THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	
DC Winery LLC t/a District Winery/Ana Restaurant & Bar	Case No.: 20-CMP-00021 License No.: ABRA-098684 Order No.: 2021-882
Holder of a Retailer's Class CT License	
at premises 385 Water Street, S.E. Washington, D.C. 20003	

BEFORE: Donovan Anderson, Chairperson
James Short, Member
Bobby Cato, Member
Rafi Aliya Crockett, Member
Jeni Hansen, Member
Edward S. Grandis, Member

ALSO PRESENT: DC Winery, t/a District Winery/Ana Restaurant, Respondent

Andrew Kline, Counsel, on behalf of the Respondent

Walter Adams, Assistant Attorney General
Office of the Attorney General for the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION

The Alcoholic Beverage Control Board (Board) finds that DC Winery, t/a District Winery/Ana Restaurant, (hereinafter "Respondent" or "District Winery") violated D.C. Official Code § 25-754(b), which prohibits the storage of alcohol outside the District, by storing a large amount of wine in Virginia, and unjustifiably shielding its full operations from appropriate inspections since 2017.

As part of its defense, in its motion to dismiss, District Winery argues that D.C. Official Code § 25-754(b) should not be enforced because it is unconstitutional under the dormant Commerce Clause. Nevertheless, ABRA, as an administrative agency, is not empowered to invalidate a duly enacted statute. Moreover, such an action is not appropriate where the District's local storage law was upheld by the United States Court of Appeals for the District of Columbia Circuit in *Milton S. Kronheim & Co., Inc. v. Dist. of Columbia*, 91 F.3d 193 (D.C. Cir. 1996), and there is no indication that another Court of Appeals or the Supreme Court has issued a contradictory opinion. Consequently, the District's local storage law remains a valid law, narrowly tailored to uphold the District's legitimate and justifiable interests in "*maint[ing] oversight over*" licensees by requiring their alcohol inventory to be "*physically located*" in the District so that ABRA "*can monitor the stores' operations through on-site inspections, audits, and the like.*" *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2475 (2019) (emphasis added).

Consequently, the District's local storage law remains valid and must be enforced by the Board. In that vein, the Board the Board denies the motion to dismiss, and imposes a fine of $1,500 for the offense and puts in place various conditions to ensure compliance with the District's local storage law. The Board's reasoning and order are provided below.

Procedural Background

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Board executed on January 29, 2021. *ABRA Show Cause File No. 20-CMP-00021*, Notice of Status Hearing and Show Cause Hearing, 2 (Jan. 29, 2021). The Notice charges the Respondent with one violation, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent's license.

Specifically, the Notice charges the Respondent with the following violation:

> **Charge I:** **[Since 2017,] [District Winery] stored alcoholic beverages upon premises outside the District of Columbia, in violation of D.C. Code § 25-754(b) . . . .**

Notice of Status Hearing and Show Cause Hearing, at 3.

Both the Government and Respondent appeared at the Show Cause Status Hearing on February 24, 2021. The parties proceeded to a Show Cause Hearing on June 16, 2021, where the parties did not dispute the facts as presented in Case Report No. 20-CMP-00021 and argued the case through the filing of legal briefs regarding the violation at issue and the legality of § 25-754(b). *Transcript* (*Tr.*), June 16, 2021 at 8.

Arguments of the Parties

In lieu of disputing the facts in this case, District Winery contends in its motion to dismiss that § 25-754(b) and Section 205 of Title 23 of the D.C. Municipal Regulations violates the Commerce Clause by prohibiting District Winery from storing alcohol outside the District of

Columbia. *DC Winery, LLC's Legal Memorandum in Support of Dismissal*, at 1 [*Mot. to Dismiss*]. District Winery recognizes that § 25-754(b) was previously upheld by the United States Court of Appeals for the District of Columbia Circuit in *Kronheim*. *Milton S. Kronheim & Co., Inc. v. Dist. of Columbia*, 91 F.3d 193 (D.C. Cir. 1996); *Mot. to Dismiss*, at 4-5. Nevertheless, the Respondent contends that this case has been superseded and should be overturned based on the Supreme Court's decision in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019); *Mot. to Dismiss*, at 5. Moreover, the Respondent further contends that a lower court's analysis in *Quality Brands*, which was rejected by *Kronheim*, is now the correct decision under current law. *Mot. to Dismiss*, at 5. In support of its motion, District Winery argues that there are suitable reasonable alternatives to the local storage law and that the local storage policy cannot be justified. *Id*. at 13-14.

