No. 22-285

In The
Supreme Court of the United States

B-21 WINES, INC., et al.,

Petitioners,

v.

HANK BAUER, CHAIR OF THE
N.C. ALCOHOLIC BEVERAGE COMM'N,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF WINE RETAILERS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The National Association of Wine Retailers (NAWR) is an association that represents and promotes the unique interests of wine sellers nationwide. Through advocacy, education, and research, NAWR seeks to expand the opportunities for America's wine retailers, whether they serve the wine buying public via small brick-and-mortar establishments, large retail chains, Internet-based businesses, grocery stores, auction houses, or wine clubs. NAWR seeks to unite and serve wine retailing interests by providing essential services, strategic advocacy, and calls to action that will lead to a stable and modernized environment for wine retailing.

Unfortunately, arbitrary and archaic state laws and regulations built for an era that decidedly no longer exists not only hamper wine retailers' abilities to access modern and growing marketplaces locally and nationally, but also hamper consumer choice and customers' ability to access the robust retail market that NAWR's members seek to foster. Too often, these measures serve only to protect local commercial interests from competition, while hindering consumers' interests in a diverse and thriving retail market for wine.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties were timely notified and have provided written consent to this filing.

It is thus a core part of NAWR's mission to work to overcome arbitrary, archaic, and protectionist state-based market access and distribution laws and support laws which create a fair and level playing field where wine retailers can legally respond to customer demand that is increasingly turning to online ordering.

NAWR submits this amicus brief in support of B-21 Wines, Inc.'s petition for a writ of certiorari. NAWR believes it is necessary for the Supreme Court of the United States to grant the writ in this case, as allowing the *B-21 Wines, Inc. v. Bauer* decision to stand will create such chaos and uncertainty in the legal system that wine retailers will be unable to make reasonable business plans.

The COVID-19 crisis has roiled the markets and devasted the economy, while at the same time motivating more people to buy online and receive deliveries of goods so as to reduce their exposure to health risks. Many wine retailers want to invest in the infrastructure to serve wine shipping markets across the country and expand their businesses and enhance their revenue, but because of legal uncertainties surrounding wine retailer shipping, they are not willing to make the necessary investment. NAWR wants these legal uncertainties removed so that wine retailers across the country can grow their businesses during this difficult time.

SUMMARY OF THE ARGUMENT

The Fourth Circuit's decision herein creates a circuit split on the question of whether or not a state must present concrete evidence to sustain its claim that a protectionist law that would otherwise violate the Commerce Clause is justified on nonprotectionist health or safety grounds. If such requirements can be ignored, then mere speculation that the challenged law advances state interests in the health and safety of its citizens would be sufficient. A circuit split is legally damaging as it creates a fractured federal legal system that apportions legal rights based more on geography than on a standard applications of the law.

On one hand, the Seventh Circuit requires a state to build a record and provide evidence to justify discrimination. On the other hand is the Fourth Circuit, which deems that §2 of the Twenty-First Amendment can authorize discrimination based on a legitimate state interest, and thus building a record or providing concrete evidence is not necessary to authorize discrimination. Problematically, any state within the Seventh Circuit would be required to follow an altogether different legal standard than a state within the Fourth Circuit.

Outside the Fourth and Seventh Circuits, without this Court settling these differences, lower courts will be left with two diametrically opposed view points from which to decide. As there are six other cases dealing with nearly identical facts and legal analyses as in the instant matter, it is of paramount importance that

this Court settle this issue and provide a clear and proper legal standard.[2]

The Fourth Circuit's decision authorizes discrimination by misapplying legal doctrines from both *Tennessee Wine v. Thomas*[3] and *Granholm v. Heald*.[4] The Fourth Circuit's majority held that under *Tennessee Wine*, §2 of the Twenty-First Amendment authorizes discrimination when it is necessary to protect an essential feature of the three-tier system.[5] The court explained that maintaining the separation of tiers is an essential feature of the three-tier system, and that if out-of-state retailers were permitted to ship wine into North Carolina that was not first purchased from in-state wholesalers, this would allow the three-tier system to be bypassed, essentially destroying the three-tier system's separation of tiers.[6]

