No. 21-2068

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHICAGO WINE COMPANY, ET AL.,
Plaintiffs-Appellants.

v.

ERIC HOLCOMB, ET AL.,
Defendants-Appellants,

and

WINE & SPIRITS DISTRIBUTORS OF INDIANA,
Intervenor Defendant-Appellant.

On appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division, No. 1:19-cv-2785-TWP-MG, The Honorable Tanya Walton Pratt, Chief Judge.

BRIEF OF THE CENTER FOR ALCOHOL POLICY AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

John C. Neiman, Jr.
MAYNARD COOPER & GALE P.C.
1901 Sixth Ave. N, Ste. 2400
Birmingham, Alabama 35203
(205) 254-1000

Attorney for Amici Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2068

Short Caption: Chicago Wine Co., et al. v. Eric Holcomb, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Center for Alcohol Policy

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Maynard, Cooper & Gale PC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

It is not owned by any corporation. It is a 501(c)(3) foundation affiliated with National Beer Wholesalers Assn.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: s/ John C. Neiman, Jr. Date: October 1, 2021

Attorney's Printed Name: John C. Neiman, Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 1901 6th Ave N., Suite 1700, Birmingham, AL 35203

Phone Number: (205) 254-1228 Fax Number: (205) 254-1999

E-Mail Address: jneiman@maynardcooper.com

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Phone Number: (205) 254-1228 Fax Number: (205) 254-1999

E-Mail Address: jneiman@maynardcooper.com

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STATEMENT OF INTEREST[1]

The Center for Alcohol Policy is submitting this brief in support of the Indiana laws at issue here, and thus in support of the appellees who are defending them—the chairperson of the Indiana Alcohol and Tobacco Commission, the Indiana Governor, the Indiana Attorney General, and the Wine & Spirits Distributors of Indiana.

The Center for Alcohol Policy is a 501(c)(3) entity with a mission to educate policymakers and regulators like the Commission, as well as courts and the public, about the unique considerations that factor into the government's regulation of alcohol. By conducting research and highlighting initiatives that maintain the appropriate state-based regulation of alcohol, the Center promotes safe and responsible consumption, fights underage drinking and drunk driving, and informs key entities and the public about the personal and societal effects of alcohol consumption.

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[1] All parties to this appeal have consented to the filing of this brief. No party's counsel authored this brief or whole or in part, and no person, party or party's counsel contributed money intended to fund the preparation or submission of this brief.

In its efforts, the Center has relied on considerable research about the effectiveness of state laws designed to combat problems associated with alcohol—research that has shown that state laws have played a crucial role, ever since the adoption of the Twenty-first Amendment, in controlling the problems that gave rise to both Prohibition and its repeal. The Indiana laws challenged in this case are among those laws. The State and the Distributors have shown that these laws achieve alcohol-related health-and-safety goals. The Center submits this brief to elaborate on the historical context in which States developed their unique systems of regulation and implemented three-tier systems and laws like the ones at issue here. The concerns that led the States to adopt these systems after Prohibition ended help to explain why these Indiana laws serve legitimate goals under the Twenty-first Amendment.

ARGUMENT

When the country chose to amend the Constitution in 1933 and give individual States near-plenary authority to regulate alcohol within their borders, it was reacting to powerful forces that caused social harm on a national scale. In the pre-Prohibition era, alcohol manufacturers exerted pressure on retailers to sell their products at prices that encouraged over-consumption. Local communities suffered the consequences—poverty, crime, domestic strife, and more—while the manufacturers, often not present in these communities, watched their profits pile up. The American people's frustration with that system eventually led to the Eighteenth Amendment and Prohibition. With the Twenty-first Amendment, the people gave States the authority to create systems that promoted moderation, severed ties between manufacturers and retailers, and promoted the unique interests and values of their local communities.

