No. 25-788

In the Supreme Court of the United States

REED DAY, ET AL.

Petitioners,

v.

BEN HENRY, 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 THE MANHATTAN INSTITUTE AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a physical-presence requirement that discriminates between in-state and out-of-state alcohol retailers can be deemed constitutional under the Twenty-First Amendment solely as an essential feature of a state's three-tier system of alcohol distribution, without concrete evidence establishing that the requirement predominantly promotes a legitimate, nonprotectionist interest such as public health or safety.

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INTEREST OF *AMICI CURIAE*[1]

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. MI has historically sponsored scholarship and filed briefs opposing regulations that restrict interstate commerce.

Reason Foundation (Reason) is a nonpartisan and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. Reason advances its mission by publishing the critically acclaimed *Reason* magazine, as well as commentary and research on its websites, www.reason.com and www.reason.org. To further its commitment to "Free Minds and Free Markets," Reason has filed briefs in many cases raising major legal and constitutional issues, including cases regarding interstate commerce.

Amici file this brief because the confusion on the interaction between the Twenty-First Amendment and the Dormant Commerce Clause is compromising core Commerce Clause doctrine. This case is a prime example of how states are seeking to apply regulations to alcohol producers and sellers that would likely be unconstitutional if applied to any other industry.

SUMMARY OF ARGUMENT

In the two-plus decades since this Court's decision in *Granholm v. Heald*, 544 U.S. 460 (2005)—and the

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

seven years since *Tennessee Wine & Spirits Retailers Association v. Thomas*, 588 U.S. 504 (2019)—lower courts have continued to resist this Court's clear holdings regarding interstate shipment of alcohol.

When it comes to the intersection of the Twenty-First amendment and the Commerce Clause, a split has developed among the circuit courts, with a slight majority now adopting what has become known as the "essential feature" test for Dormant Commerce Clause challenges to alcohol regulations. Based on this framework, if a regulatory requirement like in-state physical presence for an alcohol retailer is dubbed "essential" to the functioning of a state's three-tier system of alcohol distribution, then it is immunized from a Dormant Commerce Clause challenge.

This case epitomizes that legal disjunction. The Ninth Circuit upheld Arizona's in-state physical presence requirement for wine retailers as an "essential feature" of the state's three-tier system because doing otherwise, the court held, would "effectively be hacking off two of the three legs that constitute Arizona's three-tier system." *Day v. Henry*, 152 F.4th 961, 974 (9th Cir. 2025).

But the "essential feature" test operates in an evidentiary void, with no concrete evidence needed to establish whether the regulatory provision at issue promotes a legitimate, nonprotectionist interest like protecting health and safety. Not only does this test run contrary to the explicit holdings in *Granholm* and *Tennessee Wine*, it collapses when evidence is applied.

In-state physical presence requirements, like the one at issue here, are demonstrably *non-essential* to the functioning of state alcohol regulatory systems

generally and the three-tier system specifically. The fact that courts are nonetheless declaring such regulatory provisions to be "essential" underscores the inherent flaws in the "essential feature" test—and the need for this Court to step in again.

Amici makes three main points regarding the "essential feature" test:

First, for years, greater abridgments of the three-tier system than out-of-state Direct-to-Consumer (DtC) alcohol shipments from retailers have not interfered with an "essential feature" of the system.[2] In fact, no state in America has a perfectly "pristine" three-tier system, as numerous circumventions of the system—from laws allowing producers to ship alcohol directly to consumers, to brewpub laws, to self-distribution authorizations—have been around for decades. These already existing workarounds are more substantial disruptors to the three-tier system than allowing out-of-state alcohol retailers to ship to consumers without an in-state physical presence, as is at issue here.