In *Tennessee Wine*, this Court had already discussed the essential feature test and determined that durational residency requirements were *not* an essential

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[2] *Anvar v. Tanner*, 1:19-cv-00523 (D.R.I.); *Bernstein v. Graziano*, 2:19-cv-14716 (D.N.J.); *Block et al. v. Canepa et al.*, 2:2020-cv-03686; *Chicago Wine Co. v. Holcomb*, 21-2068 (7th Cir); *Day v. Uffleman*, 2:21-cv-1332 (D. Ariz); *Freehan v. Berg*, 1:22-cv-04956 (N.D. Ill); *Jean-Paul Weg, LLC v. Graziano*, 2:19-cv-14716 (D.N.J.)

[3] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449 (2019)

[4] *Granholm v. Heald*, 542 U.S. 935 (2004)

[5] *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 228 (4th Cir. 2022)

[6] *Id.*

feature of the three-tiered scheme, because other states' regulatory schemes operate without a durational residency, or any residency requirement whatsoever.[7] There are presently fifteen states plus the District of Columbia that allow out-of-state retailers to ship to their residents without maintaining a physical presence in state, and these jurisdictions still maintain a three-tier system.[8] The Fourth Circuit applies an essential element test that does not satisfy the standards set under *Tennessee Wine.*

The majority below, failing the *Tennessee Wine* essential feature test, tries to justify discrimination by relying on *Granholm*'s endorsement of the three-tier system as "unquestionably legitimate".[9] Under the Fourth Circuit's view, the legitimacy of the three-tier system allows the states to setup a discriminatory system where it requires a product be funneled through a state licensed wholesaler before being sold by a retailer.[10] Since it is impossible for an out-of-state retailer to purchase a product from a state licensed

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[7] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2471 (2019)

[8] Cal. Business & Professions Code §23661.2, Conn. Gen. Stat. §30-18a(2), D.C. Code Ann. §25-772, Florida Declaratory Statement 2018-038, Idaho Code §23-1309A(7), La. Rev. Stat. Ann. §26:359, Neb. Rev. Stat. §53-123.15(5), N.H. Rev. Stat. Ann. §178:27, N.M. Stat. Ann. §60-7A-3, N.D. Cent. Code §5-01-16(5), Or. Rev. Stat. §471.282(c), Va. Code §4.1-209.l(a), W. Va. Code §60-8-l(a), W. Va. Legislative Rule CSR 175-4-9, Wyo. Stat. §12-2-204

[9] *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 227 (4th Cir. 2022)

[10] *Id.* at 228

wholesaler, this would unreasonably preclude the out-of-state retailer from accessing North Carolina consumers via direct shipping.

The Fourth Circuit's reliance on *Granholm*'s "unquestionably legitimate" *dicta* to justify discrimination is actually at odds with the *Granholm* holding. We would suggest this Court never intended the "unquestionably legitimate" concept to justify discrimination. *Granholm* mentioned a state's power to control a product through a three-tier system, after it already concluded the shipping law was discriminatory and was not saved by the Twenty-First Amendment. Whether a state can require a product to be funneled through a three-tier system had no bearing on judging whether the discriminatory laws at issue were constitutionally permissible. The "unquestionable legitimate" mention was *dicta*, not doctrine, nor a part of the central holding. Yet the Fourth Circuit incorrectly takes it upon itself to transform legal *dicta* into legal doctrine.

Also of considerable importance is the Fourth Circuit's avoidance of this Court's well-established analytical framework for evaluating discriminatory state alcohol laws. This Court's three-part analysis requires lower courts to 1) determine whether a law is discriminatory; 2) whether concrete evidence has been offered by the state in showing the law advances a legitimate state interest; and 3) whether there exists any nondiscriminatory alternatives to the discriminatory law? The Fourth Circuit decision does not engage in parts 2 or 3 of the analysis.

