No. 25-788

In the Supreme Court of the United States

REED DAY AND ALBERT JACOBS, PETITIONERS

v.

BEN HENRY, DIRECTOR, ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

LOUIS A. MURRAY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

JAMES A. TANFORD
ROBERT D. EPSTEIN
EPSTEIN SEIF PORTER & BEUTEL, LLP
50 South Meridian Street, Suite 505
Indianapolis, IN 46204

KANNON K. SHANMUGAM
Counsel of Record
MASHA G. HANSFORD
ABIGAIL FRISCH VICE
KRISTA A. STAPLEFORD
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

In the Supreme Court of the United States

No. 25-788

REED DAY AND ALBERT JACOBS, PETITIONERS

v.

BEN HENRY, DIRECTOR, ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

This case presents a mature, acknowledged, 4-to-3 circuit conflict on the question whether a State may justify discriminatory physical-presence requirements by merely invoking their connection to the State's three-tier system, without establishing with evidence that the restriction predominantly promotes health or safety. Respondents cannot seriously dispute that the conflict exists. Instead, they largely argue (Br. in Opp. 32) that the conflict is "not so dire" as to be worth this Court's time because no case has yet resulted in the invalidation of a physical-presence requirement. But that is of no moment: the key point is that other States were required to provide evidence of a predominant health-and-safety purpose,

while Arizona was not. This Court routinely grants review in similar circumstances.

On the merits, respondents' arguments likewise miss the mark. Respondents spend eleven pages previewing their arguments for affirmance. Those arguments should leave the Court with a strong sense of déjà vu, because they are virtually indistinguishable from arguments that the Court already rejected in *Granholm* v. *Heald*, 544 U.S. 460 (2005), and *Tennessee Wine & Spirits Retailers Association* v. *Thomas*, 588 U.S. 504 (2019). As those decisions made clear, this Court's approval of the basic separation of the tiers is not a blank check for States to impose discriminatory regulations within the three-tier scheme. Instead, each discriminatory regulation must pass muster under the *Tennessee Wine* test. The fact that that message has not registered with States—nor with multiple lower courts—is a powerful reason that intervention is warranted.

Finally, respondents present a grab-bag of vehicle arguments. Some misread the decision below, and others reprise an argument correctly rejected by the court of appeals. None goes anywhere. Instead, this case is a particularly clean vehicle for addressing a discrete issue that has deeply split the courts of appeals. The petition for a writ of certiorari should be granted.

A. The Decision Below Deepens An Entrenched Conflict Among The Courts Of Appeals

Respondents do not meaningfully dispute that the courts of appeals are split on the question presented. See Br. in Opp. 32-36. They put off discussing the split as long as they can and then try to write off the acknowledged conflict as "tension." See *id.* at 32. In reality, as the courts

themselves have recognized, the circuits have reached opposite results. Respondents' tepid efforts to minimize the conflict are unpersuasive.

1. As the court of appeals acknowledged in the decision below, a well-entrenched "circuit split has developed" on the question presented. Pet. App. 16a. Seven circuits have now considered constitutional challenges to retailer physical-presence requirements in States with three-tier schemes. Four of those circuits (the Third, Fourth, Eighth, and Ninth) have held that States may justify those requirements as essential to the three-tier system without offering any evidence that they actually promote a legitimate, non-protectionist interest that cannot be served by nondiscriminatory alternatives. Three other circuits (the First, Sixth, and Seventh) have reached the opposite conclusion: that States must provide evidence to establish that a physical-presence requirement predominantly furthers health and safety.

a. Respondents first contend that "[n]early every circuit" has agreed with their position. Br. in Opp. 32. They then proceed to list the three courts of appeals on the Ninth Circuit's side of the conflict. *Id.* at 32-34. Four out of seven is hardly "nearly" all.

Respondents' substance is no better than their arithmetic. Respondents first deem the three cases that rejected the essential-feature approach to be "less interesting" because, on remand, the challengers either voluntarily dismissed the case or lost. Br. in Opp. 34-36. But the subsequent procedural history is irrelevant; it did not erase the holdings of the relevant courts of appeals, which split with the decision below on an important rule of constitutional law.

More broadly, respondents contend that the conflict's "[p]ractical[]" effects are minimal because, in light of developments on remand in other cases, no court has yet

"struck down any state's system." Br. in Opp. 32, 34-35. But the question presented here is whether the State must make an evidentiary showing to justify a discriminatory alcohol regulation. The fact that a State might ultimately prevail does nothing to undermine the key fact that the court of appeals below (like three of its fellow circuits) freed Arizona from meeting its "exacting" burden of "demonstrably justify[ing]" discriminatory alcohol regulations under the Commerce Clause. *Granholm*, 544 U.S. at 492-493 (citation omitted). Instead, the nature of the State's burden is the whole ballgame.

