In the United States Court of Appeals
for the Fourth Circuit

No. 21-1906

B-21 WINES, INC., MIKE RASH, JUSTIN HAMMER,
LILA RASH and BOB KUNKLE,
Plaintiffs - Appellants
vs.
A.D. GUY, JR., Chair of the North Carolina Alcoholic Beverage Control Commission, in his official capacity
Defendant - Appellee

On appeal from the United States District Court for the Western District of North Carolina, No. 3:20-cv-00099,
Hon. Frank D. Whitney, District Judge

Brief of All Appellants

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Disclosure Statement

No: 21-1906 Caption: B-21 Wines, Inc., et al. v. Guy

Pursuant to FRAP 26.1 and Local Rule 26.1, B-21 Wines, Inc., an appellant, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?
__ Yes _X_ No

2. Does party have any parent corporations? __ Yes _X_ No

3. Is 10% or more of the stock of the party owned by a publicly held corporation or other publicly held entity? __ Yes _X_ No

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?
__ Yes _X_ No

5. Is party a trade association? __ Yes _X_ No

6. Does this case arise out of a bankruptcy proceeding? __ Yes _X_ No

7. Is this a criminal case in which there was an organizational victim?
__ Yes _X_ No

Signature: s/ James A. Tanford Date: September 29, 2021

Counsel for all Appellants

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Jurisdictional Statement

1. District court jurisdiction. Plaintiffs-Appellants brought this action in the Western District of North Carolina pursuant to 42 U.S.C. § 1983, alleging that certain North Carolina statutes which prohibit out-of-state retailers from shipping wine to consumers, but allow in-state retailers to do so, discriminate against interstate commerce in violation of the Commerce Clause, U.S. Const. art. I, § 8. They sued the Chair of the North Carolina Alcoholic Beverage Control Commission, in his official capacity, seeking declaratory and injunctive relief. The district court had federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), which confer original jurisdiction on district courts to hear suits alleging the violation of rights and privileges under the U.S. Constitution.

2. Court of appeals jurisdiction. The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291. This is an appeal from a final judgment disposing of all claims and terminating the case entered on July 9, 2021. Plaintiffs filed a timely notice of appeal on July 30, 2021.

Statement of the Issue

Plaintiffs challenge the constitutionality of North Carolina's law prohibiting out-of-state retailers from shipping wine directly to consumers but allowing in-state retailers to do so. They contend that this ban violates the Commerce Clause because it discriminates against out-of-state interests, protects local retailers from competition, and denies residents access to products sold in other states. The ban cannot be justified under the Twenty-first Amendment because reasonable nondiscriminatory alternatives are available. The State already allows out-of-state wineries and in-state retailers to ship to consumers if they comply with licensing and reporting regulations, and could regulate shipments by out-of-state retailers in the same way. The district court upheld the law under the Twenty-first Amendment, and the Plaintiffs raise one issue on appeal:

Considering both the Commerce Clause and the Twenty-first Amendment, may North Carolina prohibit out-of-state retailers from shipping wine directly to consumers when it allows in-state retailers to do so?

Statement of the Case

A. The statutes at issue

Plaintiffs challenge two statutory provisions. N.C. GEN. STAT. § 18B-102.1 makes it a felony "for any person who is an out-of-state retailer ... to ship or cause to be shipped any alcoholic beverage directly to any North Carolina resident." N.C. GEN. STAT. § 18B-109 makes it unlawful for a resident to "have any alcoholic beverage mailed or shipped to him from outside this State."[1]

By contrast, N.C. GEN. STAT. § 18B-1001(4) allows an in-state retailer "to ship unfortified wine in closed containers to individual purchasers inside and outside the State," even if the wine was bought online and the customer never set foot in the store. N.C. GEN. STAT. § 18B-1001.1. allows in-state and out-of-state wineries to ship wine to consumers.

Five other statutes are relevant. N.C. GEN. STAT. § 18B-102(a) makes it unlawful to "transport, import, [or] deliver... any alcoholic beverages except as authorized by the ABC law," and the law does not authorize direct shipping by out-of-state retailers. Only retailers with a permit

[1] Violation is a class 1 misdemeanor. N.C. GEN. STAT. § 18B-102.

may ship wine to consumers, N.C. GEN. STAT. § 18B-304, and no permit is available for out-of-state retailers. Retailer permits will be issued only to state residents, N.C. GEN. STAT. § 18B-900(a)(2), and only if they purchase wine from an in-state wholesaler. N.C. GEN. STAT. § 18B-1006(h). Wine shipper permits will be issued only to wineries. N.C. GEN. STAT. §1001.1.

Relevant portions of these statutes are reprinted in the addendum, pp. 54-56, *infra*.

B. Proceedings below

On February 18, 2020, a Florida wine retailer and three North Carolina consumers filed a lawsuit in the Western District of North Carolina challenging the constitutionality of a state law prohibiting out-of-state retailers from shipping wine to consumers. They contend that the law discriminates against interstate commerce because in-state retailers are allowed to do so, and therefore violates the dormant Commerce Clause, U.S. CONST., Art. I, § 8,[2] and exceeds the state's

[2] "The Congress shall have power ... To regulate Commerce ... among the several States."

authority under § 2 of the Twenty-first Amendment.[3] They sued the chairperson of the N.C. Alcoholic Beverage Control Commission and the N.C. Attorney General, in their official capacities, for declaratory and injunctive relief. JA 006 (Complaint).

On April 27, 2020, the State moved to dismiss the complaint for lack of standing because the Plaintiffs' injuries were speculative and not redressable and for failure to state a claim because the Twenty-first Amendment immunized alcohol regulations from Commerce Clause scrutiny. Doc. 18. The district court denied the motion. JA 027 (Order).

The State also moved to dismiss the Attorney-General because he has no active role in enforcing the ABC laws, which the court granted. JA 035 (Order). Defendant Guy then filed an answer on August 28, 2020, JA 037, denying all the material allegations.

On April 28, 2021, the parties filed cross-motions for summary judgment accompanied by a total of 78 exhibits. Oral argument was held on June 17, 2021, and the district court issued its ruling on July 9, 2021. The court granted summary judgment to the State, disposing of

[3] "The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST., Amend. XXI, § 2.

all issues in the case, JA 014, and final judgment was entered. JA 026. The Plaintiffs filed a timely notice of appeal on July 30, 2021. JA 047.

C. Statement of facts

1. B-21 Wines, Inc. is a licensed wine retailer in Florida that sells wine online. It has received requests from North Carolina residents to ship wine to them but cannot do because North Carolina law prohibits such transactions. JA 049 (Hammer Decl. ¶ 4); JA 060-61 (Def. Admissions 1-2). It has therefore lost sales and profits. JA 049-050 (Hammer Decl. ¶¶ 4-6). It would ship wine directly to consumers in North Carolina and remit the required taxes if the state would permit it to do so. *Id*. ¶¶ 7-8.

2. Michael Rash lives in Charlotte, North Carolina. He is a wine consumer. He has tried to buy rare and unusual wines for clients that he can only find on the internet from out-of-state sources but cannot have shipped to North Carolina. He has also tried to buy wine from two California retailers and have it shipped home but was told that they could not ship to North Carolina. He intends to buy wine from out-of-state retailers and have it delivered to himself and clients if it becomes lawful to do so. JA 052-053 (Rash Decl. ¶¶ 2-6).

3. Robert Kunkle lives in Charlotte, North Carolina. He is a wine consumer who has been frustrated by the state law banning direct shipping from out-of-state retailers and intends to purchase wine this way if it becomes lawful. There are wines he would like to buy that are for sale on the internet but not available in North Carolina. JA 054-055 (Kunkle Decl. ¶¶ 1-6).