The laws at issue here are an integral part of Indiana's system. They require retailers that want to sell alcohol to be present in the State and—just as important—that those retailers do so only through an Indiana wholesaler that complies with Indiana's regulatory system. *See* IND. CODE §§ 7.1-5-11-1.5, 7.1-3-15-3, 7.1-3-13-3. The State and Distributors

have persuasively explained why these requirements do not discriminate against interstate commerce. They also have persuasively explained why these requirements serve legitimate public health and safety goals, such that they are justified under the dormant Commerce Clause and the Supreme Court's decision in *Tennessee Wine & Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449 (2019). The history that gave rise to these laws in the immediate wake of Prohibition and the Twenty-first Amendment—which has been a crucial area of study for the Center—bolsters the points the parties have made. If States lacked discretion to order their three-tier systems as Indiana has done, they would be vulnerable to the dangers that initially gave rise to Prohibition, which the framers of the Twenty-first Amendment sought to guard against when alcohol sales resumed in 1933.

I. The historical factors giving rise to the three-tier system justify Indiana's laws

Three historical developments help provide context about why States like Indiana developed systems that require retailers and wholesalers to be present in the State:

(1) the rise of vertical integration in the industry, and the tied-house saloon that accompanied it, before Prohibition and the Eighteenth Amendment's adoption in 1919;

(2) the collapse of nationwide Prohibition between the adoption of the Eighteenth Amendment in 1919 and the adoption of the Twenty-first Amendment in 1933, due to the country's failure to adopt local solutions to this inherently local problem; and

(3) the plan of regulatory action, for the post-Prohibition, pro-temperance era, that governments developed to prevent vertical integration and other problems associated with alcohol in conjunction with the Twenty-first Amendment's adoption in 1933.

The following pages discuss these developments in turn.

A. Vertical integration in the alcohol industry was a substantial cause of the excessive consumption that gave rise to Prohibition in 1919

The three-tier systems States enacted with the adoption of the Twenty-first Amendment in 1933 arose from concerns about vertical integration in the industry—and the undesirable consumption habits it

caused—during the pre-Prohibition era. Ever since the Founding of the United States, alcohol consumption has been a significant social problem. "Between 1780 and 1830, Americans consumed 'more alcohol, on an individual basis, than at any other time in the history of the nation,' with per capita consumption double that of the modern era." *Tenn. Wine*, 139 S. Ct. at 2463 n.6 (quoting RICHARD MENDELSON, FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA 11 (2009)). The century that followed "prompted waves of state regulation" to address the "myriad social problems" associated with alcohol. *Id.* at 2463.

Much of the blame fell on the vertically integrated institution known as the "tied-house" saloon. *See id.* at n.7. These were retail establishments that were economically tied to alcohol manufacturers and sold "exclusively the product of [that] manufacturer." RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 29 (Ctr. for Alcohol Policy 2011) (1933). Manufacturers pressured saloonkeepers to make big profits by selling more alcohol, at more locations, and at prices so low that it "encouraged irresponsible drinking." *Tenn. Wine*, 139 S. Ct. at 2463 n.7 (citing THOMAS R. PEGRAM, BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800–1933, at 95 (1998)). As the State's and Distributors'

expert observed during the proceedings in this case, this market structure "devastated local communities," which suffered the "damaging effects" to the social order from "excess consumption." Doc. 63-2 at 11, Kerr Rept., ¶15.

Making matters worse, while the saloon was tied to the manufacturer, the manufacturer was not tied to local values. *See* FOSDICK & SCOTT, *supra*, at 29. Commentators at the time observed that "[t]he manufacturer knew nothing and cared nothing about the community" in which its saloon operated. *Id.* "He saw none of the abuses, and as a nonresident he was beyond local social influence." *Id.* "All he wanted was increased sales." *Id.* This "system had all the vices of absentee ownership." *Id.*

B. Nationwide Prohibition failed because it did not account for regulatory interests unique to each State

Intemperance and tied-house saloons ultimately led the people to adopt nationwide Prohibition in 1919. The Eighteenth Amendment imposed an outright, national ban on the manufacture, sale, transportation, and importation of alcoholic beverages across the entire country. *See* U.S. CONST. amend. XVIII, §1. But the experiment did not last long, and the

Eighteenth Amendment was repealed in 1933 by the Twenty-first Amendment. *See* U.S. CONST. amend. XXI, §1.

