No. 25-788

In the Supreme Court of the United States

REED DAY, ET AL.,
Petitioners,

v.

BEN HENRY, IN HIS OFFICIAL CAPACITY AS DIRECTOR, ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth 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.

Arbitrary and archaic state laws and regulations built for an era that decidedly no longer exists not only hamper wine retailers' abilities to access 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. It is thus a core part of NAWR's mission to work to overcome arbitrary, archaic, and protectionist state-based market access

[1] Pursuant to Supreme Court Rule 37.2, 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.

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 Reed Day and Albert Jacobs' 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 *Day v. Henry* decision to stand will create such chaos and uncertainty in the legal system that wine retailers will be unable to make reasonable business plans.

SUMMARY OF THE ARGUMENT

Specialty wine retailers operate under a cloud of legal uncertainty that affects not only their revenues, 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. *Granholm v. Heald*, 544 U.S. 460 (2005). The Court rejected the notion that the Twenty-first Amendment authorizes such discrimination. In the period between *Granholm* and *Tennessee Wine*, however, lower courts fractured over whether *Granholm*'s nondiscrimination principle applied only to wineries or extended as well to retailers.

Three circuit decisions concluded that discrimination against retailers was permissible and that *Granholm*'s nondiscrimination rule stopped at the winery door. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010); *Southern Wine & Spirits v. Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013).

Two other decisions reached the opposite conclusion, holding that *Granholm*'s logic could not be so neatly cabined and that its protections extended to retailers as well. *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016); *Byrd v. Tennessee Wine & Spirits Retailers Ass'n*, 883 F.3d 608 (6th Cir. 2018).

This circuit split prompted the Court to grant certiorari in *Tennessee Wine*. There, the Court made clear that *Granholm* was not limited to producers. The Commerce Clause, the Court explained, prohibits discrimination against all "out-of-state economic interests," and protects citizens' "right to have access to the markets of other States on equal terms." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 534 (2019) (quoting *Granholm*, 544 U.S. at 473, 125 S.Ct. 1885).

The Court thus confirmed that *Granholm*'s nondiscrimination principle applies to retailers and that discriminatory direct-shipping laws violate the Commerce Clause because they "deprive citizens of their right to have access to the markets of other States on equal terms." Id.

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, including 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. Several circuits have since held that the Twenty-first Amendment permits some degree of discrimination against retailers, though how much discrimination is permitted and under what analytical framework remains unclear.

The circuits are sharply divided on the proper methodology for determining whether a discriminatory state liquor law survives Twenty-first Amendment scrutiny.

The Eighth Circuit led the way by holding that an in-state physical presence requirement is an "essential feature" of the three-tier system and therefore operates as a per se justification for discrimination. *Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171, 1183, 1184 (8th Cir. 2021).

The Third, Fourth, and Ninth Circuits followed suit, concluding that protection of an "essential feature" of the three-tier system automatically relieves the State of any obligation to justify discrimination with evidence. *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).

Other circuits rejected that approach. The First, Sixth, and Seventh Circuits held that physical presence is not an essential feature of the three-tier system and required States to demonstrate, with concrete evidence, that discrimination is ajustified by legitimate non-protectionist interests such as public health or safety. *Anvar v. Dwyer*, 82 F.4th 1 (1st Cir. 2023); *Block v. Canepa*, 74 F.4th 400 (6th Cir. 2023); *Chicago Wine Co. v. Braun*, 148 F.4th 530 (7th Cir. 2025).

For small specialty wine retailers, this doctrinal chaos is crippling. If physical presence is deemed an essential feature of the three-tier system, then retailers lacking an in-state location are categorically excluded from the market. Without legal certainty, retailers are left to guess which constitutional rule applies, particularly when the circuits are evenly divided.

This uncertainty forecloses access to out-of-state consumers, shuts small retailers out of most markets, undermines long-term planning, and stunts growth. The reliance by the Third, Fourth, Eighth, and Ninth Circuits on physical presence as a per se justification for discrimination, thereby avoiding a meaningful Commerce Clause analysis is misguided, because physical presence is not an essential feature of the three-tier system.

At present, confusion reigns over the proper Twenty-first Amendment framework applicable to Commerce Clause challenges involving discriminatory state liquor laws. Retailers believed

that *Tennessee Wine* settled the matter. Instead, they are now forced to confront whether the absence of an in-state physical presence is fatal to market access.

That is not a tolerable state of constitutional law. Because the circuits are moving in opposite directions on an issue of substantial constitutional importance, this Court's intervention is necessary to restore clarity, uniformity, and predictability.

The petition for a writ of certiorari should be granted.