In response, the District argues that the Board should find the Respondent in violation and that it has no authority to overturn a statute on constitutional grounds. *The District of Columbia's Memorandum of Points and Authorities in Opposition to Respondent's Legal Memorandum in Support of Dismissal*, at 1, 3 [*Opposition*]; *The District of Columbia's Sur-Reply to DC Winery, LLC's Reply in Support of Dismissal*, 1 [*Sur-Reply*]. The District further argues that *Kronheim* remains sound, and that later Supreme Court cases do not disturb the holding in that case. *Opposition*, at 6. In particular, the District argues that the local storage law is a legitimate exercise of the District's police powers and upholds the legitimate health, safety, and welfare interests of the public under the Twenty First Amendment. *Id.* at 7-8. Finally, the District also argues that the local storage law is not related to any previous law overturned by the Supreme Court. *Id*. at 8.

In response to the jurisdictional argument, District Winery argues that the Board has the authority to dismiss the case even if it cannot strike down the statute. *DC Winery, LLC's Response to the District of Columbia's Sur-Reply and In Support of Dismissal*, at 1 [*Reply*].

FINDINGS OF FACT

The Board, having considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file, makes the following findings:

I. Background Regarding District Winery.

1. District Winery holds a Retailer's Class CT (Tavern) License at 385 Water Street, S.E., Washington, D.C. *ABRA License No. 098684*. District Winery has a wine pub endorsement attached to its license. *Id*.

2. Under § 25-113(a)(2)(i), on-premise retailers, such as taverns, are authorized "to sell spirits, wine, and beer at the licensed establishment for consumption only at the licensed establishment." D.C. Code § 25-113(a)(2)(i). Furthermore, once obtained, a "wine pub endorsement" permits an on-premise retailer to "manufacture wine containing no more than 21% alcohol by volume at one location . . . for on-premises consumption[,] . . .for sale to . . . licensed

wholesalers for the purpose of resale to other licensees[,]" and for sale in closed containers in the manner described by D.C. Official Code § 25-124. D.C. Code § 25-124(a).

II. Facts Related to the Illegal Off-Site Storage of Alcohol.

3. On November 7, 2019, ABRA Investigator Kevin Puente suspected that District Winery was storing alcohol outside the District, which is not permitted under § 25-754(b). *Case Report No. 20-CMP-00021*, at 1 (Jan. 9, 2020). On November 13, 2019, Investigator Puente and ABRA Supervisory Jason Peru visited District Winery. *Id*. They were met by licensed ABC Manager Eduardo Teran. *Id*.

4. While at the establishment, the investigative team was introduced to Managing Member Connor McCormack and they discussed the establishment's wine making operations. *Id*. at 1-2. Mr. McCormack indicated that once per year District Winery bottles wine at the establishment. *Id*. at 2. Once finished, the bottles are placed in boxes, loaded onto pallets, and then transported by truck to a warehouse operated by International Cellars in Virginia. *Id*. Mr. McCormack explained that District Winery stored the alcohol in Virginia because it does not have enough room to store the inventory at its District location. *Id*.

5. Mr. McCormack further indicated that when District Winery requires wine from its inventory the business will place an order with International Cellars. *Id*. The wine will then be transported back from Virginia. *Id*.

6. In January 8, 2020, Supervisory Investigator Peru and spoke with a representative of the Virginia ABC Authority Bureau of Law Enforcement. *Id*. The representative confirmed that International Cellars holds a license in Virginia and had no objections to the investigative team going to the Virginia location to inspect the premises. *Id*.

7. The investigative team visited International Cellars on January 9, 2020, with two special agents employed by the Virginia ABC. *Id*. at 2-3. Inside, they spoke with Warehouse Manager Will Glover. *Id*. Mr. Glover indicated that District Winery is their biggest client and obtained warehouse space to accommodate their storage needs. *Id*. He indicated that International Cellars has been storing wine from District Winery's District location since 2017. *Id.*

8. Mr. Glover indicated that International Cellars obtains import permits from ABRA whenever it ships District Winery's inventory to its District location. *Id*. He indicated that when the business picks up wine from the District location, International Cellars usually pick up ten pallets worth of alcohol. *Id*. He estimated that District Winery was storing approximately 14,000 cases of wine in their Virginia warehouse, which is approximately 168,000 bottles. *Id*.

9. In November and December of 2019, the investigative team surveyed the licensees holding brew pub, wine pub, or distillery pub endorsements. *Id*. at 2. Based on their survey, no other licensee holding a brew pub, wine pub, or distillery pub endorsement stored alcohol outside their premises. *Id*.

III. The District of Columbia's Alcoholic Beverage Storage Laws.

10. The District of Columbia's laws and regulations related to the storage of alcoholic beverages may be found at D.C. Official Code § 25-754(b) and 23 DCMR § 205. Section 25-754 provides that

> (a) Alcoholic beverages shall not be manufactured, kept for sale, or sold by any licensee other than at the licensed establishment; provided, that the Board may permit the storing of beverages upon premises other than the licensed establishment in the District under the following classes of licenses:
>
> (1) Manufacturer's license;
> (2) Wholesaler's license;
> (3) Off-premises retailer's license, class A or B;
> (4) On-premises retailer's license, class C or D; and
> (5) Caterer's license.
>
> (b) A licensee may not store alcoholic beverages upon premises outside the District.
>
> (c) The Board may permit a licensee to conduct other activities at an approved storage location; except, that that the licensee shall not be permitted to sell, service, or allow the consumption of alcoholic beverages at the storage location.

