

No. 25-1366

**In the
Supreme Court of the United
States**

DAVE YOST, ATTORNEY GENERAL OF OHIO
Petitioner,

v.

KENNETH M. MILLER, et al.
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth
Circuit**

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF WINE
RETAILERS
IN SUPPORT OF CERTIORARI AND
AFFIRMANCE**

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INTEREST OF AMICUS CURIAE¹

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

NAWR submits this brief as amicus curiae in conditional support of the petition for a writ of certiorari and the affirmation of the Sixth Circuit. The circuit split that has developed in the wake of *Tennessee Wine & Spirits Retailers Ass'n v. Thomas* has produced precisely the doctrinal chaos and marketplace uncertainty that NAWR's members must navigate daily. Allowing that split to deepen without this Court's intervention will leave specialty retailers unable to make reasonable business plans, invest in interstate infrastructure, or serve consumers across

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, counsel of record for all parties have been provided timely notice to this filing.

state lines with confidence that the legal ground beneath them will not shift. NAWR urges this Court to grant certiorari and affirm the Sixth Circuit's correct application of the framework established in *Granholm v. Heald* and *Tennessee Wine*.

SUMMARY OF THE ARGUMENT

Specialty wine retailers operate under a cloud of legal uncertainty that affects not only their revenues and markets, but the basic structure of their businesses.

This Court's decisions in *Granholm v. Heald* and *Tennessee Wine & Spirits Retailers Ass'n v. Thomas* appeared to resolve that uncertainty. In *Granholm*, the Court held that state laws permitting in-state wineries to ship wine directly to consumers while denying that same privilege to out-of-state wineries violated the Commerce Clause and rejected the notion that the Twenty-first Amendment authorizes such discrimination. *Granholm v. Heald*, 544 U.S. 460 (2005). In *Tennessee Wine*, the Court extended *Granholm*'s nondiscrimination principle to retailers, confirming that the Commerce Clause prohibits discrimination against out-of-state economic interests and protects citizens' right to access the markets of other States on equal terms. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 534 (2019).

Retailers took the Court at its word. Believing that a measure of legal certainty had been restored, many invested in the infrastructure necessary to engage in interstate commerce — systems to calculate

differing state tax rates, account for dry areas within states, and comply with other interstate regulatory requirements.

That certainty did not last. Seven circuits have now addressed the constitutionality of discriminatory wine retailer shipping bans, and they have fractured irreconcilably over the proper constitutional framework for evaluating those bans. Four circuits — the Third, Fourth, Eighth, and Ninth — hold that an in-state physical presence requirement is an “essential feature” of the three-tier system and therefore is a *per se* justification for discrimination, relieving a State of any obligation to justify its discriminatory law with evidence. Three circuits — the First, Sixth, and Seventh — reject that approach and require States to demonstrate, with concrete evidence, that discrimination advances a legitimate non-protectionist interest. The same retailer shipping the same bottle of wine faces two different constitutional realities depending solely on which circuit governs the transaction.

The result is a system of checkerboard justice that this Court’s precedents cannot have intended. A retailer may ship wine into Ohio but not Indiana — not based on any constitutional principle, but based on the accident of appellate geography. The Ohio consumer may lawfully receive wine from an out-of-state retailer that the Indiana consumer, perhaps only miles away, is categorically denied. *Granholm* and *Tennessee Wine* could not have meant that the Commerce Clause forbids discrimination in some circuits but not others, or that the Twenty-first Amendment operates as a stronger shield against

scrutiny depending upon which side of a circuit boundary a State falls.

For small specialty wine retailers, this doctrinal chaos is crippling. These retailers differentiate themselves by offering niche, imported, and limited-production wines unavailable through large national chains or local distribution networks. Access to interstate markets is not a luxury for these businesses — it is essential to their survival. Yet the absence of a uniform legal standard has foreclosed that access. Although this Court in *Granholm* and *Tennessee Wine* applied a uniform legal standard, the lower circuits have not consistently adhered to that standard. Most small retailers may ship to consumers in only fourteen jurisdictions² and are categorically barred from the rest. Large national chains can absorb the cost of establishing a physical presence in every jurisdiction; small retailers cannot. The circuit split compounds this harm independently of any single State’s law, leaving retailers unable to build rational national business plans when the constitutional rule shifts at every circuit boundary.

