No.

In the Supreme Court of the United States

B-21 WINES, INC.,*et al.*,
Petitioners,

v.

HANK BAUER, CHAIR OF THE
N.C. ALCOHOLIC BEVERAGE COMM'N,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly held that the Twenty-first Amendment is limited by the nondiscrimination principle of the Commerce Clause. A state law that protects local liquor interests from interstate competition is unconstitutional unless the State presents concrete evidence that discriminating against out-of-state entities is reasonably necessary to protect public health and safety. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2470 (2019); *Granholm v. Heald,* 544 U.S. 460, 487 (2005); *Healy v. Beer Inst.*, 491 U.S. 324, 342 (1989); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). Departing from these precedents, the Fourth Circuit (over a strong dissent) upheld a discriminatory North Carolina wine-shipping law without subjecting it to Commerce Clause scrutiny. It held that the Twenty-first Amendment gave states authority to regulate retail wine distribution that was not limited by the nondiscrimination principle. The question, upon which the circuits disagree, is:

Does the nondiscrimination principle of the Commerce Clause apply to and invalidate North Carolina's law allowing only in-state retailers to ship wine to consumers, or is the law constitutional under the Twenty-first Amendment because the Commerce Clause does not apply to laws regulating retail wine distribution?

PARTIES TO THE PROCEEDINGS

Petitioners are B-21 Wines, Inc., Justin Hammer, Mike Rash, Lila Rash and Bob Kunkle. They were Plaintiffs-Appellees below.

Respondent is Hank Bauer, in his official capacity as Chair of the North Carolina Alcoholic Beverages Commission. He was substituted for the original Defendant-Appellant, A.D. Guy, Jr., pursuant to Fed. R. Civ. P. 25(d). Joshua Stein, North Carolina Attorney-General, was dismissed as a defendant.

CORPORATE DISCLOSURE STATEMENT

Petitioner B-21 Wines, Inc., has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

RELATED PROCEEDINGS

B-21 Wines, Inc. v. Guy, No. 3:20-cv-00099, U. S. District Court for the Western District of North Carolina. Judgment entered July 9, 2021.

B-21 Wines, Inc. v. Bauer, No. 21-1906, U.S. Court of Appeals for the Fourth circuit. Judgment entered June 1, 2022. Rehearing denied June 28, 2022.

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This petition seeks review of the decision of the United States Court of Appeals for the Fourth Circuit in *B-21 Wines, Inc. v. Bauer* (App., *infra*, 1a-52a), reported at 36 F.4th 214. The opinion and order of the United States District Court for the Western District of North Carolina (App., *infra*, 53a-67a), is reported at 548 F.Supp. 3d 555.

JURISDICTION

The opinion of the court of appeals was entered on June 1, 2022. A petition for rehearing was denied on June 28, 2022 (App., *infra*, 68a). This Court has jurisdiction under 28 U.S.C. § 1254(1) to hear this case by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The Commerce Clause, U.S. Const., Art. I, § 8, cl. 3: The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

B. The 21st Amendment, U.S. Const., Amend. XXI, § 2: The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

C. North Carolina Gen. Stat. §§ 18B-102.1, 18B-109: Relevant sections are reprinted in the appendix, *infra*, at 69a.

STATEMENT OF THE CASE

This case challenges the constitutionality of a provision in North Carolina's Alcoholic Beverage Code that prohibits out-of-state retailers from shipping wine to consumers. The Code allows in-state retailers to do so. This difference in treatment violates the Commerce Clause and is not saved by the Twenty-first Amendment, because it discriminates against interstate commerce and gives economic protection to local businesses, and there is no public health or safety justification for banning one and allowing the other.

In 2005, this Court declared unconstitutional two state laws that prohibited out-of-state wineries from shipping to consumers but allowed in-state wineries to do so. *Granholm v. Heald*, 544 U.S. 460 (2005). The Court said that "If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." 544 U.S. at 493. In the seventeen years since then, forty-four states (including North Carolina) have modernized their alcoholic beverage laws to allow both in-state and out-of-state wineries to sell and ship to consumers on evenhanded terms, without any public health or safety problems.

The states had been slower to modernize their beverage laws to allow retailers to sell wine online and ship it to consumers' homes until the pandemic. Now, a majority allow some form of off-premises home delivery. At least thirteen states have even-handed laws that permit both in-state and out-of-state retailers to ship wine to consumers, but most have repeated the pattern that existed before *Granholm*. To protect local retailers from potential loss of business,

they began allowing them to ship wine to consumers' homes, but continued to prohibit out-of-state retailers from doing so. North Carolina is one of them. In-state retailers may ship to consumers, but they are protected against the rigors of interstate competition. North Carolina has chosen to allow retail direct shipment of wine, but has not done so on evenhanded terms.

This case challenges North Carolina's legal scheme that allows an in-state retailer to ship wine to individual purchasers inside the state, even if the wine was bought online and the customer never set foot in the store. N.C. GEN. STAT. § 18B-1001(4) (App., *infra*, 69a). By contrast, it is a felony for any out-of-state retailer to ship an alcoholic beverage directly to any North Carolina resident," N.C. GEN. STAT. § 18B-102.1 (App., *infra*, 69a), and a misdemeanor for a resident to have any alcoholic beverage shipped to them from outside the State. N.C. GEN. STAT. § 18B-109 (App., *infra*, 69a).

Petitioners brought this action in the Western District of North Carolina pursuant to 42 U.S.C. § 1983. They sought a declaratory judgment that the ban on direct shipping by out-of-state retailers violated the nondiscrimination principle of the Commerce Clause. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because this is a suit arising under the Constitution and laws of the United States. On cross-motions for summary judgment, the district court declared the law constitutional. It ruled that the ban was authorized by the Twenty-first Amendment and the nondiscrimination principle of the Commerce Clause did not apply to laws like this one that regulated essential elements of the three-tier system,

including retail wine shipping. *B-21 Wines, Inc. v. Guy,* 548 F.Supp. 3d 555, 560-63 (W.D.N.C. 2021) (App., *infra*, 61a-67a).

The court of appeals affirmed in a split decision. The majority upheld the law despite its discriminatory nature. It declined to subject the law to Commerce Clause analysis and ruled that the Twenty-first Amendment authorized states to regulate shipping by wine retailers in ways that discriminated against out-of-state interests. *B-21 Wines, Inc. v. Bauer,* 36 F.4th 214, 224-28 (4th Cir. 2022) (App., *infra*, 17a-26a). The majority did not require the State to prove that the ban actually advanced a public health or safety purpose that could not be served by reasonable alternatives, declining to follow this Court's repeated holdings that such scrutiny is required. *E.g., Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct 2449, 2461 (2019); *Granholm v. Heald*, 544 U.S. at 472.

The dissent lambasted the majority for eviscerating the Commerce Clause and ignoring the plain language of this Court's precedents, *B-21 Wines, Inc. v. Bauer,* 36 F.4th at 232-38 that "discrimination is contrary to the Commerce Clause and is not saved by the 21st Amendment." *Granholm v. Heald,* 544 U.S. at 489. (App., *infra*, 35a-45a),

The court of appeals denied a petition for rehearing and rehearing *en banc*. App., *infra*, 68a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for a writ of certiorari and reverse. The Fourth Circuit upheld the constitutionality of a North Carolina law that discriminated against interstate commerce by allowing in-state, but not out-of-state, retailers to sell wine online and ship it to consumers. The court of appeals expressly declined to apply this Court's prior decisions that discriminatory state liquor laws violate the Commerce Clause unless the state can show that there are no reasonable regulatory alternatives. It ruled to the contrary that the Twenty-first Amendment gives states the authority to regulate retail wine distribution unconstrained by any Commerce Clause scrutiny. This contradicts this Court's holding in *Granholm v. Heald* that the Twenty-first Amendment does not immunize state liquor laws from Commerce Clause scrutiny, 544 U.S. at 489, and its holding in *Tenn. Wine* that the nondiscrimination principle applies to all three tiers in a state's three-tier system: producers, wholesalers, and retailers. 139 S.Ct. at 2470-71. It also directly conflicts with the Seventh Circuit's decision in *Lebamoff Enterpr., Inc. v. Rauner*, 909 F.3d 847, 854-56 (7th Cir. 2018) that the nondiscrimination principle applies to laws regulating retail wine shipping and requires the state to present concrete evidence that the law advances a legitimate state interest that could not be served by reasonable nondiscriminatory alternatives.

The issue is important Throughout the country, states are considering how best to balance the need to regulate wine as an alcoholic beverage against the growing demand from consumers for online ordering

and home deliveries.[1] There has been a surge of online sales of all kinds of products during the pandemic,[2] and wine is no exception. Wine ordered online now accounts for $4.2 billion annually.[3] Although this Court held in *Tenn. Wine* that the nondiscrimination principle applied to laws regulating retailer licensing, 129 S.Ct. at 2470-71, a number of lower courts (including the Fourth Circuit) have resisted extending it retail-shipping laws. This Court should grant the writ of certiorari and resolve the disagreement among circuits whether the nondiscrimination principle applies to retail wine-shipping laws.

A. The Fourth Circuit's decision that a discriminatory wine-shipping law was not subject to Commerce Clause scrutiny is in conflict with the Seventh Circuit.

The constitutionality of state laws that prohibit out-of-state businesses from selling wine online and shipping it to consumers, but allow in-state businesses to do so, depends on the interaction between the Commerce Clause and Section 2 of the Twenty-first

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[1] See Covid-19 Sparks Booming Beverage Alcohol Home Deliv-ery Market, https://www.marketwatchmag.com/ (last visited September 1, 2022).

[2] U. S. Census Bureau, Annual Retail Trade Survey Shows Impact of Online Shopping on Retail Sales During COVID-19 Pandemic (Apr.,2022), https://www.census.gov/library/stories/2022/04/ecommerce-sales-surged-during-pandemic.html (last visited September 1, 2022).

[3] Sovos 2022 DtC Wine Shipping Report, https://www.sovos.com/shipcompliant/content-library/wine-dtc-report/ (last viewed September 1, 2022).

Amendment. The Commerce Clause prohibits discrimination against out-of-state interests, while the Amendment gives states broad authority to regulate the sale of alcohol within their borders. This Court seemingly resolved the balance between these two provisions in *Granholm v. Heald*, ruling that "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." 544 U.S. at 493. It held that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," *id*. at 487, and "is not saved by the 21st Amendment." *Id.* at 489. It made clear in *Tenn. Wine* that the nondiscrimination principle applied to laws regulating retailers as well as producers, holding that "[t]here is no sound basis for the distinction. 129 S.Ct. at 2471.

Despite this clear language, the Fourth Circuit on a 2-1 vote, upheld a North Carolina law that did exactly what *Granholm* said the Constitution forbids. It gave only in-state retailers the privilege to sell wine online and ship to consumers, N.C.GEN.STAT. § 18B-1001(4), and made direct shipping by out-of-state retailers a felony. N.C.GEN.STAT. §§ 18B-102.1 (App., *infra*, 69a). The court held that neither *Granholm* nor *Tenn. Wine* applied because neither case specifically involved wine shipping by retailers. Therefore, the majority said that North Carolina could constitutionally discriminate against out-of-state wine retailers under its Twenty-first Amendment authority to regulate alcohol, without any showing that the restriction was necessary to protect public health and safety. 36 F.4th at 227-29 (App., *infra*, 23a-28a).

In a forceful dissent, Judge Wilkinson accused the majority of ignoring perfectly clear precedent from this Court that the State's power under the Twenty-first Amendment is limited by the nondiscrimination principle of the Commerce Clause, so a discriminatory liquor law may be upheld only if the State proves with concrete evidence that the discrimination is necessary to protect public health or safety. 36 F.4th at 233-38 (App., *infra,* 29a-30a, 35a-45a).

A court's decision whether to apply close scrutiny to a discriminatory law is one of the most important decision it makes. In a variety of contexts, it will effectively determine the outcome. This includes the Commerce Clause. When close scrutiny is applied, State laws that discriminate against interstate commerce face "a virtually per se rule of invalidity." *Granholm,* 544 U.S. at 476, but "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld" in most cases. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Four courts of appeals have considered whether discriminatory state restrictions on interstate wine shipping by retailers should be subject to the close scrutiny required by the nondiscrimination principle. They have produced six opinions. At one extreme are *Lebamoff Enterpr., Inc. v. Rauner*, 909 F.3d at 853-55 and the dissent in this case, which held that laws banning direct shipping by out-of-state wine retailers are fully subject to the nondiscrimination principle and can be upheld only if the State produces concrete evidence that discrimination is necessary to protect public health and safety At the other extreme are

Sarasota Wine Mkt., LLC v. Schmitt, 987 F.3d 1171 (8th Cir. 2021), the lead opinion in *Lebamoff Enterpr., Inc. v. Whitmer,* 956 F.3d 863 (6th Cir. 2021), and the majority opinion in this case, which said that discriminatory retail-shipping laws are immune from Commerce Clause scrutiny, fall within the states' Twenty-first Amendment authority to regulate its three-tier system, and do not require the state to show that the discrimination is necessary to protect public health and safety. In the middle is the concurring opinion by two judges in *Lebamoff Enterpr., Inc. v. Whitmer,* who said that the state was required to present evidence justifying discrimination, but the burden was lower for retailer shipping than winery shipping. *Accord Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 617-18 (6th Cir. 2018); *Cooper v. Tex. A.B.C.*, 820 F.3d 730, 743 (2016) (nondiscrimination principle applies but to a lesser extent when the regulations concern the retailer tier)/

In *Lebamoff Enterpr., Inc. v. Rauner*, Chief Judge Wood noted that this split over whether the nondiscrimination principle applies to laws that discriminate against out-of-state wine retailers has been ongoing since *Granholm* was decided. 909 F.3d at 853.