4. In order to ship wine directly to consumers, B-21 Wines must have a permit from the North Carolina ABC, but no such permit exists. JA 061 (Def. Admission 2), JA 064–65 (Def. Interrog. 2). Retail permits are issued only to businesses with physical premises in the state. JA 061 (Def. Admission 5), JA 064-070 (Def. Interrogs. 2 & 9). Wine shipper permits are issued to out-of-state entities only if they are wineries. N.C. GEN. STAT. §18B-1001.1(a).

5. The ban on the direct shipment of wine from out-of-state retailers deprives North Carolina consumers of access to a majority of wines sold in the U.S. From 2017-20, the federal Tax and Trade Bureau approved 456,561 wines for sale in the United States. JA 089 (Wark Report ¶ 10). North Carolina has approved 89,365 wines for sale in the state. JA 079 (Def. Interrog. 20). That is approximately 20% of the total wines

available. The number of wines actually available locally is much smaller. Even the biggest wine stores carry only about 3000-10,000 wines, which is less than 3% of the wines sold in the United States. JA 092 (Wark Report ¶ 24). All retailers in North Carolina obtain their wines from the same state-approved wholesalers so they sell mostly the same products, the bulk of which are recent vintages of mass-produced wines such as Barefoot, Yellowtail, Woodbridge, Black Box, Kendall-Jackson, Chateau Ste. Michelle, Apothic and Clos du Bois. *Id.* at ¶ 25.

6. Rare and unusual wines desirable to wine collectors usually can only be purchased from a few specialty wine retailers in other states that can obtain them, verify their provenance, and store them in special refrigeration units. JA 100 (Messina Aff. ¶¶ 5, 7), JA 102 (Cordes Aff. ¶¶ 3-4), JA 106 (Arger Aff. ¶¶ 5, 7, 9), JA 108 (Gralla Aff. ¶ 12), JA 093 (Wark Report ¶30).

7. It is not just rare and unusual wines that are unavailable in North Carolina.

a. Wine Spectator is the leading consumer-oriented wine magazine, and its annual Top 100 lists are especially influential. JA 090 (Wark Report ¶ 17). Of the 100 wines recommended in its 2020

Top Wine Values of the Year, JA 122-131, thirty-four are not available in North Carolina but could be purchased from out-of-state sellers. JA 133-136 (Tanford Decl. ¶¶ 11-43).

b. This spring, Wine Enthusiast and the New York Times gave favorable reviews to twenty-four Greek wines. JA 137-145. Fifteen are not available in North Carolina but could be shipped from out-of-state retailers. JA 046-047 (Tanford Supp. Decl.¶¶ 2-16).

c. Hall-of-fame pitcher Tom Seaver's death was reported on Fox 46 news in Charlotte, NC, on August 30, 2020. JA 110. Fans seeking to buy a commemorative bottle of wine from his vineyard are out of luck. His wine is not distributed in North Carolina, JA 132 (Tanford decl. ¶ 5), although it is available from out-of-state sellers. JA 112 (City Wine webpage).

d. Sports stars Drew Bledsoe and Dwayne Wade also produce wine that might be of interest to their fans. JA 113-114. They are not available in North Carolina and can only be purchased from out-of-state sellers. JA 132-133 (Tanford Decl. ¶¶ 5-7).

e. A wine from Whitebarrel Winery won a double gold medal at a competition held in Asheville, NC. JA 115. A resident of Asheville

who attended the event cannot buy any because it is not sold in North Carolina. JA 133 (Tanford decl. ¶ 8). It is available from out-of-state sources. JA 120 (Vintage Cellar listings).

f. Wines from only a few years ago may be unavailable. Robert Kunkle had tried to find a 2016 Bethel Heights Pinot Noir, JA 356-357 (Kunkle depo.), but it was no longer available in North Carolina, JA 251 (Tanford decl. ¶ 2), although later vintages were.[4]

8. North Carolina allows in-state retailers, in-state wineries, and out-of-state wineries to ship wine directly to consumers. JA 062 (Def. Admission 5), JA 064-070 (Def. Interrogs. 2 & 9). Wine shipper permits have been available for wineries since 2003. There are no known incidents in which any direct shipment threatened public health or safety. JA 078 (Def. Interrog. 19). Fifteen states and the District of Columbia allow out-of-state retailers to ship wine directly to consumers. JA 091 (Wark Report ¶¶ 18-19), JA 245-246 (Table). None has experienced any problems. JA 095-096 (Wark Report ¶¶ 42-44), JA 148-161 (Statements of state liquor commissions).

[4] See wine-searcher.com, search for Bethel Heights Pinot Noir at North Carolina retail stores (viewed Aug. 20, 2021)

9. There are no known incidents in which a minor has obtained wine from a licensed direct shipper. JA 066-070 (Def. Interrogs. 4 & 8), JA 169 (Maryland report at 8). The evidence shows to the contrary, that in the real world, minors do not use direct shipping of wine as a means to obtain alcoholic beverages, JA 202 (Youth Survey), because they want instant gratification and can easily and cheaply obtain alcohol locally. JA 174, 178-80 (FTC Report at 3, 33-36).

10. There are no known incidents in which a tainted or unsafe bottle of wine was shipped to a consumer, or even that any tainted wine has ever been sold. JA 072-073 (Def. Interrog. 13), JA 097 (Wark Report ¶ 52). All wines sold in sealed bottles at retail stores anywhere in the United States have been approved by the federal Tax and Trade Bureau. JA 097 (Wark Report ¶ 52).

11. Direct shipping does not diminish tax revenue. JA 165-167 (Maryland study). It increases revenue as shippers who previously shipped illegally without paying taxes obtain permits to ship lawfully and remit taxes. JA 185 (FTC Report at 40).

12. There is no evidence, data, or study that shows that the direct shipping of wine to consumers is a significant factor in alcohol-related

public health and safety issues such as traffic accidents, crime, absenteeism, and/or instances of domestic violence. JA 068 (Def. Interrog. 12). To the contrary, government statistics show that direct shipping by retailers is not correlated to higher consumption of wine. JA 188-191 (per capita consumption). It has not increased alcohol-impaired traffic fatalities. JA 192-196 (traffic fatality tables). It has not increased consumption by minors. JA 199 (Report to Congress), JA 200 (CDC Report). It has not caused an increase in STDs, JA 203-205 (CDC tables), teen pregnancies, JA 206-208 (CDC data), or aggravated assault rates, JA 209-214 (FBI reports), all which are correlated to excessive alcohol consumption. JA 290 (Kerr Report ¶ 61).

13. Reasonable non-discriminatory alternatives are available that would effectively regulate direct shipping of wine. Sixteen jurisdictions allow direct shipping by out-of-state retailers and forty-four states (including North Carolina) allow direct shipping by out-of-state wineries. JA 091-092 (Wark Report ¶¶ 20, 26); JA 245-246 (Table). Most use a licensing system that requires a shipper to obtain a permit, limit quantity, consent to jurisdiction, file reports, pay taxes, and verify age on delivery. JA 095 (Wark Rep. ¶¶ 39-41), JA 243 (Model direct

shipping bill). Some combine this with education and resource support. JA 216-242 (Oregon guide). States can have reciprocal enforcement agreements whereby the regulatory agency of the shipper's home state will assist enforcement efforts. JA 176 (FTC Report at 31). They can require shipments to be delivered to an ABC store, JA 051 (Hammer Decl. ¶12) or other regulated location for pick-up. JA 097 (Wark Report ¶ 51). They can require a shipper to use a common carrier licensed, regulated and inspected by state officials. JA 095 (Wark Report ¶ 40).

14. States that allow direct shipping by out-of-state retailers pursuant to a permit have not been overwhelmed by a large numbers of shippers. There are only 500-800 retailers who sell and ship wine outside their own states, and fewer than 100 have typically applied for permits in any given state. JA 096 (Wark Report ¶¶ 47-50). Oregon has allowed retailers to obtain direct shipping permits since 2007, JA 246 (table), and only eighty permits have been issued. JA 096 (Wark Report ¶ 47). Only forty-three have been issued in Nebraska. *Id.*

Summary of Argument

North Carolina prohibits out-of-state retailers from shipping wine to consumers, but allows in-state retailers to do so. This difference in

treatment discriminates against out-of-state retailers, protects in-state wine sellers from competition, and denies North Carolina consumers access to wines sold in other states but not available locally. Each of these effects is a basic violation of the Commerce Clause, so if the product were anything other than alcohol, the prohibition would be struck down without further inquiry. *Granholm v. Heald*, 544 U.S. 460, 487 (2005).