Silence by this honorable court on these issues is likely to be viewed by some lower courts as acquiescing to permitting a circuit split and will lead to unnecessary legal chaos. It will sow uncertainty about whether the Fourth Circuit or the Seventh Circuit performed the correct legal analysis.

Moreover, a review by this Court may well finally correct the discriminatory and protectionist state laws that currently hinder the important online wine sales and shipping marketplace.

ARGUMENT

I. The Majority's opinion creates a circuit split, which, if allowed to go unresolved, will sow confusion amongst the lower courts as to the proper legal standard to apply when considering the constitutionality of discriminatory state alcohol laws

The majority's opinion below creates a circuit split on the question of whether *mere assertions* by a state are enough to justify its claim that a discriminatory law that would otherwise violate the Commerce Clause actually advances legitimate health and safety interests or if *concrete evidence* is required to accompany the assertion.

At one end of the spectrum is the Fourth Circuit's split opinion, in which the majority justifies North Carolina's discriminatory ban on wine shipments from out-of-state retailers because the state asserts the law

serves a legitimate public health or safety concern. On the other side of the split is the Seventh Circuit's opinion in *Lebamoff v. Rauner*,[11] which held that simply asserting that a discriminatory ban on wine shipments from out-of-state retailers advances a legitimate nonprotectionist interest is not enough and that a state must provide concrete evidence to justify its claim that the law advances a nondiscriminatory state interest.

In the Fourth Circuit's divided decision, upholding the District Court below, it held unreasonably and incorrectly that discriminatory wine retailer shipping laws are authorized by §2 of the Twenty-First Amendment, and that because §2 authorizes discrimination, a state does not need to provide evidence to justify why discrimination is necessary. In opining that the ban passed Constitutional muster, the Fourth Circuit holds that, "although the bar [sic] discriminates against interstate commerce, it is nevertheless justified on the legitimate nonprotectionist ground of preserving North Carolina's three-tier system."[12]

The Court then quickly dismisses the plaintiff's contention that North Carolina does not meet the requirements *this* Court outlined in both *Granholm* and *Tennessee Wine* that "concrete evidence" and "the clearest showing" is necessary to "to justify discriminatory state regulation" when it held:

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[11] *Lebamoff Enters., Inc. v. Rauner*, 909 F.3d 847 (7th Cir. 2018)

[12] *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 229 (4th Cir. 2022)

> "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."[13]

The Fourth Circuit's opinion is contrary to the Supreme Court's holdings in *Granholm* and *Tennessee Wine*, which do not permit Commerce Clause discrimination based on mere speculation and unsupported assertions.

> "Recognizing that §2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy, but as we pointed out in *Granholm*, "mere speculation" or "unsupported assertions" are insufficient to sustain a law that would otherwise violate the Commerce Clause."[14]

In the Fourth Circuit's opinion, North Carolina was not required to provide evidence that discrimination was necessary to advance legitimate state interests, because protecting the three-tier system was

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[13] *Id.* at 227 n.8

[14] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2474 (2019)

enough to relieve a state of the evidentiary duties established under *Granholm* and *Tennessee Wine.*

Problematically, the Fourth Circuit decision splits from a recent Seventh Circuit decision addressing a near identical discriminatory ban on wine retailer shipping in Illinois. In *Lebamoff v. Rauner*, Chief Justice Diane Wood endorses the opposite approach to evaluating assertions that bans on retailer wine shipments further a nondiscriminatory state interest. In addressing an Illinois District Court's decision to dismiss *Lebamoff*'s challenge to a discriminatory Illinois statute prohibiting wine shipments from out-of-state retailers, Chief Judge Wood concluded that, "evidence is crucial to evaluate the constitutionality of the statute."[15]

In a starkly different approach from the Fourth Circuit, Judge Wood insists that Illinois must "show that the differential treatment is *necessitated* by permissible Twenty-First Amendment interests."[16] Instead of granting, as the Illinois District Court did, and the Fourth Circuit does, that Illinois' evidence-free assertions that the three-tier system protects the health and safety of the state's residents and therefore any challenge to that system is forestalled and ends the inquiry, the Seventh Circuit requires that evidence be deployed in support of this claim. Chief Justice Wood insists that Illinois "must show why its [wine