> Some [courts] see *Granholm* as establishing a rule immunizing the three-tier system from constitutional attack so long as it does not discriminate between in-state and out-of-state producers or products. The idea is that the Twenty-first Amendment overrides the Commerce Clause and permits states to treat in-state retailers and wholesalers differently

> from their out-of-state equivalents. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190-91 (2d Cir.2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir.2006) (Niemeyer, J., writing only for himself); *Southern Wine & Spirits of Am., Inc. v. Division of Alcohol & Tobacco Control*, 731 F.3d 799, 809-10 (8th Cir.2013). More courts have read *Granholm* simply to reaffirm a general non-discrimination principle, although the principle may carry greater or lesser weight at different tiers of a three-tier system. *Brooks,* 462 F.3d at 354; *Cooper v. Tex. Alcoholic Beverage Comm'n,* 820 F.3d 730, 743 (5th Cir.2016); *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d 608, 618 (6th Cir.2018); *Siesta Vill. Mkt., LLC v. Granholm*, 596 F.Supp.2d 1035, 1039 (E.D. Mich. 2008); *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F.Supp.2d 200, 221 (D. Mass. 2006). Finally, one judge understands *Granholm* to preclude any Twenty-first Amendment protection for state laws that otherwise violate the dormant Commerce Clause. *Brooks,* 462 F.3d at 361 (Goodwin, J., concurring in part and dissenting in part).

909 F.3d at 853-54. The three appellate decisions since Rauner have not resolved these different view. Six other cases are pending that challenge laws banning interstate wine shipping by retailers. *Chicago Wine Co. v. Holcomb*, No. 21-2068 (7th Cir); *Day v. Uffleman,* 2:21-cv-1332 (D. Ariz); *Freehan v. Berg*, 1:22-cv-04956 (N.D. Ill); *Jean-Paul Weg, LLC v. Graziano*, 2:19-cv-14716 (D.N.J.); *Block v. Canepa,* 2:20-cv-3686 (S.D. Ohio); *Anvar v. Tanner*, 1:19-cv-523 (D.R.I). This Court

should grant the writ and address the issue before more lower court judicial resources are spent on it.

B. The Fourth Circuit's decision that the Twenty-first Amendment immunizes discriminatory wine shipping laws from Commerce Clause scrutiny significantly departs from this Court's prior rulings

The Fourth Circuit majority held that the Twenty-first Amendment immunizes retail wine-shipping laws from Commerce Clause scrutiny and allows states to regulate shipping in ways that patently discriminate against out-of-state interests. 36 F.4th at 224-29 (App., *infra*, 17a-28a). As the dissent points out, this conflicts with cases from this Court "that were, in all relevant respects, indistinguishable from the one at issue here," 36 F.4th at 233 (App., *infra,* 37a).

The Fourth Circuit departed from this Court's prior rulings on five interrelated issues: whether the Twenty-first Amendment trumps the Commerce Clause, whether the nondiscrimination principle applies to state liquor laws, whether the State must present concrete evidence to justify discrimination, what level of scrutiny is given to the State's purported justification, and the significance of the Court's dictum that the three-tier system is unquestionably legitimate.

1. This Court holds that the Commerce Clause and Twenty-first Amendment are "parts of the same Constitution [and] each must be considered." *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 275 (1984). "[T]he Twenty-first Amendment does not supersede other provisions of the Constitution," *Granholm v. Heald,* 544 U.S. at 286, and does not shield "state alcohol

regulation [from the] dormant Commerce Clause." *Tenn. Wine,* 139 S.Ct at 2469. The Fourth Circuit held to the contrary that the Twenty-first Amendment overrides the Commerce Clause and gives the State absolute authority to regulate its "three-tier" distribution system any way it wants. 36 F.4th at 226-28 (App., *infra,* 23a-25a).

2. This Court holds that state regulation of alcohol is "limited by the nondiscrimination principle of the Commerce Clause." *Granholm v. Heald,* 544 U.S. at 486-87. "[D]iscrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment," *id.* at 489, The Court "has repeatedly declined to read § 2 as allowing the States to violate the 'nondiscrimination principle.'" *Tenn. Wine,* 139 S.Ct at 2470. The Fourth Circuit held to the contrary, that "even though the Retail Wine Importation Bar discriminates against interstate commerce[,] it is authorized by Section 2 of the Twenty-first Amendment," 36 F.4th at 217 (App., *infra*, 2a),and is "within its constitutional authority." 36 F.4th at 229 (App., *infra*, 29a).

3. This Court holds that a discriminatory liquor law may be upheld only if the State demonstrates that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm v. Heald*, 544 U.S. at 489, 492-93. The record must contain "'concrete evidence' showing that the [law] actually promotes public health or safety [and] evidence that nondiscriminatory alternatives would be insufficient to further those interests." *Tenn. Wine,* 139 S.Ct. at 2474. The Fourth Circuit held to the contrary. It rejected this Court's concrete evidence" standard as irrelevant, 36

F.4th at 227, n.8 (App, *infra*, 24a), because "applying [this] test to an alcoholic beverage control regime would undermine Section 2 of the Twenty-first Amendment." 36 F.4th 225 (App., *infra*, 20a).

4. This Court has applied "exacting scrutiny" to the State's purported justification for discriminating against out-of-state interests. *Granholm v. Heald,* 544 U.S. at 493. A discriminatory law can be sustained "only on a showing that it is narrowly tailored to 'advanc[e] a legitimate local purpose.'" *Tenn. Wine* at 2461. To be narrowly tailored, the law may not be more intrusive on other constitutional rights than necessary. *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 507-08 (1996). The Fourth Circuit held to the contrary, that "a less demanding standard of review applies in alcohol cases," 36 F.4th at 225 (App., infra, 20a), which does not require any consideration of nondiscriminatory alternatives. 36 F.4th at 224 (App., *infra*, 17a-19a).

5. This Court has previously said that although the three-tier system (separating producers, wholesalers and retailers) is constitutionally legitimate, each individual regulation is subject to the nondiscrimination principle and "must be judged based on its own features." *Tenn. Wine,* 139 S.Ct. at 2471-72. If a statute is discriminatory, the immunity afforded by the Twenty-first Amendment is eliminated. *Healy v. Beer Inst.*, 391 U.S. 324, 344 (1989) (Scalia, J., concurring). It may be struck down without "call[ing] into question the constitutionality of the three-tier system" as a whole. *Granholm v. Heald*, 544 U.S. at 488. The Fourth Circuit held to the contrary that because the three-tier system as a whole is legitimate, the state need not justify individual provisions. It upheld the

discriminatory shipping rules merely because retailers are a central part of the state's three-tier system. 36 F.4th at 226-28 (App., *infra*, 21a-24a).

The Fourth Circuit has declined to follow this Court's precedents on the proper balance between the Commerce Clause and the Twenty-first Amendment. By holding that North Carolina may flatly discriminate against out-of-state interests in its alcohol regulations, the majority has forsaken the most fundamental principle of the Constitution — commercial unity that makes this nation one. This reason alone calls for an exercise of this Court's supervisory power to vacate the opinion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A. Opinion of the Court of Appeals for the Fourth Circuit [Filed June 1, 2022]

No. 21-1906

B-21 WINES, INC.; Justin Hammer; Bob Kunkle; Mike Rash; Lila Rash,
Plaintiffs-Appellants,

v.

Hank BAUER, Chair, North Carolina Alcoholic Beverage Control Commission,
Defendant-Appellee.

KING, Circuit Judge:

Plaintiffs B-21 Wines, Inc., a Florida-based wine retailer, plus its owner and three North Carolina residents, initiated this 42 U.S.C. § 1983 action in the Western District of North Carolina, challenging a North Carolina alcoholic beverage control regime as unconstitutional. More specifically, the Plaintiffs allege that North Carolina's regime, which prohibits out-of-state retailers – but not in-state retailers – from shipping wine directly to consumers in North Carolina (the "Retail Wine Importation Bar"), contravenes the Constitution's dormant Commerce Clause. The Plaintiffs sought declaratory and injunctive relief and named the Chair of the North Carolina Alcoholic Beverage Control Commission as a defendant, in his official capacity only (hereinafter, the "N.C. Commission").[1]

[1] When the Plaintiffs initiated this litigation, A.D. Guy, Jr., was Chair of the N.C. Commission and was named as a defendant. During the appeal, Hank Bauer replaced Guy as Chair. We have substituted Bauer for Guy, pursuant to

After entertaining competing cross-motions for summary judgment, the district court awarded summary judgment to the N.C. Commission, ruling that the Twenty-first Amendment authorizes the Retail Wine Importation Bar. *See B-21 Wines, Inc. v. Guy*, (W.D.N.C. 2021), ECF No. 43 (the "Opinion").[2] The Plaintiffs challenge that ruling by way of this appeal. As explained herein, we are satisfied that – even though the Retail Wine Importation Bar discriminates against interstate commerce – it is authorized by Section 2 of the Twenty-first Amendment. In the circumstances, we affirm the district court.

I.

A. Plaintiff B-21 Wines is a wine retailer from Florida that sells wine by way of online transactions. B-21 Wines and its Florida resident owner, plaintiff Justin Hammer, seek to sell and ship wine to North Carolina consumers. Plaintiffs Bob Kunkle, Mike Rash, and Lila Rash are North Carolina residents who desire to purchase wine from out-of-state retailers such as B-21 Wines, and seek to have the wine shipped directly to them. North Carolina, however, has made it unlawful "for any person who is an out-of-state retail[er]" to ship any "alcoholic beverage" – a term

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Federal Rule of Appellate Procedure 43(c)(2). The Plaintiffs also named the Attorney General of North Carolina as a defendant, in his official capacity. The Attorney General asserted sovereign immunity and was dismissed. That ruling is not challenged.

[2] The Opinion is published in the Federal Supplement and can be found at 548 F. Supp. 3d 555 (W.D.N.C. 2021).

that includes wine – directly to North Carolina consumers. *See* N.C. Gen. Stat. § 18B-102.1(a). Additionally, North Carolina prohibits its residents from "hav[ing] any alcoholic beverage mailed or shipped to [them] from outside this State." *Id.* § 18B-109(a).

By contrast, North Carolina's in-state retailers may ship wine directly to consumers in the State. In that regard, North Carolina generally allows those wine retailers to ship their product "in closed containers to individual purchasers inside and outside the State." *See* N.C. Gen. Stat. § 18B-1001(4). To ship wine directly to consumers, retailers are required to obtain permits, *id.* § 18B-304, and such permits may be issued only to retail locations owned or managed by a North Carolina resident and having in-state physical premises that are made available for inspection, *id.* §§ 18B-900(a)(2), 18B-502. Additionally, qualifying retailers must purchase their wine from an in-state wholesaler. *Id.* § 18B-1006(h).

North Carolina thus prohibits out-of-state retailers – by way of the Retail Wine Importation Bar – from shipping wine directly to the State's consumers. On the other hand, North Carolina allows its in-state retailers to do so. The constitutionality of that statutory distinction is at issue in this appeal.

B. The differential treatment that North Carolina applies to in-state and out-of-state retailers with respect to wine shipping is part of the Old North State's larger regime of alcoholic beverage control. Like many other states, North Carolina has decided to regulate alcoholic beverages by routing them through a system of three distinct "tiers." A typical "three-tier

system" separates the producers, the wholesalers, and the retailers, consistent with the public interest aim of promoting responsible consumption of alcoholic beverages. An important feature of a typical three-tier system is "to prohibit a member of one tier from having a financial interest in a member of a higher or lower tier." *See Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1176 (8th Cir. 2021), *cert. denied*, __ U.S. __, 142 S. Ct. 335, 211 L.Ed.2d 178 (2021). In North Carolina, the first tier of the three-tier system relates to the alcoholic beverage producers – such as wineries, breweries, and distilleries. *See* N.C. Gen. Stat. §§ 18B-1101, -1104, -1105. The system's second tier relates to the alcoholic beverage wholesalers, who purchase such beverages from producers and sell them to retailers. *Id.* §§ 18B-1107, -1109. And the third tier is for the alcoholic beverage retailers – such as bars, restaurants, and other businesses, which sell such beverages directly to consumers. *Id.* § 18B-1001.

Most alcoholic beverages in North Carolina pass through each of the three tiers before they reach consumers. North Carolina, however, has created limited exceptions to its three-tier system. One such exception applies to a specific class of alcoholic beverage producers – that is, the wineries. North Carolina authorizes both in-state and out-of-state wineries to obtain wine-shipper permits and to ship their product directly to consumers, thus bypassing the wholesaler and retailer tiers. *See* N.C. Gen. Stat. § 18B-1001.1. But that exception applies only to the wine producers and does not pertain to the wine retailers. The wine retailers are treated differently with respect to wine shipping privileges, based on whether they are in-state or out-of-state retailers. In sum, in North

Carolina, the privilege of direct wine shipping is available to in-state wine producers, out-of-state wine producers, and in-state wine retailers – but not to out-of-state wine retailers.

The basic framework of the three-tier system has been in place for the better part of a century. Multiple states have adopted the system, primarily to promote public health and prevent alcohol abuse problems caused by so-called "tied-house" saloons that existed prior to Prohibition. Back then, the alcoholic beverage producers paid to establish saloons and, in exchange, the saloonkeepers agreed to sell only their backers' alcohol and to meet strict sales quotas. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, __ U.S. __, 139 S. Ct. 2449, 2463 & n.7, 204 L.Ed.2d 801 (2019). Because those producers served only as "absentee" owners, they "knew nothing and cared nothing" about the resulting social ills. *See* J.A. 281 (citing Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 33 (Ctr. for Alcohol Pol'y 2011) (1933)).[3] The "tied-houses" thus led to widespread alcohol abuse, which caused "a greater amount of crime and misery" than "any other source." *See Crowley v. Christensen*, 137 U.S. 86, 91, 11 S.Ct. 13, 34 L.Ed. 620 (1890).