When alcohol is involved, a different inquiry is required because § 2 of the Twenty-first Amendment is also implicated. The Amendment and the Commerce Clause are both "parts of the same Constitution [and] each must be considered in light of the ... issues and interests at stake in any concrete case." *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 275 (1984). However, the Supreme Court has repeatedly ruled that the Amendment did not repeal the Commerce Clause or exempt liquor laws from the nondiscrimination principle. Instead, it gives states the opportunity to show that discrimination is necessary to advance a core concern of § 2 that could not be furthered by nondiscriminatory alternatives. *Granholm v. Heald,* 544 U.S. at 489. Concrete evidence is required and unsupported assertions are insufficient. *Tenn. Wine &*

Spirits Retailers Ass'n v. Thomas, 139 S.Ct. 2449, 2474 (2019).

The plaintiffs have shown that North Carolina's prohibition against direct-to-consumer wine shipments by out-of-state retailers violates the Commerce Clause. It discriminates against out-of-state entities, protects local retailers from competition, and denies consumers access to a vast array of wines available for sale only in other states. The State has presented no concrete evidence that the ban advances a core concern of the Twenty-first Amendment that could not be served by reasonable nondiscriminatory alternatives. North Carolina already uses such an alternative. It allows out-of-state wineries and in-state retailers to ship wine to consumers if they obtain the proper permit, report their sales, remit taxes, and verify age on delivery, and no adverse consequences have occurred. The State has not offered a shred of evidence as to why out-of-state retailers could not similarly be licensed and regulated. In the absence of evidence why direct shipments from out of state must be banned but not those from in-state businesses, "the only [explanation] that comes to mind is protection of local economic interests, which the Commerce Clause will not tolerate." *Beskind v. Easley*, 325 F.3d 506, 512 (4th Cir. 2003).

Standard of Review

The Court of Appeals reviews the district court's grant of summary judgment *de novo*. *Belmora LLC v. Bayer Consumer Care AG,* 987 F.3d 284, 291 (4th Cir. 2021). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). An issue of fact is material if it could affect the outcome of the case under the prevailing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When cross-motions are filed, courts consider each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law. In considering each motion, courts resolve all factual disputes and any competing inferences in the light most favorable to the party opposing that motion. *Belmora LLC v. Bayer Consumer Care AG,* 987 F.3d at 291.

Argument

I. Introduction

North Carolina discriminates against out-of-state wine retailers. It prohibits them from shipping wine to consumers but allows its own retailers to do so. The constitutionality of this differential treatment of in-state and out-of-state interests depends on the interplay between the

Commerce Clause, which prohibits discrimination, and § 2 of the Twenty-first Amendment, which gives states broad authority to regulate the sale of alcoholic beverages. That constitutional balance has been set in three prior cases, all of which agree: a discriminatory state liquor law is unconstitutional unless the State can prove with concrete evidence that it advances an important regulatory interest that could not be furthered by reasonable nondiscriminatory alternatives. *Granholm v. Heald,* 544 U.S. at 489, 492; *Tenn. Wine & Spirits Retailers Ass'n v. Thomas,* 139 S.Ct. at 2474-75; *Beskind v. Easley*, 325 F.3d at 515.

II. Background

Neither the Supreme Court nor this Circuit has ruled on the precise question presented – whether a state may prohibit out-of-state retailers from shipping wine to consumers when it allows in-state retailers to do so. The courts have ruled that states may not prohibit out-of-state wineries from shipping wine to consumers when it allows in-state wineries to do so, *Granholm v. Heald*, 544 U.S. at 493; *Beskind v. Easley,* 325 F.3d at 515-16, and that the nondiscrimination principle applies to laws regulating retailers as well as wineries, *Tenn. Wine,* 139

S.Ct. at 2470-71, but neither court has heard a case specifically about direct shipping by out-of-state retailers. Some background may therefore be helpful.

A. The nondiscrimination principle of the Commerce Clause

The Commerce Clause gives Congress the power to regulate commerce among the several States. U.S. Const., art. I, § 8, cl. 3. It has long been understood that the Clause also has a negative aspect that denies states the power to discriminate against the flow of goods moving in interstate commerce. The so-called "dormant" Commerce Clause is driven by concerns about economic protectionism, *i.e.*, regulatory measures that benefit in-state economic interests by burdening or banning out-of-state competitors. *Tenn. Wine,* 1349 S.Ct at 2459; *Sandlands C & D LLC v. Co. of Horry*, 737 F.3d 45, 51 (4th Cir. 2013). Protectionism is forbidden in all fields of commerce, including the sale of alcoholic beverages. *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 276. Discrimination is a question of effect, not intent. *Tenn. Wine,* 139 S.Ct. at 2474.

In *Granholm v. Heald*, the Supreme Court summarized the non-discrimination principle of the Commerce Clause as follows:

> Time and time gain this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Syst., Inc. v. Dept. of Environmental Quality of Ore.,* 511 U.S. 93, 99 (1994). This rule is essential to the foundations of the Union. ... States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate "reflect[s] a central concern of the Framers that ... in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations ... among the States under the Articles of Confederation." *Hughes v. Oklahoma,* 441 U.S. 322, 325-326(1979) .

544 U.S. at 472-73. The Court noted that discriminatory trade laws "deprive citizens of their right to have access to the markets of other States on equal terms" and risk "generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid." *Id.* at 473. Allowing States to discriminate against out-of-state interests "invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Id.*

Discriminatory state laws are subject to "rigorous" scrutiny. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007). Under this variant of strict scrutiny analysis, the

statute is invalid unless the state demonstrates "both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013).[5]

B. The Twenty-first Amendment

The Twenty-first Amendment gave states greater regulatory authority over alcoholic beverages than they have over other products. Excessive consumption is a threat to public health and safety, and states may have different ideas about how best to minimize the threat. *Tenn. Wine,* 139 S.Ct at 2472-73. However, the Amendment did not repeal the Commerce Clause. *Granholm v. Heald*, 544 U.S. at 487. The Supreme Court "has repeatedly declined to read § 2 as allowing the States to violate the 'nondiscrimination principle.'" *Tenn. Wine,* 139 S.Ct at 2470. State regulation of alcohol remains "limited by the nondiscrimination principle of the Commerce Clause." *Granholm v. Heald,* 544 U.S. at 486-87.

[5]If a law is not discriminatory, courts use the lower-scrutiny balancing test from *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970). See *Sandlands C & D LLC v. Co. of Horry*, 737 F.3d at 51.

In *Tenn. Wine*, the Supreme Court summarized the historical context of § 2. In the 19th century, states enacted a variety of regulations, including licensing requirements, age restrictions, and Sunday-closing laws, to combat excessive drinking. Those laws were generally upheld under the states' inherent police power to protect the health, morals, and safety of their people, but the Court also cautioned that this objective could be pursued only by regulations that do not violate rights secured by the Constitution. *Id.* at 2463-64.

Those rights included the right to engage in interstate commerce, and states' attempts to ban importation of liquor were struck down under the Commerce Clause. The Court held: (1) The Commerce Clause prevented states from discriminating against the citizens and products of other states and giving preferences to in-state interests. (2) Laws regulating the alcohol trade must have a *bona fide* relation to protecting public health, morals or safety. (3) The Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce. (4) Liquor moving in interstate commerce could not be regulated as long as it remained in the original packages and not commingled with domestic property. *Id.* at 2464-65.