D.C. Code § 25-754.

11. The storage rules are further articulated in § 205 of the regulations by creating a storage facility permit that allows the holder "to establish a bonded warehouse in the District of Columbia for the storage of alcoholic beverages by the [license holder] . . . or for the accounts of other persons." 23 DCMR § 205.1 (West Supp. 2021). The storage regulation further requires that licensees obtain an "off-premises storage permit to store alcoholic beverages at a storage facility approved by the Board." 23 DCMR § 205.3 (West Supp. 2021). Finally, the storage regulations contain provisions describing approved activities, such as packaging and shipping alcohol; requiring the display of warning signs, permits, and licenses; requiring that the facility be appropriately zoned and dedicated to the storage of alcohol; prohibiting the consumption of alcohol at the premises without a tasting permit; notifying permit holders of the Board's right to inspect their facility; and that storage facility permit holders report on alcohol being stored and moved from the facility. 23 DCMR §§ 205.2, 205.6, 205.10, 205.13-205.14. (West Supp. 2021).

CONCLUSIONS OF LAW

12. The Board has the authority to fine, suspend, or revoke the license of a licensee who violates any provision of Title 25 of the District of Columbia Official Code pursuant to D.C. Code § 25-823(a)(1). Furthermore, after holding a Show Cause Hearing, the Board is entitled to impose conditions if the Board determines "that the inclusion of the conditions would be in the best interests of the locality, section, or portion of the District in which the establishment is licensed." D.C. Code § 25-447. In this matter, the Board shall only base its decision on the

"substantial evidence" contained in the record. 23 DCMR § 1718.3 (West Supp. 2021). The substantial evidence standard requires the Board to rely on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clark v. D.C. Dep't of Employment Servs.*, 772 A.2d 198, 201 (D.C. 2001) *citing Children's Defense Fund v. District of Columbia Dep't of Employment Servs.,* 726 A.2d 1242, 1247 (D.C.1999).

I. District Winery Has Been in Violation of D.C. Official Code § 25-754 Since 2017.

13. There is no dispute that District Winery has been in violation of § 25-754(b). Section § 25-754(b) states, "A licensee may not store alcoholic beverages upon premises outside the District." D.C. Code § 25-754(b). Nevertheless, the record shows that District Winery has been storing a large amount of wine in Virginia at International Cellars since 2017 and such storage is integral to its operations. *Supra*, at ¶¶ 4-5, 7-8. Therefore, the Board sustains Charge I.

II. As an Administrative Agency ABRA Cannot Invalidate § 25-754(b).

14. The Board has no authority to invalidate, overturn, and deem unconstitutional any portion of Title 25 of the D.C. Official Code. *Rhema Christian Ctr. v. Dist. of Columbia Bd. of Zoning Adjustment*, 515 A.2d 189, 197 (D.C. 1986). As "an administrative agency[, the Board] has no authority to declare invalid legislation enacted by the parent legislature." *Archer v. Dist. of Columbia Dept. of Human Res.*, 375 A.2d 523, 526 (D.C. 1977). Instead, the Board must "administer the legislation and . . . apply its provisions according to its best lights." *Id*. In that vein, on the constitutional question raised by District Winery, the Board will simply "establish a record and then grant or deny the relief prayed" based on its limited authority. *Debruhl v. Dist. of Columbia Hackers' License Appeal Bd.*, 384 A.2d 421, 425 (D.C. 1978).

15. The Board is aware of prior cases that suggest that an administrative agency, in some circumstances, may develop an appropriate record for appellate review. *Id*. Specifically, in *Rhema*, the Court stated, "Whereas the record of some administrative hearings, relevant to the regulatory issues, may suffice for the appellate court to review a constitutional question, . . . other hearing records may not, absent the agency's willingness to take evidence on an issue outside the scope of its mandate." *Rhema Christian Ctr.*, 515 A.2d at 197. Nevertheless, the parties in this case did not contest the facts in the record or introduce outside evidence related to the Commerce Clause issue (e.g., District alcohol law enforcement practices, general economic data, legislative history, or industry practice); therefore, it remains an open question whether the present proceedings are sufficient for appellate review. *Id*.

III. The Board Denies the Motion to Dismiss and Finds that § 25-754(b) Satisfies the Commerce Clause.

16. Turning to the constitutional argument raised by the District Winery, the Board is not empowered to overturn § 25-754(b), and is obligated to deny the request to deem § 25-754(b) invalid under the Commerce Clause. Nevertheless, even if the Board had the authority to invalidate § 25-754(b), the Board is not persuaded that *Kronheim* was wrongly decided or that the local storage law violates the dormant Commerce Clause.