In 1908, to address the social problems brought about by the "tied-houses," North Carolina prohibited alcoholic beverage sales statewide. This was more than a decade before the Eighteenth Amendment – ratified in 1919 – imposed Prohibition and banned nationwide the manufacture, sale, and transportation of alcoholic

[3] Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

beverages. And although Prohibition technically resolved the "tied-house" issue, it led to a myriad of other social problems. As a result, the Eighteenth Amendment was repealed only 14 years later – in 1933 – by Section 1 of the Twenty-first Amendment. To garner support for the repeal of Prohibition, the drafters of the Twenty-first Amendment included Section 2 therein, which affords every state the option of banning alcoholic beverages completely if it chooses to do so. Section 2 provides, *in haec verba*, as follows:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. *See* U.S. Const. amend. XXI, § 2.

After the Twenty-first Amendment returned the authority to regulate "intoxicating liquors" to the states, North Carolina appointed a commission in 1935 to study the issues related to alcoholic beverage control. *See A Survey of Statutory Changes in North Carolina in 1935*, 13 N.C. L. Rev. 355, 388 (1935). The commission's report of 1937 advised of the need to address the "well recognized evils of the intemperate use of alcohol as a beverage," but to avoid "excessive restrictions which, however sincere, would result in defeating the desired ends." *See* J.A. 296. To strike a balance, the commission recommended that North Carolina take over the distribution and sale of alcoholic beverages. It also recommended that North Carolina adopt a statutory regime of alcoholic beverage control that would "promote temperance" while simultaneously "driving ... the illicit dealer out of business." *Id.* at 305.

Implementing the commission's recommendations, the North Carolina General Assembly created in 1937 an administrative body with general supervisory powers over commerce involving alcoholic beverages – now known as the North Carolina Alcoholic Beverage Control Commission. For a few years thereafter, all alcoholic beverage sales in North Carolina were channeled through a network of county boards. In 1939, however, North Carolina switched from the county board system to a three-tier system of alcoholic beverage control.

North Carolina has modified and refined its three-tier system over the years, including by allowing wine producers to obtain permits to ship wine directly to consumers. The State has, however, consistently remained committed to the core of the three-tier system. Indeed, the General Assembly has recently "reaffirm[ed] its support" of the three-tier system. *See* Act of July 18, 2019, S.L. 2019-18, 2019 N.C. Sess. Laws 163, 163-64. In 2019, North Carolina amended its alcoholic beverage control statutes, specifying their purpose as to "limit rather than expand" commerce involving alcohol, and to maintain "strict regulatory control ... through the three-tier ... system." *Id.* at 165-66 (codified at N.C. Gen. Stat. § 18B-100).

C. On February 18, 2020, the Plaintiffs filed their Complaint against the N.C. Commission in this litigation, alleging, inter alia, that by prohibiting out-of-state retailers from shipping wine directly to North Carolina consumers – while at the same time permitting in-state retailers to do so – North Carolina violates the dormant Commerce Clause. The Complaint challenged three provisions of North

Carolina's alcoholic beverage control regime that relate to the Retail Wine Importation Bar – specifically, sections 18B-102.1(a), -109(a), and -900(a)(2) of the North Carolina General Statutes.[4] After the district court declined to dismiss the Complaint against the Commission, the parties filed cross-motions for summary judgment. By their respective summary judgment motions, the Plaintiffs requested the court to invalidate the challenged statutory provisions, while the Commission asked the court to uphold them as constitutional under the Twenty-first Amendment. After conducting oral argument, the court filed its Opinion of July 9, 2021, resolving the litigation by denying the Plaintiffs' motion and awarding summary judgment to the Commission.

The Opinion assessed the Retail Wine Importation Bar in light of the interplay between the dormant Commerce Clause – recognized by the Supreme Court for nearly 200 years as prohibiting discrimination by any of the states against interstate commerce – and the Twenty-first Amendment, which explicitly grants to the several states the authority to regulate "intoxicating liquors" within their borders. The Opinion recognized and explained that, for purposes of

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[4] As explained above, section 18B-102.1(a) makes it unlawful "for any person who is an out-of-state retail[er]" to ship any "alcoholic beverage" directly to North Carolina consumers. Section 18B-109(a) in turn prohibits any North Carolina resident from "hav[ing] any alcoholic beverage mailed or shipped to him from outside this State." And section 18B-900(a)(2) provides that qualifying alcohol retail locations must be owned or managed by a North Carolina resident.

a dormant Commerce Clause challenge, state regimes that regulate alcoholic beverages are analyzed under a two-step framework. *See* Opinion 6. First, a court inquires into whether the challenged regime discriminates against interstate commerce. *Id.* at 7. If that inquiry is answered in the affirmative, the court then "ask[s] whether the challenged [regime] can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* (internal quotation marks omitted).

After making the initial inquiry, the district court concluded that North Carolina's challenged statutory provisions facially discriminate against out-of-state wine retailers. *See* Opinion 9. And in assessing whether the Retail Wine Importation Bar could be justified as "a public health or safety measure or on some other legitimate nonprotectionist ground," the court recognized that North Carolina has an important interest in maintaining its three-tier system of alcoholic beverage control. *Id.* at 8-9. That system, the court explained, is "inherently tied to public health and safety measures the Twenty-first Amendment was passed to promote." *Id.* at 8.

The Opinion also recognized that North Carolina's prohibition on direct wine shipping by out-of-state retailers to the State's consumers is an essential feature of its three-tier system. *See* Opinion 9. As the district court explained, an alcoholic beverage control regime that allows out-of-state wine retailers to ship directly to North Carolina consumers would effectively enable those retailers to bypass the State's three-tier system. *Id.* at 11. The Opinion thus concluded that the Plaintiffs' challenge to the Retail Wine Importation

Bar presented

> a choice between virtually eliminating North Carolina's three-tier system, which the Supreme Court and multiple Courts of Appeals have determined is unquestionably legitimate, and maintaining the status quo.

Id. Resolving that choice, the district court rejected the Plaintiffs' challenge and upheld the Retail Wine Importation Bar as constitutional. *Id.* The Plaintiffs have timely appealed from the court's judgment, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

At the root of the parties' disagreement lies the question of the proper balance between, on the one hand, North Carolina's constitutional power under the Twenty-first Amendment to regulate alcoholic beverages within its boundaries and, on the other, the dormant Commerce Clause's prohibition on discrimination by a state against interstate commerce. The Plaintiffs' contention on appeal is that the district court struck an erroneous balance, affording North Carolina's regulatory authority too much weight. The N.C. Commission, for its part, agrees with the district court, maintaining that the differential treatment of in-state and out-of-state wine retailers at issue in these proceedings is constitutionally authorized.

We review de novo a district court's disposition of cross-motions for summary judgment. *See Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). As we have explained, "when cross-motions for summary judgment are before a court, the court examines each motion separately, employing the familiar standard under

Rule 56 of the Federal Rules of Civil Procedure." *See Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 354 (4th Cir. 2011). Pursuant to that standard, "[s]ummary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *See Lawson v. Union Cnty. Clerk of Court*, 828 F.3d 239, 247 (4th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)). We also review de novo a district court's ruling with respect to the constitutionality of a state statute. *See Miller v. Brown*, 503 F.3d 360, 364 (4th Cir. 2007).

III.

The constitutional provisions at center stage in this appeal are the Commerce Clause – contained in Article I, Section 8, Clause 3 of the Constitution and ratified late in the Eighteenth Century – and the Twenty-first Amendment, specifically Section 2 thereof, which was ratified about 145 years thereafter. The Commerce Clause provides that "[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *See* U.S. Const. art. I, § 8, cl. 3. "Although the Clause is framed as a positive grant of power to Congress," the Supreme Court has recognized that the Clause "also prohibits state laws that unduly restrict interstate commerce." *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, __ U.S. __, 139 S. Ct. 2449, 2459, 204 L.Ed.2d 801 (2019) (internal quotation marks omitted). Important here, the "negative" or "dormant" aspect of the Commerce Clause prohibits the several states from "adopting protectionist measures and thus preserves a national market for goods and services." *Id.* (internal

quotation marks omitted). Ordinarily, a state statute that discriminates against interstate commerce is evaluated under a test that is akin to strict scrutiny review, requiring invalidation 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." *See Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013) (internal quotation marks omitted). But when a challenged statutory regime regulates alcoholic beverages – thus implicating the Twenty-first Amendment – the standard of review is different.

Section 2 of the Twenty-first Amendment explicitly grants to each of the states a broad power to regulate "intoxicating liquors," i.e., wine and other alcoholic beverages, within their respective boundaries. The Supreme Court's initial assessment of Section 2, made by Justice Brandeis in 1936, was that its broad language accorded plenary authority to the several states to regulate alcoholic beverages, including the power to discriminate against out-of-state alcohol interests. *See State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59, 62, 57 S.Ct. 77, 81 L.Ed. 38 (1936). But more recently, in a somewhat fractured decision in 2005, the Court resolved that Section 2 "does not abrogate Congress' Commerce Clause powers with regard to liquor." *See Granholm v. Heald*, 544 U.S. 460, 487, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005). In fact, the Court emphasized that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Id.*

Nevertheless, because of the unique constitutional authority accorded to the states under Section 2 to regulate alcoholic beverages – the only consumer product actually mentioned in the Constitution – the Supreme Court confirmed that the Twenty-first Amendment affords a state "virtually complete control" over the distribution of alcoholic beverages within its borders. *See Granholm*, 544 U.S. at 488, 125 S.Ct. 1885 (internal quotation marks omitted). Thus, a dormant Commerce Clause challenge to a state's alcoholic beverage control statutes requires that the reviewing court "engage in a different inquiry" than it would utilize for challenges to state statutes involving other commercial products. *See Tenn. Wine*, 139 S. Ct. at 2474.

The Supreme Court recently enunciated, in its 2019 *Tennessee Wine* decision, a two-step framework for assessing alcoholic beverage control laws that are challenged under the dormant Commerce Clause. First, a court must ask whether the challenged regime discriminates against interstate commerce. *See Tenn. Wine*, 139 S. Ct. at 2474. If the answer to that inquiry is no, the court's assessment ends and the challenged regime is constitutional. On the other hand, if the inquiry is answered in the affirmative, the court proceeds to the second step and assesses "whether the challenged [regime] can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* To properly assess and dispose of this appeal, we will – as the district court did – address those two steps in turn.

A. In evaluating whether North Carolina's Retail Wine Importation Bar discriminates against interstate

commerce, the district court concluded that it did not need to "go into an extensive dormant Commerce Clause analysis" because the challenged statutes are "discriminatory on their face." *See* Opinion 9. On appeal, the Plaintiffs have limited their challenge to two provisions: sections 18B-102.1(a) and -109(a) of the North Carolina General Statutes. The first of those provisions – Section 18B-102.1(a) – prohibits out-of-state retailers from shipping wine to consumers in North Carolina. The second provision – Section 18B-109(a) – makes it unlawful for North Carolina consumers to have wine shipped directly to them from outside the State.

The Supreme Court has defined impermissible discrimination for purposes of the dormant Commerce Clause as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *See Granholm*, 544 U.S. at 472, 125 S.Ct. 1885 (internal quotation marks omitted). We therefore assess whether sections 18B-102.1(a) and -109(a) – as core provisions of the Retail Wine Importation Bar and part of North Carolina's alcoholic beverage control regime – treat in-state and out-of-state wine retailers differently and in a manner that unconstitutionally benefits the former and burdens the latter.

When construing a statute, we must start with the text thereof. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). The language of section 18B-102.1(a) – which makes it "unlawful for any person who is an out-of-state retail[er] ... to ship or cause to be shipped any alcoholic beverage directly to any North Carolina resident" – is readily suspect. That

provision singles out a specific group – out-of-state retailers – and prohibits that group from shipping alcoholic beverages directly to consumers in North Carolina. When assessed in conjunction with section 18B-1001(4) – which allows in-state retailers to ship wine "in closed containers to individual purchasers inside and outside the State" – the discriminatory nature of section 18B-102.1(a) is obvious. This discrimination against interstate commerce is emphasized by section 18B-109(a), which, for its part, prohibits any North Carolina resident from "hav[ing] any alcoholic beverage mailed or shipped to him from outside this State."[5]

On appeal, the N.C. Commission concedes that section 18B-102.1(a) targets out-of-state retailers for discriminatory treatment. The Commission nevertheless maintains that section 18B-102.1(a) is not discriminatory "in the relevant sense," in that "the kind of discrimination targeted by the dormant Commerce Clause is not present here." *See* Br. of Appellee 42, 45. The Commission thus argues that

[5] We recognize that out-of-state wine retailers can obtain a permit to ship their product to North Carolina residents, provided, inter alia, that those retailers are managed or owned by a North Carolina resident, have in-state premises, and buy their product from an in-state wholesaler. But that prospect does not eliminate the statutorily mandated differential treatment described above. As the Supreme Court ruled in its *Granholm* decision in 2005, New York discriminated against out-of-state wineries by allowing only in-state wineries to ship wine directly to consumers, even though out-of-state wineries could also do so if they established a distribution operation in New York. *See Granholm*, 544 U.S. at 474-75, 125 S.Ct. 1885.

section 18B-102.1(a) "affords no tangible benefit to in-state retailers" because section 18B-109(a) generally prohibits North Carolina consumers from having any alcoholic beverages shipped to them from outside the State, no matter whether the sender is an out-of-state retailer or an in-state retailer sending alcohol from an out-of-state warehouse. *Id.* at 45. That contention by the Commission, however, ignores those North Carolina retailers who ship wine from within the State. Such in-state retailers have the privilege of shipping wine directly to consumers, unlike their out-of-state counterparts shipping from outside the State. And that privilege benefits North Carolina retailers by broadening the manner in which they can do business. Put succinctly, we are satisfied that sections 18B-102.1(a) and -109(a), as core provisions of the Retail Wine Importation Bar and part of North Carolina's alcoholic beverage control regime, discriminate against interstate commerce by allowing in-state retailers to ship their wine directly to North Carolina consumers, while at the same time prohibiting out-of-state wine retailers from doing the same.