For example, allowing out-of-state *producers* to ship alcohol directly to consumers is a more significant abridgment of the three-tier system, but this Court in *Granholm* pointedly declined to declare producers' in-state physical presence to be an "essential feature" immune from constitutional scrutiny. Therefore, allowing out-of-state *retailers* to ship alcohol to consumers without an in-state physical presence—a more modest

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[2] For ease of reference, this brief will refer to Direct-to-Consumer alcohol shipped by producers (like wineries, breweries, and distilleries) as "producer-level DtC," while referring to Direct-to-Consumer alcohol shipped by retailing outlets and stores as "retailer-level DtC."

abridgement of the three-tier system—cannot be said to undermine an "essential feature" of the system.

Second, the defining feature of America's alcohol regulatory system is *licensure*, not the three-tier system in and of itself. By using licensure, states have proven adept at regulating alcohol delivery in the absence of in-state physical presence—or any physical presence whatsoever.

Specifically, since the COVID-19 global pandemic, the so-called "fourth tier" delivery of alcohol—allowing retailers to ship and deliver alcohol to consumers—has seen a meteoric rise. The growth of this additional tier shows that state regulatory regimes can effectively regulate alcoholic-beverage delivery, even without an in-state presence requirement. Just like any tier of the alcohol regulatory system, a straightforward license for out-of-state retail shippers can readily buffer against potential negative externalities that may arise from the sale and shipment of out-of-state alcohol.

Third, allowing out-of-state retailers to ship alcohol to consumers without an in-state physical presence is best seen as a niche *amplification* of the three-tier system, not as an undermining of it. As observers of the industry understand—but courts like the Ninth Circuit have failed to appreciate—out-of-state retailers are not competing with in-state wholesalers and retailers but are rather selling alcohol that is generally not available within a state's current system.

For these reasons, the "essential feature" test fails on its own terms. In-state physical presence for alcohol retailers is demonstrably non-essential to the functioning of the alcohol regulatory system and allowing courts—without concrete evidence—to simply deem it

to be "essential" creates a get-out-of-jail-free card for state governments seeking to shield protectionist laws.

This Court was abundantly clear in *Granholm* and *Tennessee Wine* that states cannot discriminate against out-of-state economic interests unless doing so advances a legitimate, nonprotectionist interest like public health and safety. Because lower courts have pointedly decided not to listen—and have adopted the "essential feature" test as a backdoor evasion of this Court's holdings—the Court should grant *certiorari* and put an end to this manufactured loophole.

ARGUMENT

I. MORE SIGNIFICANT ABRIDGMENTS OF THE THREE-TIER SYSTEM HAVE NOT BEEN FOUND TO INTERFERE WITH AN "ESSENTIAL FEATURE" OF THE SYSTEM

A. *Granholm* Allowed Producer-level Direct-to-Consumer Sales That Are a Greater Abridgement of the Three-Tier System

Striking down in-state physical presence requirements for alcohol retailers—and thereby greenlighting out-of-state retailer-level DtC—could be viewed, in one sense, as a "hacking off" of two in-state tiers, as described by the Ninth Circuit. *Day*, 152 F.4th at 974. But it is no more so—and actually less so—than the similar "hacking off" endorsed by this Court when it came to out-of-state producer-level DtC in *Granholm*.

In *Granholm*, when this Court struck down in-state physical-presence requirements for alcohol producers, it greenlit a system of out-of-state producer-level DtC. That system skips two of the three tiers outright—and consolidates producer, wholesaler, and retailer into

one entity, which runs contrary to the bar on vertical integration that the three-tier system was meant to prevent. Put another way, if there ever was a time to stake out an "essential feature" of the three-tier system as being untouchable by the Dormant Commerce Clause, it would have been in *Granholm*, which involved a direct circumvention of the three-tier system itself. But this Court pointedly declined to do so.

Striking down in-state physical presence requirements for retailers—and thereby greenlighting out-of-state retailer-level DtC—represents *less* of a threat to the three-tier system than the producer-level DtC in *Granholm*. With retailer-level DtC, the alcohol has at least already made the proverbial run-through-the-tiers in the originating state from whence it is being shipped. With out-of-state producer-level DtC, the alcohol in question never goes through *any* wholesaler and retailer tiers—in either the originating or destination state—since the producer is functionally converted into the wholesaler and retailer of the alcohol.

