

No. 25-1366

In the Supreme Court of the United States

D. ANDREW WILSON, ATTORNEY GENERAL OF OHIO,
PETITIONER

v.

KENNETH M. MILLER; HOUSE OF GLUNZ, INC.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

**BRIEF FOR RESPONDENTS
KENNETH M. MILLER AND HOUSE OF GLUNZ, INC.**

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QUESTIONS PRESENTED

1. Whether a physical-presence requirement that discriminates between in-state and out-of-state alcohol retailers is constitutional under the Twenty-first Amendment where a State fails to establish, with concrete evidence, that the requirement predominantly promotes a legitimate, nonprotectionist interest such as public health or safety.

2. Whether an individual-transport restriction that discriminates between alcohol purchased in-state and out-of-state is constitutional under the Twenty-first Amendment where a State fails to establish, with concrete evidence, that the restriction predominantly promotes a legitimate, nonprotectionist interest such as public health or safety.

**PARTIES TO THE PROCEEDING
AND CORPORATE DISCLOSURE STATEMENT**

Petitioner is D. Andrew Wilson, the Attorney General of Ohio. After the petition for a writ of certiorari was filed, petitioner succeeded Dave Yost, the former Attorney General, and he is substituted as petitioner pursuant to Rule 35.3.

Respondents are Kenneth M. Miller and House of Glunz, Inc. Respondent House of Glunz, Inc., has no parent corporation, and no public company holds 10% or more of its stock.

The Wholesale Beer & Wine Association of Ohio intervened in support of petitioner in the proceedings below and is a respondent before this Court pursuant to Rule 12.6.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 175 F.4th 642. The opinion of the district court (Pet. App. 38a-63a) is reported at 771 F. Supp. 3d 1010.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2026. The petition for a writ of certiorari was filed on June 5, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides:

The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Section 2 of the Twenty-first Amendment to the United States Constitution provides:

The 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.

Section 4301.20 of the Ohio Revised Code provides in relevant part:

This chapter and Chapter 4303[] of the Revised Code do not prevent * * *

(L) Any resident of this state or any member of the armed forces of the United States, who has attained the age of twenty-one years, from bringing into this state, for personal use and not for resale, not more than one liter of spirituous liquor, four and one-half liters of wine, or two hundred eighty-eight ounces of beer in any thirty-day period * * * .

Section 4301.58(C) of the Ohio Revised Code provides:

No person, personally or by the person's clerk, agent, or employee, who is not the holder of an A, B, C, D, E, F, G, I, or S permit issued by the division, in force at the time, and authorizing the sale of beer, intoxicating liquor, or alcohol, or who is not an agent or employee of the division or the tax commissioner authorized to

sell such beer, intoxicating liquor, or alcohol, shall sell, keep, or possess beer, intoxicating liquor, or alcohol for sale to any persons other than those authorized by Chapters 4301[] and 4303[] of the Revised Code to purchase any beer or intoxicating liquor, or sell any alcohol at retail.

Section 4303.12 of the Ohio Revised Code provides in relevant part:

Permit C-2 may be issued to the owner or operator of a retail store to sell wine in sealed containers only and not for consumption on the premises where sold in original containers. * * *

Additional provisions of the Ohio Revised Code are reproduced at Pet. App. 66a-80a.

STATEMENT

Respondents Kenneth M. Miller and House of Glunz, Inc., agree with petitioner that further review is warranted, but disagree as to the scope of that review and the correct answer on the merits.

Although the petition purports to raise a single question presented, that question actually encompasses two distinct questions about a State's authority to implement discriminatory alcohol regulations under the guise of the Twenty-first Amendment. The first question concerns whether a State may require retailers to have a physical presence within the State in order to ship wine directly to consumers. That question implicates a well-developed, four-to-three circuit conflict, and it is exceptionally important to businesses, consumers, and States alike. The first question accordingly warrants this Court's review, even though the court of appeals correctly held in the decision below that the Ohio requirement at issue was unconstitutional. The second question concerns whether a

State may limit the volume of wine that an individual consumer may transport across its borders for personal use. That question has not yet resulted in a mature circuit conflict, and the court of appeals correctly resolved the question in the decision below. The second question accordingly does not warrant the Court’s review at this time. The Court should grant the petition, limited to the first question presented in this brief.

A. Background

1. The Commerce Clause provides that “[t]he Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. Art. I, § 8, cl. 3. “Although the Clause is framed as a positive grant of power to Congress,” this Court has “long held” that the Clause “also prohibits state laws that unduly restrict interstate commerce.” *Tennessee Wine & Spirits Retailers Association v. Thomas*, 588 U.S. 504, 514 (2019). That principle—the “negative” or “dormant” “aspect of the Commerce Clause”—“prevents the States from adopting protectionist measures and thus preserves a national market for goods and services.” *Ibid.* (internal quotation marks and citations omitted).

Section 2 of the Twenty-first Amendment prohibits the “transportation or importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the” State’s laws. U.S. Const. amend. XXI, § 2. As this Court has explained, that provision authorizes States to “maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use.” *Granholm v. Heald*, 544 U.S. 460, 484 (2005).

2. The Court has considered the relationship between the Commerce Clause and the Twenty-first Amendment in two recent decisions, *Granholm* and *Tennessee Wine*.