B. Turning to the second and most difficult step of the *Tennessee Wine* framework – whether the Retail Wine Importation Bar is justified as "a public health or safety measure or on some other legitimate nonprotectionist ground" – the district court concluded that the Bar was so justified. On appeal, the Plaintiffs challenge that ruling, maintaining that the court erred in two principal respects: first, by applying an erroneously lenient standard; and second, in ruling that the Bar was justified.

1. We will first evaluate the Plaintiffs' contention that the district court erred by applying an erroneously lenient standard in assessing whether North Carolina's Retail Wine Importation Bar was justified. Addressing step two of the *Tennessee Wine* framework, the Opinion inquired whether the Bar was "justified as a public health or safety measure or on some other legitimate nonprotectionist ground," drawing that language directly from the Supreme Court's *Tennessee Wine* decision. *See* Opinion 7-8 (internal quotation marks omitted). In *Tennessee Wine*, the Court upheld a dormant Commerce Clause challenge to Tennessee's two-year residency requirement for individuals seeking initial retail license. *See* 139 S. Ct. at 2457. In applying the framework "dictated by [Section 2's] history and our precedents," the Court, after concluding at step one of its analysis that the Tennessee statute facially discriminated against interstate commerce, assessed, at step two, whether the statute was "justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* at 2474.

The Plaintiffs nevertheless contend on appeal that, instead of asking whether the discriminatory treatment by North Carolina is "justified as a public health or safety measure or on some other legitimate nonprotectionist ground," the district court should have assessed – and we should now assess – whether such treatment advances "an important regulatory interest that could not be furthered by reasonable nondiscriminatory alternatives." *See* Br. of Appellants 17.[6] In arguing for a different standard of review that

[6] We pause to observe that the Plaintiffs are inconsistent in several respects in how they phrase the inquiry

is similar to strict scrutiny, the Plaintiffs rely in part on the *Tennessee Wine* decision, where the Supreme Court conducted a limited inquiry into the possible existence of nondiscriminatory alternatives. *See* 139 S. Ct. at 2474. But that inquiry was not central to the *Tennessee Wine* analysis, which was made pursuant to the two specified steps of the Court's framework.

The Plaintiffs additionally rely on the *Granholm* decision, which preceded *Tennessee Wine* by about 14 years, to support their argument for a more lenient standard. In *Granholm*, the Supreme Court struck down alcoholic beverage control regimes in Michigan and New York that allowed in-state wine producers to bypass three-tier systems and ship wine directly to consumers, but prohibited out-of-state wine producers from doing the same. *See Granholm*, 544 U.S. at 466, 125 S.Ct. 1885. As part of its analysis, the *Granholm* Court inquired into whether the challenged statutory regimes "advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 489, 125 S.Ct. 1885 (internal quotation marks omitted). But the existence of a "legitimate local purpose" and the availability of "nondiscriminatory alternatives" were

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they urge us to conduct in this appeal. Instead of "an important regulatory interest," they sometimes suggest that we look for "a core concern of § 2," "an important purpose," "a legitimate non-protectionist purpose," or "a legitimate local purpose." See Br. of Appellants 14, 32, 35, 46. Each of those options, however, are similar to the "legitimate local purpose" terminology used in the ordinary dormant Commerce Clause analysis. *See, e.g., Colon Health Ctrs. of Am., LLC v. Hazel,* 733 F.3d 535, 543 (4th Cir. 2013).

discussed by the Court only after it had already concluded that the discriminatory regimes contravened the dormant Commerce Clause and were not saved by the Twenty-first Amendment. *Id.* Here, by contrast, the district court ruled that the Retail Wine Importation Bar was authorized by the Twenty-first Amendment. And the Supreme Court's "nondiscriminatory alternatives" language relied on by the Plaintiffs was drawn from the Court's 1988 decision in *New Energy Co. of Indiana v. Limbach*, where the Twenty-first Amendment was not even implicated. *See* 486 U.S. 269, 278, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988). As a result, the ordinary dormant Commerce Clause analysis was applied in that case, triggering a standard that was akin to strict scrutiny. In making that reference, the *Granholm* Court was explaining that the discriminatory regimes in Michigan and New York, which were not authorized by the Twenty-first Amendment, also failed the ordinary dormant Commerce Clause test.

Finally, our *Beskind v. Easley* decision that the Plaintiffs invoke similarily offers no support for their position here. *See* 325 F.3d 506 (4th Cir. 2003). In *Beskind*, we struck down a North Carolina alcoholic beverage control regime prohibiting out-of-state wineries from shipping wine to consumers when in-state wineries were allowed to do so – a similar ruling to that of the Supreme Court in *Granholm* two years thereafter. *Id.* at 509. Although *Beskind* preceded both *Granholm* and *Tennessee Wine*, its reasoning is entirely consistent with those decisions. *Beskind* could not have applied the precise language of *Tennessee Wine*, but the solid analysis made by Judge Niemeyer properly centered, first, on whether the challenged

regime discriminated against interstate commerce, and then on whether the discriminatory regime was saved by the Twenty-first Amendment. *Id.* at 513-17.

The Plaintiffs concede on appeal that, when a statute regulating products other than alcoholic beverages is challenged, the ordinary dormant Commerce Clause analysis applies, triggering "a variant of strict scrutiny" and requiring invalidation of the discriminatory statute "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." *See* Br. of Appellants 19-20 (internal quotation marks omitted). And they also recognize that "the Twenty-first Amendment gave states greater regulatory authority over alcoholic beverages than they have over other products." *Id.* at 20. Based on those two correct observations, a less demanding standard of review must necessarily apply to an alcoholic beverage control regime than to regulations involving other products. Put most simply, applying the same stringent test to an alcoholic beverage control regime would undermine Section 2 of the Twenty-first Amendment.

Our analysis of the applicable precedents compels us to conclude that, where a challenged alcoholic beverage control regime discriminates against interstate commerce, the proper follow-up inquiry is whether that regime can nevertheless be justified "as a public health or safety measure or on some other legitimate nonprotectionist ground." *See Tenn. Wine*, 139 S. Ct. at 2474. Although consideration of nondiscriminatory alternatives could have some relevance to that inquiry, it does not transform the

applicable framework into the test that ordinarily applies to a dormant Commerce Clause challenge when the Twenty-first Amendment is not implicated.

2. Finally, we turn to the dispositive issue in this appeal – whether the Retail Wine Importation Bar is justified under the Twenty-first Amendment as a public health or safety measure or on some other legitimate nonprotectionist ground. As the district court explained, a state's interest in preserving its three-tier system for alcohol distribution can itself constitute "a legitimate nonprotectionist ground inherently tied to public health and safety measures the Twenty-First Amendment was passed to promote." *See* Opinion 8. Its Opinion thus focused on whether North Carolina's discriminatory treatment of out-of-state wine retailers is essential to the preservation of the State's three-tier system. Concluding that such treatment was essential to the preservation goal, the court rejected the Plaintiffs' contentions. The Plaintiffs, however, maintain on appeal that North Carolina has effectively abandoned its three-tier system. And they argue that, even if North Carolina yet maintains a three-tier system, its preservation is not a sufficient justification for the discriminatory aspect thereof.

a. We will first assess the Plaintiffs' contention that North Carolina has abandoned its three-tier system. They maintain that, because North Carolina allows wineries – that is, wine producers – to sell their products directly to consumers, thus bypassing the separate wholesaler and retailer tiers, the State no longer has a three-tier system of alcoholic beverage control.

As the N.C. Commission emphasizes, however, the Twenty-first Amendment is not an either-or proposition. Rather, it "gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable." *See Tenn. Wine*, 139 S. Ct. at 2457. Put simply, there is no single "one size fits all" three-tier system that a state must either adhere to or abandon entirely. North Carolina has decided that its three-tier system can tolerate a limited exception for in-state and out-of-state wine producers, allowing them to sell wine directly to consumers. And that exception is within North Carolina's constitutional power to create.

That North Carolina has preserved its three-tier system for distribution of alcoholic beverages is also supported by our precedent. In *Beskind*, we reviewed and struck down North Carolina statutes that authorized in-state wineries to bypass the State's three-tier system and sell directly to consumers, but prohibited out-of-state wineries from doing the same. *See* 325 F.3d at 509. Notwithstanding the exception for in-state wineries, *Beskind* recognized that North Carolina has adopted the "familiar three-tiered" system of alcohol distribution, and that it "prohibit[s] the importation of wine ... except through [its] highly regulated three-tiered structure." *Id.* at 509-10. There was no indication in *Beskind* that the flawed exception for in-state wineries meant that North Carolina no longer used a three-tier system for alcohol distribution. And we have no reason to rule today that the limited statutory exception made available by North Carolina

to in-state and out-of-state wineries means that the State has abandoned its three-tier system.[7]

b. We thus turn to the final inquiry of whether the Retail Wine Importation Bar is justified as a public health or safety measure or on some other legitimate nonprotectionist ground. In resolving that inquiry, the district court concluded that North Carolina's interest in preserving its three-tier system is itself a legitimate nonprotectionist ground that constitutes a sufficient justification. As explained below, and having reviewed de novo the relevant precedents and the contentions of the parties, we agree with that ruling.

The Supreme Court has recognized that the several states, in the exercise of their constitutional authority under the Twenty-first Amendment, are entitled to create and operate three-tier alcoholic beverage control systems. *See Granholm*, 544 U.S. at 489, 125 S.Ct. 1885. Indeed, the Court has specifically described the three-tier system as "unquestionably legitimate." *Id.* (internal quotations marks omitted). The Court has also emphasized that "[s]urely, if § 2 granted States the power to discriminate in the field of alcohol regulation, that power would be at its apex when it comes to regulating the activity to which the provision expressly refers" – the importation and transportation for delivery of alcoholic beverages. *See Tenn. Wine*, 139 S. Ct. at 2471. The three-tier system– the regime that

[7] We readily reject the Plaintiffs' effort to recast the relevant inquiry as being whether North Carolina has abandoned the three-tier system with respect to wine. The Plaintiffs have offered no legal support for that proposition, and we have identified none.

limits the importation of alcoholic beverages by requiring that they flow first from manufacturers to in-state wholesalers, then to in-state retailers, and only thereafter to consumers – by its nature discriminates to some extent against interstate commerce. The only question about its viability in the context of this appeal relates to the extent such discrimination is constitutionally permissible.

Despite its unambiguous approval of the three-tier system, the Supreme Court explained in *Tennessee Wine* that it did not previously suggest "that § 2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme." *See* 139 S. Ct. at 2471. Instead, only those discriminatory requirements that are essential features of the three-tier system are authorized by the Twenty-first Amendment. *Id.* at 2471; *see also North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990) (plurality opinion). The district court's focus on whether the Retail Wine Importation Bar is an essential feature of North Carolina's three-tier system was therefore appropriate.[8]

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[8] We acknowledge the competing contentions of the parties with respect to whether North Carolina's three-tier system actually meets the objectives it was designed to achieve – such as promotion of safe alcohol consumption and reduction of risks associated with alcohol abuse. For their part, the Plaintiffs contend that the N.C. Commission failed to provide "concrete evidence" that North Carolina's restriction on direct wine shipping to consumers by out-of-state retailers "actually promotes public health or safety." *See Tenn. Wine*, 139 S. Ct. at 2474. But in *Tennessee Wine*, the Supreme Court only referenced that requirement in the context of a statutory provision that was

We emphasize that the Retail Wine Importation Bar directly implicates the provisions of Section 2 of the Twenty-first Amendment. To slightly recast Section 2 to precisely reflect the facts underlying this dispute, it reads as follows:

> The transportation or importation into [North Carolina] for delivery ... therein of [wine], in violation of the laws [of North Carolina], is hereby prohibited.

See U.S. Const. amend. XXI, § 2. The "transportation or importation" of wine "for delivery" into North Carolina is thus specified in Section 2, and North Carolina's constitutional power to enact restrictions such as the Bar is therefore "at its apex." *See Tenn. Wine*, 139 S. Ct. at 2471. Indeed, the Supreme Court has confirmed that the several states possess "virtually complete control" over the distribution of alcoholic beverages – including wine – within their borders. *See Granholm*, 544 U.S. at 488, 125 S.Ct. 1885 (internal quotation marks omitted).