The Sixth Circuit below applied the correct analytical framework from *Granholm* and *Tennessee Wine*. Consistent with these rulings, it required Ohio

² 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 §4.1-209.1(A), W. Va. Code §60-8-1(a), W. Va. Legislative Rule CSR 175-4-9, Wyo. Stat. §12-2-204

to demonstrate with concrete evidence that its discriminatory direct-ship restrictions advance a legitimate non-protectionist interest and that nondiscriminatory alternatives would prove unworkable. Ohio could not make that showing, and the Sixth Circuit correctly held that Ohio's restrictions violate the Commerce Clause.

This Court should grant certiorari and affirm. The position that an in-state physical presence is an essential feature of the three-tier system and precludes a court from performing the *Tennessee Wine* concrete evidence test runs afoul of Supreme Court precedent. Moreover, the analysis of nondiscriminatory alternatives carried out by this Court in both *Granholm* and *Tennessee Wine* is not an optional analytical step that Courts can ignore—it is the critical element in determining if a law's predominant effect is discrimination. A State invoking the Twenty-first Amendment to justify discrimination against out-of-state retailers must demonstrate, with a concrete evidentiary record, that less discriminatory means will not suffice. The fourteen jurisdictions that permit interstate retailer shipping while continuing to operate robust three-tier systems prove that such alternatives exist and are workable.

Absent this Court's intervention, the circuits will continue to develop irreconcilable answers to a question of substantial constitutional importance. The concrete evidence requirements from *Tennessee Wine* and *Granholm* will survive in three circuits and cease to exist in four circuits, and the nondiscriminatory alternatives framework mandated by this Court would become a superfluous instead of a

crucial part of a court's legal analysis in all but one circuit. That is not a tolerable state of constitutional law. The petition for a writ of certiorari should be granted, and the Sixth Circuit's judgment should be affirmed.

ARGUMENT

I. The current legal environment produces a system of checkerboard justice in which a retailer's constitutional rights to access state markets are defined not by the Constitution, but by the accident of geography

The Constitution does not speak in regional dialects. Yet that is precisely what the current state of Twenty-first Amendment jurisprudence has produced via recent circuit court decisions. Whether a wine retailer may ship to a consumer across state lines — and whether that consumer may lawfully receive the shipment — depends not on any principle derived from the Commerce Clause or the Twenty-first Amendment, but on which federal circuit's decision happens to govern the transaction.

The result is constitutional chaos of the most concrete kind. Consider a retailer, operating a specialty wine shop, seeking to ship an identical bottle of wine to a customer who ordered online. The retailer wants to ship into Union City, Ohio and into Union City, Indiana — the two halves of a single town divided only by a street that happens to be the state line. If the retailer attempts to ship to an Ohio resident, the Ohio resident of Union City is within the

Sixth Circuit, which held in *Block v. Canepa* that Ohio's discriminatory wine retailer shipping restrictions violate the Commerce Clause. The Sixth Circuit determined the state lacked concrete evidence to support their assertions that discrimination was necessary and that nondiscriminatory alternatives would prove unworkable. *Block v. Canepa*, 175 F.4th 642 (6th Cir. 2026). If the retailer attempts to ship to an Indiana resident, the Indiana resident of Union City is within the Seventh Circuit and is governed by an entirely different rule. In the Seventh Circuit, the court determined that Indiana provided adequate concrete evidence to justify discriminatory wine retailer shipping laws and that the court did not need to consider nondiscriminatory alternatives. *Chicago Wine Co. v. Braun*, 148 F.4th 530 (7th Cir. 2025). Because the Indiana resident happens to reside in a Seventh Circuit state as opposed to a Sixth Circuit state, the retailer cannot ship to the Indiana resident.