In *Granholm*, the Court analyzed Michigan and New York laws permitting in-state wineries to sell and ship directly to consumers while prohibiting out-of-state wineries from doing so (or making direct sales economically impracticable). See 544 U.S. at 465-466. The Court held that the laws at issue “discriminate[d] against interstate commerce in violation of the Commerce Clause” and that the discrimination was “neither authorized nor permitted by the Twenty-first Amendment.” *Id.* at 466. The Court explained that “the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers.” *Id.* at 486.

The States in *Granholm* had argued that invalidating their direct-shipment restrictions would “call into question the constitutionality of the three-tier system” of licensing, which separates producers, wholesalers, and retailers, and which the Court had previously approved. 544 U.S. at 466, 488-489. That system first developed in response to an uptick in “tied-house” arrangements in the post-Civil War period, in which a producer of alcohol also ran the saloon hosting its purchase and consumption—incentivizing irresponsible consumption and causing social problems. See *Tennessee Wine*, 588 U.S. at 521 & n.7. Although the Court observed that the three-tier system is “unquestionably legitimate,” it rejected the States’ argument. *Granholm*, 544 U.S. at 488-489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion)). Instead, it distinguished the state laws at issue, which allowed only in-state wineries to ship directly to consumers, as “straightforward attempts to discriminate” against interstate commerce. *Id.* at 489. The Court reaffirmed that “state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause,”

and it ultimately invalidated the discriminatory regulations. *Id.* at 487, 493.

In *Tennessee Wine*, the Court considered a law that required an individual to reside in Tennessee for two years before seeking a license to operate a liquor store in the State. See 588 U.S. at 510. The Court reiterated that a state alcohol regulation violates the dormant Commerce Clause when it is “aimed at giving a competitive advantage to in-state businesses.” *Id.* at 531. The Court explained that a State’s regulation of in-state alcohol distribution will survive constitutional scrutiny only if it “can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground.” *Id.* at 539. “[M]ere pretences” would not suffice, the Court emphasized, *id.* at 522 (citation omitted); States were not permitted to “impose protectionist measures clothed as police-power regulations,” *id.* at 528.

Applying those principles, the Court concluded that the Tennessee law was invalid. The Court first determined that Tennessee’s durational residency requirement “discriminate[d] on its face against nonresidents.” 588 U.S. at 539. The Court proceeded to analyze whether the durational residency requirement was justified on nonprotectionist grounds under the Twenty-first Amendment. The Court rejected the argument that “*Granholm*’s discussion of the three-tiered model” supported the State. *Id.* at 535. Instead, it explained that “the basic three-tiered model of separating producers, wholesalers, and retailers” was not at issue, but rather that the case concerned a specific durational residency requirement that Tennessee had imposed on applicants for liquor-store licenses. *Ibid.* That requirement, the Court reasoned, was “not an essential feature of a three-tiered scheme.” *Ibid.* Reviewing the record, the Court identified no “con-

crete evidence” showing that the durational residency requirement promoted legitimate state interests or that nondiscriminatory alternatives would be insufficient. *Id.* at 540 (quoting *Granholm*, 544 U.S. at 490). Accordingly, the Court held that the durational residency requirement “violate[d] the Commerce Clause and [was] not saved by the Twenty-first Amendment.” *Id.* at 543.

B. Facts And Procedural History

1. This case concerns Ohio’s regime for regulating the sale and distribution of alcohol. Ohio uses a three-tier system, and alcohol generally must “pass through each tier prior to reaching the consumer.” Pet. App. 3a-4a. But with respect to wine, Ohio has “carved out several exceptions” from its three-tier system. *Id.* at 4a. Under those provisions, an in-state or out-of-state winery that holds a permit may ship up to 288 bottles of wine per year directly to each Ohio household and “sell wine directly to Ohio retailers without going through an Ohio wholesaler.” *Id.* at 4a-5a; see Ohio Rev. Code §§ 4301.24(E)(4), 4303.071, 4303.232-4303.233, 4303.236.

With regard to retailers, however, the picture is very different. Ohio allows in-state retailers to ship wine directly to consumers, but it prohibits out-of-state retailers from doing the same (aside from certain grandfathered retailers under an earlier permitting scheme). Pet. App. 5a-6a; see Ohio Rev. Code §§ 4301.01(A)(2), 4301.58(C), 4301.60, 4303.12, 4303.25, 4303.27, 4303.236(B)(1); see also Ohio Rev. Code § 4303.232(A)(1), (3) (2011) (repealed 2021). Ohio also prohibits consumers from “transporting more than 4.5 liters, or six bottles, of wine acquired outside of Ohio into the state during any thirty-day period.” Pet. App. 6a; see Ohio Rev. Code §§ 4301.20(L), 4303.236(A).

Respondent Kenneth M. Miller is an Ohio resident who seeks to order wine from out-of-state retailers to be shipped directly to his home. Mr. Miller also seeks personally to transport wine purchased outside Ohio into the State in excess of the six-bottle limit imposed by state law. Respondent House of Glunz, Inc., is an Illinois wine retailer that seeks to sell and ship wine directly to Ohio consumers. Pet. App. 3a, 42a.

In 2020, respondents sued Ohio’s Attorney General, petitioner here, under 42 U.S.C. 1983 in the United States District Court for the Southern District of Ohio. Respondents alleged that the physical-presence requirement and the individual-transport restriction “discriminate against interstate commerce, protect local economic interests, and violate the Commerce Clause.” Pet. App. 6a, 8a (alterations and citation omitted).¹

2. In the initial proceedings, the district court granted summary judgment in favor of petitioner. *Block v. Canepa*, Civ. No. 20-3686, 2022 WL 4133221, at *12 (S.D. Ohio Sept. 12, 2022). The court considered an earlier Sixth Circuit decision upholding a Michigan physical-presence requirement to be “dispositive” and did not examine the parties’ evidence about the justifications for and effects of the Ohio law. *Id.* at *11; see *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), cert. denied, 592 U.S. 1169 (2021).