In making our assessment of whether North Carolina's differential treatment of the in-state and out-of-state retailers is essential to its three-tier system, the *Tennessee Wine* decision is highly instructive. The Supreme Court recognized therein that Tennessee's durational-residency requirement for retailers was not an essential feature of Tennessee's

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not an essential feature of a three-tier system. *Id.* at 2471. When, as here, an essential feature of a state's three-tier system is challenged, a court's role is more limited and does not entail an examination of the effectiveness of the three-tier system.

three-tier system. *See Tenn. Wine*, 139 S. Ct. at 2471-72. As the Court explained, such a requirement was not imposed in many other states and it did not flow from the basic three-tier system of separating producers, wholesalers, and retailers. *Id.*

Unlike the discriminatory licensing requirement for retailers that the Supreme Court reviewed in *Tennessee Wine*, the Retail Wine Importation Bar is an integral part of North Carolina's three-tier system. To begin with, the Bar directly relates to North Carolina's ability to separate producers, wholesalers, and retailers. The Old North State requires that nearly all alcoholic beverages pass through each of the three tiers before being sold to consumers. And the direct shipping of alcoholic beverages to North Carolina consumers by out-of-state retailers would completely exempt those out-of-state retailers from the three-tier requirement. That would open the North Carolina wine market to less regulated wine, undermining the State's three-tier system and the established public interest of safe alcohol consumption that it promotes. As one of our sister circuits recently observed in similar circumstances, the opening of a state's wine market to retail wine shipments from outside the State "necessarily means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all." *See Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 872 (6th Cir. 2020), *cert. denied*, __ U.S. __, 141 S. Ct. 1049, 208 L.Ed.2d 520 (2021). Eliminating the role of North Carolina's wholesalers in this way would create what the court of appeals in *Whitmer* appropriately called "a sizeable hole" in the State's three-tier system. *Id.* And when

such direct wine shipping is authorized, "the least regulated (and thus the cheapest) alcohol will win." *Id.*[9]

Furthermore, the direct-shipping option that in-state retailers enjoy in North Carolina is simply another way for them to sell wine to North Carolina consumers. *See Whitmer*, 956 F.3d at 873. As we recognized in *Brooks v. Vassar* several years ago, a challenge to a Virginia statute that permitted only in-state retailers to sell alcoholic beverages to consumers was "nothing different than an argument challenging the three-tier system itself." *See* 462 F.3d 341, 352 (4th Cir. 2006). That challenge was foreclosed by the *Granholm* decision, which described the three-tier system as "unquestionably legitimate." *Id.* (internal quotation marks omitted). And although the statutory authorization to sell alcoholic beverages to in-state consumers is not identical to the privilege to sell *and* ship them to such consumers, the privilege of shipping alcohol is closely intertwined with the privilege of selling it. In these circumstances, the

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[9] We observe that *Whitmer* is one of two recent court of appeals decisions that assessed challenges to regimes very similar to the Retail Wine Importation Bar post-*Tennessee Wine*. Both decisions upheld the constitutionality of such regimes under the Twenty-first Amendment. *See Whitmer*, 956 F.3d at 867 (upholding Michigan's alcoholic beverage control regime that permitted in-state retailers to offer at-home deliveries while denying that option to out-of-state retailers); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1175, 1184 (8th Cir. 2021), *cert. denied*, __ U.S. __, 142 S. Ct. 335, 211 L.Ed.2d 178 (2021) (upholding Missouri's alcoholic beverage control regime that barred out-of-state wine retailers – but not in-state wine retailers – from shipping directly to Missouri consumers).

differential treatment with respect to wine shipping by retailers is an essential aspect of North Carolina's three-tier system.[10]

Finally, we emphasize that our ruling today is consistent with the Supreme Court's *Granholm* decision and with our decision in *Beskind*. The challenged regimes underlying those disputes allowed in-state wine producers – not wine retailers – to ship wine directly to consumers, but prohibited out-of-state wine producers from doing the same. *See Granholm*, 544 U.S. at 466, 125 S.Ct. 1885; *Beskind*, 325 F.3d at 509. Those regimes were struck down as unconstitutional because they allowed only in-state wine producers to bypass the statutory three-tier system of alcohol distribution and ship directly to consumers. *Granholm*, 544 U.S. at 474, 493, 125 S.Ct. 1885; *Beskind*, 325 F.3d at 509. By contrast, the Retail Wine Importation Bar simply assures that all wine sold to North Carolina consumers by retailers goes through the State's three-tier system.

C. Put simply, our analysis of North Carolina's Retail Wine Importation Bar under the *Tennessee Wine*

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[10] We also reject the Plaintiffs' contention that reasonable nondiscriminatory alternatives are available to North Carolina and are required to be used. As the district court observed, the Plaintiffs' challenge presents a choice between "virtually eliminating North Carolina's three-tier system ... and maintaining the status quo." *See* Opinion 11. We find no basis to disagree with that observation. There is no way for North Carolina to effectively maintain its three-tier system while allowing out-of-state retailers to bypass the system completely and ship wine directly to North Carolina consumers.

framework leads us to conclude that, although the Bar discriminates against interstate commerce, it is nevertheless justified on the legitimate nonprotectionist ground of preserving North Carolina's three-tier system. We therefore arrive at the same conclusion reached by our colleagues in the Sixth and Eighth Circuits when they faced similar situations. *See Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 867 (6th Cir. 2020), *cert. denied*, __ U.S. __, 141 S. Ct. 1049, 208 L.Ed.2d 520 (2021); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1175, 1184 (8th Cir. 2021), *cert. denied*, __ U.S. __, 142 S. Ct. 335, 211 L.Ed.2d 178 (2021). At bottom, we rule that North Carolina acted within its constitutional authority – granted by Section 2 of the Twenty-first Amendment – in adopting the Retail Wine Importation Bar and prohibiting out-of-state retailers from shipping wine directly to consumers.

IV.

Pursuant to the foregoing, we reject the Plaintiffs' appellate contentions and affirm the judgment of the district court.

AFFIRMED

WILKINSON, Circuit Judge, dissenting:

By holding that North Carolina may flatly discriminate against out-of-state interests in its alcohol regulations, the majority has forsaken the commercial unity that makes this nation one. To be sure, in the post-Prohibition world the Twenty-first Amendment grants North Carolina considerable power over alcohol to promote temperance and public health. But some of what the Twenty-First Amendment appears to give,

the Commerce Clause takes away. Just a few terms ago, the Supreme Court unequivocally reiterated that even alcohol regulations may not discriminate in violation of the dormant Commerce Clause, and it invalidated a law that disfavored out-of-state liquor retailers. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, __ U.S. __, 139 S. Ct. 2449, 2462, 204 L.Ed.2d 801 (2019). North Carolina's law does just that. Because each of North Carolina's undeniably legitimate Twenty-first Amendment interests could readily be furthered in a nondiscriminatory way, I respectfully dissent.

I.

The briefest description of the North Carolina law lays bare a Commerce Clause problem. North Carolina allows in-state retailers to ship wine directly to consumers. N.C. Gen. Stat. §§ 18B-900(a)(2), -1001(4). Out-of-state retailers, under pain of criminal law, cannot do the same. *Id.* § 18B-102.1.

This law is a textbook example of a dormant Commerce Clause violation. The Commerce Clause states that "Congress shall have Power ... To regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). This so-called dormant Commerce Clause is understood to "prohibit[ ] economic protectionism – that is, regulatory measures designed to benefit in-state economic

interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988).

And for good reason. Previously, under the Articles of Confederation, each state had free reign to "pursue a system of commercial policy peculiar to itself" and implement "regulations of trade" in an "endeavor to secure exclusive benefits to their own Citizens. The Federalist No. 7, at 62-63 (C. Rossiter ed. 1961) (A. Hamilton). The resulting trade barriers were "expensive," "vexatious," and "destructive of the general harmony." Madison, Vices of the Political System of the United States, *in* 2 Writings of James Madison 363 (G. Hunt ed. 1901); *see also* The Federalist No. 22, p. 144-45 (A. Hamilton) (describing the "animosity and discord" caused by "injurious impediments to the intercourse between the different parts of the Confederacy"); The Federalist No. 42, p. 267-68 (J. Madison) (describing how such regulations "would nourish unceasing animosities" among states). As one historian put it, "Interference with the arteries of commerce was cutting off the very life-blood of the nation." M. Farrand, The Framing of the Constitution of the United States 7 (1913). The new Constitution, by nationalizing the power to regulate interstate commerce, sought to avoid these ills. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979); *Granholm v. Heald*, 544 U.S. 460, 472, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005).

Thus, "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87, 107 S.Ct. 1637, 95 L.Ed.2d 67

(1987). A statute is discriminatory if it imposes "differential treatment [on] in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys.*, 511 U.S. at 99, 114 S.Ct. 1345. While a law that "regulates evenhandedly and only indirectly affects interstate commerce" is subject to a balancing test, a law that "discriminates facially, in its practical effect, or in its purpose" is "virtually *per se*" invalid. *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (quotation marks omitted); *see also Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 152 (4th Cir. 2016). Courts have found facially discriminatory statutes – those that speak in unmistakably geographical terms – particularly easy to reject under the dormant Commerce Clause. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 618, 626-27, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) (invalidating state law prohibiting importation of waste from "outside the territorial limits of the State"); *Hughes*, 441 U.S. at 336-37, 99 S.Ct. 1727 (invalidating state law prohibiting exportation of minnows "out of the State for purposes of sale").[1]

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[1] To be sure, not every facial distinction between in- and out-of-state interests violates the dormant Commerce Clause. For instance, most state university systems charge higher tuition for out-of-state students, as they are permitted to do by the market participant exception, *see Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 496 n.9 (10th Cir. 1998) (citing *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-39, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980)), and states have also been allowed to implement facially-discriminatory quarantine laws for health and safety purposes, *see City of Philadelphia v. New Jersey*, 437

North Carolina's law quite plainly discriminates on its face. The very words of the law distinguish between what in-state and out-of-state retailers may do. As noted earlier, a licensed in-state retailer may ship wine directly to North Carolina consumers, N.C. Gen. Stat. §§ 18B-900(a)(2), -1001(4), yet it is a felony offense for an "out-of-state retail[er]" to do the same. *Id.* § 18B-102.1. As a result – and as reiterated by a separate statutory provision for good measure – a North Carolina consumer may receive retail wine only from another North Carolinian; he may not "have [it] mailed or shipped to him from outside th[e] State." *Id.* § 18B-109. I cannot think of a more starkly discriminatory scheme.

Because the discrimination is manifest in the statute's very text, there is no need to speculate about the law's purpose or effects. Those are much thornier questions, as "once one gets beyond facial discrimination [the] negative-Commerce-Clause jurisprudence becomes (and long has been) a quagmire." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) (Scalia, J., concurring in the judgment) (quotation marks omitted). For the simple reality of geography can place all sorts of *de facto* burdens on commerce – being in-state may bring with it certain inherent advantages, such as proximity to one's customer base – and there may be perfectly benign regulations that have adverse ripple effects on out-of-state commercial activity. *See Colon Health Ctrs.*, 813 F.3d at 159 (warning of the risk of "judicial interference with legislation touching no end of subject

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U.S. 617, 628-29, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).

matters" under a wide view of the dormant Commerce Clause). But this case is straightforward. It does not require us to test the perimeters of the dormant Commerce Clause. This law lies in the prohibition's crosshairs. It is a *de jure* imposition of differential treatment, a legal codification of advantages. By "depriv[ing] citizens of their right to have access to the markets of other States on equal terms," this law strikes at the very evils the "Commerce Clause w[as] designed to avoid." *Granholm*, 544 U.S. at 473, 125 S.Ct. 1885.

North Carolina would have us believe that the laws are not *really* discriminatory, for all retailers with licenses may ship directly to consumers on the same terms, and out-of-staters can obtain a license by setting up shop in North Carolina and designating a resident to manage the business. But, as the majority correctly recognizes, it is misguided to think that recasting the discrimination absolves it. *See Granholm*, 544 U.S. at 474, 125 S.Ct. 1885. Any way you slice it, the scheme still "grants in-state [retailers] access to the State's consumers on preferential terms." *Id.* As long as they have relevant licenses, in-state retailers "can ship directly to consumers" from their stores. *Id.* But "[o]ut-of-state [retailers] must open a branch office and warehouse in [North Carolina]" and designate an in-state resident to manage it, "additional steps that drive up the cost of their wine." *Id.* at 474-75, 125 S.Ct. 1885. Such an "in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Id.* at 475, 125 S.Ct. 1885 (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963)).

Of course, it is always easier for state legislatures to follow the course of least resistance, appeasing the in-state crowd. And I understand the fondness for home cooking. But the fact remains that it is impermissible under the dormant Commerce Clause for North Carolina to "plainly favor[ ]" North Carolina retailers over those of any other state. *Tenn. Wine*, 139 S. Ct. at 2462. "Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *W. Lynn Creamery*, 512 U.S. at 205, 114 S.Ct. 2205. "This rule is essential to the foundations of the Union": North Carolina simply may not prohibit out-of-state retailers from accessing its market on equal terms. *Granholm*, 544 U.S. at 472, 125 S.Ct. 1885.

II.

Were this any other commodity, North Carolina's facially discriminatory scheme would instantly be ruled invalid. *Granholm*, 544 U.S. at 476, 125 S.Ct. 1885; *Tenn. Wine*, 139 S. Ct. at 2462. But since it deals with alcohol, the Twenty-first Amendment swoops into play, and the majority holds that it lifts the statute to firm ground. It does no such thing.

There is no question that states have wide latitude in regulating the sale and consumption of alcohol. Part of the compromise to repeal national Prohibition, after all, was to lodge that regulatory power instead with each individual state, resulting in § 2 of the Twenty-first Amendment: "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. States may set the age at which residents can purchase and consume alcohol, *e.g.*, N.C. Gen. Stat. § 18B-300, and determine qualifications for producer, wholesaler, and retailer permits, *e.g.*, N.C. Gen. Stat. § 18B-900. They may institute and police the system for distributing alcohol. *E.g.*, N.C. Gen. Stat. §§ 18B-1000 to -1300. They may, as many do, establish a three-tiered system, in which alcohol must flow through a licensed producer, wholesaler, and retailer before reaching the consumer. *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885. They may even establish a state-run monopoly for distribution or outlaw alcohol altogether within their borders. *Id.* I do not dispute that North Carolina, like any state, has the clear authority to do all these things.

What I do dispute is that it may do these things in a way that starkly favors in-state interests. The Supreme Court has repeatedly confirmed that it may not: states' § 2 power to regulate alcohol remains "limited by the nondiscrimination principle of the [dormant] Commerce Clause." *Granholm*, 544 U.S. at 487, 125 S.Ct. 1885; *see also Tenn. Wine*, 139 S. Ct. at 2470. If, for example, a state banned domestic alcohol, it could also ban imported alcohol. But its ability to do so remained subject to the proviso "that the States treated in-state and out-of-state liquor on the same terms." *Granholm*, 544 U.S. at 481, 125 S.Ct. 1885. In no way did either the Act or § 2 displace the nondiscrimination principle of the Commerce Clause. *Id.* at 484-85, 125 S.Ct. 1885.

In sum, § 2 of the Twenty-first Amendment authorized evenhanded, nondiscriminatory laws for "maintain[ing] an effective and uniform system for

controlling liquor." *Id.* It did "not ... give States a free hand to restrict the importation of alcohol for purely protectionist purposes." *Tenn. Wine*, 139 S. Ct. at 2469. Accordingly, the Court has consistently "invalidated state alcohol laws aimed at giving a competitive advantage to in-state business." *Id.* at 2470 (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-76, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) (invalidating tax exemption favoring in-state alcohol producers); *Healy v. Beer Inst.*, 491 U.S. 324, 340-41, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) (invalidating price regulation on out-of-state beer distributors); *Granholm*, 544 U.S. at 487-98, 125 S.Ct. 1885 (invalidating direct-shipment law favoring in-state wineries)). I therefore have no trouble concluding that the Twenty-first Amendment does not authorize North Carolina's discriminatory treatment of in-state and out-of-state retailers.