A publication commissioned at that time by John D. Rockefeller Jr.—and, more recently, republished by the Center for Alcohol Policy—provides crucial context about why Prohibition failed and about what the country envisioned as the regulatory plan moving forward. This book serves, in other words, much like a Federalist Paper for the Twenty-first Amendment. The book, *Toward Liquor Control*, is a 1933 publication by Raymond B. Fosdick and Albert L. Scott. *See* FOSDICK & SCOTT, *supra*. It underscored, more than anything else, that the problems American governments had faced in regulating alcohol had stemmed from a failure to account for different needs of different States—and that the Twenty-first Amendment would not only repeal nationwide Prohibition, but also authorize States to develop their own unique regulatory systems to address those inherently local issues in the future.

The book's foreword stresses the complexity and magnitude of a problem that is difficult to conceive of today. In that foreword Rockefeller—businessman and philanthropist, and son of the Standard Oil founder—explained that he "was born a teetotaler" and had stayed that

way all his life. JOHN D. ROCKEFELLER, JR., *Foreword* to TOWARD LIQUOR CONTROL, *supra*, at xiii. He thus held the "earnest conviction that total abstinence is the wisest, best, and safest position for both the individual and society." *Id.* But "the regrettable failure of the Eighteenth Amendment" had persuaded him that "the majority of the people of this country are not yet ready for total abstinence, at least when it is attempted through legal coercion." *Id.* He explained that "[i]n the attempt to bring about total abstinence through prohibition, an evil even greater than intemperance resulted—namely, a nation-wide disregard for law, with all the attendant abuses that followed in its train." *Id.* These rule-of-law concerns had moved Rockefeller from supporting prohibition to favoring "repeal of the Eighteenth Amendment." *Id.*

Building on Rockefeller's argument, Fosdick and Scott explained that the Eighteenth Amendment's "mistake"—and cause of the lawlessness that led to its repeal—had not been the policy choice it embodied of banning alcohol *per se*. The mistake had been the assumption that the country was "a single community in which a uniform policy of liquor control could be enforced." FOSDICK & SCOTT, *supra*, at 6; *see also id.* at 14.

"When the citizens of the United States" adopted the Eighteenth Amendment, "they forgot that this nation is not a social unit with uniform ideas and habits." *Id.* at 6. "They overlooked the fact that in a country as large as this, racially diversified, heterogeneous in most aspects of its life and comprising a patchwork of urban and rural areas, no common rule of conduct in regard to a powerful human appetite could possibly be enforced." *Id.* at 6–7. The divergence between the nationwide rule established by the Eighteenth Amendment and the specific values of particular communities had, in Fosdick and Scott's assessment, destroyed public respect for the rule of law. *Id.* at 5. And that lack of respect for the rule of law was what made it imperative for Prohibition to end.

C. The Twenty-first Amendment's Framers envisioned that each State would develop its own unique regulatory system, reflecting its own values, to prevent vertical integration of the industry and the problems alcohol can cause

While the Eighteenth Amendment's repeal eliminated the rule-of-law problem and Prohibition's failure to account for State-specific interests, *Toward Liquor Control* also explained that the Twenty-first Amendment's aim was emphatically not to end alcohol regulation altogether. Rockefeller, for his part, explained that "with repeal," the problems the

country faced were "far from solved." ROCKEFELLER, *supra*, at xiii. If abstinence could not be achieved through Prohibition, the "next best thing" would be "temperance." *Id.* Without it, he emphasized, "the old evils against which prohibition was invoked" could "easily return." *Id.* The only way to achieve a stable equilibrium between those social ills and the lawlessness that Prohibition had brought would be what Fosdick and Scott called a "fresh trail," *see* FOSDICK & SCOTT, *supra*, at 11, which Rockefeller described as "carefully laid plans of control" by each individual State, *see* ROCKEFELLER, *supra*, at xiii.