The court of appeals reversed. *Block v. Canepa*, 74 F.4th 400, 414 (6th Cir. 2023). The court clarified that its earlier decision in the Michigan case “did *not* hold that direct ship restrictions are always constitutional” or

¹ Respondents also brought claims against other state officials, but those claims were dismissed on the basis of sovereign immunity and are not at issue in the petition. See *Block v. Canepa*, 74 F.4th 400, 405-406, 412 (6th Cir. 2023). Another plaintiff voluntarily dismissed his claims. See Pet. App. 38a n.1.

“foreclose challenges to other states’ direct ship restrictions.” *Id.* at 413. Instead, the court of appeals reasoned, the district court “should have considered the competing evidence” in light of the test announced by this Court in *Tennessee Wine*. *Id.* at 414. The court of appeals accordingly remanded with instructions for the district court to apply that test and determine, first, whether the restrictions “‘can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground,’” and second, whether their “‘predominant effect’ is ‘the protection of public health or safety,’ rather than ‘protectionism.’” *Ibid.* (quoting *Tennessee Wine*, 588 U.S. at 539-540).

A petition for rehearing was denied without recorded dissent. Pet. App. 64a-65a.

3. On remand, the district court again granted summary judgment to petitioner. Pet. App. 38a-63a. It held that both the physical-presence requirement and the individual-transport restriction were constitutional because they were “essential components of Ohio’s three-tier system,” and that, as components of that system, they operate “with the predominant purpose and effect of promoting public health and safety.” *Id.* at 56a, 62a. The court reasoned that Ohio’s three-tier system could be “justified by public health and safety” based on evidence that the system allowed Ohio to monitor “the movement and sale of wine throughout the state” and to “control alcohol prices.” *Id.* at 56a, 58a. The court declined to consider “nondiscriminatory alternatives to the [three-tier] scheme.” *Id.* at 54a n.4.

4. The court of appeals again reversed, and this time remanded with instructions to enter summary judgment for respondents. Pet. App. 1a-37a.

a. The court of appeals reasoned that the district court “erred in applying” an “‘essential feature’ framework.” Pet. App. 20a. The court of appeals explained that, although the Twenty-first Amendment “protects features ‘essential’ to ‘the basic three-tiered model of separating producers, wholesalers, and retailers,’” each variation of the three-tier system beyond the basic separation of the tiers “‘must be judged based on its own features.’” *Ibid.* (quoting *Tennessee Wine*, 588 U.S. at 535); see *id.* at 21a (citing *Anvar v. Dwyer*, 82 F.4th 1, 10-11 (1st Cir. 2023)).

The court of appeals then concluded with “little difficulty” that the challenged restrictions were not “essential components of three-tier systems.” Pet. App. 20a. Indeed, “[m]any” States with three-tier systems lacked physical-presence requirements, *id.* at 20a-21a (citing *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 235 (4th Cir. 2022), cert. denied, 143 S. Ct. 567 (2023) (Wilkinson, J., dissenting)), and even Ohio “carved out extensive wine-specific exceptions to the three-tier system,” *id.* at 22a. In addition, the court reasoned, there was “no clear relationship” between the individual-transport restriction and the three-tier system. *Id.* at 23a.

b. The court of appeals proceeded to assess each challenged restriction “on its own terms,” evaluating the “evidence in the record” under the *Tennessee Wine* test. Pet. App. 23a-24a.

With respect to the physical-presence requirement, the court of appeals concluded that the requirement had only a “tenuous and unsubstantiated” connection to Ohio’s “three primary health and safety justifications”: ensuring product safety, promoting temperance, and curbing underage drinking. Pet. App. 24a. The court observed that petitioner’s own evidence illustrated that nondiscriminatory alternatives could accomplish the same objectives,

which, as this Court explained in *Tennessee Wine*, “undermine[s]” a State’s “purported health and safety rationales.” *Id.* at 26a; see *id.* at 30a, 32a-33a.

Turning to the individual-transport restriction, the court of appeals similarly concluded that the predominant effect of the restriction was protectionism, as the record was “virtually ‘devoid of any concrete evidence’” suggesting that the restriction promoted public health or safety. Pet. App. 36a (quoting *Tennessee Wine*, 588 U.S. at 540). The court thus held that both the physical-presence requirement and the individual-transport restriction were unconstitutional, and it remanded for a determination of the appropriate remedy. *Id.* at 36a-37a.

ARGUMENT

Respondents agree with petitioner that review is warranted here, but limited to the question whether a physical-presence requirement that discriminates between in-state and out-of-state alcohol retailers is constitutional where a State fails to establish, with concrete evidence, that the requirement predominantly promotes a legitimate, nonprotectionist interest. That question implicates an entrenched, four-to-three circuit conflict about whether a physical-presence requirement may be upheld solely as an essential feature of a State’s three-tier system. The court of appeals falls on the correct side of the conflict: it rightly rejected petitioner’s reliance on the essential-feature framework as the latest attempt by a State to evade this Court’s instruction to judge “each variation” of the three-tier system “based on its own features.” *Tennessee Wine & Spirits Retailers Association v. Thomas*, 588 U.S. 504, 535 (2019). But even though the decision below was correct, review is warranted because the constitutionality of physical-presence requirements has divided

the courts of appeals; the question has exceptional practical and legal importance; and this case is an unusually clean candidate for resolving the conflict on the question presented. Multiple lower courts have disregarded the clear teaching of *Granholm v. Heald*, 544 U.S. 460 (2005), and *Tennessee Wine*, and this case presents a perfect opportunity to bring them into line.