If an in-state physical-presence requirement for wineries was found to run afoul of the Dormant Commerce Clause in *Granholm*—and was not salvageable as an "essential feature" of the three-tier system—then *a fortiori* in-state physical presence for retailers cannot be deemed "essential" to the three-tier system.

After *Granholm*—and even before the ruling—there was a substantial uptick in alcohol-shipping laws that allowed both in- and out-of-state wineries (and sometimes breweries and distilleries) to ship products directly to consumers. *Direct Shipping Table*, Wine Inst. (May 20, 2025), https://tinyurl.com/yprpz3cb. As noted, by allowing a winery (or brewery or distillery) to sell alcohol directly to

consumers, these rules functionally allow the winery to play the role of wholesaler and retailer, not just producer. *Granholm*, 544 U.S. at 524 (Thomas, J., dissenting) ("Michigan's and New York's laws [allowing in-state producer DtC] simply allow some in-state wineries to act as their own wholesalers and retailers.").

This reality led Fourth Circuit Judge Jay Wilkinson, in discussing North Carolina's own producer-level DtC law, to note:

> Even if I were to agree with the majority that a physical-presence requirement for retailers is essential to maintaining a three-tiered system, North Carolina's laws as applied here would still fail. *That is because North Carolina does not have a three-tiered system when it comes to wine.*
>
> In general, North Carolina requires alcohol to flow through all three separate tiers before it may be imbibed. See, e.g., N.C. Gen. Stat. § 18B-1300. But not wine. *Where wineries are concerned, the three-tiered system no longer holds.* . . . For wine, then, *North Carolina's is not a regime premised on three separately owned tiers. It is a regime premised on simply permitting.*

B-21 Wines, Inc. v. Bauer, 36 F.4th 214, 236 (4th Cir. 2022) (Wilkinson, J., dissenting) (emphases added).

As noted below, Arizona, like North Carolina, also has a law authorizing out-of-state wineries to deliver alcohol directly to consumers. The Ninth Circuit majority dismisses this inconvenient complication via its conclusion that producer-level DtC is a mere "limited exception" to the three-tier system compared to the

supposed dire threat that retailer-level DtC would pose to the system. *Day*, 152 F.4th at 975.

As grounds for that conclusion, the majority cites to the fact that there are "only" around 11,000 wineries in America today, compared to around 400,000 wine retailers. *Id.* The characterization of there being that many wine retailers, however, is misleading. While there have been estimates of there being around 400,000 *discrete alcohol retail licenses* nationwide, this number counts every single outlet for every large chain store, including Walmart (over 4,600 stores), Kroger (over 2,700 stores), Aldi (over 2,600 stores), Albertsons (over 2,300 stores), and Target (at least 1,400 outlets of which sell alcohol)—not to mention every corner 7-Eleven that sells alcohol (over 12,000 outlets).[3]

Large chain stores have near zero incentive to engage in interstate alcohol shipping because they can readily obtain—and usually already have—an in-state physical presence in whatever state they wish to enter. In reality, there are just over 45,000 businesses in the U.S. alcohol retailing industry. *See* Christopher Lombardo, Beer, Wine & Liquor Stores in the US - Market Research Report (2015–2030), IBISWorld (April 2025), https://tinyurl.com/55dn8mm3. Of these, the number

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[3] Data pulled from various sources. *See 10 Largest Grocery Chains in the United States in 2025*, Locations Cloud (Jul. 8, 2024), https://tinyurl.com/uvadbyrn ; *10 Largest grocery chains in the United States in 2025*, Scrape Hero: A Data Company (Dec. 31, 2025), https://tinyurl.com/2ff57wwn; Emily Weyrauch, *Target Makes a Killing on Alcohol Sales and Is Expanding Its Booze Selection*, Money.com (June 29, 2017), https://tinyurl.com/2s3mwd5h; *Our Business*, The Kroger Co., https://tinyurl.com/39uf2sap; *10 Largest convenience stores in the United States in 2025*, Scrape Hero: A Data Company (Dec. 23, 2025), https://tinyurl.com/3738b75y.

focusing on wine could be fewer than 10,000. *Tom Wark, Books and Wine: A Tale of Two Markets*, Fermentation Newsletter (January 26, 2026), https://tinyurl.com/44uhsjar ("Speaking specifically about wine, we had 4,179,575 offers, *from 7,141 U.S. merchants*, representing 170,342 different wines, as of Jan 22.") (emphasis added).