This left dry states in a bind. They could ban the production and sale of alcohol within their borders but could not stop citizens from importing liquor from other states. In response, Congress enacted the Wilson Act in 1890 (27 U.S.C. § 121), which provided that liquor became subject to state laws upon arrival, as long as those laws were valid exercises of the police power to protect public health and safety. However, the Act failed to stop mail-order liquor because the Court interpreted "upon arrival" as when it was received by the purchaser, not when it entered the state. *Id.* at 2465-66.

In 1913, Congress tried again to give each State a measure of regulatory authority over the importation of alcohol, by enacting the Webb-Kenyon Act (27 U.S.C. § 122). It was drafted to eliminate the "original package" doctrine that had enabled liquor importers to evade state dry laws. The Act declared that the shipment of alcohol into a state for use therein, "either in the original package or otherwise," in violation of any state law was prohibited. Despite the use of the phrase "any law," the Webb-Kenyon Act did not repeal the limitation in the Wilson Act and the cases interpreting it that states could not enact protectionist measures. It thus protected state liquor laws from

Commerce Clause scrutiny only where a State treated in-state and imported liquor on the same terms. *Id.* at 2466-67.

The Eighteenth Amendment was ratified in 1919, and the manufacture, sale, transportation, and importation of alcoholic beverages were prohibited throughout the country. Prohibition was a disaster, of course, and the Eighteenth Amendment was repealed in 1933 by § 1 of the Twenty-first Amendment. Some states opposed repeal, so in order to garner support, the drafters included § 2, which gave each state the option of banning alcohol if its citizens so chose. It tracked the language of the Webb-Kenyon Act, and with it, the understanding that Webb-Kenyon did not did not permit the states to enact protectionist measures clothed as police-power regulations. *Id.* at 2467-68.

The Supreme Court's earliest interpretations of § 2 were cursory holdings that the Amendment gave states plenary authority to regulate alcohol, including the power to discriminate against out-of-state liquor interests. *See, e.g., State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62 (1936). Subsequent cases, however, hold that § 2 cannot be read so broadly and that state liquor laws must comply with other constitutional provisions. *Tenn. Wine*, 139 S.Ct. at 2468-60, *citing*

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (Free Speech Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig* v. *Boren*, 429 U.S. 190 (1976) (Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Due Process Clause); *Dept. of Rev. v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Import-Export Clause); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331–332 (1964) (federal Commerce Clause power). Nor did § 2 give states authority to restrict the importation of alcohol for protectionist purposes, to favor local liquor interests, to erect barriers to competition, or to discriminate against out-of-state businesses. *Tenn. Wine,* 139 S.Ct at 2469-70, *citing Healy v. Beer Institute*, 491 U.S. 324 (1989); *Bacchus Imports, Ltd. v. Dias,* 468 U.S. at 276.

The Court concludes that the history of § 2 establishes that it gives the states broad power to regulate alcohol importation and distribution within its borders, but not to discriminate against out-of-state interests. A state may require that alcohol be distributed through a three-tier system that separates producers, wholesalers, and retailers to prevent market domination by a few large companies, but does not "sanction[]

every discriminatory feature that a State may incorporate into its three-tiered scheme." Each provision must be judged individually based on its own features. *Tenn. Wine*, 139 S.Ct. at 2470-72.

C. Controlling Supreme Court cases

In 2005, the Supreme Court decided *Granholm v. Heald*. It is the Court's only case to deal directly with interstate shipments of wine. In *Granholm*, the Court reaffirmed that § 2 of the Twenty-first Amendment did not give states the power to discriminate against out-of-state liquor interests. The Commerce Clause and the Twenty-first Amendment are parts of the same Constitution and neither overrules the other. The Court held that if a state liquor law discriminated against out-of-state entities, it was unconstitutional unless the state could prove with concrete evidence that the law advanced a non-protectionist regulatory purpose that could not be served by reasonable nondiscriminatory alternatives. 544 U.S. at 489.

The Court then struck down state laws that allowed in-state wineries to ship directly to consumers but prohibited out-of-state wineries from doing so. The different treatment discriminated against out-of-state entities, triggering rigorous scrutiny, and the states had not proved that

the ban on interstate shipping or the requirement that shippers have physical premises in the state advanced any important interest that could not be served by an obvious alternative – licensing and regulation, the method by which all other aspects of the distribution and sale of alcohol are regulated. 544 U.S. at 492.

Because *Granholm* involved wineries, the circuits split on whether the nondiscrimination principle and the rigorous-scrutiny standard applied to laws regulating direct shipping by retailers. Some held that they did. *E.g.*, *Lebamoff Enterp., Inc. v. Rauner,* 909 F.3d 847, 854 (7th Cir. 2018) (all "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause"). Others held that they did not. *E.g., Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191-92 (2d Cir. 2009).

The Supreme Court therefore granted *certiorari* in *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, to resolve "the disagreement among the Courts of Appeals about how to reconcile our modern Twenty-first Amendment and dormant Commerce Clause precedents." 139 S.Ct. at 2459. It held that the nondiscrimination principle set out in *Granholm v. Heald* in the context of wine producers also applied to state liquor

laws regulating retailers, because "[t]here is no sound basis for [a] distinction." *Id.* at 2471. The Court then applied the same rigorous scrutiny it had used in *Granholm* to a Tennessee law limiting retail licenses to residents only and struck it down because the State had produced no concrete evidence that it advanced a legitimate public health purpose that could not be served by nondiscriminatory alternatives. *Id.* at 2474-75.

D. Fourth Circuit cases

The leading case in this Circuit is *Beskind v. Easley,* 325 F.3d 506 (4th Cir. 2003), which is consistent with *Granholm* and *Tenn. Wine*. It held that the nondiscrimination principle of the Commerce Clause applies to alcoholic beverage laws, and it struck down a law prohibiting out-of-state wineries from shipping wine to consumers when in-state wineries were allowed to do so.

It set the following standard of review: The court "determine[s] first whether the ... regulation violates the Commerce Clause without consideration of the Twenty-first Amendment." 325 F.3d at 513-14. A violation is established if the law discriminates against out-of-state interests directly or in practical effect. *Id.* at 514. A discriminatory

scheme "must be invalidated unless [the State] can show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 515 (citations omitted). The State must prove "why imposing the same restrictions on [out-of-state] wineries that it imposes on [in-state] wineries would not be a reasonable nondiscriminatory alternative." *Id.* at 516. Without such proof, "the only [explanation] that comes to mind is protection of local economic interests, which the Commerce Clause will not tolerate." *Id.* at 511-12.

There is one other Fourth Circuit case worth mentioning: *Brooks v. Vassar,* 462 F.3d 341 (4th Cir. 2006). It was not concerned with direct shipping but with the constitutionality of a statute restricting personal importation by residents. The panel reiterated the basic principle that a discriminatory liquor law can pass constitutional muster only if the State proves with concrete evidence that the restriction advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives, *id.* at 351-52 (calling this an "exacting standard"), but did not reach the merits. The statute had been rendered moot by legislative changes. *Id.* at 345. *Brooks* is best known for Judge

Niemeyer's passionate defense of the three-tier system and his view that states had the right to discriminate against out-of-state retailers because the Supreme Court had said in *dictum* that the three-tier system was unquestionably legitimate. *Id.* at 352. Neither of the other judges on the panel joined in this section of the opinion, *id.* at 361, which has in any event been nullified by *Tenn. Wine's* clear holding that the nondiscrimination principle does in fact apply to laws regulating retailers. 139 S.Ct at 2470-71.

E. Recent cases from other circuits

There have been four recent cases decided in other circuits involving laws prohibiting direct-to-consumer wine shipping by out-of-state retailers. They have gone in different directions. Two are consistent with *Granholm* and *Beskind* and hold that the nondiscrimination principle and rigorous scrutiny standard apply to all state liquor laws, including laws regulating direct shipping by retailers. Discrimination is unconstitutional unless the State proves with concrete evidence that the ban advances an important Twenty-first Amendment interest that could not be served by reasonable nondiscriminatory alternatives. *Lebamoff Enterp., Inc. v. Rauner,* 909 F.3d at 854-56; *Byrd v. Tenn.*

Wine & Spirits Retailers Ass'n, 883 F.3d 608, (6th Cir. 2018), *aff'd* 139 S.Ct. 2449 (2019).