Petitioner also folds in a second question—the constitutionality of an individual-transport restriction that discriminates between alcohol purchased in-state and out-of-state. Petitioner devotes essentially no argument as to why that question warrants review. It does not: the question is not the subject of a developed circuit split, and the court of appeals correctly invalidated the individual-transport restriction. At a minimum, this Court should allow further percolation on the issue, including in light of any guidance from this Court on the physical-presence question. The Court should grant the petition, limited to respondents’ first question presented.

I. REVIEW IS WARRANTED AS TO THE CONSTITUTIONALITY OF PHYSICAL-PRESENCE REQUIREMENTS

Respondents agree that further review is warranted on the question whether Ohio’s discriminatory physical-presence requirement is constitutional. The court of appeals correctly held that it is not, rejecting both petitioner’s argument that the requirement can be justified as an essential feature of Ohio’s three-tier system and his argument that his evidence constitutes the concrete evidence required under *Tennessee Wine*. But the constitutionality of physical-presence requirements such as Ohio’s has splintered the courts of appeals. The confusion in the lower courts, and the continued disregard of this Court’s teaching in *Granholm* and *Tennessee Wine*, warrant the Court’s intervention.

A. The Courts Of Appeals Are Divided On The Constitutionality Of Physical-Presence Requirements

The holding that Ohio’s physical-presence requirement is unconstitutional implicates an entrenched circuit conflict about the “per se” validity (Pet. 21) of discriminatory alcohol regulations that bear some relationship to a State’s three-tier system of alcohol regulation. Specifically, the courts of appeals are split as to whether a physical-presence requirement may be upheld as an essential feature of a State’s three-tier system, regardless of other evidence bearing on whether the requirement predominantly promotes a health, safety, or other nonprotectionist interest. That conflict is all the deeper because other courts of appeals have suggested that they are willing to defer fully to a State’s asserted public-health rationale for a discriminatory alcohol regulation, in disregard of the analysis required by this Court in *Tennessee Wine*.

1. The courts of appeals are split four-to-three on whether a physical-presence requirement may be upheld as an essential feature of a State’s three-tier system, regardless of whether the State can demonstrate that the regulation predominantly serves a legitimate interest other than economic protectionism.

a. Four courts of appeals have held that a physical-presence requirement may be upheld solely as an essential feature of a State’s three-tier system, without any further showing that the predominant effect of the requirement is the protection of public health or safety.²

² As petitioner notes (Pet. 23), two other courts of appeals previously upheld physical-presence requirements as “integral,” *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 191-192 (2d Cir. 2009), or “inherent,” *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010), cert. denied, 562 U.S. 1270 (2011), to a State’s three-tier system. But both decisions predate *Tennessee Wine*, and neither the

In *Jean-Paul Weg LLC v. Director of New Jersey Division of Alcoholic Beverage Control*, 133 F.4th 227 (2025), the Third Circuit concluded that New Jersey’s physical-presence requirement was independently justified as an “essential feature[]” of its three-tier system. *Id.* at 239. The court took the view that the State’s restriction was permissible because authorizing direct shipments from out-of-state retailers would create “a regulatory hole large enough to shake the foundations of the three-tier model.” *Ibid.*³

In *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214 (2022), cert. denied, 143 S. Ct. 567 (2023), a divided Fourth Circuit upheld a similar North Carolina physical-presence requirement on the ground that the requirement was “integral” to the State’s three-tier system, and the majority declined to consider evidence about whether the State’s three-tier system “actually meets the objectives it was designed to achieve.” *Id.* at 227 n.8, 228. In dissent, Judge Wilkinson explained that the laws invalidated in *Granholm* and *Tennessee Wine* “were, in all relevant respects, indistinguishable” from North Carolina’s law. *Id.* at 233. He reasoned that the majority committed “the very same mistake identified in *Tennessee Wine*” by failing to judge a variation “on its own features.” *Id.* at 234-235 (citation omitted).

Second nor the Fifth Circuit has reconsidered the question in light of that precedent.

³ Amicus Michigan Beer and Wine Wholesalers Association asserts that the Third Circuit vacated its decision and simply affirmed the constitutionality of New Jersey’s physical-presence requirement without further explanation. Br. 8. In reality, the Third Circuit vacated an earlier opinion, Dkt. 85, at 1, *Jean-Paul Weg*, *supra* (No. 23-2922), and later entered judgment “in accordance with” its opinion endorsing the essential-feature approach, see Dkt. 89-1, at 1-2, *Jean-Paul Weg*, *supra* (No. 23-2922).

And he explained that North Carolina’s restriction was invalid because the State offered insufficient “concrete evidence” that its requirement promoted health and safety objectives. *Id.* at 237-238 (citation omitted).

In *Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171, cert. denied, 142 S. Ct. 335 (2021), the Eighth Circuit upheld Missouri’s physical-presence requirement as an “essential feature” of the State’s three-tier system. *Id.* at 1175-1176, 1184. The court recognized that *Tennessee Wine* “may forecast a future decision” subjecting such requirements “to an evidentiary weighing.” *Id.* at 1183. But the court reasoned that it should be “no more invasive of the ‘unquestionably legitimate’ three-tiered system than the Supreme Court has mandated.” *Id.* at 1184.