A. There is no need to bake this cake from scratch. The Supreme Court has twice considered state laws that were, in all relevant respects, indistinguishable from the one at issue here. And both times it held they were not authorized by the Twenty-first Amendment. I am startled that the majority would not follow this precedent.

At issue in *Granholm v. Heald* were New York and Michigan laws permitting in-state wineries, but not out-of-state wineries, to ship wine directly to consumers. 544 U.S. at 465-66, 125 S.Ct. 1885. After concluding with "no difficulty" that the law "discriminates against interstate commerce," *id.* at 476, 125 S.Ct. 1885, the Supreme Court held that it was "not saved by the Twenty-first Amendment." *Id.* at 489, 125 S.Ct. 1885. It noted that states have broad

power to regulate alcohol under the Twenty-first Amendment and that "the three-tier system itself is 'unquestionably legitimate.'" *Id.* at 488-89, 125 S.Ct. 1885 (quoting *North Dakota v. United States*, 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990)). But the Court emphasized that this power "does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers." *Id.* at 493, 125 S.Ct. 1885. "If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Id.*

Following *Granholm*, the circuits divided over how broadly to apply its holding. Some circuits read *Granholm* as establishing a more limited rule "immunizing the three-tier system from constitutional attack so long as it does not discriminate between in-state and out-of-state *producers* or *products*," while others read it broadly to stand for a "general non-discrimination principle" applicable to all three tiers including retailers. *Lebamoff Enters., Inc. v. Rauner*, 909 F.3d 847, 853–54 (7th Cir. 2018) (collecting cases); *see also Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 616–18 (6th Cir. 2018) (same).

In *Tennessee Wine*, the Supreme Court unequivocally endorsed the broader reading. The case involved Tennessee's law limiting alcohol retail licenses to those who had been state residents for at least a two-year period. 139 S. Ct. at 2456. The Court squarely rejected the proposition that *Granholm*'s nondiscrimination principle applied only to producers and products, but not retailers or distributers: "There is no sound basis for this distinction." *Id.* at 2470–71. Nothing in *Granholm*'s "reading of history or its

Commerce Clause analysis was limited to discrimination against products or producers," but rather forbade "discrimination against all out-of-state economic *interests*" that "deprived *citizens* of their right to have access to the markets of other States on equal terms." *Id.* at 2471 (quotation marks and citations omitted) (emphasis in original). Accordingly, Tennessee's durational-residency requirement for retailers was prohibited by the dormant Commerce Clause and not saved by the Twenty-first Amendment. *Id.* at 2476.

Adding *Granholm* and *Tennessee Wine* together, the writing is on the wall. The former explained that states may not implement discriminatory direct-shipment laws favoring in-state producers over out-of-state competitors. And the latter emphasized that this principle was not limited to producers, but applied to all out-of-state interests. The sum total is that North Carolina cannot implement discriminatory direct-shipment laws favoring in-state retailers over out-of-state retailers.

B. Nevertheless, the majority upholds the law as part of North Carolina's three-tiered scheme, which is itself "unquestionably legitimate." Maj. Op. at 226-27 (quoting *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885). Respectfully, I believe the majority commits the very same mistake identified in *Tennessee Wine* by "read[ing] far too much into *Granholm*'s discussion of the three-tiered model," which exists to track and regulate the distribution of alcohol. 139 S. Ct. at 2471; *see also id.* at 2463 & n.7. "Although *Granholm* spoke approvingly of that basic model, it did not suggest that § 2 sanctions every discriminatory feature that a State

may incorporate into its three-tiered scheme." *Id.* And "[a]t issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers," *id.*, but rather North Carolina's choice to impose on the third tier what amounts to a physical-presence requirement. In my view, that choice is not essential to maintaining a three-tiered scheme.

The crux of the three-tiered system is to prevent vertical integration in alcohol distribution systems by strictly "separating producers, wholesalers, and retailers." *Tenn. Wine*, 139 S. Ct. at 2471; *see also Granholm*, 544 U.S. at 466, 125 S.Ct. 1885 ("Separate licenses are required for producers, wholesalers, and retailers.... [B]oth state and federal laws limit vertical integration between tiers.") (citing FTC, Possible Anticompetitive Barriers to E-Commerce: Wine (July 2003) (hereinafter FTC Report)). The "vertical quarantine" among tiers is consistently called out as the scheme's defining feature. *Bainbridge v. Turner*, 311 F.3d 1104, 1106 (11th Cir. 2002); *see, e.g., Whitmer*, 956 F.3d at 868 ("[B]usinesses at each tier must be independently owned, and no one may operate more than one tier."); *Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171, 1176 (8th Cir. 2021) ("A central feature of the separated tiers is to prohibit a member of one tier from having a financial interest in a member of a higher or lower tier."); Maj. Op. at 217–18.

Beyond that, "there is no one archetypal three-tier system." *Rauner*, 909 F.3d at 855 (citation omitted); *see also Tenn. Wine*, 139 S. Ct. at 2472 (citing FTC Report, *supra*, at 7-9). And "each variation must be judged

based on its own features." *Tenn. Wine*, 139 S. Ct. at 2472. A discriminatory variation does not find sanctuary in the Twenty-first Amendment if it is not "essential" to preserving the three-tiered model. *Id.* The Supreme Court has already explained that a residency requirement for liquor licenses "is not an essential feature of a three-tiered scheme," observing that many states maintain such schemes without requiring retailers to be in-state residents. *Id.* at 2471-72 (citing FTC Report, *supra*, at 7-9).

The majority fails to adequately explain why the feature in the case at bar is any different. Prohibiting wine shipments to consumers from out-of-state retailers is no more essential to a three-tiered model than residency requirements. One can easily imagine a state maintaining a strict licensing regime to ensure that the tiers remain distinctly owned, while treating in-state and out-of-state retailers alike. Indeed, many states with three-tiered systems do allow out-of-state retailers to ship wine on the same terms as in-state retailers. J.A. 91, 245-46; *e.g.*, Cal. Bus. & Prof. Code § 23661.2; Conn. Gen. Stat. § 30-18a; Idaho Code § 23-1309A; La. Rev. Stat. § 26:359; Neb. Rev. Stat. § 53-123.15; N.H. Rev. Stat. § 178:27; N.M. Stat. § 60-7A-3; Or. Rev. Stat. § 471.282; Va. Code §§ 4.1-206.3(F), -209.1; W. Va. Code § 60-8-6; Wyo. Stat. § 12-2-204.

In no way is the three-tiered system jeopardized by a requirement of evenhandedness. Allowing imported wine does not necessitate allowing *unregulated* wine. Nothing stops North Carolina from requiring out-of-state retailers to obtain a state shipping license and comply with the same conditions as in-state

retailers. *See, e.g.*, FTC Report, *supra*, at 7-8; J.A. 243 (Model Direct Shipping Bill); *Granholm*, 544 U.S. at 491-92, 125 S.Ct. 1885 (referencing the Model Direct Shipping Bill favorably). One of those conditions could be that retailers sell wine to North Carolina consumers only if it has been purchased from a wholesaler. In all events, the conditions are for North Carolina to decide, so long as they have the virtue of being facially evenhanded.

Trying a somewhat different tack, North Carolina argues that discriminatory treatment of out-of-state retailers is simply the natural result of inherent features of the three-tiered system. The rationale goes like this: as a starting point, some courts have held that states may limit alcohol sales to licensed retailers with a physical storefront in the state. *See Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016) (citing *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010)); *Whitmer*, 956 F.3d at 870 (citing *Byrd*, 883 F.3d at 623 n.8). And if the state may permissibly require retailers to be physically present, it naturally can allow those retailers to make sales in any form – in-store, curbside, or delivery – while forbidding non-present retailers from doing the same. *See Wine Country*, 612 F.3d at 820-21; *Whitmer*, 956 F.3d at 870 ("If Michigan may ... require retailers to locate within the State, may it limit the delivery options created by the new law to in-state retailers? The answer is yes."). Any resulting difference between in-state and out-of-state retailers is supposedly just the way things always are in a three-tiered system.

I could not disagree more. To begin with, our

circuit has never held that states may require retailers to be physically present in the state. As already explained, a state could maintain three strictly regulated, separately owned tiers without also requiring retailers to be physically present, and many states do so.

Nor has the Supreme Court ever sanctioned physical-presence requirements. In *Granholm*, for instance, the Court struck down a state law requiring wineries to "establish[ ] a bricks-and-mortar distribution operation" in the state to do business there. 544 U.S. at 475, 125 S.Ct. 1885. It explained that it has always "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)). Likewise, *Tennessee Wine*'s holding that states cannot limit retail licenses to in-state residents strongly suggests as much. *See* 139 S. Ct. at 2472 (rebutting arguments in favor of "in-state presence and residency requirements"); *id.* at 2484 (Gorsuch, J., dissenting) (noting that the majority's holding calls into question "physical presence laws ... requiring [retailers] to have a brick-and-mortar store in the State").

In any event, there is no need to decide the larger question of whether physical-presence requirements are always or never constitutional. A state that limits *all* alcohol sales to in-person storefronts, for instance, would present a different case. North Carolina has not done that; it allows mail-order and Internet wine sales with delivery anywhere in the state. It has thus rendered an in-state physical storefront unnecessary to

its distribution model. *See Rauner*, 909 F.3d at 856-57; *Whitmer*, 956 F.3d at 877 (McKeague, J., concurring) (doubting that, given the modern "ubiquity of online sales," a physical-presence requirement "is just a coda to Michigan's three-tier regulations"). Receiving Internet orders and shipping to consumers is something that both in-state *and* out-of-state retailers are perfectly capable of doing, but only the former is currently allowed to do. And once North Carolina "chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Granholm*, 544 U.S. at 493, 125 S.Ct. 1885.

C. Even if I were to agree with the majority that a physical-presence requirement for retailers is essential to maintaining a three-tiered system, North Carolina's laws as applied here would still fail. That is because North Carolina does not have a three-tiered system when it comes to wine.

In general, North Carolina requires alcohol to flow through all three separate tiers before it may be imbibed. *See, e.g.*, N.C. Gen. Stat. § 18B-1300. But not wine. Where wineries are concerned, the three-tiered system no longer holds. North Carolina specifically allows wineries to obtain a "wine shipper permit" "to sell and ship [up to] two cases of wine per month to any person in North Carolina to whom alcoholic beverages may be lawfully sold." *Id.* § 18B-1001.1. Wineries may also "[o]btain a wine wholesaler permit to sell, deliver, and ship at wholesale unfortified wine manufactured at the winery." *Id.* § 18B-1101(7). Thus, wine may be sent from the producer directly to a retailer (bypassing a separate wholesaler) or directly to a consumer (bypassing a wholesaler and retailer altogether). For

wine, then, North Carolina's is not a regime premised on three separately owned tiers. It is a regime premised simply on permitting. That permitting system must be evenhanded.

North Carolina characterizes the winery shipper permits as simply a "limited exception" to its three-tiered system and insists that small exceptions should not require it to abandon its three-tiered system altogether. *See* Resp. Br. 41. I grant that states may choose to make exceptions while still maintaining their interest in three-tiered systems generally. But this is no limited exception – it *is* an abandonment of the three-tiered system *for wine*. North Carolina may still have a three-tiered scheme for distribution of other alcoholic beverages, but by allowing wine producers, as opposed to retailers, to ship directly to consumers, it has eviscerated any semblance of a three-tiered distribution scheme *for wine*. At the very least, then, it fights a losing battle in its claim that having *wine* retailers physically present in the state, or having all wine flow through each of the three tiers, is somehow essential.

III.

I do not think the Twenty-first Amendment can wholly shield North Carolina's discriminatory law. But one more step is left to strike it, for even a discriminatory law may pass dormant Commerce Clause muster if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (quoting *New Energy Co.*, 486 U.S. at 278, 108 S.Ct. 1803). In alcohol regulation cases, the inquiry is slightly "different."

Tenn. Wine, 139 S. Ct. at 2474. "Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged [law] can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* And "'mere speculation' or 'unsupported assertions' are insufficient to sustain a law that would otherwise violate the Commerce Clause"; we instead require "concrete evidence" that the law "actually promotes public health or safety." *Id.* (quoting *Granholm*, 544 U.S. at 490, 492, 125 S.Ct. 1885). An asserted objective also fails if it could "easily be achieved by ready [nondiscriminatory] alternatives." *Id.*

Without a doubt, the three-tiered system as a whole is admirable and justified on public health and safety grounds. Yet this analysis must focus on the particular "provision at issue"– North Carolina must justify the *discrimination*. *Tenn. Wine*, 139 S. Ct. at 2474. So the question is whether prohibiting out-of-state retailers from shipping directly to consumers, while allowing in-state retailers to do so, is justified on recognized health and safety grounds, rather than being predominantly protectionist.

North Carolina offers three primary justifications for this feature: preventing the sale of alcohol to minors, collecting taxes on alcohol sales, and enhancing safety. All these interests are certainly important, and it is North Carolina's prerogative to further them by regulating the flow of alcohol. But it may not do so in an unjustifiably discriminatory way. And none of its asserted interests justifies this

differential treatment.

Take, for example, the sale of alcohol to minors. North Carolina has fallen well short of providing "concrete evidence" that its underage-drinking interest is at issue here, for the same reasons as in *Granholm*. *See* 544 U.S. at 490-92, 125 S.Ct. 1885. The record lacks evidence "that the purchase of wine over the Internet by minors is a problem," which is "not surprising" given minors' preference for other types of alcohol and their need for instant gratification. *Id.* at 490, 125 S.Ct. 1885; *see* FTC Report, *supra*, at 12, 33-34; J.A. 202 (showing that the majority of underaged drinkers obtained their alcohol from an adult). Even if direct shipping does increase the risk of underage drinking, it does not justify discriminatory treatment as "minors are just as likely to order wine from in-state [retailers] as from out-of-state ones," or for that matter directly from wineries. *Granholm*, 544 U.S. at 490, 125 S.Ct. 1885.