Two panels have inexplicably refused to apply the nondiscrimination principle and rigorous scrutiny standard to state laws banning out-of-state retailers from shipping wine to consumers. They have upheld discriminatory laws that reserved shipping privileges to in-state retailers only despite *Granholm* and *Tenn. Wine.* One did so on the narrow ground that prior circuit precedent made this kind of law immune from Commerce Clause scrutiny, which controlled its decision until clearly overruled by the Supreme Court. *Sarasota Wine Market, LLC v. Schmitt,* 987 F.3d 1171, 1181-82 (8th Cir. 2021). It is irrelevant outside the Eighth Circuit.

Lebamoff Enterp., Inc. v. Whitmer, 956 F.3d 863 (6th Cir. 2020) deserves somewhat more attention because this is the case that misled the District Court, which decided to follow it rather than precedent from this circuit and the Supreme Court. See JA 022-023 (opinion). *Whitmer* upheld a Michigan law similar to North Carolina's that prohibited out-of-state retailers from selling and shipping wine to consumers. It rejected every principle announced in *Beskind*, *Granholm* and *Tenn.*

Wine. It said that the Twenty-first Amendment alone controlled the outcome so the nondiscrimination principle of the Commerce Clause did not apply. It explicitly declined to apply rigorous scrutiny to the State's purported justification, and did not discuss whether there were nondiscriminatory alternatives. 956 F.3d at 869. It then criticized the Supreme Court for even reviewing state liquor laws because "the Twenty-first Amendment leaves these considerations to the people of Michigan, not federal judges," 956 F.3d at 875.[6] The *Whitmer* decision has been widely criticized as inconsistent with *Granholm* and *Tenn. Wine. See, e.g.,* McDermott, Will & Emery, *Examining Lebamoff Enterprises v. Whitmer*, JDSUPRA (May 28, 2020).[7]

F. The District Court made fundamental errors of law

The District Court upheld North Carolina's ban on direct shipping, but Judge Whitney's opinion rests on four fundamental errors of law.

First, the Court did not apply the rigorous scrutiny required by the

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[6] Judge Sutton authored the *Whitmer* opinion. It is virtually identical to his previous opinion in *Byrd v. Tenn. Wine & Spirits Retailers Ass'n,* 883 F.3d 608, 628-36 (6th Cir. 2018) that state liquor laws are immune from the Commerce Clause. The Supreme Court rejected his opinion in *Tenn. Wine*., which may partly explain his criticism of the Court.

[7] https://www.jdsupra. com/legalnews/examining-lebamoff-enterprises-v-whitmer-86470/ (viewed July 13, 2021).

Supreme Court and this circuit, under which a discriminatory state liquor law can be upheld only if the State proves it advances an important purpose that could not be served by nondiscriminatory alternatives. *Granholm v. Heald,* 544 U.S. at 490-92; *Tenn. Wine,* 139 S.Ct. at 2474; *Beskind v. Easley,* 325 F.3d at 515. The opinion contains no analysis of whether the ban actually advances any identifiable purpose and no discussion whatsoever of nondiscriminatory alternatives such as the direct-shipper licensing system the State already uses to regulate shipping by out-of-state wineries, N.C. GEN. STAT. § 1001.1.[8] Instead, Judge Whitney applied a discredited minimal-scrutiny standard from a Sixth Circuit case under which a discriminatory law is completely shielded by the Twenty-first Amendment if it is an "essential element" of a state's three-tier system. *Lebamoff Enterp. v. Whitmer*, 956 F.3d at 867-72. That standard has been rejected by the Supreme Court and this circuit,[9] and District Courts are not free to ignore the

[8] The Supreme Court has held that evenhanded licensing requirements are a reasonable nondiscriminatory alternative. *Granholm v. Heald*, 544 U.S. at 492; *Tenn. Wine,* 139 S.Ct. at 2475.

[9] *Tenn. Wine*, 139 S.Ct at 2471-72 (amendment does not sanction discriminatory features of a three-tiered scheme). *Accord Granholm v. Heald,* 544 U.S. at 488; *Beskind v. Easley*, 325 F.3d at 514-15..

Supreme Court or decide for themselves that a recent circuit precedent is no longer good law. *See Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331, 337 n7 (4th Cir. 1996).

Second, the District Court ignored the requirement that the State must prove its purported justification with "concrete evidence." *Granholm v. Heald*, 544 U.S. at 490; *Tenn. Wine,* 139 S.Ct at 2474. The parties introduced more than 70 exhibits totaling hundreds of pages but the opinion makes no reference to any of the evidence and contains no findings of fact. The only "fact" upon which the Court based its decision – that North Carolina has a three-tier system for distributing wine, JA 17-18, 21 – is patently false. Wine producers may sell their wine directly to consumers and do not have to go through separate wholesaler and retailer tiers. N.C. GEN. STAT. § 1001.1, 1001.2.[10] Instead of basing its opinion on the facts of this case, the Court adopted the factual conclusions of the Sixth Circuit in *Lebamoff Enterpr. v. Whitmer*, which were, of course, based on a different record.

[10] Ironically, the Court questioned why the parties did not focus on the three-tier system, JA 22 n4, failing to realize that the state has no such system for wine.

Third, the District Court's interpretation of *Tennessee Wine* is, frankly, backwards. The Court justified not applying *Granholm* and *Beskind's* rigorous-scrutiny standard because those cases concerned wineries and there are "fundamental differences between producers and retailers." JA 023.[11] It then makes the bizarre claim that *Tennessee Wine* confirmed this distinction, when in fact it held the exact opposite – that the nondiscrimination principle *does apply* to laws regulating retailers as well as wineries because "[t]here is no sound basis for [a] distinction." *Tenn. Wine*, 139 S.Ct. at 2471.

Fourth, the Court bases its decision in part on the one clearly prohibited factor: economic protection of in-state businesses. The Court upheld the ban because out-of-state retailers might sell their wine to consumers at lower prices, JA 023, putting in-state retailers at "a competitive price disadvantage." JA 024. The one point upon which all precedents agree is that the Twenty-first Amendment does not permit economic protectionism.

[11] The opinion cited scattered older cases from other circuits, and the opinion of one judge in *Brooks v. Vassar,* 462 F.3d at 352, all of which predated and had been superseded by *Tenn. Wine*.

III. North Carolina's ban in wine shipping by out-of-state wine retailers violates the Commerce Clause and is not saved by the Twenty-first Amendment.

A. Burdens of Proof

Plaintiffs have the initial burden to establish that the ban on direct wine shipments discriminates against out-of-state economic interests. The burden then shifts to the State to prove that the ban advances a legitimate non-protectionist purpose that cannot adequately be served by reasonable nondiscriminatory alternatives. *Tenn. Wine*, 139 S.Ct. at 2474, *Granholm v. Heald*, 544 U.S. at 489; *Beskind v. Easley*, 325 F.3d at 515. To carry that burden, the party must produce "concrete evidence." *Granholm v. Heald*, 544 U.S. at 492. The plaintiffs have done so; the State has not. It has provided only assertions and speculation, which are not enough. *Tenn. Wine*, 139 S.Ct at 2474.

B. The ban violates the Commerce Clause

The court "determine[s] first whether the ... regulation violates the Commerce Clause without consideration of the Twenty-first Amendment." *Beskind v. Easley,* 325 F.3d at 513-14. North Carolina's direct shipping violates four Commerce Clause principles: it discriminates against out-of-state retailers, imposes a physical-presence requirement,

requires local processing of goods, and denies consumers access to the markets of other states.