Finally on this side of the conflict, in *Day v. Henry*, 152 F.4th 961 (2025), cert. denied, No. 25-788, 2026 WL 1377175 (May 18, 2026), a divided Ninth Circuit upheld Arizona’s physical-presence requirement “simply” as an “essential feature of a state’s three-tier scheme.” *Id.* at 972. The majority acknowledged a “circuit split” on the issue, but it concluded that Arizona’s requirement could be upheld “without further determinations as to whether its predominant effect is to support public health and safety.” *Id.* at 972, 974. Judge Forrest dissented in relevant part, reasoning that the majority’s “per se” approach sidestepped the “evidentiary burden” imposed by this Court in *Granholm* and *Tennessee Wine*. *Id.* at 978-979.

b. In contrast, three courts of appeals have held that a physical-presence requirement may not be upheld as an essential feature and instead have required a State to demonstrate that a physical-presence requirement predominantly promotes a legitimate interest other than economic protectionism.

In *Anvar v. Dwyer*, 82 F.4th 1 (2023), the First Circuit concluded that Rhode Island’s physical-presence requirement could not be upheld as “integral” to the State’s three-tier system. *Id.* at 9. Rather, it explained that a court should ask whether there is “concrete evidence” that a challenged law serves legitimate public health, safety, or other nonprotectionist objectives. *Id.* at 8 (citation omitted). It thus declined to give the law a “judicial seal of approval premised either on the virtues of three-tier systems generally or on the basis of a theoretical benefit to public health and safety.” *Id.* at 10.

On repeated occasions, the Seventh Circuit has declined to endorse the essential-feature approach. In *Lebamoff Enterprises, Inc. v. Rauner*, 909 F.3d 847 (2018), the court reversed the dismissal of a challenge to Illinois’ physical-presence requirement and warned of “serious problems” resulting from an essential-feature framework that risked giving “privileged status to only one form of state liquor regulation.” *Id.* at 850-851, 855. And more recently, in *Chicago Wine Co. v. Braun*, 148 F.4th 530 (2025), cert. denied, No. 25-844, 2026 WL 1377162 (May 18, 2026), neither member of a two-judge panel endorsed the essential-feature approach when confronted with Indiana’s physical-presence requirement. Judge Easterbrook would have held that the Indiana statute was not discriminatory, but he expressed skepticism that a discriminatory “retail-premises requirement” could be upheld, on the assumption that “[a]fter *Tennessee Wine* a trans-border delivery rule that discriminates against interstate commerce is forbidden.” *Id.* at 533-534 (concurring opinion). Judge Scudder also disagreed with the essential-feature approach—while alluding to the split on the issue—because “nowhere did the Court in *Tennessee Wine* suggest it intended to create a carve out to the requirement that States must produce ‘concrete evidence’

that discriminatory regulations serve legitimate interests.” *Id.* at 540 (concurring opinion) (citation omitted).⁴

In the decision below, the court of appeals also correctly declined to uphold Ohio’s physical-presence requirement as an essential feature. The court explained that a state law “is not automatically valid simply because it addresses a portion of a three-tier system.” Pet. App. 20a (citation omitted). Instead, “each variation” beyond the basic model of separating producers, wholesalers, and retailers “must be judged based on its own features.” *Ibid.* (quoting *Tennessee Wine*, 588 U.S. at 535). The court of appeals noted that a State “can easily maintain three distinct tiers *and* treat in-state and out-of-state retailers evenhandedly with respect to direct-shipping.” *Id.* at 21a. Accordingly, the court concluded that Ohio’s requirement could not be upheld as an “essential feature,” but rather must be analyzed “on its own terms.” *Id.* at 21a, 23a.

2. The disagreement among the courts of appeals runs even deeper than that four-to-three conflict. See Pet. 25-26. In addition to adopting the essential-feature approach, both the Third and Ninth Circuits have indicated that a State’s mere assertion of a public-health rationale is sufficient to uphold a physical-presence requirement under *Tennessee Wine*, even in the absence of the essential-feature rule. In *Jean-Paul Weg*, the Third Circuit

⁴ Petitioner attempts to discount the First Circuit’s decision in *Anvar* and the Seventh Circuit’s decision in *Rauner* on the basis that both cases were voluntarily dismissed on remand. See Pet. 23-24. And because the Seventh Circuit upheld Indiana’s physical-presence requirement in *Chicago Wine*, petitioner claims that case falls on his side of the conflict. See Pet. 26. But those contentions miss the point. Both circuits expressly rejected the essential-feature approach, even if they previously have upheld, or in the future could uphold, a physical-presence requirement on other grounds.

took the view that declarations submitted by New Jersey outlining the asserted purposes of the physical-presence requirement were sufficient under *Tennessee Wine*. See 133 F.4th at 237-238. Similarly, in *Day*, the Ninth Circuit suggested that it would defer to similar statements by Arizona in support of its physical-presence requirement. See 152 F.4th at 974. And Judge Scudder’s separate opinion in *Chicago Wine* is of a piece: in order to conclude that Indiana’s physical-presence requirement was constitutional, he relied on a small number of declarations purporting to show that the requirement advanced the State’s legitimate, nonprotectionist interests. See 148 F.4th at 540-542.