To gauge the size of the market, one can look at states that already permit out-of-state retailer-level DtC for wine. Nebraska's Liquor Control Commission lists 774 DtC permits on its "Active Roster" of state alcohol licenses. *See Active License Roster*, Nebraska Liquor Control Commission (last visited Jan. 29, 2026), https://tinyurl.com/2sawpk42. Of these, 708 are producer-level DtC permits (S1 licenses) for wineries, while 66 are retailer-level DtC permits (S1R licenses) for wine retailers. This means that *a mere 8.5%* of DtC wine licenses in Nebraska are retailer-level DtC. And of all the wine retailers in America, *only 66* have bothered to obtain a retailer-level DtC license in the state.

As discussed in more detail below, this demonstrates the niche aspects of the retailer-level DtC market and its role as an amplifier of, rather than a dire threat to, the three-tier system. Most importantly, nowhere in *Granholm* did this Court indicate that its Dormant Commerce Clause analysis was contingent on volume of alcohol sales, making the Ninth Circuit's 400,000 figure not only inaccurate but irrelevant.

Simply put, this Court has upheld far greater abridgments of the three-tier system in cases like *Granholm*. Retailer-level DtC appears to be, at best, a

niche adjunct to the system rather than a "hacking off" of two of its three branches.

B. No State Has a "Pristine" Three-Tier System, Further Undermining the Ninth Circuit's Claim That Any One Feature of the System Is "Essential" to Its Functioning

Another truth lost in the Ninth Circuit's analysis—as well as that of its sister circuits that have endorsed the "essential feature" test—is that no state in America has a purely intact three-tier system for alcohol regulation, with pristine separation between the producer, wholesaler, and retailer tiers.

In addition to the aforementioned producer-level DtC laws, so-called "brewpub laws" have proliferated since the 1980s. Those laws allow breweries to sell beer in their taprooms to their customer base without needing to make the traditional run-through-the-tiers of first selling their brews to a wholesaler, who in turn sells it to a retailer, who then finally gets the beer into the hands of the customer. Erica Techo, *Examining the Trends of Craft Beer Legislation in the U.S.* 37—38 (2021) (M.S. thesis, Univ. of Ala. At Birmingham), https://tinyurl.com/3t4we8w8. Likewise, so-called self-distribution laws—in which alcohol producers are permitted to sell their products directly to retail shops without going through the wholesaler tier—have gained ascendancy in recent years. Alex Koral, *Is Beverage Alcohol Self-Distribution the Next Big Thing?*, Sovos (Feb. 22, 2024), https://tinyurl.com/3uv9x2np.

Contrary to the Ninth Circuit's framing of the three-tier system as a finely tuned, intricately interwoven system of hermetically sealed-off tiers, the reality is that numerous substantial abridgements to the

system have existed for decades, thereby undermining claims to any discrete feature of the system automatically qualifying for "essential" status.

To understand how our modern regulatory system for alcohol has survived such notable workarounds and circumventions, it's important to understand that the defining feature of the system is *licensure*, not the three-tier system in and of itself.