1. Banning direct shipping by out-of-state retailers but allowing in-state retailers to do so violates the nondiscrimination principle

The Commerce Clause prohibits states from discriminating against out-of-state business interests and protecting the economic interests of local business by erecting barriers to competition." *Granholm v. Heald,* 544 U.S. at 472; *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 276. Laws that discriminate against interstate commerce face a "virtually *per se* rule of invalidity." *Beskind v. Easley*, 325 F.3d at 515.

Discrimination is defined as "mandat[ing] differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald,* 544 U.S. at 472. North Carolina clearly treats in-state and out-of-state retailers differently. It gives in-state retailers the privilege to ship wine to consumers' homes. N.C. GEN. STAT. § 18B-304. It denies that privilege to out-of-state retailers – indeed, it makes it a felony to do so. N.C. GEN. STAT. § 18B-102.1. There can be no question that the ability to offer direct shipping is a major competitive advantage, especially during the pandemic.

A state law that is neutral on its face violates the nondiscrimination principle "when its effect is to favor in-state economic interests over out-of-state interests." *Granholm v. HeaId*, 544 U.S. at 487; *Beskind v. Easley*, 325 F.3d at 514-15. Discrimination *de jure* and *de facto* are both unconstitutional. Thus, not only is the Commerce Clause violated directly by N.C. GEN. STAT. § 18B-102.1, it is also violated by the combined effect of five statutes that are facially neutral. N.C. GEN. STAT. § 18B-102(a) makes it unlawful to "transport, import, [or] deliver... any alcoholic beverages except as authorized by the ABC law," and the ABC law only authorizes direct shipping by wineries, N.C. GEN. STAT. §1001.1, and by retailers with a permit. N.C. GEN. STAT. § 18B-304. However, the State will issue retail permits only to state residents, N.C. GEN. STAT. § 18B-900(a)(2), and only for wine purchased from an in-state wholesaler. N.C. GEN. STAT. § 18B-1006(h).

A finding of discrimination assumes two entities are similarly situated, although they do not have to be identically situated. *U.S. v. Dodd,* 770 F.3d 306, 312 (4th Cir. 2014). There is no serious question that in-state and out-of-state wine retailers are similarly situated. They sell the same products, compete for the same consumers, advertise over

the same internet, and use the same common carriers to ship the wine. *See Gen. Motors v. Tracy*, 519 U.S. 278, 298-99 (1997) (companies selling the same products are similarly situated); *Exxon Corp. v. Maryland,* 437 U.S. 117, 126 (1978) (in-state and out-of-state companies in the same retail market are similarly situated); *Wal-Mart Stores, Inc. v. Texas ABC,* 935 F.3d 362, 376 (5th Cir. 2019) (in-state and out-of-state wine retailers are similarly situated).

Two related Commerce Clause principles are also implicated. North Carolina requires that direct wine shipments originate from premises in the state, N.C. GEN. STAT. § 18B-102.1, and include only wine that was purchased from a North Carolina wholesaler. N.C. GEN. STAT. § 18B-1006(h). This violates the holding in *Granholm v. Heald*, that "States cannot require an out-of-state firm to become a resident in order to compete on equal terms," 544 U.S. at 474-75, and "cannot require business operations to be performed in the home State that could more efficiently be performed elsewhere." *Id.* at 475.

2. Banning direct shipping denies consumers their right to engage in interstate commerce

Every interstate transaction has two parties – a seller and a buyer. The buyer has just as much right to engage in interstate commerce free

from restrictive state regulation as the seller. *Dennis v. Higgins,* 498 U.S. 439, 449-50 (1991). The Commerce Clause guarantees that:

> Every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

N.C. GEN. STAT. § 18B-109 makes it unlawful for a resident to "have any alcoholic beverage mailed or shipped to him from outside this State." This ban on direct shipping forces residents to buy from local businesses and results in just such exploitation. Bans on direct wine shipping lead to higher prices and less variety locally. JA 174-175 (FTC Report). As shown in ¶¶ 5-7 of the Statement of Facts, *supra* at pp. 7-10, local retailers do not carry anywhere near a majority of wines for sale in the United States. Eighty percent of the wines approved for sale in the United States by the Tax and Trade Bureau are not sold in North Carolina. This includes rare wine, older vintages, wines produced by celebrities, 34% of the wines on the Wine Spectator's list of top 100 values, and 63% of the Greek wines recommended by Wine Enthusiast and the New York Times. All these wine are readily available at retailers in other states who are willing to ship it, but the ban on

shipping cuts North Carolina consumers off from all these wines sold in other states. This, too, violates the Commerce Clause and can be justified only if the State shows that no other alternatives are available.

C. The ban is not justified under the Twenty-first Amendment

The Twenty-first Amendment gives states broad latitude to regulate the distribution of alcohol in the public interest, but does not override the nondiscrimination principle of the Commerce Clause. *Granholm v. Heald*, 544 U.S. at 488. It does not shield economic protectionism, *Tenn. Wine,* 139 S.Ct. at 2474, nor "empower States to favor local liquor interests by erecting barriers to competition." *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 276. Thus, the Amendment gives states the authority to decide whether or not to allow direct wine shipping, but having done so, the Commerce Clause requires that "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Granholm v. Heald,* 544 U.S. at 493.

In order to justify a discriminatory ban on direct shipping by out-of-state wine retailers, and bring it under the protection of the Twenty-first Amendment, the State must prove that the discrimination is necessary to advance a legitimate interest that cannot be achieved

through reasonable nondiscriminatory alternatives. *Granholm v. Heald,* 544 U.S. at 490-92; *Tenn. Wine,* 139 S.Ct. at 2474; *Beskind v. Easley,* 325 F.3d at 515. The kinds of interests protected by the Twenty-first Amendment include public health and safety matters like temperance and restricting youth access, *Tenn. Wine,* 139 S.Ct. at 2474; and raising revenue. *Granholm v. Heald*, 544 U.S. at 490-91. They do not include bureaucratic interests such as facilitating orderly market conditions and ensuring regulatory accountability, because "[t]hese objectives can also be achieved through the alternative of an evenhanded licensing requirement." *Id.* at 492.[12]

1. The State has not proved that direct shipping by out-of-state retailers threatens any interest protected by the Twenty-first Amendment

Since North Carolina allows other entities to ship wine to consumers, it has decided that shipping wine in and of itself does not threaten any public safety interest protected by the Twenty-first Amendment. Therefore, to justify banning shipping only by out-of-state retailers, the

[12] In a plurality opinion in 1990, several Justices on the Supreme Court suggested that maintaining an orderly market was a legitimate state interest protected by the Twenty-first Amendment. *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990). It was never a majority position and has been rejected by *Granholm*.

State must prove that it poses some unique threat that is not posed by other shipments. It is not enough to show that direct shipping of alcohol in general might pose a potential threat to public safety because if one is harmful, so is the other, so a general regulatory interest does not explain the need to discriminate. *Chem. Waste Mgmt., Inc. v. Hunt*, 504 US 334, 348 (1992). The State must prove why it must prohibit shipping by out-of-state retailers when it allows others to do so, and the "standards for such justification are high." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988). *Accord Brooks v. Vassar*, 462 F.3d at 352 (same exacting standard applies to liquor law cases). Concrete evidence is required, and mere speculation and unsupported assertions are insufficient. *Tenn. Wine,* 139 S.Ct. at 2474.

The State has devoted considerable effort to showing that excessive consumption of alcohol in general is a social problem, *e.g.,* JA 284-292 (Kerr Report),but that is not the issue. North Carolina already allows its residents to buy an almost unlimited amount of liquor – 50 liters of wine, 8 liters of spirits, and 80 liters of beer. N.C. GEN. STAT. § 18B-303. The State suggests that the ability to order wine online and have it shipped makes alcohol easier to buy, but that is not the issue either.