Those observations highlighted an important reality about the constitutional amendment the country then "anticipated." FOSDICK & SCOTT, *supra*, at xvii. The Twenty-first Amendment did not wave the white flag on the goals the Eighteenth Amendment had sought to achieve. It instead effectuated a balance between the need to limit alcohol's deleterious effects and the need to acknowledge the limits of law enforcement. As Fosdick and Scott would put it, the Twenty-first Amendment reflected American sentiment "that there is some definite solution for the liquor problem—some method other than bone-dry prohibition—that will allow a sane and moderate use of alcohol to those who desire it, and at the same

time minimize the evils of excess." *Id.* at 10–11. But to ensure that the solution would have a rule-of-law legitimacy that nationwide Prohibition had lacked, the Amendment provided that the solution would be catered to the interests and desires of the citizens in each individual State. So immediately after its first section repealing Prohibition, the new amendment's second section made it a constitutional violation for someone to break any given State's laws regarding "[t]he transportation or importation" of alcohol into that State "for delivery or use therein." U.S. CONST. amend. XXI, §2.

Rockefeller therefore asked Fosdick and Scott to develop a "program of action" for States based on a "study of the practice and experience of other countries" as well as "experience in this country" regulating alcohol. ROCKEFELLER, *supra*, at xiv. That study was embodied in *Toward Liquor Control*, which "became the most important proposal for post-Repeal regulation" because it "articulated commonly accepted ideas and packaged them in a form that demanded respect in a post-Progressive world." Stephen Diamond, *The Repeal Program*, *in* SOCIAL & ECONOMIC CONTROL OF ALCOHOL 100 (Carole L. Jurkiewicz & Murphy J. Painter eds., CRC Press 2008). "Many of Fosdick and Scott's recommendations

for prohibition's repeal have been enacted by state and local governments." Mark R. Daniels, Toward Liquor Control*: A Retrospective*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 230; *accord* R. 63-3 at 12, Erickson Rept., ¶7 (explaining that "all of our states, to one degree or another, relied upon the recommendations in *Toward Liquor Control*"). Courts thus have cited the book as an authoritative guide to, as Justice O'Connor once wrote, "[c]ontemporaneous[]" views of the Twenty-first Amendment's meaning. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 357 (1987) (O'Connor, J., dissenting); *accord Tennessee Wine*, 139 S. Ct. at 2480 (2019) (Gorsuch, J., dissenting) (calling *Toward Liquor Control* "a leading study").

The most crucial teaching of *Toward Liquor Control*—and the one that matters most for the purposes of this case—was that alcohol was a local problem that would require local solutions. Whereas Prohibition had failed because it did not account for the diversity of viewpoints across the nation, Fosdick and Scott envisioned a post-Prohibition world in which each State would tailor its regulatory system to the unique interests of its own citizens. Accordingly, Fosdick and Scott recommended that States pass alcohol laws that reflect "[w]hat" their particular "Community want[s]." FOSDICK & SCOTT, *supra*, at 8. They suggested that States

follow "the principle of 'local option,'" which placed "the determination of how the liquor problem shall be handled as close as possible to the individual and his home." *Id*. Doing so would "place[] behind all the local officials who administer the system the same public opinion that determines the system." *Id*. They emphasized that if "the new system is not rooted in what the people of each state sincerely desire at this moment, it makes no difference how logical and complete it may appear as a statute—it cannot succeed." *Id*. at 98.

The understanding that each State would need to have its own system provides critical insight as to why the Indiana laws at issue here are, to paraphrase what the Supreme Court has said of three-tier systems generally, "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). Given the role that vertical integration played in causing excessive consumption, there was a national consensus that, as President Roosevelt said in announcing the Twenty-first Amendment's adoption, "no State" should "authorize the return of the saloon either in its old form or in some modern guise." Franklin D. Roosevelt, *Proclamation 2065—Repeal of the Eighteenth Amendment* (Dec. 5, 1933). Many States followed

Fosdick and Scott's general recommendation by "interposing a wholesaler level between the supplier and retailer, as the best method of correcting past abuses, establishing an orderly system of distribution and control of alcoholic beverages and preventing the evil of the 'tied house.'" Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 33. But consistent with Fosdick and Scott's view that "this nation is not a social unit with uniform ideas and habits," each State was free to adopt its own, unique means of keeping manufacturers separate from retailers and heading off the problems associated with vertical integration. FOSDICK & SCOTT, *supra*, at 6.