II. LICENSURE, NOT THE THREE-TIER SYSTEM, IS THE DEFINING FEATURE OF AMERICAN ALCOHOL REGULATION

A. Alcohol Has Long Operated Under a Licensing and Permitting Regime

The decision below repeatedly references the unquestioned legitimacy of the three-tier system. *Day*, 152 F.4th at 974. But even though nearly every state operates under either (1) a "control system" of alcohol regulation, in which the government itself operates the wholesaling and/or retailing tiers, or (2) a private system containing three distinct tiers, it's a misconception to view the three-tier system itself as the defining feature of alcohol regulation. *The Three-Tier System Explained: How Alcohol Distribution Works in the U.S.*, Ansira (Dec. 26, 2025), https://tinyurl.com/y4wrumt6.

Properly understood, alcohol operates under a *licensure* regulatory regime. The modern conception of licensing alcohol sellers dates at least as far back as the 16th century, when English inns were granted licenses that effectively gave them exclusivity over serving alcohol in a respective region. C. Jarrett Dieterle, *Revisiting Alcohol Licensing Caps in 21st Century America*, R St. Inst. (May 5, 2021), https://tinyurl.com/2pzv4y4w. This licensing tradition likewise

took off in colonial America with its network of roadside inns and taverns. *Id.*

After Prohibition, the licensing regime made a comeback. Temperance advocates like John D. Rockefeller funded efforts to develop a revamped, more localized regulatory system for alcoholic beverages. The effort culminated in the well-known book titled *Toward Liquor Control*, which is widely recognized as laying the foundation for modern alcohol governance. *Id.*

Toward Liquor Control laid out both the control state option and the licensure option for regulating alcohol. To this day, these are the predominant systems through which alcohol is regulated in America. The regulatory tool of a license or permit is straightforward: It is a functional transference of regulatory responsibility from the government to a private actor over some designated activity that could potentially produce negative externalities. *Id.*

Understanding this historical backdrop has profound implications for the "essential feature" test.

B. Arizona's Already Existing Licensure Protocols for Out-of-State Producer-level Direct-to-Consumer Sales Show that Physical Presence Is Not an "Essential Feature"

The Ninth Circuit's opinion spends little time fleshing out the alleged regulatory concerns at play with out-of-state retailer-level DtC. Because the court held that Arizona's in-state physical presence requirement is an "essential feature" of the state's three-tier system, it seems further inquiry was thought largely unnecessary. The court nonetheless notes various ways in which it views Arizona's in-state physical presence requirement as being critical to ensuring public health

and safety when it comes to alcohol. It notes that Arizona conducted "thousands of on-site inspections" of licensee establishments between 2016 and 2021, including running "covert underage buyer programs" and "inspect[ing] the records of wholesalers" to ensure compliance with state law. *Day*, 152 F.4th at 974.

But none of these are remarkable regulatory features and are in fact simply run-of-the-mill regulatory protocols that nearly every state alcohol licensure regime utilizes. Other than on-site inspections—which don't exist with any type of alcohol delivery, whether from in-state or out-of-state sources—none of these depend upon physical presence nor even the three-tier system. Instead, they depend on the tool of licensure.

Arizona's own producer-level DtC license for out-of-state wineries is instructive in demonstrating how out-of-state origination of alcohol can be appropriately regulated. The state code lays out the requirements, which mandate, among other things, a detailed application with identifying information of the out-of-state winery applicant, disclosure of any criminal convictions by officers of the applicant, the applicant's license as issued from its own home state, and its federal permit from the Alcohol and Tobacco Tax and Trade Bureau. Ariz. Rev. Stat. § 4-243.01(B) (2025). This out-of-state wine shipping license can be suspended, revoked, or not renewed on account of any violations or malfeasance on the part of the licensee, and the licensee must submit a yearly report of all wine shipped into the state, including to whom it was delivered. *Id*. Rules are also laid out for proper identification checks at the point-of-sale to ensure no alcohol ends up in the hands of minors. *Id*.

In short, Arizona demonstrates ample ability to appropriately regulate out-of-state alcohol shipments, without an in-state physical presence, via the use of licensure. This is hardly remarkable. It is also readily adaptable to other tiers, including the retailing tier.