The consumer on the other end of that transaction fares no better. A consumer on the Ohio side of Union City may lawfully receive wine shipped from an out-of-state retailer. A consumer on the Indiana side, living perhaps across the street, may be denied that same access. The bottle is identical. The retailer is identical. The transaction is identical. What differs is only the accident of which side of the state line the consumer happens to call home.

This Court's decisions in *Granholm* and *Tennessee Wine* cannot have countenanced this result. In *Granholm*, the Court held that the Commerce Clause prohibits states from discriminating against out-of-state economic actors in favor of their in-state

counterparts. *Granholm v. Heald*, 544 U.S. 460, 472 (2005). In *Tennessee Wine*, the Court reaffirmed that this principle extends to retailers, confirming that discriminatory direct-shipping laws deprive citizens of their right to access the markets of other States on equal terms. *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 588 U.S. 504, 534 (2019). Neither decision suggested that these protections would apply in some circuits but not others, or that § 2 of the Twenty-first Amendment would operate as a stronger shield against Commerce Clause scrutiny depending on the happenstance of geography.

Yet that is precisely the system that now exists. Seven circuits have addressed the constitutionality of discriminatory retailer shipping laws, and they are irreconcilably divided. Four circuits — the Third, Fourth, Eighth, and Ninth — have held that an in-state physical presence requirement is an “essential feature” of the three-tier system and therefore a *per se* justification for discrimination, relieving the State of any obligation to justify its discriminatory law with evidence. *Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171 (8th Cir. 2021); *B-21 Wines, Inc. v. Guy*, 36 F.4th 214 (4th Cir. 2022); *Jean-Paul Weg LLC v. Director of New Jersey Division of Alcoholic Beverage Control*, 133 F.4th 227 (3d Cir. 2025); *Day v. Henry*, 152 F.4th 961 (9th Cir. 2025). Three circuits — the First, Sixth, and Seventh — have rejected that approach and required States to demonstrate with concrete evidence that discrimination is justified by a legitimate non-protectionist interest. *Anvar v. Dwyer*, 82 F.4th 1 (1st Cir. 2023); *Block v. Canepa*, 175 F.4th 642 (6th Cir. 2026); *Chicago Wine Co. v. Braun*, 148 F.4th 530 (7th Cir. 2025). The consequence is that

identical laws produce different constitutional outcomes depending solely on where the lawsuit is filed.

This is not a tolerable state of constitutional law. The rights protected by the Commerce Clause do not diminish or expand depending on which circuit a consumer or retailer happens to fall within. Section Two of the Twenty-first Amendment cannot confer greater power to discriminate for states in some circuits than for states in others. And this Court's precedents do not permit their guarantees to fluctuate from circuit to circuit based on differing judicial interpretations of what *Granholm* and *Tennessee Wine* require.

The only mechanism capable of resolving this fragmentation is this Court's intervention. As the split deepens — and with additional challenges pending in multiple circuits, it will — more consumers and retailers will find themselves on the wrong side of a constitutional line drawn not by the Framers but by the fortuity of appellate geography. This Court should grant certiorari and finally adjudicate the uniform national standard that *Granholm* and *Tennessee Wine* promised but the lower courts have failed to deliver.

II. The circuit split is creating uncertainty in the marketplace and is especially damaging to small specialty wine retailers and the consumers who depend on them

Legal uncertainty in the law governing wine retailer shipping is not an abstract concern. It has immediate and concrete consequences for the small specialty wine retailer located in every state and consumers that bear its heaviest burdens.

Small specialty wine retailers occupy a distinct and irreplaceable niche in the American wine market. Unlike large national chains, they differentiate themselves by offering collectible niche, rare, imported, and limited-production wines often unavailable through large distribution networks or mass-market retailers. For these businesses, access to interstate markets is not a luxury; it is essential to growth and, in many cases, survival. Yet the absence of a clear and uniform legal standard has effectively foreclosed that access, leaving small retailers to navigate a fragmented regulatory landscape that shifts at every state line.