North Carolina already allows its residents to order wine online and have it shipped from in-state retailers, N.C. GEN. STAT. § 18B-1001(4), and from in-state and out-of-state wineries. N.C. GEN. STAT. § 18B-1001.1. The state suggests that it may be harder for state officials to regulate out-of-state businesses, but that also is not the issue. North Carolina already allows all sorts of out-of-state businesses to participate in the distribution of alcohol, including wineries, N.C. GEN. STAT. § 18B-1001.1, malt beverage distributors, N.C. GEN. STAT. § 18B-1113, and wine distributors. N.C. GEN. STAT. § 18B-1114.

The issue is whether the State can prove that shipments of wine from out-of-state retailers poses some kind of unique threat to the public that justifies singling out for prohibition only this one method of obtaining one kind of alcohol from one subset of sellers. It has not done so. Forty-four states, including North Carolina, allowed direct shipping from wineries. Sixteen jurisdictions allow direct shipping by out-of-state wine retailers. Statement of Facts ¶ 13, *supra* at p.12.

The State presented no evidence from any of these jurisdictions that direct shipping from out-of-state sources has caused any public safety problems – no evidence of increased access by minors, increased

consumption, unsafe products,[13] tax evasion, or difficulty auditing or regulating them. It has presented no evidence that regulators in these states have had any difficulty monitoring wine shipments from out-of-state sources. The State speculates that direct shippers *might* be harder to regulate and that adverse consequences *might* occur, but speculation and unsupported assertions are insufficient. *Tenn. Wine,* 139 S.Ct. at 2474.

The evidence in the record is to the contrary. The states that allow direct shipping by out-of-state retailers report that there have been no problems. Statement of Facts ¶ 8, *supra* p. 10. In states that allow direct shipping, fewer than 100 out-of-state retailers have applied for the license, so they are not difficult to monitor and regulate. *Id.* ¶ 14, *supra* p. 13. The Supreme Court found that direct wine shipping did not result in more youth access, because minors have easier ways to acquire alcohol and want instant access rather than waiting for a shipment to arrive. *Granhom v. Heald*, 544 U.S. at 490. Data from federal agencies

[13] Safety is not a genuine issue. Wine is among the most heavily regulated product in the country – regulated. inspected and tested by every state, by the federal Tax and Trade Bureau, 27 C.F.R. 24.1 et seq (more than 200 regulations), and by the Food and Drug Administration. 21 C.F.R. 110.35.

show that states that allow direct shipping by retailers do not have higher *per capita* consumption than other states. They do not have higher rates of measurable social problems associated with excessive consumption, such as alcohol-impaired traffic fatalities, aggravated assaults, or ill-advised sexual activity leading to sexually transmitted disease or teen pregnancies. Statement of Facts ¶¶ 9-12, *supra* pp. 11-12. The FTC and Comptroller of Maryland studied the issue and found no evidence of tax evasion or revenue loss. *Id.* ¶ 11, *supra* p. 11.

Banning this one form of direct shipping cannot actually advance North Carolina's interest in preventing these problems because there is no credible evidence any of these problems have arisen in states that allow direct shipping by out-of-state retailers and out-of-state wineries.

2. Nondiscriminatory alternatives are available.

Even if the State could show that direct shipping of wine from out-of-state retailers posed a genuine threat to public safety, a total ban on such transactions would still be unconstitutional unless the State also proved with "concrete record evidence" that nondiscriminatory alternatives will be unworkable. *Granholm v. Heald,* 544 U.S. at 489, 492-93; *Tenn. Wine,* 139 S.Ct. at 2474-75; *Beskind v. Easley*, 325 F.3d at

515. A discriminatory law can pass constitutional muster only if the State proves both that it advances a legitimate local purpose, and also that the purpose "cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*. 544 US at 489; *Beskind v. Easley*, 325 F.3d at 513-14.

It is inconceivable that the State could meet this burden. The Supreme Court has held that evenhanded licensing requirements and regulations are a nondiscriminatory alternative that can protect public health and safety and ensure accountability. *Granholm v. Heald*, 544 U.S. at 492; *Tenn. Wine,* 139 S.Ct. at 2475. North Carolina already uses that alternative to allow out-of-state wineries to ship to consumers. N.C. GEN. STAT. §§ 1001.1, 1001.2. The Supreme Court also has noted that physical presence is not necessary for regulatory effectiveness because "[i]n this age of split-second communications by means of computer networks ... there is no shortage of less burdensome, yet still suitable, options." *Tenn. Wine*, 139 S.Ct. at 2475. Age verification can be required at the delivery stage. North Carolina already uses this alternative to permit other online wine purchases. N.C. GEN. STAT. §§ 1001.1, 1001.2. Some states with ABC stores have allowed direct

shipments to be sent in care of local ABC stores where they can be inspected and taxed. *E.g.*, Ala. Admin Code R. 20-X-8-.03. North Carolina has a state-wide system of ABC stores.

North Carolina has put forward only two reasons why these alternatives might not work, and neither has evidentiary support. First, the State speculates it might be overwhelmed by a huge number of retail shippers – up to 400,000. Speculation is not evidence, and in the states that allow direct shipping, fewer than 100 out-of-state retailers have actually signed up. Statement of Facts ¶ 14, *supra* p. 13. Second, the State speculates that it might lack jurisdiction to require out-of-state retailers to comply with state law. The Supreme Court has found to the contrary, that states can acquire jurisdiction over an out-of-state seller by requiring it to consent to jurisdiction and appoint an agent to receive process as a precondition to obtaining a permit. *Tenn. Wine,* 139 S.Ct. at 2475. North Carolina already uses this alternative to allow other kinds of foreign corporations to do business in the state. N.C. GEN. STAT. § 55-15-05.The State can also use the Twenty-first Amendment Enforcement Act to bring an out-of-state retailer into federal court. 27 U.S.C. § 122a.

IV. Remedy

The court of appeals generally defers to the district court's choice of remedy, respecting its proximity to the evidence. *Porter v. Clarke*, 923 F.3d 348, 364 (4th Cir. 2019). Because the district court granted summary judgment for the State, it has not yet had the opportunity to consider remedy. The better course is therefore to remand the case to the district court for such consideration.

However, if this court takes up the issue of remedy, it should strike the two offending provisions: N.C. GEN. STAT. § 18B-102.1 that prohibits out-of-state retailers from shipping wine, and N.C. GEN. STAT. § 18B-109 that prohibits consumers from receiving it. Once a constitutional violation is found, the court's remedy should remove the barrier that had been preventing the plaintiffs from exercising their constitutional rights, not allow it to remain in place. *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995); *Ostergree v. Cuccinelli,* 615 F.3d 263, 289-90 (4th Cir. 2010). It should vindicate the Constitution itself, and one of its core purposes was to assure free trade among the states. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). The proper remedy is therefore to strike the ban and extend shipping privileges to out-of-state retailers so

that commerce may increase. *See Kassel v. Consol. Freightways*, 450 U.S. 662 (1982). Indeed, one court has suggested it is the only appropriate remedy. *Dickerson v. Bailey,* 336 F. 3d 388, 408 (5th Cir. 2004).

In theory, discrimination against out-of-state wine retailers could also be remedied by taking away the direct-shipping rights of in-state retailers. In that way, all retailers would be treated equally – equally badly. This is not a real option, however, because it would contravene the plain language of N.C. GEN. STAT. §18B-100 that "[i]f any provision [is] determined [to be] unconstitutional, such provision shall be stricken." If the ban on direct shipping by out-of-state retailers is unconstitutional, that is the provision that muse be stricken, not the statute allowing in-state retailers to ship. The Supreme Court cautions that courts should not normally nullify a valid portion of a state law because a different portion is invalid. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). Doing so would also cause significant harm to those in-state retailers that have invested resources into developing a direct-shipping business, were not represented in the litigation, and have not had an opportunity to be heard. *Heckler v. Mathews*, 465 U.S. 728, 733,

738-40 (1984); *Nguyen v. INS*, 533 U.S. 53, 95-96 (2001) (Scalia J., concurring). Nor would it provide a remedy to the consumers who, by preference, necessity or coronavirus concerns, depend on home delivery.