C. The Rise of So-called "Fourth Tier" Delivery Further Shows That Physical Presence Is Not "Essential"

Since the COVID-19 global pandemic, there has been a substantial growth in alcohol delivery across the country. C. Jarrett Dieterle, *Capturing the COVID Booze Wave, Part 2 – It's Tsunami Time*, R. St. Inst. (Sep. 16, 2022), https://tinyurl.com/4433uszm. While capturing the precise extent of this growth is difficult given the nuances of alcohol delivery—i.e., Is it delivery via mail or via local app-based delivery driver?; Is it in-state or out-of-state delivery?; Is it delivery from a producer or a retailer?, etc.—at least 40 out of 50 states enacted some form of pro-delivery reform for alcohol during the pandemic. *Id*.

Most of this COVID-era growth came in the form of the so-called "fourth tier" of the alcohol distribution system: alcohol delivery from retailer to consumer. Many of these reforms allowed local app-based delivery from restaurants—seen in the rise of the "to-go cocktail" phenomenon—but others involved rules allowing interstate DtC shipments of alcohol. *Id*.

Rather than being seen as a threat to the three-tier system, the fourth tier is best viewed as an augmentation of the system—hence its descriptor as an additional tier rather than a replacement of any existing one. In the wake of COVID, states across the country proved that creating a shipping or delivery license for

the fourth tier was not some intractable regulatory quagmire but a straightforward endeavor.

In the delivery context, there are many available answers to address concerns over the potential negative externalities that are inherent to alcohol, such as road safety, overserving, and underage drinking prevention, as well as more standard regulatory concerns such as insurance requirements and the collecting sales tax. C. Jarrett Dieterle & Teri Quimby, *Coming to a Door Near you: Alcohol Delivery in the COVID-19 New Normal* (R. St. Inst. Nov. 2020), https://tinyurl.com/35rb3356; C. Jarrett Dieterle, *How to Regulate Alcohol Delivery* (R. St. Inst. Feb. 2024), https://tinyurl.com/492u2hy6.

As just one example, the Ninth Circuit's concern over things like "covert underage buyer programs"—termed "decoy operations" in proper regulatory parlance—has proven readily adaptable to the delivery context. *Id*. Numerous states have conducted such decoy operations, leading to documented improvements in ID verification rates for alcohol delivery. Va. Alcoholic Beverage Control Auth., *Virginia ABC Report on "Third-Party Delivery Licenses" Pursuant to Chapters 105 and 159 of the 2024 Acts of Assembly* 4 (October 29, 2024), https://tinyurl.com/26rwn92t; C. Jarrett Dieterle, *Alcohol Delivery and Underage Drinking in California: An Update*, R. St. Inst. (Apr. 19, 2022), https://tinyurl.com/y5a3nuu8.

In other words, the system works. No evidence has been adduced to suggest that the alcohol regulatory system—or even the three-tier system itself—has suffered because of this new tier of licensing. Thus, far from physical presence being "essential" to the three-tier system, the physical-presence-free alcohol

delivery landscape has grown exponentially over the course of the past half-decade.

D. Thirteen States Successfully Regulate Out-of-State Retailer-level Direct-to-Consumer Sales, Confirming that In-State Physical Presence Is Not Essential

The specific experience of interstate DtC for alcohol is instructive. Today, 48 states allow some form of DtC shipping from out-of-state wineries to in-state consumers, although the rules vary in their particulars. Lizzy Connolly, *What Are the DtC Wine Shipping Laws by State?*, Sovos (July 29, 2021), https://tinyurl.com/yckhzhy5. DtC authorization for breweries and distilleries is more limited but growing, with ten states allowing out-of-state producer-level DtC for beer and eight allowing it for distilled spirits. Gail Cole, *States Where Breweries, Distilleries, Retailers, and Wineries Can Ship DTC*, Avalara (Aug. 15, 2025), https://tinyurl.com/yb7p9nax.

Most relevant for the purposes of this case, 13 states plus the District of Columbia currently allow some form of out-of-state retailer-level DtC for wine. *See* 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. A review of these states' licensing requirements for retailer-level DtC is instructive—and again shows the ability of the licensure system to

be adapted to the arena of delivery without the need for in-state physical presence.