17. The Constitution of the United States provides in Section 8 of Article I that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Section 2 of the Twenty First Amendment provides that "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." U.S. Const. amend. XXI.

18. In 2019, *Tennessee Wine & Spirits*, the Court held that a "2-year residency requirement" to obtain a new retail license was unconstitutional. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2457 (2019). The Court based its decision on the "dormant Commerce Clause," which invalidates state laws when they "discriminate[] against out-of-state goods or nonresident economic actors" unless it is shown that the state law "*is narrowly tailored to advance a legitimate local purpose.*" *Id.* at 2461 (quotation marks omitted) (emphasis added). The Court further noted that *the Twenty First Amendment authorized the use of a state's traditional "police power to regulate the alcohol trade" when "such regulation" has "a bona fide relation to protecting . . . public health, . . . public morals . . . public safety," or other "legitimate interests.*" *Id*. at 2464, 2468-69, 2474 (quotation marks omitted) (emphasis added). But the Twenty First Amendment "does not license the States to adopt protectionist measures with no demonstrable connection to those interests." *Id*. at 2474.

19. In determining whether a specific law served a legitimate purpose, the Court indicated that the law at issue should be subject to "an examination of the actual purpose and effect of a challenged law." *Id*. at 2473. As part of this examination, the Court noted that "mere speculation or unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Id*. at 2474 (quotation marks omitted).

20. In overturning the residency requirement, the Court noted that the residency requirement "is not an essential feature of a three-tiered scheme" that "separates producers, wholesalers, and retailers." *Id*. at 2471-72. Among various stated reasons for the residency requirement, the Court noted that Tennessee's residency requirement did not serve the goal "of enabling the State to ensure that only law-abiding and responsible applicants receive licenses" or "*to enable the State to maintain oversight over liquor store operators.*" *Id*. at 2475 (emphasis added). In particular, Tennessee's justifications were not persuasive because "the stores at issue are *physically located within the State*" and "*the State can monitor the stores' operations through on-site inspections*, *audits, and the like*." *Id*. (emphasis added). For these reasons, the residency requirement was deemed unnecessary and in violation of the dormant Commerce Clause. *Id*. at 2476.

21. Before the Court issued its opinion in *Tennessee Wine & Spirits*, in 1996, in *Kronheim,* the United States Court of Appeals for the District of Columbia Circuit upheld a prior version of 25-754(b) that "generally forbids alcoholic beverage licensees from storing beverages outside the District." *Milton S. Kronheim & Co., Inc. v. Dist. of Columbia*, 91 F.3d 193, 195 (D.C. Cir. 1996). In doing so, it rejected a lower court's reasoning finding the law unconstitutional and its own unpublished affirmance of the lower court decision in *Quality Brands, Inc. v. Barry*, 715 F. Supp. 1138, 1138 (D.D.C. 1989), *aff'd,* 901 F.2d 1130 (D.C. Cir. 1990). *Id*. at 196.

22. In *Kronheim*, the D.C. Circuit Court of Appeals examined the storage requirement under the dormant Commerce Clause. *Id*. at 198. Based on its review, the *Kronheim* court found the statute "facially discriminatory" and likely protectionist. *Id*. at 202-03. Nevertheless, the *Kronheim* court considered the Supreme Court's precedent in *Bacchus* that overturned a Hawaii alcohol tax exemption where the primary justification by Hawaii for the tax exemption was to promote local industry. *Id*. at 203 *citing Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 270 (1984). Unlike the law enacted by Hawaii in *Bacchus*, the *Kronheim* court recognized that the District had a "mixed motive" for enacting the rule. *Id*. at 202. In particular, in *Kronheim*, the District also had legitimate reasons for the law, such as "*auditing company records, monitoring compliance with the ABC laws, monitoring licenses, checking tax forms for audits, and similar enforcement goals*." *Id*. at 202 (quotation marks omitted) (emphasis added). Thus, despite being facially discriminatory, the District's requirement banning licensees from storing alcohol outside the District was "supported by a clear concern for the core enforcement function of the Twenty-First Amendment." *Id*. at 204.

23. Based upon the Board's review of this precedent, nothing in the Supreme Court's decision in *Tennessee Wine & Spirits* directly or indirectly contradicts the D.C. Circuit Court of Appeals' decision in *Kronheim* or otherwise suggests that the local storage law is unconstitutional. As such, the *Kronheim* court's reasoning that the District had legitimate interests in enacting the local storage requirement remains sound.

24. First, there is a key distinction between the local storage requirement and the residency requirement in *Tennessee Wine & Spirits* or the tax exemption in *Bacchus*. In addition, to being an entirely different type of regulation, the District's local storage law regulates the manner of delivery, importation, and the transportation of alcohol, as storage outside the premises or the District requires the licensee to engage in delivery, transportation, and importation to and from the licensee, which are recognized as legitimate areas of regulation under the Twenty First Amendment. U.S. Const. amend. XXI ("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.") (emphasis added). Thus, the District's local storage law falls squarely within the plain language of the Twenty First Amendment.