The context of this case provides examples of how the States' individual choices played out. With limited exceptions, Indiana generally makes it illegal for brewers and vintners in any State to "hold, acquire, possess, own, or control, or to have an interest, claim, or title, in or to an establishment, company, or corporation holding or applying for" an Indiana permit to wholesale beer or wine, respectively. *See* IND. CODE § 7.1-5-9-2(a)-(b). Indiana likewise makes it unlawful for a holder of a wine

retailer's permit to be owned or controlled by the holder of a manufacturer's or wholesaler's permit. *See* IND. CODE § 7.1-5-9-13. While allowing brewers and vintners to provide certain forms of "financial assistance" to a wholesaler, Indiana heads off vertical integration by generally prohibiting brewers and vintners from using that assistance "to acquire complete or partial control of the business of the holder of wholesaler's permit." IND. CODE § 7.1-5-9-2(c)(5). Indiana also diminishes the influence a wholesaler can exert over a retailer by limiting, with some exceptions, a wholesaler's ability to sell retailers alcohol on credit and "for anything other than cash." IND. CODE § 7.1-5-10-12. Indiana prohibits some forms of horizontal integration, generally barring any entity from wholesaling beer, liquor, and wine at the same time. *See* IND. CODE § 7.1-3-3-19. Each of these provisions reflects Indiana's judgment about what laws are necessary and workable in light of values and interests particular to what Fosdick and Scott would call the Indiana "[c]ommunity." FOSDICK & SCOTT, *supra*, at 8.

It is no doubt true that other States have made some of the same choices in configuring their own three-tier laws. But state laws vary in important ways, and a State like Indiana cannot be expected to allow

alcohol to be sold within its borders that is subject to a different set of rules. Illinois—the State where Chicago Wine operates—requires retailers to purchase their alcohol exclusively from Illinois-licensed wholesalers, who will be subject to regulation under Illinois law, not Indiana law. *See Lebamoff Enterprises, Inc. v. Rauner*, 909 F.3d 847, 850 (7th Cir. 2018); 235 ILL. COMP. STAT. ANN. 5/6-2 & 5/6-29.1(b). And Illinois' regulation of vertical integration within its three-tier system is of course not identical to Indiana's. To take but one example, Illinois law allows beer wholesalers to own up to "5% of the outstanding shares of a manufacturer of beer whose shares are publicly traded." 235 ILL. COMP. STAT. ANN. 5/6-4.5. The Twenty-first Amendment gives States freedom to head off vertical integration within their borders in different ways—and to create their own, uniquely tailored three-tier systems that best meet the needs of their own citizens. But that is reason, by itself, to justify state laws requiring alcohol sold to consumers in that particular State to go through that State's own three-tier system.

Indiana, in other words, has an imperative interest in ensuring that the retailers that sell alcohol to its citizens are free from vertical integration in the manner Indiana—rather than some other State—sees fit. The

only way for Indiana to be certain that this will happen is to require the alcohol to have come through Indiana retailers and wholesalers that are subject to Indiana's three-tier system—including its restrictions on credit sales, financial assistance, and other provisions. As the Sixth Circuit suggested, Indiana cannot impose those requirements on wholesalers in States like Illinois because "[t]he extraterritoriality doctrine, also rooted in the dormant Commerce Clause, bars state laws that have the 'practical effect' of controlling commerce outside their borders." *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863, 872 (6th Cir. 2020) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). So although Indiana "may regulate the business relationship and prices between *in-state* wholesalers and retailers, it may not do the same for *out-of-state* wholesalers and retailers." *Id.* at 872–73. That is why, as the Supreme Court has explained, "[t]he Twenty-first Amendment empowers [States] to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Granholm*, 544 U.S. at 489 (alteration adopted) (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)).