The decision below, by contrast, correctly applied this Court’s methodology in *Tennessee Wine* by asking whether the State’s concrete evidence establishes more than a tenuous connection with the stated objectives and whether nondiscriminatory alternatives would achieve the same objectives. See pp. 21-23, *infra*. Instead of uncritically accepting Ohio’s justifications, the Sixth Circuit concluded that there was a “tenuous and unsubstantiated” connection between those justifications and the physical-presence requirement. Pet. App. 24a. That additional disagreement reinforces the need for this Court’s review.

B. The Decision Below Is Correct

The decision below correctly held that Ohio’s physical-presence requirement is unconstitutional. It rightly rejected the essential-feature approach adopted by several courts. Pet. App. 20a. And it proceeded to conclude that petitioner could not make the showing required by *Tennessee Wine* because Ohio’s discriminatory regulation bore only a “tenuous and unsubstantiated” relationship to its proffered objectives. *Id.* at 23a-24a.

1. This Court’s precedents establish that a discriminatory state alcohol regulation is authorized under the Twenty-first Amendment only where “concrete evidence” shows that the restriction “actually promotes public health [and] safety,” as opposed to “protectionism.” *Tennessee Wine*, 588 U.S. at 539-540.

In *Granholm*, the Court considered state laws that allowed in-state wineries to ship their products directly to consumers while effectively prohibiting out-of-state wineries from doing the same. 544 U.S. at 473-476. The laws’ defenders asserted that the requirements were “essential” to the three-tier systems of Michigan and New York, which “otherwise would be circumvented by direct shipments from out of state.” Pet. Br. at 2, *Michigan Beer & Wine Wholesalers Association v. Heald*, 544 U.S. 460 (No. 03-1120); see Br. for State Respondents at 30-35, *Swedenburg v. Kelly*, 544 U.S. 460 (No. 03-1274). This Court recognized that States may “funnel sales through the three-tier system” and that the system is “unquestionably legitimate.” *Granholm*, 544 U.S. at 489 (citation omitted). But it nonetheless placed the “burden * * * on the State[s]” to put forward “concrete evidence” that the restrictions “advance[d] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Id.* at 489, 492 (citations omitted). Because the States offered only “unsupported assertions” and “speculation” to justify the restrictions, the Court concluded that the States had not met that burden. *Id.* at 490, 492.

Likewise, in *Tennessee Wine*, the Court held that a discriminatory alcohol regulation is “shielded” by the Twenty-first Amendment only if the State can show that the law is “justified as a public health or safety measure or on some other legitimate nonprotectionist ground.” 588 U.S. at 539-540. A discriminatory law will not stand,

the Court continued, if its “predominant effect” is “protectionism, not the protection of public health or safety.” *Ibid.* The petitioner had urged a different approach, arguing that the Twenty-first Amendment “immunize[d]” the residency requirement from further scrutiny because that requirement formed a “core component” of the State’s three-tier system. Pet. Br. at 19-21, *Tennessee Wine*, *supra* (No. 18-96) (citation omitted). But the Court rejected that argument, cautioning against “read[ing] far too much into *Granholt*’s discussion of the three-tiered model.” *Tennessee Wine*, 588 U.S. at 535. The Court clarified that, although *Granholt* “spoke approvingly of that basic model,” the Twenty-first Amendment does not “sanction[] every discriminatory feature” in a State’s three-tier system. *Ibid.*

The Court further explained that the regulation at issue was not an essential feature of Tennessee’s three-tier system, because “[m]any” states did not impose a similar requirement. *Id.* at 511, 535. Instead, the Tennessee law had “at best a highly attenuated relationship to public health or safety,” because the record was “devoid of any ‘concrete evidence’” demonstrating such a connection or suggesting that “nondiscriminatory alternatives would be insufficient to further” the State’s interests. *Id.* at 540 (quoting *Granholt*, 544 U.S. at 490).

2. The decision below faithfully followed *Granholt* and *Tennessee Wine* in holding Ohio’s physical-presence requirement unconstitutional. The court of appeals held that requirement could not be justified as an essential feature of Ohio’s three-tier system, and it further held that petitioner had failed to provide concrete evidence that the predominant effect of the requirement was the furtherance of the State’s health and safety objectives. Both holdings were correct.

The court of appeals correctly held that the district court “erred” by applying the “‘essential feature’ framework” and that a physical-presence requirement such as Ohio’s was not an essential feature of a three-tier scheme. Pet. App. 20a-21a. That is because the Twenty-first Amendment does not “sanction[] every discriminatory feature that a State may incorporate into its three-tiered scheme.” *Id.* at 20a (quoting *Tennessee Wine*, 588 U.S. at 535). Instead, the Amendment protects only “features ‘essential’ to ‘the basic three-tiered model of separating producers, wholesalers, and retailers,’ but beyond that, ‘each variation must be judged based on its own features.’” *Ibid.* (quoting *Tennessee Wine*, 588 U.S. at 535). In other words, “a state’s alcoholic-beverages law is not automatically valid simply because it addresses a portion of a three-tier system.” *Ibid.* (citation omitted).

Consistent with those principles, the court of appeals eschewed a per se approach and concluded that the physical-presence requirement was “neither basic nor essential.” Pet. App. 20a. Echoing *Tennessee Wine*, the court explained that “[m]any states with three-tier systems” lack physical-presence requirements; as a result, Ohio’s requirement was “hardly instrumental to the existence of three-tier schemes,” especially when Ohio had already “carved out extensive wine-specific exceptions to the three-tier system.” *Id.* at 20a-22a; see *Tennessee Wine*, 588 U.S. at 535.

