate.

Fourth, Appellants' claim that the State's public health concerns are "mere speculation," Br. 41, ignores the State's extensive undisputed evidence. Setting aside that Appellants challenge "an essential feature of [New Jersey's] three-tier system," *B-21 Wines*, 36 F.4th at 227 n.8, undisputed record evidence shows that the physical-presence and wholesaler-purchase requirements promote health and safety, as the district court recognized, *see* JA26-30; *see also supra* at 11-15. In fact, from 2017 to 2020, the State prosecuted over 100 cases related to the purchase of alcohol from a prohibited source or prohibited sales of alcohol. JA482 ¶ 23 (Sapolnick Decl.). Such enforcement is indeed "concrete evidence" that New Jersey's physical-presence and wholesaler-purchase requirements serve legitimate, nonprotectionist

goals. None of Appellants' evidence concerning direct-shipping in other States creates any dispute of material fact about the legitimate, nonprotectionist nature of these regulations. *See Tenn. Wine*, 139 S. Ct. at 2474. The district court considered Appellants' evidence, but appropriately found it "not persuasive … as to the constitutionality of the New Jersey System." JA25; *see also* JA30-31.

3. Appellants also err in demanding the State "prove that 'nondiscriminatory alternatives would be insufficient to further those interests' and minimize the risks." Br. 42 (quoting *Tenn. Wine*, 139 S. Ct. at 2474). As explained, *supra* at 25-27, under *Tennessee Wine*, the question whether adequate alternative means exist to achieve the State's interests is of only limited relevance. *See B-21 Wines*, 36 F.4th at 225-26 ("Although consideration of nondiscriminatory alternatives could have some relevance to [the Twenty-first Amendment] inquiry, it does not transform the applicable framework into the test that ordinarily applies to a dormant Commerce Clause challenge when the Twenty-first Amendment is not implicated."); *Anvar*, 82 F.4th at 11 ("[T]he mere existence of possible alternatives does not, for purposes of a Twenty-first Amendment inquiry, necessarily invalidate a challenged law."). That is a key distinction in this context from other consumer goods.

Even if this Court considered alternatives, Appellants' proposed alternative is wholly inadequate. To begin with, Appellants' suggestion that New Jersey "already uses a permit system to safely regulate direct shipping by in-state retailers," Br. 43,

and thus could ostensibly implement a similar system for out-of-state retailers, Br. 40, 42-43, is incorrect. New Jersey does not separately award a "shipping" license to retailers; it simply provides that privilege (subject to regulations, *see supra* at 10 n.3) to all licensed retailers. What Appellants appear to seek, instead, is a novel license that would allow them not only to bypass New Jersey's three-tiered system (by not having to purchase products from New Jersey–licensed wholesalers), but also to bypass any physical inspection of its premises (by not having to maintain a premises in New Jersey). *See* JA28 (recognizing that Appellants "request 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"); *see also, e.g.*, *Steen*, 612 F.3d at 820 ("[A]llowing 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."). And creating such "a sizeable hole in the three-tier system," *Lebamoff*, 956 F.3d at 872, would have serious consequences—including inspections and audits that could not occur, JA483 ¶ 24 (Sapolnick Decl.), and misconduct undiscovered, *id*. ¶¶ 21-23. This "alternative," in short, is hardly a fair substitute.

Nor have Appellants considered the weight of precedent when they suggest that because New Jersey "allows wine producers to sell directly to retailers or consumers," Br. 29, it should be able to do so for out-of-state retailers, Br. 43.

Rather, Appellants overlook the growing number of courts—the Second, Fourth, Sixth, and Eighth Circuits—upholding physical-presence requirements for retailers even when those states' systems allow limited sales by out-of-state wine *producers*. *See B-21 Wines*, 36 F.4th at 226 (upholding physical-presence requirement despite "limited exception" to three-tier system "for in-state and out-of-state wine producers); *Sarasota Wine*, 987 F.3d at 1176 (upholding retailer physical-presence requirement even though Missouri "allow[ed] in-state and out-of-state wine producers to ship wine directly to Missouri consumers"); *Arnold's Wines*, 571 F.3d at 187-88 (upholding retailer physical-presence requirement even though New York allowed "in-state and out-of-state wineries [to] bypass the three-tier system to ship directly to consumers"); *Lebamoff*, 956 F.3d at 879 (McKeague, J., concurring) (agreeing Michigan's retailer physical-presence requirement is valid even though "[o]ut-of-state wineries can ship directly to consumers"). That rule makes sense. The Twenty-first Amendment "gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable," *Tenn. Wine*, 139 S. Ct. at 2457, and so it is within a State's power to allow "a limited exception" for a small subset of producers while preserving the core of its three-tier system with a retailer physical-presence requirement. *B-21 Wines*, 36 F.4th at 226.

Furthermore, the wine producers at issue are not similarly situated to alcohol retailers in general, and New Jersey's rules governing each are quite different. For

one, New Jersey's direct-shipment regulation for wine producers is limited to smaller wineries that produce a maximum of 250,000 gallons of wine per year, and allows such wineries to "ship not more than 12 cases of wine per year," only for "personal consumption." N.J. Stat. Ann. § 33:1-10(2). Additionally, these wineries may only ship their own wine, and therefore the source of the wine is known (and limited to one producer)—mitigating concerns about counterfeiting and dangerous or contaminated products. A retail licensee, by contrast, may sell alcohol in unlimited quantities, may source that alcohol from hundreds of different producers (because retailers, of course, do not produce their own alcohol), and may sell different types of alcohol, including hard liquor. *See* N.J. Stat. Ann. § 33:1-12(3a). Comparing small and manageable sales of wine produced by out-of-state wineries to unrestricted sales by out-of-state retailers is apples and oranges.

* * *

Under the Twenty-first Amendment, States retain special "leeway" to regulate alcohol, and thus courts "engage in a different inquiry" in assessing dormant Commerce Clause challenges to state restrictions on alcohol sales than they do for other products. *Tenn. Wine*, 139 S. Ct. at 2474. Whether because such provisions are non-discriminatory, or adequately justified on nonprotectionist grounds, or both, a growing consensus of courts have concluded that physical-presence and wholesaler-purchase requirements like New Jersey's are constitutionally valid. The district

court, thoroughly considering the undisputed, concrete evidence introduced by the State, correctly came to the same conclusion below.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

LYNDSAY V. RUOTOLO
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Liza B. Fleming
Liza B. Fleming
Deputy Attorney General

Dated: April 8, 2024

CERTIFICATION OF SERVICE

I certify that on April 8, 2024, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel of record for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Liza B. Fleming
Liza B. Fleming
Deputy Attorney General

Dated: April 8, 2024

CERTIFICATION OF BAR MEMBERSHIP

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

/s/ Liza B. Fleming
Liza B. Fleming
Deputy Attorney General

Dated: April 8, 2024

CERTIFICATION OF COMPLIANCE

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

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because the brief contains 12,234 words, excluding sections exempted by Fed. R. App. P. 32(f), and thus does not exceed the 13,000-word limit.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing system in Times New Roman that is at least 14 points.

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

Company: McAfee, Inc.
Product: McAfee Endpoint Security, version 10.7.0.2687

4. 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.

/s/ Liza B. Fleming
Liza B. Fleming
Deputy Attorney General

Dated: April 8, 2024