Moreover, this Court routinely grants certiorari to resolve disagreements over the proper test for assessing constitutional claims, regardless of whether the differing tests have produced distinct outcomes. See, *e.g.*, *Brown* v. *Davenport*, 596 U.S. 118, 127 (2022); *Fry* v. *Pliler*, 551 U.S. 112, 120-121 (2007). Respondents identify no reason why the conflict here is any less worthy of review.

b. Nor do respondents' efforts to nitpick the individual cases on petitioners' side erode the conflict. Respondents criticize the First Circuit for "remand[ing] for further proceedings" in *Anvar* v. *Dwyer*, 82 F.4th 1 (2023), contending that the court simply "misunderstood how the three-tiered system works." Br. in Opp. 34. But the First Circuit's decision to remand for an analysis of whether the State could meet its evidentiary burden, rather than affirming based on the State's argument that the physical-presence requirement was "integral to Rhode Island's three-tier system," *Anvar*, 82 F.4th at 9-10, illustrates, not negates, that a conflict exists warranting this Court's review.

Respondents likewise minimize the Sixth Circuit's decision to reject the essential-feature rationale and "remand[] for the district court to analyze Ohio's supporting evidence" in *Block* v. *Canepa*, 74 F.4th 400 (2023). Br. in

Opp. 35. Relying on the Sixth Circuit's earlier decision in *Lebamoff Enterprises Inc.* v. *Whitmer*, 956 F.3d 863 (2020), cert. denied, 141 S. Ct. 1049 (2021), respondents claim that *Block* created an "intra-circuit split" not fit for this Court's review. Br. in Opp. 35. Respondents are mistaken. *Block* expressly considered the precedential effect of the court's earlier decision in *Whitmer*, and determined that the proper course was to follow the approach that "had the support of a majority of the panel." 74 F.4th at 413; see Pet. 17 n.*. That is the binding rule in the Sixth Circuit going forward.

Finally, respondents brush off the Seventh Circuit's decision in *Lebamoff Enterprises, Inc.* v. *Rauner*, 909 F.3d 847 (2018), describing it as a motion-to-dismiss-stage case that raised "questions about the three-tiered scheme" without providing "definitive answers." Br. in Opp. 36 (citation omitted). But the fact that *Rauner* arose on a motion to dismiss is neither here nor there because the Seventh Circuit held that the State could sustain its physical-presence requirement on remand only with evidence "demonstrably justif[ying]" the restriction as predominantly furthering aims "unrelated to economic protectionism." 909 F.3d at 853, 856 (citation omitted). That is the exact rule the court of appeals rejected here. See Pet. App. 20a.

Respondents likewise minimize the Seventh Circuit's recent two-judge decision in *Chicago Wine Co.* v. *Braun*, 148 F.4th 530 (2025), petition for cert. pending, No. 25-844 (2026), emphasizing its "split reasoning." Br. in Opp. 36. But they do not dispute that, despite splintering on adjacent questions, both judges' opinions were united in disagreeing with the essential-feature approach. See Pet. 18-20.

c. Respondents also suggest that this Court should not intervene because it has not granted previous petitions about a physical-presence requirement. See Br. in Opp. 1. But the circuit split has deepened since this Court last considered the issue. See Pet. at 6-11, *B-21 Wines* v. *Bauer* (No. 22-285) (Sept. 23, 2022) (setting out a 3-to-1 conflict). In that time, each of the circuits on petitioners' side of the conflict either newly staked out or meaningfully clarified its position, while the Ninth Circuit rejected petitioners' approach over an impassioned dissent. Given those recent developments, respondents have no credible argument that further percolation is needed.

B. The Decision Below Is Incorrect

In a preview of their merits brief, respondents devote considerable space to defending the decision below. See Br. in Opp. 18-29. While the merits are ultimately a question for another day, respondents' arguments—which bear an uncanny resemblance to arguments by States that this Court previously rejected—fail to persuade.

1. Respondents first resist how the petition "frames the dispute," contending that the court of appeals did not create a "carve-out" from the *Tennessee Wine* test for essential physical-premise requirements and asserting that the no-evidence-necessary rule applies only to alcohol regulations that are not "discriminatory in the first place." Br. in Opp. 18-19. That is flatly contrary to the decision below, which specifically "assume[d] without deciding" that the physical-premise requirement was discriminatory—a question that, it recognized, has itself "split the circuits." Pet. App. 13a, 15a. It proceeded to hold that a discriminatory alcohol regulation could be upheld "simply because [it] [is] an essential feature of a state's three-tier scheme." *Id.* at 16a, 18a.