For instance, Connecticut's out-of-state wine retailer shipper's permit requires that the permittee conspicuously display that the package contains alcohol, verify that the recipient is of-age, pay all appropriate sales taxes, file a complete report of all sales alongside a chronological account of every consumer the retailer sold wine to, hold an in-state transporter's permit or work with an entity that holds one, permit the state's Department of Consumer Protection and Department of Revenue Services to perform audits of the permittee's records, and sign a written consent to be subject to state jurisdiction. Conn. Gen. Stat. §30-18a(2).

This is not a light regulatory touch or a wild west of unregulated booze. We'll spare the Court a tour through each state code, but they largely mirror Connecticut's regulatory structure, proving that states have faced no special difficulty in incorporating out-of-state retailer-level DtC into their state regulatory structures. And once again, we have evidence that the system works. State courts have cracked down on out-of-state retailers operating without the proper license in a destination state, proving that violative conduct can and is appropriately policed. *Va. Alcoholic Beverage Control Auth. v. Zero Links Markets, Inc.*, 78 Va. App. 261 (Va. Ct. App. 2023).

If 13 states—more than a quarter of them—have found a way to regulate out-of-state retailer-level DtC without the "essential feature" of in-state physical presence, then it is a curious "essential feature." In reality, the presence of these 13 states proves that in-state physical presence is the epitome of a non-

essential feature, which demonstrates the precise problem with the "essential feature" test writ large.

If states can simply assert that aspects of their alcohol regulatory system are "essential"—and thereby immunize themselves from a Dormant Commerce Clause challenge—even for features that are clearly non-essential, then it's hard to identify any limiting principle whatsoever for the "essential feature" test.

III. OUT-OF-STATE RETAILER-LEVEL DIRECT-TO-CONSUMER SALES ARE AN AMPLIFICATION OF THE THREE-TIER SYSTEM, NOT A THREAT TO IT

Even if one centers the three-tier system as the predominant feature of alcohol regulation, out-of-state retailer-level DtC shipping is not an inherent threat to the three-tier system but rather a niche *amplification* of it. Contrary to the Ninth Circuit's framing of retailer-level DtC as constituting a "hacking off" of two tiers, a proper understanding of the current market for alcoholic beverages shows how out-of-state retailer-level DtC operates as an adjunct to the current system, not its mortal enemy.

To see why, one needs to understand the current state of the alcoholic beverage marketplace. Over the past several decades, the number of wineries in America has grown while the number of wholesalers has declined precipitously. In 1995, there were around 3,000 wine wholesaler companies in America; by 2021, this had declined to around 1,200 (with some estimates ranging below a thousand). C. Jarrett Dieterle & Teri Quimby, *R Street Institute Regulatory Comment on Executive Order Regarding Competition in the Beer, Wine, and Spirits Markets*, R. St. Inst. (Aug. 18, 2021),

https://tinyurl.com/tz4an48a. Further, the market dominance of the largest wholesalers has *increased* over this same time, so that today the two largest wholesalers control over 50 percent of the market and the top ten control over 80 percent of the market. *U.S. Wholesaler Wine Distribution Today and What Does the Future Promises [sic]*, USA Wine Ratings (Sep. 23, 2024), https://tinyurl.com/y3sy998j.

Compounding the issue even more, many regions of the country are only serviced by one or at most two wholesalers, creating regional monopolies or oligopolies that strictly control the alcohol supply chain. As a result, consumers within a state are beholden to what wine their respective wholesaler/distributor carries. Dieterle & Quimby, *supra*, *R Street Institute Regulatory Comment*.