25. Second, nothing in *Tennessee Wine & Spirits* suggests that a finding that a legislature had both protectionist and legitimate reasons for enacting a specific law are sufficient to render it a *per se* violation of the dormant Commerce Clause. Therefore, the *Kronheim* court's determination that a mixed motive passes constitutional muster remains authoritative and controlling.

26. Third, the *Kronheim* court's determination that the specific reasons for adopting the local storage requirement are legitimate and appropriate appear to be upheld by *Tennessee Wine & Spirits*. In *Kronheim*, the court noted that the District enacted the local storage requirement in support of auditing, licensee monitoring, and other enforcement goals. *Milton S. Kronheim & Co., Inc.*, 91 F.3d at 202. In *Tennessee Wine & Spirits*, the court did not find any legitimate interest in the mandatory residency requirement where the stores were in the state and could be subject to "*on-site inspections, audits, and the like*." *Tennessee Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2475 (emphasis added). Yet unlike the residency requirement in *Tennessee Wine &*

Spirits, the District's local storage law requires the physical location of alcohol in the District and creates an opportunity for on-site inspections and to maintain of oversight over licensees, which constitute attributes that favor deeming the requirement constitutional. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. at 2475. As a result, *Tennessee Wine & Spirits* suggests that requiring the physical location of alcohol within the District for the purpose of promoting monitoring, compliance, and inspections are a legitimate State interest that may be upheld under the Commerce Clause and the Twenty First Amendment.

a. District Winery fails to demonstrate that a reasonable alternative to the local storage law exists.

27. Further addressing the argument made by District Winery, the Respondent argues that nondiscriminatory alternatives to the local storage law are available. *Mot. to Dismiss*, at 8-9, 11. Nevertheless, this contention is conclusory, unsupported, and speculative.

28. In *Granholm*, the Supreme Court noted that when faced with a discriminatory law, courts must consider whether the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm v. Heald*, 544 U.S. 460, 489 (2005).

29. To show the availability of reasonable alternatives to the local storage law, District Winery speculates that the District could permit storage in Virginia or other "proximate" locations. *Mot. to Dismiss*, at 3, 8. Nevertheless, once the District permits out of state storage, licensees will not just be limited to locations to Northern Virginia and Southern Maryland. Most likely, based on the nature of the alcohol industry, it is reasonable to expect that licensees will request storage locations near major ports, such as in New York and New Jersey, major wine producing regions, such as Napa Valley, California, near a licensee's corporate headquarters, or even in major alcohol producing countries such as Chile, France, and Australia. Therefore, once permitted, alcohol may be stored in distant and remote locations that would require significant travel and expense to engage in on-site inspections, even if possible, which renders the proposal unreasonable.

30. Further emphasizing the unreasonable nature of permitting storage outside the District, District Winery fails to grapple with the issues that would arise once out of state storage is permitted. First, District Winery does not explain how the District would conduct on-site inspections of out of state storage facilities if such storage was permitted. Second, District Winery fails to cite any authority that permits ABRA to perform equivalent, at-will inspections, seize evidence or alcohol, demand the provision of identification or on-site records, or otherwise exercise law enforcement authority outside the District of Columbia. D.C. Code §§ 25-801(f)-(g), 25-802, 25-803; 23 DCMR §§ 250.11, 205.13 (West Supp. 2021). Third, District Winery does not explain how its proposal to permit out of state storage addresses potential conflicts between the host jurisdiction's alcohol laws and the District's alcohol laws. Finally, District Winery has not provided evidence that any state currently permits out of state storage and conducts on-site inspections outside the state.

31. District Winery further suggests that the District's laws permitting the importation of alcohol by retailers proves that a reasonable alternative system exists. *Mot. to Dismiss*, at 14. *See also* D.C. Code § 25-119. Yet, this comparison is not relevant because the import laws solely address converting alcohol outside the District's three-tier system into alcohol that may be distributed and sold in the District, tax compliance, and transporting alcohol across state lines. In contrast, the storage laws address how licensees must handle alcohol once obtained or placed into inventory and the location of specific activities. As a result, the reference to the District's import system is entirely irrelevant.