3. The court of appeals also correctly held that petitioner had failed to justify discriminating between in-state and out-of-state commerce under *Tennessee Wine* and *Granholm*. Pet. App. 33a.

In *Tennessee Wine*, the Court determined that the law at issue had “at best a highly attenuated relationship to public health or safety.” 588 U.S. at 540. Surveying the

evidence for each of the public-health objectives purportedly advanced by Tennessee’s law, the Court observed that the law’s connection to those objectives was “implausible” and that it “poorly serve[d]” and was “ill suited” for those objectives. *Id.* at 540-542. The Court also noted that the law’s proponents had failed to explain why the public-health objectives “could not easily be achieved by ready alternatives.” *Id.* at 540. Accordingly, the Court concluded that the predominant effect of the law was protectionism. See *id.* at 543. The Court’s reasoning and conclusion closely tracked its earlier decision in *Granholm*. See 544 U.S. at 489-493.

Applying the same analysis as in *Tennessee Wine* and *Granholm*, the court of appeals reached the same result in this case. The court required petitioner to justify the discriminatory regulation through “concrete evidence,” rather than “unsupported assertions.” *Id.* at 24a, 36a (quoting *Tennessee Wine*, 588 U.S. at 539-540); see *Granholm*, 544 U.S. at 490. Consistent with that requirement, the court examined the evidence for each of Ohio’s purported health and safety objectives, and it determined that it was “speculative” and “questionable” whether the physical-presence requirement advanced those objectives. Pet. App. 33a; see *id.* at 24a-33a. Given the availability of nondiscriminatory alternatives, moreover, the court observed that the physical-presence requirement was “not necessary” to achieve the State’s asserted objectives. *Id.* at 26a-27a (citing *Tennessee Wine*, 588 U.S. at 540). The court therefore concluded that the physical-presence requirement was predominantly protectionist and “clearly violate[d] the Commerce Clause” under *Tennessee Wine*. *Id.* at 33a.

4. Petitioner contends (Pet. 27-28) that the court of appeals erred by requiring him to show that the predominant effect of the physical-presence requirement was the

promotion of health and safety, instead of showing that the requirement's predominant effect was not protectionism. But petitioner does not explain how those showings would be different. The court of appeals determined that Ohio's physical-presence requirement had a "tenuous and unsubstantiated" relationship to the State's proffered nonprotectionist objectives. Pet. App. 24a. As a result, the court concluded that the predominant effect of the physical-presence requirement was protectionism. *Id.* at 33a. That is precisely the analysis that *Tennessee Wine* requires. See 588 U.S. at 539-543.

C. The Constitutionality Of Physical-Presence Requirements Is Exceptionally Important And Warrants Review In This Case

Respondents agree with petitioner that the first question presented in this brief is recurring and has substantial legal and practical importance. Respondents further agree that this case is an ideal vehicle to consider that question. See Pet. 28-30.

1. The question of how to evaluate the constitutionality of discriminatory regulations governing the distribution of alcohol is recurring and important. Since *Tennessee Wine*, that question has arisen in published decisions issued by seven courts of appeals. Those cases have resulted in spirited opinions on both sides, giving rise to the well-developed circuit conflict outlined above. There is no sign of a consensus developing; on the contrary, in the last five published decisions, three courts of appeals have endorsed the essential-feature approach and two have rejected it. Given the volume of opinions already written on the question and the intractability of the conflict, further percolation is unnecessary.

In addition to splintering on the proper analysis, the courts of appeals have also diverged on the ultimate result. Five courts of appeals have upheld discriminatory

physical-presence requirements, either under an essential-feature approach or by crediting the State's bare assertions of a public-health interest as sufficient. See pp. 13-18, *supra*. The Sixth Circuit, by contrast, has correctly invalidated such a requirement in the absence of concrete evidence that the discrimination against out-of-state retailers was necessary to further public health and safety. See pp. 17-18, *supra*.

The disagreement on analysis, and now result, has significant consequences for parties on both sides of the question. The decision below exacerbates the uncertainty for businesses that encounter discriminatory alcohol regulations, especially in the approximately 35 States that can still enforce physical-presence requirements such as Ohio's. See Alexander Fallone, Note, *Wine Unwelcome: The Constitutional Contours of Wine Regulation*, 19 Brook. J. Corp. Fin. & Com. L. 429, 430 (2025). Without this Court's intervention, businesses and States alike will remain uncertain about how alcohol distribution may be regulated in a manner consistent with the Constitution.

That uncertainty also harms consumers, who seek to access the wine markets of other States on "equal terms," just as they can access the markets for other goods and services. *Granholm*, 544 U.S. at 473. Without clarity, consumers will have unequal access to wine solely as a function of geography, with a consumer in Columbus, Indiana, unable to access the same variety of wines as a consumer in Columbus, Ohio. See, e.g., National Association of Wine Retailers Br. 10-15; Manhattan Institute Br. at 18-20, *Day*, *supra* (No. 25-788). Therefore, without the Court's intervention, there will persist exactly the kind of "economic Balkanization" that was the driving force behind the enactment of the Commerce Clause. *Tennessee Wine*, 588 U.S. at 517 (citation omitted).

2. This case is an ideal vehicle to address the first question presented in this brief. It not only creates a circuit conflict on the ultimate result, see pp. 23-24, *supra*, but it includes a fully developed factual record, compiled through multiple rounds of discovery and thoroughly briefed and analyzed below, that allows this Court to address all aspects of the question. See pp. 7-11, *supra*.