No feature of the current legal landscape better illustrates the harm than the disparity between what wine retailers and wine producers are permitted to do. Foreign wineries are prohibited from shipping wine directly to consumers in the United States due to import restrictions; such wines may be purchased only through retailers. If a state's in-state distribution

network does not carry a particular foreign wine, and state law prohibits out-of-state retailers from shipping, the consumer has no lawful means of obtaining that product. The result is not regulation but exclusion.

Consumers seeking niche domestic wines, by contrast, face no such barrier. Consider a consumer seeking a limited-production wine from a small winery in a State far from his own. It is unlikely that such a wine will be carried by state wholesalers or stocked by local retailers in most markets. But because States responded to *Granholm* by opening their markets to direct-to-consumer winery shipping, the consumer may lawfully order the wine online and have it shipped directly. *Granholm v. Heald*, 544 U.S. 460 (2005). Domestic wineries thus retain an alternative avenue to reach consumers across state lines. Retailers do not.

The growth that followed *Granholm* illustrates what interstate shipping makes possible. As of January 2026, 11,165 wineries operated in the United States, up from approximately 3,000 in 2004, the year preceding *Granholm*.³ That growth is the predictable

³ WineBusiness Analytics, U.S. Wineries — By State and By Winery Size (July 1, 2026), <https://winebusinessanalytics.com/statistics/winery/>. The overwhelming majority of those wineries — more than eighty percent — are small, very small, or limited-production operations making fewer than 50,000 cases annually. *Id.* (reporting 1,737 “small” wineries producing 5,000–49,999 cases, 3,524 “very small” wineries producing 1,000–4,999 cases, and 5,592 “limited production” wineries producing fewer than 1,000

result of eliminating protectionist barriers and allowing interstate commerce to function. Small specialty wine retailers have been denied a comparable opportunity. Only fourteen jurisdictions currently permit out-of-state retailers to ship wine directly to consumers, and small retailers are categorically barred from the rest — not by consumer demand or logistical limitation, but by discriminatory law.

If an Indiana resident visits a California winery, he may join a wine club and have wine shipped home. If that same resident visits a California wine retailer and discovers rare foreign wines unavailable through an Indiana retailer, state law forbids the California retailer from shipping the wine to the Indiana resident. There is no principled distinction between those two transactions that bears on the Commerce Clause analysis.

The burden of discriminatory retailer shipping laws falls with particular severity on consumers whose cultural, religious, or ethnic preferences are served by specialized retailers concentrated in a limited number of States. Wine imported from abroad may be sold in the United States only through licensed importers and retailers; foreign producers have no mechanism comparable to a domestic winery's direct-to-consumer shipping license. Consumers seeking imported wines therefore depend entirely on access to specialized retail markets that may not exist within

cases, together accounting for approximately 82% of all U.S. wineries).

their own state or their own state's distribution network may not provide these products to in-state retailers. — The markets that maintain discriminatory shipping restrictions guarantee that these niche but desired products are permanently out of reach for the consumer.

The problem is concrete. Kentucky⁴ maintains a discriminatory retailer shipping law and has an estimated Jewish population of 18,300, representing approximately 0.40% of the State's population.⁵ A Jewish Kentuckian seeking a specific Kosher wine for Passover Seder is unlikely to find it locally. New York, by contrast, has an estimated Jewish population of 1,672,025, representing approximately 8.54% of its population, and offers a far more robust market for Kosher wines. *Id.* Although a New York retailer could satisfy the Kentucky consumer's demand, discriminatory shipping laws foreclose that transaction entirely. The consumer is left not merely

⁴ The Sixth Circuit correctly held in *Block v. Canepa*, 175 F.4th 642 (6th Cir. 2026), that discriminatory wine retailer shipping laws are unconstitutional, and its reasoning would compel the conclusion that Kentucky's retailer shipping laws are likewise unconstitutional. Kentucky's law, like Ohio's law, bans out-of-state wine retailer shipping, but allows for in-state wine retailer shipping. NAWR believes the Sixth Circuit would hold Kentucky's law as unconstitutional. Because Ohio has sought a stay of the mandate pending its petition for certiorari, NAWR respectfully reserves this argument at this time.