2. Respondents next paint the decision below as a "straightforward application" of this Court's precedents. Br. in Opp. 19. That argument fails at every turn.

a. Respondents first contend that *Tennessee Wine* "already resolved" the constitutionality of physical-presence requirements for retailers. Br. in Opp. 20. They note that, in the course of *rejecting* Tennessee's argument that its durational-residency requirement served public health and safety, the Court observed that nondiscriminatory alternatives such as "on-site inspections" and "audits" could serve the State's asserted interest in "maintain[ing] oversight" over retailers given that the stores were "physically located within the State." *Tennessee Wine*, 588 U.S. at 540-541. But identifying a nondiscriminatory alternative based on the on-the-ground reality in Tennessee is a far cry from holding that a law *requiring* retailers to maintain a physical presence in the State is necessarily constitutional—a question that was, of course, not then before the Court. And far from helping respondents, the passage illustrates the careful scrutiny of the State's evidence and nondiscriminatory alternatives that courts must undertake under the *Tennessee Wine* test.

Next, respondents contend that this Court's precedents approving the three-tier system necessarily imply that a regulation essential to that system must also be automatically constitutional. See Br. in Opp. 22-26. Michigan ran a virtually identical argument in *Granholm*, arguing that a discriminatory physical-presence requirement for producers was "essential" to the three-tier system, which "otherwise would be circumvented by direct shipments from out-of-state." See Pet. Br. at 2-3, 40, *Granholm*, *supra* (No. 03-1120) (July 29, 2004). That position did not carry the day: although the three-tier system is itself "legitimate," the Court explained, a discriminatory law unsupported by "concrete evidence" showing

that it "advances a legitimate local purpose" would not be "saved by the Twenty-first Amendment." *Granholm*, 544 U.S. at 489-490 (internal quotation marks and citations omitted). Undeterred, the petitioner in *Tennessee Wine* reprised the argument in defense of a durational-residency requirement, contending that the Twenty-first Amendment "immunize[d]" it from scrutiny because it was a "core component" of the State's three-tier scheme. See Pet. Br. at 19-21, *Tennessee Wine*, *supra* (No. 18-96) (Nov. 13, 2018) (internal quotation marks and citation omitted); Pet. 25-27. Again, the Court rejected that claim: although the "basic" practice of "separating producers, wholesalers, and retailers" is legitimate, the Court reiterated, the Twenty-first Amendment does not "sanction[] every discriminatory feature that a State may incorporate into its three-tiered scheme." *Tennessee Wine*, 588 U.S. at 535. Instead, "each variation must be judged based on its own features." *Ibid.* Respondents seem to think that the third time is the charm. The Court should make clear it is not.

b. As the petition explained, the court of appeals also erred because the physical-presence requirement is not in fact essential to a three-tier scheme. See Pet. 29-30. Respondents cannot explain how retailer physical presence is necessary to guarantee that alcohol travels through the separate tiers—the only "essential feature of a three-tiered scheme." *Tennessee Wine*, 588 U.S. at 535; see Pet. 27. Indeed, many States have three-tier schemes but allow out-of-state retailers to ship directly to consumers, exemplifying that there is nothing "essential" to the three-tier system about the physical-presence requirement. See Manhattan Institute Br. 16-18; *B-21 Wines, Inc.* v. *Bauer,* 36 F.4th 214, 235 (4th Cir. 2022) (Wilkinson, J., dissenting).

Respondents mount a lengthy defense of the supposedly essential nature of the retailer physical-presence requirement based on the "inherent consequences * * * for the wholesale tier." Br. in Opp. 22. That argument fails: at the outset, the Court has never approved a physical-presence requirement for wholesalers either. *Granholm* held no such thing. Compare Br. in Opp. 22 with *Granholm*, 544 U.S. at 489. Further, as respondents admit, Arizona does not even require that all alcohol flow through the wholesaler tier. See Br. in Opp. 23. Nor can respondents explain why the retailer must be physically present in the State in order to ensure that alcohol is funneled through a state-sanctioned wholesaler. In short, moving the problems with their position up a level of the three-tier structure does nothing to help respondents' cause.

c. In addition to previewing their merits argument before this Court, respondents preview their arguments in the event of remand, repeatedly insisting that the physical-presence requirement serves important health and safety goals. See Br. in Opp. 25-28. But respondents fail to explain why Arizona could not simply require out-of-state retailers to consent to on-site audits, employ age-verification methods, and other similar measures through a licensing scheme, as other States do. See Manhattan Institute Br. 12-18; National Association of Wine Retailers Br. 17-18. In any case, respondents will have a full opportunity to make their showing under petitioners' rule. Petitioners' submission is a modest one: that respondents are obliged to support their assertions of health and safety benefits with evidence, rather than mere rhetoric.