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[15] *Lebamoff Enters., Inc. v. Rauner*, 909 F.3d 847, 856 (7th Cir. 2018)

[16] *Id.*

shipping] restrictions are necessary."[17] *Id.* And that until it does "the record is not developed enough at this point to allow us to say definitively that there is no possibility of effective relief."[18]

The analyses applied by the Fourth Circuit and the Seventh Circuit could not be more different and, not surprisingly, lead to completely polar outcomes for plaintiffs in two cases that are identical in nearly every way. While the Fourth Circuit sidesteps the call in *Granholm* and the Supreme Court's subsequent decision in *Tennessee Wine* for "concrete evidence" to support assertions that a wine shipping ban advances a legitimate state interest, the Seventh Circuit does the opposite. It reverses and remands a near identical evidentiary sidestepping by the District Court due to a lack of "concrete evidence" to support state claims its wine shipping law is necessary to protect the health and safety of residents.

While amici recognize the benefit of issues percolating in lower courts, we submit the coffee is done brewing and this Court ought to step in and pour the muddy brew into the correct cup. How courts ought to analyze challenges to facially discriminatory state laws such as North Carolina's ban on wine shipments from out-state retailers impact billions of dollars in interstate commerce at a moment when e-commerce (not just in alcoholic beverages) is expanding.

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[17] *Id.*

[18] *Id.*

Cases[19] now in federal court in seven different states dealing with this same issue all will turn on whether lower courts believe this Supreme Court when it says "The Court has upheld state regulations that discriminate against interstate commerce only after finding, *based on concrete record evidence* [emphasis added], that a State's nondiscriminatory alternatives will prove unworkable."[20]

II. The Majority's opinion authorizes discrimination as it contradicts Supreme Court precedent in *Granholm* and *Tennessee Wine*

A. The Majority's opinion incorrectly authorizes discrimination by misconstruing legal doctrines developed by the Supreme Court in *Granholm* and *Tennessee Wine*.

Relying on this Court's *dicta* in *Granholm* that the three-tier system is "unquestionably legitimate," the Fourth Circuit's majority opinion held that §2 of the Twenty-First Amendment authorizes discrimination when it is necessary to protect an essential feature of the three-tier system.[21] The three-tier system was developed after Repeal to prevent vertical integration

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[19] *Chicago Wine Co. v. Holcomb*, No. 21-2068 (7th Cir); *Day v. Uffleman*, 2:21-cv-1332 (D. Ariz); *Freehan v. Berg*, 3:21-cv-3212 (C.D. Ill); *Jean-Paul Weg, LLC v. Graziano*, 2:19-cv-14716 (D.N.J.); *Block v. Canepa*, 2:20-cv-3686 (S.D.Ohio); *Anvar v. Tanner*, 1:19-cv-523 (D.R.I.).

[20] *Granholm v. Heald*, 544 U.S. 460, 493 (2005)

[21] *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 228 (4th Cir. 2022)

between the tiers and to separate producers, wholesalers, and retailers.[22] States adopted the three-tier system to promote public health and prevent alcohol abuse brought on by tied house saloons in the pre-Prohibition era.[23] Under Prohibition, it was common for unethical saloon owners to influence overconsumption of alcohol and a dangerous period of alcohol abuse in America.[24]

The Fourth Circuit held that maintaining the separation of tiers is an essential feature of the three-tier system, and that if out-of-state retailers were permitted to ship wine into the state that wasn't first purchased from a North Carolina wholesaler, this would destroy the three-tier system's separation of tiers.[25] This analysis misunderstands and incorrectly applies the Supreme Court's essential feature test.

In *Tennessee Wine*, this Court discussed the three tier system and determined that durational residency requirements were not one of its essential features, noting that numerous other states' regulatory schemes operate without a durational residency or *any* residency

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[22] *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 234 (4th Cir. 2022), citing *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2471 (2019); *Granholm v. Heald*, 544 U.S. 460 (2005).