More importantly, though, all of North Carolina's stated objectives could be readily accomplished through nondiscriminatory alternatives. One option is to impose "an evenhanded licensing requirement." *Granholm*, 544 U.S. at 492, 125 S.Ct. 1885. Many other states have implemented such systems, *see* J.A. 245-46, as has North Carolina itself with respect to wineries, *see* N.C. Gen. Stat. § 1001.1. The license usually requires out-of-staters to remit taxes, consent to jurisdiction, undergo audits, and comply with various other regulatory requirements. *See* J.A. 95; FTC Report, *supra*, at 3, 8, 27-28. Out-of-state shipper permits could address each of North Carolina's stated concerns. *See Granholm*, 544 U.S. at 490-91, 125 S.Ct.

1885 (explaining that the State could "require[] an adult signature on delivery and a label so instructing on each package" to prevent delivery to minors); *id.* at 491, 125 S.Ct. 1885 (explaining that the State "could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping," an approach which other states have taken "and report no problems with tax collection"); *Tenn. Wine*, 139 S. Ct. at 2476 (explaining that licenses could "limit both the number of retail licenses and the amount of alcohol that may be sold to an individual" to promote safe sales and consumption).

To the extent that North Carolina is worried about out-of-staters evading state regulations, that concern too is unfounded. North Carolina "of course remains free to monitor the practices of retailers and to take action against those who violate the law." *Id.* It can inspect out-of-state retailers' books and financials remotely, for "improvements in technology have eased the burden of monitoring out-of-state" entities. *Granholm*, 544 U.S. at 492, 125 S.Ct. 1885. "In 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 (quoting *Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994)). And it can enforce its laws through the Twenty-first Amendment Enforcement Act, which allows its attorney general to obtain injunctive relief in federal court against alcohol suppliers who violate state law. *See* 27 U.S.C. § 122a; FTC Report, *supra*, at 10.

But even if North Carolina takes issue with those alternatives or thinks they might weaken its grip on alcohol regulation, there is another obvious nondiscriminatory option – one which indisputably preserves each of the State's stated interests. North Carolina could simply not allow direct shipping from wine retailers at all. That there exists such an easy nondiscriminatory alternative, fully protective of every interest the state has asserted under § 2, is what makes the State's Commerce Clause violation so blatant. And the availability of that alternative should inform any choice of remedy.

IV.

Where, as here, unconstitutional discrimination results from the combination of two otherwise permissible provisions, the court faces "two remedial alternatives:" extend the benefit to the disfavored group or withdraw the benefit from the favored group. *Heckler v. Mathews*, 465 U.S. 728, 738, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984) (quoting *Welsh v. United States*, 398 U.S. 333, 361, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970) (Harlan, J., concurring in the result)); *see also Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 569, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015). "The choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand." *Sessions v. Morales-Santana*, __ U.S. __, 137 S. Ct. 1678, 1699, 198 L.Ed.2d 150 (2017). "In making this assessment, a court should 'measure the intensity of commitment to the residual policy ... and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'" *Id.* at 1700 (quoting *Heckler*, 465 U.S. at

739 n.5, 104 S.Ct. 1387). In many cases, "th[e] choice may well be dictated by the severability clause enacted" as part of the statutory scheme. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 347, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996); *see also Heckler*, 465 U.S. at 740, 104 S.Ct. 1387.

In this case, the choice is easy. For the State itself has expressly stated that its preferred remedy, should it lose on the merits, "is to restrict in-state shipping, not to extend shipping privileges to out-of-state retailers." Resp. Br. 48. And this position is supported by the statute, which states that it is to be "construed to the end that the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages shall be *prohibited except as authorized* in this Chapter." N.C. Gen. Stat. § 18B-100 (emphasis added). The statute's severability clause likewise instructs that any unconstitutional provisions should be stricken "and the remaining provisions shall be construed in accordance with the intent of the General Assembly to further *limit rather than expand* commerce in alcoholic beverages" and "to *enhance strict regulatory control* over taxation, distribution, and sale of alcoholic beverages through the three-tier regulatory system." *Id.* (emphasis added). It is hard to imagine more unambiguous directions.

Each of B-21 Wines' counterarguments is unavailing. First, I "reject the plaintiffs' suggestion that they have placed at issue only the selected portions of North Carolina's ABC laws that regulate direct importation and that they can themselves select the portions to be stricken and those to be preserved." *Beskind*, 325 F.3d at 518. Since the constitutional

violation results from the "conjunctive effect" of multiple provisions, B-21 Wines has effectively put each of them into play. *Id.* While a limited remedy may not be the result that plaintiffs desire, "their right is not to void a law protected by the Twenty-first Amendment but rather to eliminate discrimination in interstate commerce." *Id.* at 520. Second, I would decline B-21 Wines' invitation to extrapolate North Carolina's wishes from its past actions, namely its statutory expansion of wine shipment rights after a more limited remedy was imposed in *Beskind*. There is no need to guess at legislative intent from past actions, which could mean a variety of things, when given the benefit of an explicit statement of purpose in the statute itself.

Most importantly, any remedy in cases involving both the Twenty-first Amendment and Commerce Clause should seek to vindicate the interest of both constitutional provisions. "[W]e can assume that North Carolina would wish us to take the course that least destroys the regulatory scheme that it has put into place pursuant to its powers under the Twenty-first Amendment." *Id.* at 519. And yet, we must eliminate "the discrimination violating the Commerce Clause." *Id.* Both objectives are accomplished by enjoining North Carolina's extension of direct shipment rights to in-state retailers.

This remedy would not only guard each of North Carolina's stated regulatory interests, but strengthen them. If there is a danger in shipping wine directly from retailers to consumers, then it would seem clear that those interests would not only be protected but promoted by limiting the advantage that in-state

shippers receive. If shipments interfere with regulation or taxation, then that is true of any shipment. If the State does not want minors ordering online, that will happen less if no retailers ship from online orders. Every single interest the state points to can be protected and furthered by eliminating its bald in-state preference. This remedy fully protects the states' regulatory purposes under the Twenty- first Amendment, and yet does so in an evenhanded manner.

V.

It is tempting to declare that this is nothing more than an alcoholic beverages case and that the Twenty-first Amendment sweeps all before it. I respect this view. In many areas, state sovereignty is indeed paramount. Yet in matters of commerce we are as one, and that unity has contributed to our nation's strength and endurance.

I would give full force and effect to the commerce power in this case. Doing so need not compromise state interests in the slightest. The majority is quite wrong to enable North Carolina to enact protectionist measures masquerading as part of its three-tiered scheme. I respectfully dissent.

APPENDIX B. Opinion of the U. S. District Court for the Western District of North Carolina
[Filed July 9, 2021].

No. 3:20-cv-00099

B-21 Wines, Inc., et al.,
Plaintiffs,

v.

Stein, et al.,
Defendants,

Order

Frank D. Whitney, United States District Judge

THIS MATTER is before the Court on the Parties' cross-motions for Summary Judgment, and Defendant's Motion to Strike. (Doc. Nos. 27, 28, 35). On June 17, 2021, the Court held oral arguments on all three pending motions. After carefully considering the arguments presented in the Parties' briefing and at oral argument and for the reasons stated herein, the Court DENIES Defendant's Motion to Strike (Doc. No. 35), DENIES Plaintiff's Motion for Summary Judgment, (Doc. No. 27), and GRANTS Defendant's Motion for Summary Judgment. (Doc. No. 28).

I. Background

Plaintiffs are a group of North Carolina citizens who wish to buy specialty wine from out-of-state retailers, and B-21 Wines, a Florida-based wine retailer who wishes to ship wine directly to consumers located in North Carolina. (Doc. No. 1). The individual Plaintiffs are unable to buy specialty wine from out-of-state retailers because North Carolina prohibits

the direct shipment of wine from out-of-state retailers sent to North Carolina consumers. *Id.* B-21 Wines is likewise prohibited from shipping wine directly to consumers in North Carolina and as a consequence, has lost out on revenues that would have been generated by selling to the North Carolina market. *Id.*

Plaintiffs initially filed this lawsuit on February 18, 2020, against Defendant A.D. Guy, in his official capacity as the Chair of the North Carolina Alcoholic Beverage Control Commission ("ABC"), and Joshua Stein, in his official capacity as Attorney General of North Carolina. *Id.* However, on August 19, 2020, this Court entered an Order dismissing Joshua Stein as a Defendant because Mr. Stein was, and remains, insulated from suit under the Eleventh Amendment. (Doc. No. 21, p. 9). After roughly eight months of discovery, the parties filed the pending cross-motions for summary judgment. (Doc. Nos. 27, 28). Defendant also filed a Motion to Strike two of Plaintiffs' expert reports. (Doc. No. 35). The Court has carefully considered the arguments and evidence set forth in the motions and at oral argument and is now ready to rule on the pending Motion to Strike and the pending Motions for Summary Judgment.

II. Discussion

a. Motions for Summary Judgment

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact *and* the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a) (emphasis added). In this Matter, both Plaintiff and Defendant agree on the material facts, compare (Doc. No. 27-1) with (Doc. No. 29); thus, the Court is tasked only with

determining whether Plaintiff or Defendant is entitled to judgment as a matter of law. See Fed.R.Civ P. 56(a).

Plaintiffs and Defendant have filed cross-motions for summary judgment on the same issue: whether North Carolina's statutory scheme that prohibits out-of-state wine retailers from shipping directly to consumers in North Carolina violates the dormant Commerce Clause. See (Doc. Nos. 27, 28). Plaintiffs argue the prohibition on direct shipping by out-of-state wine retailers violates the Commerce Clause and is not saved by the Twenty-First Amendment. (Doc. No. 27-1). Defendant argues the prohibition on direct shipping by out of state-wine retailers is protected by the Twenty First-Amendment. (Doc. No. 29).

Thus, the Court must determine whether North Carolina's prohibition on direct shipping by out-of-state wine retailers violates the dormant Commerce Clause and if so, whether the Twenty-First Amendment breathes life back into the North Carolina regulations at issue.

I. Alcohol Regulation in North Carolina

In their Motion for Summary Judgment, Plaintiffs ask this Court to invalidate the following North Carolina statutes: N.C. Gen. Stat. § 18B-102.1, N.C. Gen. Stat. § 18B-109, and N.C. Gen. Stat. § 18B-900(a)(2). (Doc. No. 27). The statutes work together to create a regulatory environment in which out-of-state wine retailers may not ship wine directly to consumers residing in North Carolina and may not obtain a North Carolina ABC permit to sell alcohol unless certain conditions are met. However, before setting forth the specific statutes Plaintiffs seek to invalidate, the Court finds it would be useful to explain

the historical developments that led to North Carolina's current alcohol regulatory scheme.

Prior to Prohibition and the passage of the Eighteenth Amendment, alcohol was primarily bought and sold under a "tied-house" saloon system whereby alcohol producers entered into monopolistic arrangements with saloonkeepers. (Doc. No. 29-2, pp. 6-7); *see also Lebamoff Enters., Inc. v. Whitmer*, 956 F.3d 863, 867 (6th Cir. 2020), cert. denied, __ U.S. __, 141 S. Ct. 1049, 208 L.Ed.2d 520 (2021). These monopolistic arrangements required saloonkeepers to sell only the alcohol provided by the controlling manufacturer. The manufacturers were generally profit-motivated "absentee owners" who "knew nothing and cared nothing about the community." Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 33 (Ctr. for Alcohol Pol'y 2011) (1933); accord Lebamoff, 956 F.3d at 867. What resulted was a significant "amount of crime and misery" within American society. *See Crowley v. Christensen,* 137 U.S. 86, 91, 11 S.Ct. 13, 34 L.Ed. 620 (1890); *accord Lebamoff,* 956 F.3d at 867.

In response to the problems caused by the tied-house saloon system, federal and State governments passed laws granting individual States the right to regulate the sale and consumption of alcohol. *See Tenn. Wine and Spirits Retailers Ass'n v. Thomas,* __ U.S. __, 139 S. Ct. 2449, 2464-65, 204 L.Ed.2d 801 (2019) (discussing the Wilson Act and Webb-Kenyon Act, which were federal laws that aimed to give individual States regulatory power over alcohol). Eventually, the Eighteenth Amendment was ratified, which prohibited "the manufacture, sale, or transportation of intoxicating liquors" within the United States. U.S. Const. amend. XVIII, § 1. However,

Prohibition proved to be unworkable and, less than fifteen years later, the Eighteenth Amendment was repealed by the Twenty-First Amendment. U.S. Const. amend. XXI, § 1. In addition to repealing the Eighteenth Amendment, the Twenty-First Amendment explicitly gave States the right to set laws governing the importation, sale, and possession of alcohol within its borders. Id., § 2.

In response to the passage of the Twenty-First Amendment, North Carolina convened a commission to study alcohol in North Carolina and to propose appropriate legislation to regulate and control the sale and possession and alcohol in North Carolina. Victor S. Bryant, et al., Report of Commission to Study the Control of Alcoholic Beverages in North Carolina (1937). The Report detailed a number of findings related to the ills of alcohol consumption and ultimately recommended North Carolina adopt a "Governmental Monopoly" for the regulation of alcohol, known today as the Alcohol Control Beverage Commission. See Bryant, et al., 18. In accordance with the Report's recommendations, North Carolina's General Assembly formally established the State's Alcohol Beverage Control Commission and a "three-tier system" for regulating alcohol. Act of Feb. 22, 1937, ch. 49, 1937 N.C. Sess. Laws 84.