Review is particularly warranted here because the developed record will give this Court the option to provide definitive guidance about the appropriate analysis. Such guidance may be beneficial in light of the resistance to this Court's precedents reflected in the decisions of lower courts on the opposite side of the conflict. In both *Granholt* and *Tennessee Wine*, parties attempted to justify discriminatory alcohol regulations on the basis that those restrictions were "core" components of the three-tier system, see Pet. Br. at 19-21, *Tennessee Wine*, *supra* (No. 18-96), and that invalidating the restrictions would "undo" that system, see Pet. Br. at 3, 40, *Michigan Beer & Wine Wholesalers Association v. Heald*, *supra* (No. 03-1120); see Br. for State Respondents at 30-35, *Swedenburg v. Kelly*, *supra* (No. 03-1274). This Court has now twice rejected those efforts. See *Granholt*, 544 U.S. at 488-489; *Tennessee Wine*, 588 U.S. at 535.

With this case, the Court has an ideal opportunity to clarify that those precedents mean what they say and to ensure that States cannot raise an argument already rejected by this Court merely by relabeling it. In addition to embracing the essential-feature approach, the Third and Ninth Circuits have already provided a blueprint for how States can effectively make the same argument at the evidentiary stage of the *Tennessee Wine* analysis by contending that a discriminatory alcohol regulation can be upheld based on the mere assertion of a public-health rationale. See *Jean-Paul Weg*, 133 F.4th at 237-238; *Day*,

152 F.4th at 974. Because this case reaches the Court on a complete record, it presents the Court with the opportunity to foreclose that ready evasion of its precedents.

Moreover, unlike previous petitions for certiorari presenting similar questions, this case comes to the Court after a court of appeals squarely determined that a physical-presence requirement was unconstitutional. By contrast, the petition in *Day v. Henry*, No. 25-788, the last case to present this issue, was fully briefed before any court of appeals had deemed a physical presence requirement unconstitutional. And although the decision below was issued shortly before the Court denied that petition, it was unclear whether petitioner would be seeking en banc review in this case. Cf. Br. in Opp. at 34-36, *Day, supra* (No. 25-788). Moreover, given the number of circuits that have adopted the essential-feature approach, it is less likely now that another candidate for review will reach this Court, and particularly unlikely that it will do so on a full record where a State puts forward its best justification (such as it is) for a discriminatory alcohol regulation.

In short, this case provides the Court with an ideal opportunity not only to reject the essential-feature framework, but also to clarify how the correct analysis should proceed in the context of a complete record. The Court should grant certiorari on the first question presented in this brief.

II. REVIEW IS NOT WARRANTED AS TO THE CONSTITUTIONALITY OF INDIVIDUAL-TRANSPORT RESTRICTIONS

As framed by the petition, the question presented also encompasses what is properly understood as a second, distinct question: whether an individual-transport restriction that discriminates between alcohol purchased in-state and out-of-state is constitutional under the Twenty-first Amendment where a State fails to establish, with

concrete evidence, that the restriction predominantly promotes a legitimate, nonprotectionist interest such as public health or safety. The petition offers no argument in support of review of that distinct question. No circuit conflict has developed on the constitutionality of individual-transport restrictions, and the decision below faithfully applied this Court's decisions in *Granholm* and *Tennessee Wine* to invalidate Ohio's restriction. Review as to the validity of individual-transport restrictions is thus unwarranted at this time.

A. Other than the court of appeals in the decision below, the courts of appeals have not yet considered whether a restriction on individual transportation of alcohol for personal use comports with the dormant Commerce Clause and the Twenty-first Amendment since this Court's decision in *Tennessee Wine*. Tellingly, petitioner himself only describes a conflict on "direct-ship restrictions." Pet. 21-26. And petitioner cites only a single decision that has upheld an individual-transport restriction. See *Wine Country Gift Baskets.com*, 612 F.3d at 821. But that case was decided before *Tennessee Wine*, and the Fifth Circuit's analysis in that case centered on a discriminatory *physical-presence* requirement; "[n]o other issue about the personal importation limit [was] meaningfully raised." *Id.* at 812, 821; see *id.* at 816 & n.4 (noting another pre-*Tennessee Wine* decision that upheld an individual-transport restriction but had "limited precedential effect").

B. In any event, the court of appeals correctly invalidated Ohio's individual-transport restriction. As the court of appeals explained, even assuming that a restriction could be upheld as essential to a three-tier system, a limit on personal transportation of wine is not "essential," and Ohio law permits even greater volumes of wine to be

shipped directly to consumers from out-of-state producers. Pet. App. 34a-35a. Nor did petitioner show that a restriction on individual transportation of wine for personal use was “reasonably necessary to protect” Ohio’s purported health and safety objectives. *Id.* at 35a (quoting *Tennessee Wine*, 588 U.S. at 533). Instead, uninspected wine already enters the State through direct shipments and permitted personal transportation, and “no concrete evidence” demonstrated that the individual-transport restriction prevented the State from being “flooded with so much out-of-state wine that the price of wine for sale in the state would fall so precipitously as to undermine the state’s price control and attendant temperance objectives.” *Ibid.*

At a minimum, this Court should wait to address any question concerning the validity of individual-transport restrictions until after it resolves the widespread disagreement on the validity of physical-presence requirements. Petitioner offers no specific reason why the constitutionality of Ohio’s individual-transport restriction warrants the Court’s consideration at this time. Accordingly, the Court should limit review to the first question presented in this brief.

CONCLUSION

The petition for a writ of certiorari should be granted limited to respondents' first question presented.

Respectfully submitted.

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