In *Beskind v. Easley,* the Fourth Circuit decided contrary to this principle and nullified the direct shipping rights of in-state wineries rather than extend them to out-of-state wineries. It did so because back in 2003, direct shipping was a cautious expansion of traditional regulations requiring all sales to take place at brick-and-mortar establishments. The court was convinced that the State would prefer to go back to the more restrictive rule rather than open the market to more direct shipping. 325 F.3d at 519-20. That was almost 20 years ago, and the evidence of legislative intent is now to the contrary. Immediately after *Beskind*, the General Assembly restored the shipping rights of in-state wineries and expanded them to out-of-state wineries, N.C. GEN. STAT. § 18B-1001.1. Since then, it has expanded shipping rights to in-state retailers. N.C. GEN. STAT. § 1001(4). It has extended delivery rights to third-party consolidators that ship wine on behalf of multiple wineries, N.C. GEN. STAT. § 18B-1001.3, and third-party delivery services. N.C. GEN. STAT. § 18B-1001.4. It has expanded alcohol

distribution to Tribal lands, N.C. GEN. STAT. § 18B-112, common areas of apartment complexes, N.C. GEN. STAT. § 18B-1001(21), guest room cabinets in hotels, N.C. GEN. STAT. § 18B-1001(13), auction houses N.C. GEN. STAT. § 18B-1002.1, stadiums and ballparks, N.C. GEN. STAT.§ 18B-1009, and on the premises of craft distilleries. N.C. GEN. STAT. §18B-1105(a)(4a).

Although there is boilerplate language in the ABC code that the state intends to limit rather than expand commerce in alcoholic beverages, N.C. GEN. STAT. § 18B-100, that language cannot be taken seriously. Legislative intent is not determined by platitudes inserted into statutes, but by "what the legislature would have done had it been apprised of the constitutional infirmity." *Sessions v, Morales-Santana*, 137 S.Ct. 1678, 1699 (2017). In this case we know what the North Carolina legislature would have done because it faced this situation once before. When the ban on direct shipping by out-of-state wineries was struck down in *Beskind v. Easley* and the court's remedy was to take away shipping rights from in-state wineries, the legislature promptly restored privileges to in-state wineries and extended them to those located out of state. N.C. GEN. STAT. § 18B-1001.1. Actions speak louder than words.

Conclusion

The decision of the district court should be reversed and summary judgment granted to the plaintiffs.

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Certification of Word Count

I certify that this brief, including footnotes and the statement of issues, but excluding tables and certificates, contains 10,209 words according to the word-count function of WordPerfect, the word processing program used to prepare this brief.

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Certificate of Service

I certify that on September 29, 2021, I electronically filed the foregoing and the Joint Appendix with the Clerk of the Court for the U. S. Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ James A. Tanford
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Certification as to Appendix

I certify that all materials required by Cir. R. 30(a) & (b) are included in the appendix.

s/ James A. Tanford
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Addendum: Relevant portions of N.C. GEN. STATS.

§ 18B-102. (a). General Prohibition.--It shall be unlawful for any person to manufacture, sell, transport, import, deliver, furnish, purchase, consume, or possess any alcoholic beverages except as authorized by the ABC law.

§ 18B-102.1. (a) It is unlawful for any person who is an out-of-state retail or wholesale dealer in the business of selling alcoholic beverages to ship or cause to be shipped any alcoholic beverage directly to any North Carolina resident who does not hold a valid wholesaler's permit under Article 11 of this Chapter.
* * *
(e) Whoever violates the provisions of this section shall be guilty of a Class I felony and shall pay a fine of not more than ten thousand dollars ($10,000).

§ 18B-109. (a) General Prohibition.--Except as provided in G.S. 18B-1001.1, no person shall have any alcoholic beverage mailed or shipped to him from outside this State unless he has the appropriate ABC permit.

§ 18B-304. (a) Offense.--It shall be unlawful for any person to sell any alcoholic beverage, or possess any alcoholic beverage for sale, without first obtaining the applicable ABC permit and revenue licenses.

§ 18B-900. (a) Requirements.--To be eligible to receive and to hold an ABC permit, a person must satisfy all of the following requirements:
(1) Be at least 21 years old.
(2) Be a resident of North Carolina, unless any of the following apply:
a. The person is an officer, director or stockholder of a corporate applicant or permittee and is not a manager or otherwise responsible for the day-to-day operation of the business.
b. The person has executed a power of attorney designating a qualified resident of this State to serve as attorney in fact for the purposes of receiving service of process and managing the business for which permits are sought.
c. The person is applying for a nonresident malt beverage

vendor permit, a nonresident wine vendor permit, or a vendor representative permit.

§ 18B-1001. When the issuance of the permit is lawful in the jurisdiction in which the premises are located, the Commission may issue the following kinds of permits:
* * *
(4) Off-Premises Unfortified Wine Permit.--An off-premises unfortified wine permit authorizes (i) the retail sale of unfortified wine in the manufacturer's original container for consumption off the premises, (ii) the retail sale of unfortified wine dispensed from a tap connected to a pressurized container utilizing carbon dioxide or similar gas into a cleaned and sanitized container that is filled or refilled and sealed for consumption off the premises and that identifies the permittee and the date the container was filled or refilled, and (iii) the holder of the permit to ship unfortified wine in closed containers to individual purchasers inside and outside the State. The permit may be issued for retail businesses. ....

§ 18B-1001.1. (a) A winery holding a federal basic wine manufacturing permit located within or outside of the State may apply to the Commission for issuance of a wine shipper permit that shall authorize the shipment of brands of fortified and unfortified wines identified in the application. The applicant shall not be required to pay an application fee for the wine shipper permit. A wine shipper permittee may amend the brands of wines identified in the permit application but shall file any amendment with the Commission. Any winery that applies for a wine shipper permit shall notify in writing any wholesalers that have been authorized to distribute the winery's brands within the State that an application has been filed for a wine shipper permit. A wine shipper permittee may sell and ship not more than two cases of wine per month to any person in North Carolina to whom alcoholic beverages may be lawfully sold. All sales and shipments shall be for personal use only and not for resale. A case of wine shall mean any combination of packages containing not more than nine liters of wine.
* * *
(c) A wine shipper permittee may contract with the holder of a wine shipper packager permit for the packaging and shipment of wine

pursuant to this section. The direct shipment of wine by wine shipper or wine shipper packager permittees pursuant to this section shall be made by approved common carrier only. Each common carrier shall apply to the Commission for approval to provide common carriage of wines shipped by holders of permits issued pursuant to this section. Each common carrier making deliveries pursuant to this section shall:

(1) Require the recipient, upon delivery, to demonstrate that the recipient is at least 21 years of age by providing a form of identification specified in G.S. 18B-302(d)(1).

(2) Require the recipient to sign an electronic or paper form or other acknowledgment of receipt as approved by the Commission.

(3) Refuse delivery when the proposed recipient appears to be under the age of 21 years and refuses to present valid identification as required by subdivision (1) of this subsection.

(4) Submit any other information that the Commission shall require.

All wine shipper and wine shipper packager permittees shipping wines pursuant to this section shall affix a notice in 26-point type or larger to the outside of each package of wine shipped within or to the State in a conspicuous location stating: "CONTAINS ALCOHOLIC BEVERAGES; SIGNATURE OF PERSON AGED 21 YEARS OR OLDER REQUIRED FOR DELIVERY". Any delivery of wines to a person under 21 years of age by a common carrier shall constitute a violation of G.S. 18B-302(a)(1) by the common carrier. The common carrier and the wine shipper or wine shipper packager permittee shall be liable only for their independent acts.

(d) A wine shipper permittee shall be subject to jurisdiction of the North Carolina courts by virtue of applying for a wine shipper permit and shall comply with any audit or other compliance requirements of the Commission and the Department of Revenue.

§ 18B-1006. (h) Purchase Restrictions.--A retail permittee may purchase malt beverages, unfortified wine, or fortified wine only from a wholesaler who maintains a place of business in this State and has the proper permit.