ARGUMENT

I. The Majority's opinion deepens an already existing circuit split, which is causing confusion on the proper legal standard to apply

The majority's conclusion that an in-state physical presence requirement is an "essential feature" of the three-tier system and therefore a per se justification for discrimination does not resolve an unsettled area of law. It exacerbates it. By relieving the State of any obligation to justify discrimination with evidence, the decision below entrenches an already existing circuit split and further obscures the proper constitutional standard.

The Ninth Circuit held that a State may bypass its evidentiary burden under the Commerce Clause because physical presence is allegedly inherent to the three-tier system and therefore automatically constitutional under the Twenty-first Amendment. *Day v. Henry, 152 F.4th 961* (9th Cir. 2025). That

holding places the Ninth Circuit squarely alongside the Third, Fourth, and Eighth Circuits, each of which has adopted a similar per se rule. See *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).

Other circuits, reading this Court's precedents differently, have reached the opposite conclusion. The First, Sixth, and Seventh Circuits have rejected the notion that retailer physical presence is an essential feature of the three-tier system that automatically excuses discrimination. Those courts require what the Constitution requires: that a State invoking the Twenty-first Amendment must demonstrate, with concrete evidence, that its discriminatory law advances a legitimate non-protectionist interest such as public health or safety. *Anvar v. Dwyer*, 82 F.4th 1 (1st Cir. 2023); *Block v. Canepa*, 74 F.4th 400 (6th Cir. 2023); *Chicago Wine Co. v. Braun*, 148 F.4th 530 (7th Cir. 2025).

This disagreement is not merely about outcomes; it is about method. One set of circuits treats physical presence as dispositive, ending the constitutional inquiry before it begins. The other insists on evidence and analysis, as this Court's precedents demand. Identical laws are judged differently depending solely on geography.

The confusion deepens further because even within circuits adopting the per se rule, judges disagree on whether physical presence truly qualifies

as an "essential feature" of the three-tier system. *B-21 Wines, Inc. v. Guy*, 36 F.4th 214 (4th Cir. 2022); *Day v. Henry*, 152 F.4th 961 (9th Cir. 2025). Such intra-circuit division only underscores the instability of the doctrine embraced below.

This Court's intervention is necessary to answer questions the lower courts plainly cannot. Is retailer physical presence so indispensable to the three-tier system that it relieves States of their obligation to justify discrimination? Or must states, consistent with *Granholm v. Heald and Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, support discriminatory laws with concrete evidence? See *Granholm v. Heald*, 544 U.S. 460, 490, 492 (2005); *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 540 (2019).

The per se physical-presence rule finds no footing in either decision. *Granholm* rejected physical presence as a condition of market access, and *Tennessee Wine* rejected speculation and tradition as substitutes for proof. Yet the Ninth Circuit decision below adopts both.

Absent this Court's review, confusion and inconsistency will persist.[2] The Constitution does not

[2] Several cases exist in the system that deal with this same exact issue and fact pattern and there is a lack of guidance on this important issue. *Block v. Canepa*, No. 25-3305 (6th Cir. 2025); *Freehan v. Berg,* No. 25-2967, (7th Cir. 2025). In addition to these two cases, there could be future challenges to discriminatory wine retailer shipping laws for Rhode Island in the First Circuit, New York in the Second Circuit, Texas in the

permit its guarantees to fluctuate from circuit to circuit, nor does it tolerate discrimination justified by labels rather than evidence. This Court should grant certiorari to restore doctrinal clarity and enforce the constitutional rule it has already announced.

II. The lack of legal certainty on this issue is wreaking havoc in the marketplace and is especially damaging to small specialty wine retailers and consumers

Legal uncertainty in the law governing wine retailer shipping is not an abstract concern. It has immediate and concrete consequences for small specialty wine retailers and the consumers they serve.

Small specialty wine retailers differentiate themselves by offering niche, imported, and limited production wines, products that are often unavailable through large national chains or local distribution networks. For these retailers, 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.

Consumer access to foreign wines illustrates the problem. Foreign wineries are prohibited from shipping wine directly to consumers in the United States. 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

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Fifth Circuit, Kentucky in the Sixth Circuit, and Washington in the Ninth Circuit.

prohibits out-of-state retailers from shipping, the consumer has no lawful means of obtaining that product. The result is not regulation but exclusion.

By contrast, consumers seeking niche domestic wines face no such barrier. If a consumer wishes to purchase a limited-production strawberry rhubarb wine from Bear Creek Winery in Alaska, it is unlikely that this unique and limited production wine will be distributed by state wholesalers and stocked by local retailers. But because States responded to *Granholm v. Heald* 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; retailers do not.