Those principles, of their own accord, render laws like the ones at issue constitutional. The alcohol that is sold by retailers from other

States generally is not—and, often by law cannot be—alcohol that was purchased from Indiana wholesalers, through the Indiana three-tier system. It is instead alcohol that the out-of-state retailers purchased from wholesalers in their own States, through the three-tier systems that operate there. Because the Twenty-first Amendment was premised on the notion that "this nation is not a social unit with uniform ideas and habits," the Constitution does not require Indiana to assume that those systems and their governments protect the same interests, with the same degree of force, as its own three-tier system does. FOSDICK & SCOTT, *supra*, at 6. That is a legitimate reason, under the Twenty-first Amendment, for Indiana to decline to allow those retailers to sell alcohol within its borders.

II. The role in-state wholesalers have come to play in promoting health and safety independently justifies Indiana's law

While Fosdick and Scott originally proposed separating the distribution tiers to prevent vertical integration, they also recognized that "[o]ur legal prescriptions and formulas must be living conceptions, capa-

ble of growing as we grow." FOSDICK & SCOTT, *supra*, at 98. Correspondingly, the three-tier system has developed, in the time since the Twenty-first Amendment's adoption, into an effective tool for promoting health and public safety in ways that go above and beyond the vertical-integration concern.

This product-safety function of the three-tier system is rightly emphasized by the State and Distributors in their submission to this Court. Just as their briefs are right to say that requiring retailers to have an in-state presence promotes health and public safety—for a number of reasons relating to the need for regulators to be able to physically enter a retailer's premises, *see* Appellees' Br. 35–37—they are also right to suggest that requiring retailers to purchase alcohol from in-state wholesalers promotes those goals. The Center would add a few words to explain why, in its experience, States have been particularly successful in using in-state wholesalers to achieve those health and public safety goals—and why, as the State's and Distributors' expert stated, "[b]y requiring retailers who sell alcohol to Indiana consumers to purchase their products from licensed in-state wholesalers, Indiana is able to protect Indiana consumers from products that are unsafe." R. 63-2 at 16, Kerr Rept., ¶45.

In the years since Fosdick and Scott first proposed plans for state control of alcohol distribution, it has become apparent that focusing certain regulatory efforts on the wholesale tier can make for efficient enforcement. That is so because the three-tier system, by its nature, requires alcohol to be funneled through in-state distributors and operates like an "hourglass." *Family Winemakers v. Jenkins*, 592 F.3d 1, 5 (1st Cir. 2010). On one end is a relatively large number of manufacturers, who are situated across the globe. On the other end are numerous retailers. In between—at what one court has called the "constriction point"—have been a relatively small number of wholesalers in each State. *Family Winemakers*, 592 F.3d at 5.

That structure can make for especially smart regulation when policymakers and regulators concentrate their efforts on that relatively small wholesale tier. With very limited exceptions, all the alcohol distributed in a State generally must pass through those wholesalers on its way from the manufacturers to retailers, so States can effectively regulate all the "sand" in this "hourglass" by focusing on that narrower middle part. States thus typically require wholesalers to have in-state premises and limit their number. *See, e.g.*, IND. CODE §§ 7.1-3-3-3, 7.1-3-8-2, 7.1-3-13-

2.5, 7.1-3-22-2, 7.1-5-11-1.5. States, in turn, regulate this tier extensively. Just as much as retailers, Indiana's wholesalers must consent, as a condition of seeking a wholesalers' permit, "to the entrance, inspection, and search by an enforcement officer, without a warrant or other process, of his licensed premises and vehicles to determine whether he is complying with" pertinent laws. IND. CODE § 7.1-3-1-6. Many States make wholesalers responsible for tracking all products and effectuating recalls when needed. Wholesalers can be subject to audit and required to retain records of their sales. By monitoring and imposing reporting requirements on the relatively few entities licensed to serve as wholesalers within their States, regulators can efficiently and effectively monitor and police the activities of all three tiers.