⁵ Ira M. Sheskin & Arnold Dashefsky, *United States Jewish Population, 2024*, in *American Jewish Year Book* (Springer, forthcoming), available at <https://www.jewishvirtuallibrary.org/jewish-population-in-the-united-states-by-state>.

inconvenienced but categorically excluded from a lawful market that exists in New York.

Discriminatory retailer shipping laws also distort how small retailers operate and compete. Unlike wineries, which may market broadly to a national audience, small retailers must narrow their efforts to a handful of permissive jurisdictions. Resources that could otherwise be invested in innovation, customer service, or product diversity are instead spent navigating a fragmented and shifting regulatory landscape.

These laws are precisely the sort of state-imposed trade barriers the Framers sought to eliminate. As James Madison observed, the lack of a general power over commerce under the Articles of Confederation led States to enact discriminatory measures against one another that proved destructive to the young nation's economy. James Madison, *Notes of Debates in the Federal Convention of 1787*, at 14 (Ohio Univ. Press 1966). Discriminatory retailer shipping laws accomplish precisely that result today: by shielding local wholesalers and retailers from interstate competition, they eliminate incentives to innovate, expand selection, or improve service, leaving consumers with narrower choices, higher prices, and markets artificially insulated from competition.

The burden falls most heavily on small independent retailers. Large national retail chains can absorb the cost of establishing a physical presence

in every jurisdiction; small retailers cannot. The costs imposed by physical presence mandates, the types of mandates found unconstitutional in *Block v. Canepa*, are substantial and unnecessary to protect any legitimate state interest. Retailers subject to such requirements must incur licensing and compliance costs, navigate unfamiliar regulatory regimes, maintain local inventory, depend on in-state distributors who may not carry the products their customers want, and absorb increased storage and fulfillment expenses. These burdens erode margins, discourage expansion, and stifle efficient direct-to-consumer business models, operating as a barrier to entry that favors scale over specialization.

The lack of legal certainty surrounding retailer shipping laws has warped the wine marketplace. It harms small businesses, restricts consumer choice, and resurrects the very economic Balkanization the Commerce Clause was designed to eliminate. This Court should not permit that confusion to persist.

III. This Court must resolve the circuit courts' conflicting interpretations of the constitutional analysis governing discriminatory state liquor laws under *Granholm* and *Tennessee Wine*.

Seven circuits have addressed the constitutionality of discriminatory retailer shipping laws, and they have fractured on two distinct questions. The first is whether a State invoking the Twenty-first Amendment must justify discrimination with concrete evidence, or whether an in-state

physical presence is such an “essential feature” of the three-tier system that the mere invocation of a physical presence requirement within the three-tier system operates as a per se justification that relieves the State of any evidentiary burden. The second is whether the nondiscriminatory alternatives analysis that *Granholm* and *Tennessee Wine* applied survives in the Twenty-first Amendment context at all.

On the first question, four circuits have adopted the “essential feature” approach and three have required concrete evidence. On the second question, only the Sixth Circuit has properly applied the nondiscriminatory alternatives analysis required by *Granholm* and *Tennessee Wine*. By contrast, the circuits applying the “essential feature” test have effectively dispensed with the nondiscriminatory alternatives inquiry altogether, while the First and Seventh Circuits have expressed confusion on whether this Court endorses the analysis. This Court’s intervention is necessary to establish a uniform national standard on both questions.

**A. Circuits applying the
“Essential Feature” test
have eliminated *Granholm*'s
evidentiary requirement**

The Third, Fourth, Eighth, and Ninth Circuits each held that an in-state physical presence requirement is an “essential feature” of a three-tier system and therefore operates as an automatic justification for discrimination, relieving the State of any evidentiary burden and rendering the nondiscriminatory alternatives inquiry unnecessary.