Naturally, wholesalers are inclined to stock their portfolios with the products that earn them the most money. A small-batch wine made three states away is not likely to make the list next to popular wines like Charles Shaw or Stags' Leap. The following example is illustrative:

> The key example is the Nebraska consumer looking for a specialty imported wine that is sold only by one or two select New York retailers who have access to the importer; there is not enough demand in Nebraska (or most states) for a local distributor to pick up that wine, and therefore it is otherwise unavailable to the Nebraska consumer . . . .
>
> This is a very different scenario than the sale of a $20 bottle of widely distributed wine,

> for which any consumer is going to rely on their local wine shop for a purchase.

How and Where Retailers Can Ship Alcohol Direct-to-Consumer, Sovos (last visited Jan. 26, 2026), https://tinyurl.com/yadxvse9. As a result, "[t]he products that reach consumers through the DtC wine shipping channel are not the same ones they are shopping for at their local retail outlets" and thus "there is generally no direct competition between the products available through these different channels." *The Case for Spirits Direct-to-Consumer (DtC) Shipping*, Sovos (last visited Jan. 26, 2026), https://tinyurl.com/5dmskz8p.

Further, as noted above, there's evidence to believe that this the retailer-level DtC market is extremely niche—in states like Nebraska, which allows retailer-level DtC, a mere *66* retailer-level DtC licenses have been issued. Accordingly, allowing out-of-state wine retailers to ship into a state is properly viewed as a niche amplification of, or adjunct to, a state's three-tier system rather than a subversion of it.

The alcohol that out-of-state retailers are shipping into a state is generally not the same as the alcohol currently being carried by the in-state system. Out-of-state retailers are not competing with in-state wholesalers and retailers because their portfolio of products looks entirely different. So once again we run into the reality that the in-state physical-presence rule is as non-essential of a feature as one can imagine, not an "essential feature" upon which the survival of the three-tier system depends.

IV. THE "ESSENTIAL FEATURE" TEST SHOULD NOT BE ALLOWED TO UNDERMINE *GRANHOLM* AND *TENNESSEE WINE*

The lack of in-state physical presence for alcohol retailers is not a threat to the essential functioning of the alcohol regulatory system.

But under the analysis of the Ninth Circuit and several of its sister circuits, the "essential feature" test has operated as a get-out-of-jail-free card when it comes to the Dormant Commerce Clause. Rather than weighing the actual regulatory provision at issue to determine if it is truly essential, these courts have asserted—with little to no evidentiary support—that regulations like in-state physical presence for alcohol retailers are an "essential feature" of the system.

Given that, as argued here, physical presence is not an essential feature of a state's alcohol regulatory system, these courts have created a setup whereby nearly any discrete regulatory provision in a state's alcohol code could be dubbed essential and thus immunized from a Dormant Commerce Clause challenge.

In the end, if physical presence is deemed "essential" even when it self-evidently is not, it's hard to see how there's any limiting principle whatsoever when it comes to states immunizing protectionist alcohol rules under the guise of the rule's purported essentialness. In this way, the "essential feature" test becomes a free-floating and seemingly limitless rationale for upholding regulatory programs in the alcohol arena.

In comparison, the alternative "concrete evidence" test—requiring evidence that the regulation advances a legitimate, nonprotectionist interest like public health and safety—is most faithful to this Court's

holdings in *Granholm* and *Tennessee Wine*. The circuits courts that have adopted this alternative have rightly eschewed the "essential feature" test. *Anvar v. Dwyer*, 82 F.4th 1 (1st Cir. 2023); *Block v. Canepa*, 74 F.4th 400 (6th Cir. 2023); *Lebamoff Enterprises, Inc. v. Rauner*, 909 F.3d 847 (7th Cir. 2018); *Chicago Wine Co. v. Braun*, 148 F.4th 530 (7th Cir. 2025).

CONCLUSION

In the end, constitutional analysis should never be evidence-free, and non-essential features should never be deemed essential. The Court should grant *certiorari* to hear this case and clarify that it meant what it said in *Granholm* and *Tennessee Wine*. Lower courts cannot be allowed to undermine those decisions with an evidence-free test that immunizes demonstrably non-essential alcohol rules from constitutional scrutiny.

Respectfully submitted,

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