In simplified terms, North Carolina's three-tier system requires alcohol producers, the first tier, to sell only to licensed in-state wholesalers, the second tier. In turn, the wholesalers are then permitted to sell to in-state retailers, the third tier. Once alcohol has made its way through all three tiers, consumers are permitted to buy alcohol from in-state retailers. *See* (Doc. No. 29, pp. 5-6); *Beskind v. Easley*, 325 F.3d 506,

510 (4th Cir. 2003). This three-tier system, which exists in many other States, serves to promote temperance and the social welfare of the citizens of North Carolina by requiring nearly all alcohol to pass through North Carolina's regulated system.[1] *See* Bryant, et al., 18; *see also Lebamoff*, 956 F.3d at 875.

Turning now to the statutes at issue: N.C. Gen. Stat. § 18B-102.1, N.C. Gen. Stat. § 18B-109, and N.C. Gen. Stat. § 18B-900(a)(2) work in tandem to prohibit out-of-state wine retailers from shipping directly to consumers in North Carolina. Specifically, N.C. Gen. Stat. § 18B-102.1 makes it

> 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.[2]

N.C. Gen. Stat. § 18B-109 provides that "[e]xcept as authorized 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."[3] ABC permits are generally only issued to

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[1] Certain types of alcohol imported into North Carolina by producers are exempted from the three-tier system. See, e.g., N.C. Gen. Stat. § 18B.

[2] Article 11 lists the entities or people to whom the Alcohol Beverage Control Commission can issue commercial alcohol permits. N.C. Gen. Stat. § 18B-1100.

[3] N. C. Gen. Stat. 18B-1001.1 allows "wineries holding a federal basic wine manufacturing permit" to obtain a

residents of North Carolina, unless the permit applicant falls within a defined exception. N.C. Gen. Stat. § 18B-900(a). The only defined exceptions to the residency requirement are: (1) the applicant 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;" (2) the applicant "has executed a power of attorney designating a qualified resident of this State to serve as attorney in fact for purposes of receiving service of process and managing the business for which permits are sought;" or (3), the applicant is "applying for a nonresident malt beverage vendor permit, a nonresident wine vendor permit, or a vendor representative permit." § 18B-900(a)(2). Plaintiffs challenge the constitutionality of the relevant statutes under the dormant Commerce Clause.

ii. The Dormant Commerce Clause

The Commerce Clause of the U.S. Constitution provides that "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. In addition to the affirmative grant of power given to Congress, the Commerce Clause contains an implied restriction on State power – it contains a "'self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.'" *Dennis v. Higgins*, 498 U.S. 439, 447, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991) (quoting *S.-Cent. Timber Dev., Inc.*

"wine shipper permit," allowing those wineries holding such permits to ship wine directly to consumers in North Carolina.

v. Wunnicke, 467 U.S. 82, 87, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984)). The implied restriction on State power has come to be known as the "dormant Commerce Clause," which is "driven by concern about 'economic protectionism, that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (*quoting New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988)).

State laws challenged under the dormant Commerce Clause are analyzed under a two-step inquiry. First, a court "inquires whether the state law *discriminates* against interstate commerce." *Brown v. Hovatter*, 561 F.3d 357, 363 (4th Cir. 2009) (emphasis in original). If the answer to the first question is yes, then the "discriminatory law is virtually *per se* invalid," unless the "discrimination is demonstrably justified by a factor unrelated to economic protectionism." *Id.* (citations omitted). Only when there is no discrimination, does a court ask the second question and evaluate "whether the state law[ ] 'unjustifiably ... burden[s] the interstate flow of articles of commerce.'" *Id.* (*citing Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 98 (1994)).

iii. The Twenty-First Amendment.

A dormant Commerce Clause analysis changes somewhat when the article of commerce being regulated is alcohol. The Twenty-First Amendment explicitly gives States the right to regulate the "transportation or importation into any State ... for deliver or use therein of intoxicating liquors." U.S.

Const. amend. XXI, § 2. Thus, a tension exists between the dormant Commerce Clause and the Twenty-First Amendment:

> [W]ithin the authority to regulate alcoholic beverages conferred on the States by the Twenty-first Amendment, some power to regulate commerce was withdrawn from Congress so that the Commerce Clause could not be construed to prevent the enforcement of State laws regulating the importation of alcoholic beverages and the manufacture and consumption of alcoholic beverages within State borders.

Beskind, 325 F. 3d at 513 (*citing Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 84 L.Ed. 128 (1939)). In order to resolve the tension between the dormant Commerce Clause and Twenty-First Amendment, courts are directed to first consider "whether the purported State regulation violates the Commerce Clause *without* consideration of the Twenty-first Amendment." *Beskind,* 325 F.3d at 513 (emphasis added); *see also Tenn. Wine*, 139 S. Ct. at 2474 (explaining that a law "could not be sustained" [under the dormant Commerce Clause] if the law "discriminates on its face against nonresidents"). Then, if the challenged regulation or law is found to violate the dormant Commerce Clause, courts "ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Tenn. Wine*, 139 S. Ct. at 2474. Such public health and safety measures include the promotion of "responsible consumption, preventing underage drinking, and collecting taxes." *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1180 (8th

Cir. 2021).

Most relevant to this case, however, are other legitimate nonprotectionist grounds that could save North Carolina's challenged regulations. Maintaining a three-tier system for alcohol regulation, like North Carolina's, *can* be a legitimate nonprotectionist ground inherently tied to public health and safety measures the Twenty-First Amendment was passed to promote. Indeed, the Supreme Court has explicitly stated the three-tier system for alcohol regulation is "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 489, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) (*citing North Dakota v. United States,* 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990)); *Tenn. Wine*, 139 S. Ct. at 2471 (invalidating a two-year durational residency requirement in part because it was "not an essential feature of a three-tiered scheme"). And, both before and after *Tenn. Wine*, numerous Courts of Appeals – including the Fourth Circuit – have found that laws essential to the existence of a three-tier system withstand scrutiny under the dormant Commerce Clause thanks to § 2 of the Twenty-First Amendment. *See, e.g., Brooks v. Vassar,* 462 F.3d 341, 352 (4th Cir. 2006) ("[A]rguments challenging the three-tier system itself ... [are] foreclosed by the Twenty-First Amendment and ... *Granholm."*); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016) ("Distinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system.") (citation omitted), cert. denied sub nom., *Tex. Package Stores Ass'n v. Fine Wine & Spirits of N. Tex.*, __ U.S. __, 137 S. Ct. 494, 196 L.Ed.2d 404 (2016); *Lebamoff,* 956 F.3d at 872 (upholding Michigan's ban

on direct shipping by out-of-state wine retailers because striking down the ban would "necessarily" undermine Michi-gan's three-tier system); *Sarasota Wine Mkt., LLC,* 987 F.3d at 1183 (upholding Missouri liquor laws in part because the plaintiff "without question attack[ed] core provisions of Missouri's three-tiered system").

Thus, the question before the Court is relatively straightforward: if North Carolina's ban on direct shipping by out-of-state wine retailers is discriminatory on its face, is the ban an essential feature of the State's three-tier system? If the ban is essential to North Carolina's three-tier system, then it is permissible under § 2 of the Twenty-First Amendment, notwithstanding its discriminatory features.

iv. North Carolina's Prohibition on Direct Shipping by Out-of-State Retailers

Plaintiffs challenge three North Carolina statutes that make it illegal for an out-of-state wine retailer to directly ship wine to North Carolina consumers. (Doc. No. 27-1, p. 9). The Court need not go into an extensive dormant Commerce Clause analysis as the challenged Statutes are discriminatory on their face. See N.C. Gen. Stat. § 18B-102.1; § 18B-109; § 18B-900(a)(2). Accordingly, the only question the Court need evaluate is the question of whether North Carolina's differential and discriminatory treatment of out-of-state wine retailers is essential to North Carolina's three-tier system.[4] The

[4] Neither party focused on the three-tier system as their central argument. See (Doc. Nos. 27-1, 29). Defendant argues North Carolina has a legitimate interest in a "fair and orderly market for wine," and cites the State's three-tier system as "one such tool," to achieve that

Court finds that it is, and the challenged statutes are accordingly protected by § 2 of the Twenty-First Amendment.

In reaching this conclusion, the Court finds a recent Sixth Circuit case instructive. In *Lebamoff Enters. v. Whitmer*, 956 F.3d 863 (2020), the court was presented with an identical issue: whether Michigan's ban on direct shipping by out-of-state alcohol retailers, while allowing in-state retailers to ship directly, violated the dormant Commerce Clause. Id. at 867. The Sixth Circuit upheld Michigan's laws under the Twenty-First Amendment because Michigan's differential treatment of out-of-state *retailers* was essential to the maintenance of Michigan's three-tier system. Id. As the court explained,

> [T]here is nothing unusual about the three-tier system, about prohibiting direct deliveries from out of state to avoid it, or about allowing in-state retailers to deliver alcohol within the State. Opening up the State to direct deliveries from out-of-state retailers *necessarily* means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all.

Id. at 872 (emphasis added). Because there was no way to afford the plaintiffs the relief sought without drastically undermining Michigan's three-tier system, which was unquestionably legitimate, the Sixth Circuit upheld the challenged laws.

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interest. (Doc. No. 29, p. 22). And Plaintiffs insist they are not challenging North Carolina's authority to implement a three-tier system. (Doc. No. 31, p. 11).

The Court sees no meaningful difference between the Michigan laws at issue in Lebamoff and the North Carolina laws at issue here. Both sets of challenged laws targeted the commercial activity of liquor or wine *retailers*, which is the third-tier in a three-tier system. And as the Lebamoff court astutely explained, allowing out-of-state retailers to circumvent the three-tier system – while still requiring in-state retailers to participate in the system – would render the three-tier system meaningless.

To the extent Plaintiffs argue the Court should take direction from Beskind, in which the Fourth Circuit invalidated a North Carolina law which prohibited direct shipping by out-of-state wineries, Beskind, 325 F.3d at 517-518, the Court is unpersuaded. Wineries are *producers*; they are the first tier in a three-tier system and are meaningfully distinct from retailers, the third tier. See Tenn. Wine, 139 S. Ct. at 2470 ("§ 2 does not give the States the power to discriminate against out-of-state alcohol *products and producers*." (emphasis in original)); Sarasota Wine Mkt., 987 F.3d at 1176, 1184 (agreeing with the district court that there is a fundamental difference between producers and retailers). Allowing producers to circumvent the three-tier system does not undermine the system in the same way allowing retailers to circumvent the system would.

For example, if the Court were to invalidate the challenged laws here, the result would be a regulatory environment in which out-of-state wine retailers could circumvent North Carolina's three-tier system, while in-state wine retailers could not. Out-of-state wine retailers would be treated *more favorably* than in-state

retailers, which is a result not mandated by the dormant Commerce Clause. Indeed, out-of-state retailers would be able to sell their wine to consumers at lower prices than in-state retailers, who are required to buy their supply from wholesalers at prices set based on excise tax rates. See N.C. Gen. Stat. § 105-113.80. Put simply, North Carolina wine retailers would be at a competitive pricing disadvantage. And the only ways of remedying that disadvantage would be to either grant in-state retailers the ability to circumvent the three-tier system and thus virtually eliminate the system, or to prohibit out-of-state retailers from circumventing the system – which is exactly what the presently-challenged laws do now. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 854 (7th Cir. 2000) ("[S]tates discriminated against in-state sellers, because they could not effectively govern direct shipments from elsewhere").

Given a choice between virtually eliminating North Carolina's three-tier system, which the Supreme Court and multiple Courts of Appeals have determined is unquestionably legitimate, and maintaining the status quo, the Court chooses the latter.

In so concluding, the Court does not summarily cast aside Plaintiffs' well-founded arguments that North Carolina's ban on direct-shipping does not have the *effect* of advancing the public health goals the laws purport to advance. The Supreme Court itself has held that it is the effect of a law that matters in a § 2 analysis, not the law's stated purpose. Tenn. Wine, 139 S. Ct. at 2474 ("Where the predominant *effect* of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2." (emphasis added)).

However, until such time when the citizens of North Carolina determine its three-tier system does not appropriately "address the public health and safety effects of alcohol" by making it harder and more expensive to sell alcohol in North Carolina, see id.; see also Lebamoff, 956 F.3d at 874 ("The purpose [and effect] of the [three-tier] system, for better or worse, is to make it harder to sell alcohol by requiring it to pass through regulated in-state wholesalers."), the Twenty-First Amendment protects North Carolina's three-tier system and its essential and necessary features. Defendant is accordingly entitled to judgment as a matter of law.

b. Motion to Strike

Defendant moves to strike two of Plaintiff's excerpt reports: the Wark Report and the Lassiter Report. (Doc. No. 36). Based on the foregoing discussion and conclusion regarding the cross-motions for summary judgment, Defendant's Motion to Strike, (Doc. No. 36), is DENIED AS MOOT.

III. Conclusion

IT IS THEREFORE ORDERED that Defendant's Motion to Strike, (Doc. No. 35) is DENIED; Plaintiffs' Motion for Summary Judgment, (Doc. No. 27), is DENIED; and Defendant's Motion for Summary Judgment, (Doc. No. 28) is GRANTED. The Clerk of Court is respectfully DIRECTED to issue a separate judgment in accordance with the terms of this Order.

APPENDIX C. U. S. Court of Appeals for the Fourth Circuit, Order Denying Rehearing [Filed June 28, 2022].

No. 21-1906

B-21 WINES, INC.; Justin Hammer; Bob Kunkle; Mike Rash; Lila Rash,
Plaintiffs-Appellants,

v.

Hank BAUER, Chair, North Carolina Alcoholic Beverage Control Commission,
Defendant-Appellee.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Upon consideration of submissions relative to the motion for leave to file an amicus curiae brief in support of appellants' petition for rehearing en banc, the court denies the motion as moot.

Entered at the direction of the panel: Judge Wilkinson, Judge King, and Judge Quattelbaum.

For the court:

/s/ Patricia S. Connor, Clerk

APPENDIX D. North Carolina General Statutes

§ 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-1001(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, ... and (iii) the holder of the permit to ship unfortified wine in closed containers to individual purchasers inside and outside the State.