Sarasota Wine Market, LLC v. Schmitt, 987 F.3d 1171 (8th Cir. 2021); *B-21 Wines, Inc. v. Guy*, 36 F.4th 214 (4th Cir. 2022); *Jean-Paul Weg LLC v. Director of New Jersey Division of Alcoholic Beverage Control*, 133 F.4th 227 (3d Cir. 2025); *Day v. Henry*, 152 F.4th 961 (9th Cir. 2025).

The First, Sixth, and Seventh Circuits have rejected the “essential feature” approach. Each of the three circuits held that a State must demonstrate, through concrete evidence, that its discriminatory law advances a legitimate non-protectionist interest. *Anvar v. Dwyer*, 82 F.4th 1 (1st Cir. 2023); *Chicago Wine Co. v. Braun*, 148 F.4th 530 (7th Cir. 2025); *Block v. Canepa*, 175 F.4th 642 (6th Cir. 2026). Neither the First nor the Seventh Circuit, however, has definitively held that the nondiscriminatory alternatives test governs that inquiry, leaving open the precise analytical framework *Granholm* and *Tennessee Wine* require.

The Sixth Circuit alone has applied *Granholm*’s framework as written, which requires concrete evidence to justify discrimination by finding that nondiscriminatory alternatives prove unworkable. In its most recent decision, the Sixth Circuit held that physical presence is not an essential feature of the three-tier system, that the State bears the burden of demonstrating through concrete evidence that its discriminatory law advances a legitimate non-protectionist interest, and that the nondiscriminatory alternatives test governs that inquiry. *Block v. Canepa*, 175 F.4th 642, 658 (6th Cir. 2026).

**B. *Granholm* imported a
demanding evidentiary
standard from *Maine v. Taylor***

The Sixth Circuit’s approach follows directly from *Granholm* itself, which was explicit about the role of the nondiscriminatory alternatives analysis: “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. Michigan and New York have not satisfied this exacting standard.” *Granholm v. Heald*, 544 U.S. 460, 493 (2005) (citing *Maine v. Taylor*, 477 U.S. 131, 141–44 (1986)).

Granholm’s citation to *Maine v. Taylor* illustrates precisely how demanding that standard is. *Maine v. Taylor* remains the only instance in which this Court has upheld a discriminatory state law against a Commerce Clause challenge, and Maine prevailed only after presenting extensive expert testimony and concrete scientific evidence establishing that its prohibition on importing out-of-state baitfish was justified by unique ecological risks that no nondiscriminatory alternative could adequately address. *Maine v. Taylor*, 477 U.S. at 141–44. *Granholm* imported that exacting standard into the Twenty-first Amendment context: discrimination against interstate commerce is the exception, not the rule, and the burden on a State seeking to justify it is correspondingly severe.

**C. Circuits applying the
"Essential Feature" test
have inverted *Granholm's*
Framework**

The Fourth and Eighth Circuits have inverted *Granholm's* analytical framework by treating the "essential feature" label as a substitute for the inquiry *Granholm* actually requires. Rather than demand that a state satisfy *Granholm's* concrete evidence requirement and its nondiscriminatory alternatives analysis, these courts have treated the three-tier system's general legitimacy — a point *Granholm* acknowledged only in dicta, describing the system as "unquestionably legitimate" — as sufficient on its own to foreclose that inquiry. This reading does not survive *Tennessee Wine*. There, the Court expressly rejected the argument that the three-tier system's general legitimacy insulates every discriminatory feature a state builds into it, explaining that such an argument reads far too much into *Granholm's* discussion of the three-tier model. 588 U.S. 504, 535 (2019). The Fourth and Eighth Circuits' essential-feature approach revives precisely the reasoning *Tennessee Wine* disclaimed.