32. District Winery further argues that guidance to wholesalers to only hold the product at their District warehouse for only four hours maximum before delivery to a retailer shows there is no practical need for inspections. *Mot. to Dismiss*, at 14; *Advisory Opinion on the Storage Requirements of D.C. Licensed Wholesalers*, Board Order No. 2019-012, 2 (D.C.A.B.C.B. Jan. 9, 2019). However, this point ignores that the "at rest" guidance only applies to wholesalers to ensure that wholesalers actually engage in delivery to retailers under the three-tier system, and not an unauthorized third party.[1] Board Order No. 2019-012, at 2; *In re Gina Trippi and John Kerr*, Advisory Opinion, Board Order No. 2011-398 ("As a result, allowing the source of the alcoholic beverages to ship directly to Retail Licensees, violates § 25-754(a) by permitting the source of supply, rather than the Wholesaler to keep the product for sale to Retail Licensees."). Moreover, the Applicant's statement that investigations are not practical under such a regime, ignores the fact that investigators can engage in monitoring or stake outs of licensed locations to monitor for brief or fleeting activity. It also ignores the fact that ABRA's investigative interest in wholesalers, which primarily engage in distribution, may be different than its enforcement concerns related to manufacturers and retailers, which primarily engage in the production of alcohol and the sale of alcohol to the public. Finally, this argument ignores that the "at rest" guidance primarily addresses products moving through the supply chain, while the storage requirement primarily addresses products that have reached their final destination or being held in inventory. As a result, this argument is not relevant to the Commerce Clause issue raised by District Winery.

33. Another argument raised by District Winery is that the local storage law could be replaced by electronic systems. *Mot. to Dismiss*, at 14. Nevertheless, this argument appears conclusory, as District Winery has not suggested how electronic monitoring could replace all on-site inspections, address all of the compliance interests of the District, or even whether such an adequate electronic system currently exists.

34. Finally, § 25-754(b) is narrowly tailored to the enforcement needs of the agency because it is limited only to the storage of alcohol. The provision does not require the storage of other goods in the District, such as food, alcohol manufacturing equipment (e.g., barrels), packaging materials, and computers. It also does not require that various services being provided to the business (e.g., accounting, human resources, vehicle fleet repair, information technology, or legal) be in the District. Consequently, many other aspects of licensed businesses are free to be conducted anywhere the ownership selects because the District's local storage law only regulates matters relevant to ABRA's legitimate compliance and enforcement interests.

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[1] The Board has not considered the issue of whether to apply the four hour "at rest" guidance to retailers or manufacturers where it is unclear how or when such a situation would arise for these classes of license.

35. Therefore, District Winery has failed to demonstrate a reasonable or more narrowly tailored alternative that permits on-site inspections and storage outside the District of Columbia.

b. The local storage law is demonstrably justified to ensure compliance with the District's alcohol laws.

36. District Winery's next argument is that the District's enforcement rationale is unsupported, which the Board rejects because it is conclusory, unsupported, and speculative. *Mot. to Dismiss*, at 13.

37. In *Granholm*, the Court wrote that the "burden is on the State to show that the *discrimination* is demonstrably justified." *Granholm* 544 U.S. at 492 (quotation marks removed).

38. In its motion, District Winery argues that the analysis conducted in *Quality Brands*, which rejected the District's enforcement rationale, was correct; nevertheless, this citation to *Quality Brands* is problematic for several reasons. *Mot. to Dismiss*, at 13. First, the Court of Appeals for the District of Columbia Circuit clearly and expressly rejected the *Quality Brands* decision, rendering the case unpersuasive and unauthoritative. *Milton S. Kronheim & Co., Inc.*, 91 F.3d at 202 (D.C. Cir. 1996) (saying it would review the constitutional issue *de novo* and that the issue required further analysis under the Twenty First Amendment). Second, no party sought to admit the record in *Quality Brands* into evidence (e.g., witness testimony, government documents, etc.); therefore, all Commerce Clause evidence considered by the court in *Quality Brands* is not contained in the present record and not eligible for consideration. Third, *Quality Brands* was issued in 1989, and merely relying on that case without the submission of additional evidence, ignores approximately 30 years of changes to the law, the regulations, the alcohol industry (e.g., internet), the creation of ABRA, and ABRA's current enforcement practices, policies, and procedures, which could have an impact on an analysis under the Commerce Clause. Therefore, the *Quality Brands* case no longer merits consideration.[2]

39. The Board further notes that the District's local storage requirement serves the District's legitimate interests in monitoring licensees and performing on-site inspections. Most concerning to the Board is that no other jurisdiction will enforce the District's alcohol laws or perform on-site inspections to confirm compliance with District law if alcohol is stored outside of the District. Moreover, under such circumstances, ABRA cannot guarantee that other states or unlicensed third parties will voluntarily cooperate with investigations, permit inspections, or permit the seizure of evidence.

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[2] For example, at the time *Quality Brands* and *Kronheim* was decided, ABRA had not been established, the District did not have an anti-bottle tampering law, and the wine pub endorsement had not been created. *Title 25, D.C. Code Enactment and Related Amendments Act of 2001* (D.C. Law 13-298, Effective May 3, 2001) (establishing ABRA); *Omnibus Alcoholic Beverage Regulation Amendment Act of 2016*, § 2, (D.C. Law 21-260, Effective Apr. 7, 2017) (enacting the anti-bottle tampering law codified as D.C. Official Code § 25-833); *Omnibus Alcoholic Beverage Regulation Amendment Act of 2012*, (D.C. Law 19-310, Effective May 1, 2013) (creating the wine pub endorsement codified at D.C. Official Code § 25-124).