The economic consequences of *Granholm* underscore the point. In 2004, the year preceding *Granholm*, there were approximately 3,000 wineries operating in the United States. Id. at 467. Today, that number exceeds 11,500.[3] More than eighty percent of those wineries are classified as very small or limited-production producers, making fewer than 5,000 cases annually.[4] Nearly half of all winery sales now occur

[3] Wine Business Analytics U.S. Wineries By State (2025) https://winebusinessanalytics.com/statistics/winery/ (last viewed January 10, 2026)

[4] Sovos Ship Compliant 2025 Direct to Consumer Wine Shipping Report, https://cdn.bfldr.com/UG5EBX6L/at/3r5nqrnrckp9gtmnsnwrxzb/2025-DtC-Wine-Shipping-Report.pdf (last viewed January 10, 2026)

through online channels or wine clubs, with most products delivered via direct-to-consumer shipping.[5]

That growth is no accident. It is the predictable result of eliminating protectionist barriers and allowing interstate commerce to function. Yet small specialty wine retailers are denied comparable opportunities. Most may ship to consumers in only fourteen jurisdictions and are categorically barred from the rest. Their markets are artificially confined, not by consumer demand or logistical limitations, but by discriminatory law.

The disparity is indefensible. If an Arizona resident visits a California winery, the resident may join a wine club, purchase wine, and have it shipped home. If that same resident visits a California wine retailer and discovers rare foreign wines unavailable in Arizona, state law forbids shipment. There is no principled constitutional distinction between the two transactions meaningfully relevant to the Commerce Clause.

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

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[5] Silicon Valley Bank, Direct-to-Consumer Wine Survey: Report, Results, and Benchmarks, https://www.svb.com/globalassets/library/uploadedfiles/wine/2023-direct-to-consumer-wine-report.pdf (last viewed January 10, 2026)

The need for specialty retailers is growing, not shrinking. Between 2000 and 2025, more than 2.3 million wines were approved for sale in the United States. Over 1.5 million[6] of those were imported wines, products that can be sold only through retailers and cannot be shipped directly by producers. Consumers seeking these wines necessarily depend on access to specialized retail markets.

Demographics further illustrate the harm. Many niche ethnic wines—such as Greek or Israeli wines are concentrated in a small number of States. Consider Kentucky, which maintains a discriminatory retailer shipping law and has an estimated Jewish population of approximately 18,300, representing roughly 0.4% of the State's population. A Kentucky consumer seeking a specific Israeli wine for Passover is unlikely to find it locally. New York, by contrast, has an estimated Jewish population of approximately 1.67 million, representing more than 8.5% of its population[7], and offers a far more robust market for Israeli wines. Although a New York retailer could satisfy the Kentucky consumer's demand, discriminatory shipping laws foreclose that transaction entirely.

These laws are precisely the sort of state-imposed trade barriers the Framers sought to eliminate. As

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[6] Alcohol and Tobacco Tax and Trade Bureau COLA Registry, https://ttbonline.gov/colasonline/publicSearchColasAdvanced.do (last viewed January 10, 2026)

[7] https://www.jewishvirtuallibrary.org/jewish-population-in-the-united-states-by-state (last viewed January 10, 2026)

James Madison observed, the lack of a general power over commerce under the Articles of Confederation led States to enact "rival, conflicting and angry regulations" that proved both abortive and destructive. James Madison, *Notes of Debates in the Federal Convention of 1787*, at 14 (Ohio University Press 1966).

This Court has repeatedly recognized that one of the principal reasons for convening the Constitutional Convention was to avoid economic Balkanization. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 517 (2019); *Granholm v. Heald*, 544 U.S. 460, 472 (2005). The Commerce Clause was adopted to prevent States from isolating their markets behind protectionist barriers.

Yet that is exactly what discriminatory retailer shipping laws accomplish. By shielding local wholesalers and retailers from interstate competition, such laws eliminate incentives to innovate, expand selection, or improve service. Consumers are left with narrower choices, higher prices, and markets artificially insulated from competition.

The burden falls most heavily on small independent retailers. Large national chains such as Amazon, Total Wine, and Walmart can absorb the costs of establishing a physical presence in every jurisdiction. Small retailers cannot. Physical presence requirements thus operate as a barrier to entry and a deterrent to innovation, favoring scale over specialization.

The costs imposed by physical presence mandates are substantial and unnecessary. Retailers must incur high licensing and compliance costs, navigate unfamiliar regulatory regimes, maintain local inventory, deal with in-state distributors who may not supply desired products, and absorb increased storage and fulfillment expenses. These burdens erode margins, discourage expansion, stifle efficient direct-to-consumer business models, and are wholly unnecessary to efficiently serve the state's wine consumers.

In short, 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 protectionism the Commerce Clause was designed to eradicate. This Court should not permit that confusion to persist.