[23] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2463 (2019)

[24] *Id.*

[25] *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 228 (4th Cir. 2022)

requirement, yet continue to maintain a scheme of separating producers, wholesalers, and retailers.[26]

Just as with the durational residency requirement examined in *Tennessee Wine*, there are currently numerous states that allow shipment of wine from out-of-state retailers while continuing to maintain a separation of the tiers within their own states. Moreover, the 14 states and District of Colombia that allow shipments from out-of-state retailers maintain their separation of the tiers without requiring out-of-state retailers to establish residency or an in-state presence in order to ship wine.

The crucial mistake made by the Fourth Circuit is its elevation of mere *dicta* to constitutional doctrine, which in turn leads to the erasure of B-21 Wine's right to engage in interstate commerce. The Majority opinion relies almost entirely on the mention in *Granholm* that the three-tier system's separation of the tiers is "unquestionably legitimate," but does not take into account this Court's declaration in *Tennessee Wine* that, "(a)lthough *Granholm* spoke approvingly of that basic model, it did not suggest that §2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme."[27] Yet, the Majority's opinion suggests exactly this.

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[26] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2471 (2019)

[27] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2471 (2019)

Under the Fourth Circuit's view, the legitimacy of the three-tier system as derived by *dicta* in *Granholm*, allows the states to setup a discriminatory system where it requires a product to be funneled through a state licensed wholesaler before being sold by an in-state retailer, but then may also impose this system for regulating in-state retailers to out-of-state retailers.[28] Since it is illegal for an out-of-state retailer to purchase product from a North Carolina licensed wholesaler, this would preclude the out-of-state retailer from accessing North Carolina consumers via direct shipping.

Granholm acknowledged a state may require its in-state, licensed retailer to purchase products only from an in-state licensed wholesaler before selling it in its brick-and-mortar storefront. However, when North Carolina allows its in-state retailers to sell alcohol in the state without requiring a face-to-face transaction, it creates a digital marketplace that is something altogether different than the in-state brick-and-mortar marketplace its three-tier system was built to regulate.

In North Carolina's digital marketplace, a retailer does not need a physical presence, as it can ship its product to the consumer without the consumer visiting its brick-and-mortar location. Instead, a retailer in Raleigh, approximately 250 miles away, can sell to a resident of Asheville by shipping product to the Asheville resident. The out-of-state retailer is requesting the same privilege, the ability to make sales to North

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[28] *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 228 (4th Cir. 2022)

Carolina consumers without maintaining a physical presence in the area.

The Fourth Circuit's opinion necessitates, as a condition for B-21 Wines entering the digital marketplace, that it establish and maintain an in-state physical presence. This requirement directly contradicts *Granholm*'s holding:

> "States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.' "[29]

Finally, we further emphasize that the Court never intended the "unquestionably legitimate" *dicta* to be part of its holding in *Granholm*. We observe that the *Granholm* Court mentioned a state's power to control product through a three-tier system only after it already concluded the shipping laws at issue in the case were discriminatory and were not saved by the Twenty-First Amendment. Whether a state can require product be funneled through a three-tier system had no bearing on judging whether the discriminatory laws at issue were constitutionally permissible. The "unquestionable legitimate" comment was *dicta* and not doctrine.

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[29] *Granholm v. Heald*, 544 U.S. 460, 475 (2005)

B. The Fourth Circuit opinion fails to adopt and apply the well-established analytical framework necessary to uphold a discriminatory state alcohol law.