40. This means states, like Virginia, will not enforce D.C. Official Code § 25-833, which prohibits misrepresenting alcohol being sold, refilling alcohol containers, diluting the contents of alcohol bottles, among other requirements, or otherwise conduct inspections that may discover such violations. D.C. Code § 25-833. For example, if out of state storage is permitted, this means licensees may transport opened or empty containers of high-end products, such as Grey Goose brand vodka, to their out of state storage facility, buy cheap low-end alcohol from an out of state big box retailer, refill or dilute the containers with the low-end product (or something worse), and then transport them back to their District location for sale to the public without fear that their operations may be discovered by an inspection. The Board further notes that this type of activity is unlikely to be uncovered by electronic self-reporting requirements. For example, an unannounced inspection could uncover alcohol purchased from a retailer, the presence of funnels, empty bottles, spilled alcohol, or the presence of alcohol not identified in a licensee's invoices. Moreover, if the agency received a compelling complaint about such activity, ABRA investigators would not be able to seize such product if stored in another state, and if asked to surrender the product, the licensee would have an opportunity to secretly withhold any offending products or substitute any tampered product with genuine products at its discretion.

41. Additionally, allowing alcohol to be moved outside the District creates opportunities for other types of illegal behavior that cannot be deterred without a credible threat of an on-site inspection. For example, consider the following scenarios:

(1) An on-premise retailer holds a wine pub endorsement and stores alcohol outside the District. The retailer engages in bottling, dilution, mixing, labeling, ageing, and other activities at the out of state storage location. Because ABRA cannot conduct an inspection of an out of state storage facility, ABRA cannot determine whether the retailer is fully compliant with the on-site manufacturing requirement or the exception for off-site production up to 600 feet from the premises. D.C. Code § 25-124(c-1); *see also* D.C. Code §§ 25-117(a)(3), 25-125(c-1) (showing the same reasoning applies to brew pubs and distillery pubs because they operate under similar rules).

(2) A retailer uses an out of state storage facility. A manufacturer or wholesaler provides the retailer with discounted or free space, labor, and other goods and services at the out of state storage facility that is not subject to inspection. Thus, the out of state operations are shielded from inspections that may detect cases where manufacturers and wholesalers are attempting to obtain undue influence or inappropriate interests in the operations of other alcohol industry members, as prohibited by D.C. Official Code §§ 25-302, 25-735, 25-736, and 25-824.

(3) A retailer is subject to credit and alcohol purchasing restrictions for failing to make a required payment to a wholesaler pursuant to D.C. Official Code § 25-731(c) and stores alcohol outside the District. In order to obtain a popular alcoholic beverage produced by national alcohol manufacture and distributed by a licensed wholesaler, the retailer attempts to evade the credit and purchase restrictions by illegally buying the product from an off-premises retailer located either in the District or another state. *See* D.C. Code §§

25-111(a), 25-112(C)(c).[3] In this case, the retailer would be able to evade detection because the retailer can commingle the illegally bought products with any remaining product in their inventory, or otherwise claim legitimately bought product exists to hide illegally purchased product, at the off-site storage facility located outside the District, which cannot be detected because the storage facility cannot be visually inspected to see if the licensee's inventory matches their alcohol invoices.

42. Finally, a storage facility located outside the District of Columbia cannot be inspected to determine whether the activities conducted at the facility exceed those permitted by the District's storage laws. *See, e.g.,* 23 DCMR §§ 205.2 (authorizing certain activities, such as packaging and shipping); 205.5 (authorizing the removal of alcohol from a storage facility for limited reasons); 205.6 (requiring the facility to meet certain security, zoning, and physical separate standards); 205.8 (restricting outside activity at the storage facility); 205.9 (restricting the consumption of alcohol without a permit); 205.10 (requiring the display of certain signs and the presence of various documents).

43. For these reasons, § 25-754(b) is narrowly tailored to uphold the legitimate and demonstrably justified compliance and enforcement interests of the District of Columbia as permitted by the Commerce Clause and the Twenty First Amendment.

IV. Enforcement of D.C. Official Code § 25-754(b) is Warranted.

44. District Winery suggests that the Board should take it upon itself to deem § 25-754(b) unconstitutional and not enforce the local storage requirement. *Reply*, at 1. Nevertheless, § 25-754(b) has been on the books for many years and not unique to the District, as similar laws have been enacted in other jurisdictions. *Milton S. Kronheim & Co., Inc.*, 91 F.3d at 204. Furthermore, *Kronheim* remains good case law, and the Board is not aware of any court in any other jurisdiction that has invalidated this type of storage law for the reasons stated by District Winery. Finally, none of the valid legal opinions cited by District Winery expressly render the local storage law unconstitutional. Under these circumstances, the Board lacks any justification for refusing to implement and enforce § 25-754(b).