III. The Majority's opinion reliance on physical presence as a per se justification for discrimination, which precludes it from conducting a proper Commerce Clause analysis is misguided, because physical presence is not an essential feature of the three-tier system

The majority's conclusion that an in-state physical presence requirement is an "essential feature" of the three-tier system and therefore a per se justification for economic discrimination finds no support in this Court's precedents.

This Court squarely addressed the meaning of an "essential feature" in *Tennessee Wine & Spirits Retailers Association v. Thomas*. There, the Court rejected the argument that Tennessee's durational-residency requirement for retail license applicants was immune from Commerce Clause scrutiny simply because it was embedded in a three-tier system. The Court explained that a requirement cannot qualify as "essential" if a State can and many States do operate a three-tier system without it:

> At issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers, but the durational-residency requirement that Tennessee has chosen to impose on new applicants for liquor store licenses. Such a requirement is not an essential feature of a three-tiered scheme. Many such schemes do not impose durational-residency requirements—or indeed any residency requirements—on individual or corporate liquor store owners. *Tennessee Wine and Spirits Retailers Association v. Thomas*, 588 U.S. 504, 535 (U.S. 2019).

Under *Tennessee Wine*, a State invoking the "essential feature" label bears a demanding burden: it must demonstrate that the challenged requirement is so fundamental that the three-tier system could not function without it. Mere assertions will not suffice.

Concrete evidence demonstrates that an in-state physical presence requirement for retailer shipping fails this test. Fourteen jurisdictions currently permit out-of-state retailers to ship wine directly to in-state

consumers.[8] Each of these jurisdictions continues to operate a robust, well-regulated three-tier system. Allowing interstate retailer shipping has not caused those systems to collapse, nor has it created regulatory gaps so severe that the three-tier framework ceased to function. If permitting interstate retailer shipping truly rendered the three-tier system unworkable, these jurisdictions would have been forced to abandon such laws. They have not.

The majority's contrary conclusion ignores this reality. By declaring physical presence "essential," the majority relieves the State of its burden and converts the exception recognized in *Tennessee Wine* into a categorical rule, precisely what that decision forbids.

The majority's reasoning is further flawed because it misidentifies the proper object of regulation. An out-of-state retailer shipping wine into a State should be regulated not based on the location of its brick-and-mortar premises, but based on the wine it ships into the State.

This Court recognized the same principle in *Granholm v. Heald*. There, out-of-state wineries sought not to establish a local physical presence, but

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[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

to compete as remote shippers on equal terms with in-state wineries.

The States' regulatory interests centered on tax collection and preventing access by minors—not on inspecting the physical characteristics of distant production facilities. *Granholm v. Heald*, 544 U.S. 460 (2005).

Arizona consumers do not travel to out-of-state retail locations; they interact with those retailers online. Arizona's decision to permit in-state retailers to engage in remote sales and shipping necessarily subjects that market to interstate competition. As the Seventh Circuit observed, where a State allows remote sales and shipments by in-state retailers, it cannot then exclude out-of-state retailers seeking to compete as interstate shippers. *Lebamoff Enterprises, Inc. v. Rauner*, 909 F.3d 847, 853 (7th Cir. 2018).

The majority attempts to justify its per se rule by invoking the importance of on-site inspections. *Day v. Henry*, 152 F.4th 961, 974 (9th Cir. 2025). But physical inspection of a retailer's premises is not necessary to regulate shipping activity, nor is it required to advance legitimate non-protectionist interests.

As in *Granholm*, the relevant regulatory concerns are ensuring tax compliance, preventing sales to minors, and maintaining accountability. None of those objectives depends on whether a retailer maintains a physical storefront within the State.

Indeed, Arizona already employs nondiscriminatory alternatives to address these

concerns in the winery shipping context. It could do the same here: require out-of-state retailers to obtain shipping licenses, mandate tax remittance, require adult signatures upon delivery, and compel submission to Arizona's regulatory and judicial jurisdiction. These tools are readily available and effective.

The Commerce Clause requires States to consider such reasonable nondiscriminatory alternatives before resorting to protectionist measures that exclude out-of-state businesses from the market. *Granholm v. Heald*, 544 U.S. 460, 463 (U.S. 2005); *Tennessee Wine and Spirits Retailers Association v. Thomas*, 588 U.S. 504, 540 (U.S. 2019).

In sum, the majority's analysis establishes neither that physical presence is an inherent feature of the three-tier system nor that Arizona's regulatory interests require discriminatory treatment. By treating physical presence as dispositive, the majority abandons the Commerce Clause analysis this Court's precedents demand.

CONCLUSION

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

Respectfully submitted,

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