C. The Question Presented Is Important And Recurring And Warrants The Court's Review In This Case

1. Respondents do not dispute that the petition implicates an important question about the intersection of two constitutional provisions—an intersection that this Court has repeatedly addressed in the face of lower-court confusion. See Pet. 31-33. Respondents briefly suggest that the dispute is not important because it will not affect the ultimate outcome, but that argument does not withstand scrutiny: it is far from clear that Arizona's physical-presence requirement will meet the *Tennessee Wine* test. See pp. 8-9, *supra*. And whether States can enact discriminatory laws only if they predominantly support public health over protectionism is critically important even aside from whether a particular requirement survives. Indeed, respondents all but concede practical importance by lamenting the supposed burden of being required to make that constitutionally mandated showing. See Br. in Opp. 20.

2. Faced with an important and acknowledged conflict, respondents throw up every conceivable roadblock they can imagine. Each is insubstantial.

a. Respondents contend that petitioners have given the game away by "conced[ing] below that the three-tiered system is constitutional." Br. in Opp. 29. That simply recycles respondents' incorrect merits argument. All (petitioners, respondents, and the seven circuit courts that have addressed the question) agree that the basic three-tier system is constitutional. But they are sharply and evenly divided as to whether that renders a discriminatory physical-presence requirement for retailers automatically constitutional.

b. Respondents next try to conjure a standing problem, arguing that, because petitioners never challenged Arizona's wholesaler-purchase requirements, which require some alcohol to be purchased from a licensed in-

state wholesaler, prevailing on the question presented would not redress petitioners' injury. See Br. in Opp. 29-30. For all its disagreements, the panel was united and consistent in (twice) rejecting respondents' standing argument. See Pet. App. 6a-9a, 24a, 59a-62a, 72a; see also Pet. 10-11. Indeed, any requirements at the wholesaler tier are beside the point: as even respondents admit, under Arizona law, retailers may buy their wine directly from licensed wineries (including out-of-state ones). Ariz. Rev. Stat. §§ 4-205.04(C)(8), 4-243.01(A)(3)(d); see Br. in Opp. 23. At a minimum, if the retailer physical-presence requirement were held unconstitutional, petitioners could get some additional direct deliveries from out-of-state retailers sourcing from those wineries. That is more than sufficient to establish redressability. See *Diamond Alternative Energy, LLC* v. *Environmental Protection Agency*, 606 U.S. 100, 114 (2025).

c. Respondents also insist that the answer to the question presented does not matter in this case because, even if evidence were required, both the district court and the court of appeals "reviewed the evidence" in favor of the physical-presence requirement and "found Arizona met its burden." Br. in Opp. 30. That is simply inaccurate. As Judge Forrest aptly put it in her dissent, the district court "bypassed the requisite evidentiary weighing," Pet. App. 33a, instead crediting the State's assertion that the physical-presence requirement "is such an essential feature of the three-tier system," *id.* at 50a. Even more importantly, the court of appeals did not purport to perform the requisite weighing, specifically "uphold[ing] [the requirement] without further determinations as to whether its predominant effect is to support public health and safety." *Id.* at 20a. The court also declined even to consider whether Arizona had nondiscriminatory alternatives. See *id.* at 22a. And although the panel majority

opined that the requirement "does bear on a state's ability to support public health and safety," *id.* at 20a, that suggests only that respondents *might* win if held to their burden—not that they already won.

d. Finally, respondents contend that "petitioners have never met their threshold burden to show discrimination." Br. in Opp. 30. But, as explained above (p. 6), the court below "assume[d] without deciding" that Arizona's physical-presence requirement is discriminatory. Pet. App. 15a. That makes this case a particularly *clean* vehicle. It allows the Court to focus on the single issue that was the subject of disagreement between the majority and dissent, while avoiding the "quagmire" of the discrimination question. See *ibid.* (internal quotation marks and citation omitted). The Court should thus grant review.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LOUIS A. MURRAY
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

JAMES A. TANFORD
ROBERT D. EPSTEIN
EPSTEIN SEIF
PORTER & BEUTEL, LLP
50 South Meridian Street,
Suite 505
Indianapolis, IN 46204

KANNON K. SHANMUGAM
MASHA G. HANSFORD
ABIGAIL FRISCH VICE
KRISTA A. STAPLEFORD
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

APRIL 2026