V. The Imposition of Penalties and Conditions are Warranted

45. Based on the Board's finding of a violation, the present violation merits the imposition of a fine and conditions to correct the ongoing and continuous violation of the local storage law. District Winery has been charged with violating § 25-754(b), which is listed as a primary tier violation in the regulations. 23 DCMR § 800 (West Supp. 2021) (see § 25-754 in the penalty schedule). District Winery's investigative history shows no prior primary tier violations;

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[3] In this scenario, the retailer would not be eligible for an import permit because the product is offered by the wholesaler and available in large quantities. D.C. Code § 25-119 (Authorizing the issuance of an import permit to a retailer when the product is "not obtainable by the licensee from a licensed manufacturer or wholesaler in the District in sufficient quantity to reasonably satisfy the immediate needs of the licensee and when the licensee has paid the appropriate taxes . . . . .").

therefore, the fine range for the offense falls between $1,000 and $2,000. 23 DCMR § 801.1 (West Supp. 2021).

46. In accordance with D.C. Official Code § 25-447, the Board further imposes conditions to ensure compliance with § 25-754(b) in the future and to ensure the ability of ABRA to conduct inspections of District Winery's entire operation, which is necessary to ensure the health, safety, and welfare of the community and the people of the District of Columbia. In crafting these conditions, the Board notes that in not requiring immediate compliance, the Board weighed the public interest in preventing District Winery from further shielding its full operations from inspections versus the practical logistical and financial implications of moving a large quantity of alcohol to the District in a short amount of time. As described below, the Board imposes conditions requiring District Winery to store alcohol in the District by requiring the business to obtain an appropriate off-site storage permit, which can only be issued for a location in the District of Columbia under current law. The Board will further ensure compliance by mandating specific reporting requirements to track the location of District Winery's alcohol inventory.

ORDER

Therefore, the Board, on this 8th day of December 2021, finds DC Winery, t/a District Winery/Ana Restaurant, guilty of violating D.C. Official Code § 25-754(b). The Board imposes the following penalty on District Winery:

(1) For the violation described in Charge I, District Winery shall pay a fine of $1,500.

IT IS FURTHER ORDERED, as a condition issued pursuant to D.C. Official Code § 25-447, that District Winery shall

(1) cease all operations that violate D.C. Official Code § 25-754 and 23 DCMR § 205 and cease storing alcohol outside its licensed premises without a valid off-site storage permit within ninety (90) days of the issuance of this Order;

(2) Within thirty (30) days of the issuance of this Order, District Winery shall provide in writing, in the form of a notarized affidavit, the address of all current alcohol storage locations, and the current amount of each type, brand, and container size of alcohol stored at each location under its direct or indirect control or possession at each location, as of the date of the affidavit;

(3) Within (90) days of the issuance of this Order, District Winery shall report in writing, in the form of a notarized affidavit, whether it is currently compliant with D.C. Official Code § 25-754 and 23 DCMR § 205, the manner in which it achieved compliance, the current address of all alcohol storage locations, and the current amount of each type, brand, and container size of alcohol stored at each location under its direct or indirect control or possession at each location, as of the date of the affidavit;

(4) District Winery shall provide a copy of all reports and affidavits to the Government upon submission to the Board;

(5) District Winery shall file additional affidavits as described and in the manner required by Condition 2 upon the request of the Board, within fifteen (15) days of receiving the request; and

(6) The parties are instructed that the Board may reopen the record and hold additional hearings on these conditions, and amend them, as needed, to ensure timely compliance with the District's storage laws.

IT IS FURTHER ORDERED that the motion to dismiss filed by the Respondent is **DENIED.**

IT IS FURTHER ORDERED that the Respondent must pay all fines imposed by the Board within thirty (30) days from the date of this Order, or its license shall be immediately suspended until all amounts owed are paid.

IT IS FURTHER ORDERED, in accordance with 23 DCMR § 800 (West Supp. 2021), the violations found by the Board in this Order shall be deemed one primary tier violation.

IT IS FURTHER ORDERED that the Board's findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

The ABRA shall deliver copies of this Order to the Government and the Respondent.

District of Columbia
Alcoholic Beverage Control Board

eSigned via SeamlessDocs.com
Donovan Anderson
Key: ac430b96b99d5f09e4b730093d1dccd8

Donovan Anderson, Chairperson

eSigned via SeamlessDocs.com
Key: 547ae373f820de6ac8d1b332dd2949ec

James Short, Member

eSigned via SeamlessDocs.com
Key: 256d3fcadfbe146d7f4b75bd7917d20d

Bobby Cato, Member

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Edward Grandis, Member
Key: 5027bda7ff9f0040ec14adeb52541ce5

Edward S. Grandis, Member

Pursuant to D.C. Official Code § 25-433(d)(1), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001; (202-879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. *See* D.C. App. Rule 15(b) (2004).