Granholm held discriminatory wine shipping laws are not authorized by §2 of the Twenty-First Amendment.[30] "We hold that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, Art. I, §8, cl. 3, and that the discrimination is neither authorized nor permitted by the Twenty-First Amendment."[31]

Granholm went on to note that a state's discriminatory shipping law can be saved if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives"[32] The case laid out, and *Tennessee Wine* applied, a three-part analysis for determining whether a discriminatory alcohol law could pass constitutional muster. That analysis includes:

1. Whether the law is discriminatory;

2. If so, whether it can be shown with concrete evidence that the law advances a legitimate local purpose; and

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[30] *Granholm v. Heald*, 544 U.S. 460 (2005)

[31] *Id.* at 466

[32] *Granholm v. Heald*, 544 U.S. 460, 463 (2005)

> 3. If so, whether that law's legitimate local purpose can be adequately served by reasonable nondiscriminatory alternatives.[33]

The Fourth Circuit is clearly wrong in that it stops after determining the shipping ban is discriminatory on its face, but then fails to apply the subsequent two parts of the analysis.

Tennessee Wine, applying the *Granholm analysis*, held that a state cannot utilize §2 to authorize discrimination based on simple assertions that the law advances a legitimate state interest such as health, safety and welfare:

> "Recognizing that §2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy, but as we pointed out in *Granholm*, "mere speculation" or "unsupported assertions" are insufficient to sustain a law that would otherwise violate the Commerce Clause.[34]

Under *Tennessee Wine*, the Court would permit a state to justify discrimination based on a public health or safety grounds. However, the assertions of health

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[33] *Id.*

[34] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2474 (2019)

and safety justifications alone won't suffice. Instead, such assertions must come with "concrete evidence"[35] and "require the 'clearest showing' to justify discriminatory state regulation."[36]

To illustrate, for North Carolina to defend its admittedly discriminatory law based on the notion that the three-tier system advances the important state interests of health and safety, it must provide "concrete evidence" that allowing wine retailer shipping undermines the separation of the three tiers. North Carolina makes no clear showing of this.

More importantly, the Fourth Circuit dismisses this Court's call for the clearest showing, with concrete evidence, that North Carolina's discriminatory law advances a legitimate local purpose. Again, relying on the notion that the Supreme Court's "unquestionably legitimate" *dicta* authorized all discriminatory elements of North Carolina's three-tier system, the Majority decision declares the "court's role is more limited and does not entail an examination of the effectiveness of the three-tier system."[37]

With the Fourth Circuit dismissing the well-established requirement that states provide concrete evidence that a discriminatory law is necessary to advance legitimate state interests, it is no surprise that

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[35] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2474 (2019)

[36] *Granholm v. Heald*, 544 U.S. 460, 490 (2005)

[37] *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 227 n.8 (4th Cir. 2022)

that the third part of the *Granholm* analysis is also dismissed by the Majority.

This Court has been clear that a discriminatory alcohol law may only survive if it is shown that there are no nondiscriminatory alternatives to the regulation: "The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable."[38] The Court then when on to devote ten full paragraphs to exploring various alternatives to the discriminatory wine shipping bans at issue in *Granholm*.

Yet the Fourth Circuit dismisses this Court's examination of nondiscriminatory alternatives when it incorrectly notes, "the existence of a 'legitimate local purpose' and the availability of 'nondiscriminatory alternatives' were discussed by the [*Granholm*] Court only after it had already concluded that the discriminatory regimes contravened the dormant Commerce Clause and were not saved by the Twenty-First Amendment."[39] This contention ignores the Court's declaration that it "must consider" if the state's legitimate local interests "cannot be adequately served by reasonable nondiscriminatory alternatives."[40]

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[38] *Granholm v. Heald*, 544 U.S. 460, 493 (2005)

[39] *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 225 (4th Cir. 2022)

[40] *Granholm v. Heald*, 544 U.S. 460, 489 (2005)

In *Tennessee Wine*, the Court carries out the third and last part of the *Granholm* analysis by devoting seven full paragraphs to examining potential nondiscriminatory alternatives to Tennessee's discriminatory two-year durational residency requirement. This labor too is dismissed in the Fourth Circuit's opinion, where it is described as a "limited inquiry" that was "not central to the *Tennessee Wine* analysis."[41] Here, again, the Majority appears to be claiming the Court took considerable effort to undertake an analysis for no other reason than to put in more work than was necessary.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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[41] *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 224 (4th Cir. 2022)