The Fourth Circuit illustrates the point most directly. Rather than require North Carolina to demonstrate that nondiscriminatory alternatives would prove unworkable, the court treated the question as effectively answered by the existence of the three-tier system itself, reasoning that the only alternative to a physical presence requirement was the wholesale elimination of that system:

“We also reject the Plaintiffs’ contention that reasonable nondiscriminatory alternatives are available to North Carolina and are required to be used. As the district court observed, the Plaintiffs’ challenge presents a choice between “virtually eliminating North Carolina’s three-tier system . . . and maintaining the status quo.” See Opinion 11. We find no basis to disagree with that observation. There is no way for North Carolina to effectively maintain its three-tier system while allowing out-of-state retailers to bypass the system completely and ship wine directly to North Carolina consumers.”

B-21 Wines, Inc. v. Guy, 36 F.4th 214, 229 (4th Cir. 2022).

The Eighth Circuit went further still, declining to apply the nondiscriminatory alternatives test at all on the ground that Commerce Clause review of an “unquestionably legitimate” three-tier system should be no more searching than the Supreme Court has required. *Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171, 1184 (8th Cir. 2021). In doing so, the Eighth Circuit and its fellow adherents to the “essential feature” test elevated a passing observation about the three-tier system’s general legitimacy above the evidentiary standard that *Granholm* actually applied from *Maine v. Taylor*.

Even among the circuits that have rejected the “essential feature” test approach, uncertainty persists. The Seventh Circuit, in upholding Indiana’s discriminatory wine retailer shipping law, expressly acknowledged that it could not determine whether *Tennessee Wine* altered the nondiscriminatory

alternatives framework, observing that “it is not clear whether the framework applied by the Supreme Court compels consideration of nondiscriminatory alternatives in challenges to state alcohol regulations — as would be required in a typical dormant Commerce Clause case.” *Chicago Wine Co. v. Braun*, 148 F.4th 530, 543 (7th Cir. 2025).

D. *Tennessee Wine* did not relax *Granholm*'s evidentiary demand

Circuits Applying the "Essential Feature" Test read *Tennessee Wine* as having granted States broader latitude to invoke the three-tier system as a shield against Commerce Clause scrutiny. That reading is incorrect. *Tennessee Wine* extended *Granholm*'s nondiscrimination principle to retailers. It confirmed that the Commerce Clause protects citizens' right to access the markets of other States on equal terms, and that discriminatory liquor laws must be justified by something more than tradition, assumption, or the structural label of a “three-tier system”. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 539-540 (2019). The Court held that although it spoke “approvingly” of the three-tier system in general terms, that approval did not sanction every discriminatory feature a State might choose to attach to it. *Id.* at 535.

Tennessee Wine did not loosen *Granholm* — it reaffirmed *Granholm*'s core holding and extended its protections against discrimination to retailers. The circuits that have read *Tennessee Wine* as creating a more permissive standard have misread it. *Tennessee Wine* did not impose an “essential feature” test that

quelled the mandate that a state employ concrete evidence to justify discrimination nor did this court remove the necessity of courts examining the availability of non-discriminatory alternatives to determine if a law's predominant effect is discrimination that which *Granholm* imported from *Maine v. Taylor* remains the governing framework.

E. This Court's Intervention Is Necessary

The conflict among the circuits is not a matter of degree — it is a fundamental disagreement about what *Granholm* and *Tennessee Wine* require from both states and courts. Three questions divide the circuits: (1) whether physical presence is an "essential feature" of the three-tier system that precludes *Granholm*'s "concrete evidence" standard; (2) whether the nondiscriminatory alternatives test survives; and (3) if so, what a State must show to satisfy it. Left unresolved, this fragmentation will only deepen as more circuits confront the question, widening the disparity in constitutional protection across state lines.

This case is a clean vehicle to resolve all three. The Court should grant certiorari and reaffirm that *Granholm*'s evidentiary standard — including the nondiscriminatory alternatives test imported from *Maine v. Taylor* — governs challenges to discriminatory state liquor laws. If *Tennessee Wine* altered that framework, the Court should say so. Either way, only this Court can supply the guidance the lower courts need.

CONCLUSION

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

Respectfully submitted,
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