The hourglass structure also provides critical tax-collection advantages—advantages that are crucial not only from the perspective of raising revenues, but also for promoting health and public safety. Indiana, like other States, generally requires wholesalers to collect and pay the excise tax due on alcohol distributed in the State. *See* R.63-1 at 5–6, Stewart Decl. ¶10(c); IND. CODE §§ 7.1-4-2-2, 7.1-4-3-2, 7.1-4-4-3. While cooperative out-of-state retailers theoretically could pay the tax in the

event that they ship the alcohol across state lines, a State's ability to collect and enforce taxes against uncooperative out-of-state entities is limited. The problem is compounded by the reality that in some States, taxes are collected at the local level rather than the State level. *See* Wash. Nat'l Tax KPMG LLP, *An Analysis of the Structure and Administration of State and Local Taxes Imposed on the Distribution and Sale of Beer* v–vi (2009), http://www.nbwa.org/sites/default/files/NBWA_Report_2009.pdf.

This problem is as much about public health as it is about revenue. As Fosdick and Scott explained and Indiana has shown in this case, taxation plays a critical role in "limiting consumption" by keeping prices at a level that encourages moderation. *See* FOSDICK & SCOTT, *supra*, at 82. If out-of-state retailers avoid taxes and thereby sell their products more cheaply, then the disincentives to overconsumption will disappear. Requiring all alcohol to run through the in-state wholesalers at the middle of the hourglass allows States to more effectively use taxation to this end.

But the hourglass's advantages would disappear if the appellees in this case succeeded in their challenge to these Indiana laws. The State and Distributors have shown that, as a practical matter, it would be impossible for Indiana to directly regulate all the out-of-state retailers who

might attempt to ship wine into the State. *See* Appellees Br. 36–37; R.63-2 at 16, Kerr Rept. ¶41. That problem would be compounded because those retailers would be shipping alcohol that came from out-of-state wholesalers—and thus would not have been subject to the various health-and-public-safety regulations on the wholesale tier that Indiana believes to be essential.

Even more so than restrictions on vertical integration, health-and-safety regulations will vary from State to State. Those regulations matter a great deal because multiple health-and-safety concerns associated with alcohol persist—sales to minors, sales to intoxicated persons, and sales of fake alcohol and other products not allowed within a State. *See* R.63-2 at 16–21, Kerr Rept., ¶¶45–47, 61–69; R. 63-4 at 8–9, 12–13, Eriksen Rept., ¶¶3, 7. So Indiana's interest in ensuring that the alcohol sold within its borders be subjected to *those* health-and-safety regulations, and thus ultimately comes from wholesalers that were subject to those regulations, stands as an independent health-and-safety justification for Indiana's choice to prohibit shipments of wine to its citizens from retailers who are not present in the State.

The "predominant effect" of Indiana's laws—and of numerous other States' three-tier laws that are catered to the needs and desires of those States' citizens related to alcohol—is thus not economic "protectionism." *Tenn. Wine*, 139 S. Ct. at 2474. It is instead the same fundamental goal that Fosdick and Scott sought to promote—the "protection" of the "public health and safety" of each individual State's citizens, through a uniquely drawn system of regulation that is designed to have legitimacy in the unique community in which it operates. *Id.* These laws fall within the heartland of state alcohol regulations that the Twenty-first Amendment renders constitutional.

CONCLUSION

This Court should affirm the District Court's judgment.

Respectfully submitted,

s/ John C. Neiman, Jr.

Attorney for Amici Curiae

OF COUNSEL:

John C. Neiman, Jr.
MAYNARD COOPER & GALE P.C.
1901 Sixth Ave. N, Ste. 2400
Birmingham, Alabama 35203
(205) 254-1000
jneiman@maynardcooper.com

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable type-volume limitations under the Federal Rules of Appellate Procedure and the Circuit Rules. According to the word count in Microsoft Word 2010, the relevant parts of this brief contain 4,783 words.

This brief complies with the applicable type-style requirements limitation under the Rules. I prepared this brief in a proportionally spaced Century Schoolbook font sized 14 point or, for headings, with a larger point size.

s/ John C. Neiman, Jr.
OF COUNSEL