Case No. 11-1362

United States Court of Appeals
for the Seventh Circuit

Lebamoff Enterprises, Inc., d/b/a Cap N' Cork,
Randy Lewandowski, and Luther Stroder
Plaintiffs - Appellants
vs.

Mark Massa, in his official capacity as the
Chairman of the Indiana Alcohol & Tobacco Commission
Defendant - Appellee

Appeal from the U. S. District Court for the Southern District of Indiana
Dist.Ct. No. 1:09-cv-0744 - JMS-TAB
Hon. Jane E. Magnus-Stinson, District Judge

OPENING BRIEF OF APPELLANTS
with Required Short Appendix

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Disclosure Statement

1. Corporate disclosure statement: Lebamoff Enterprises, Inc., is not a parent, subsidiary or other affiliate of a publicly owned corporation and no publicly owned corporation owns any of its stock.

2. Law firm disclosure statement. Names of law firms and other entities with which lawyers are affiliated who have appeared for Plaintiffs-Appellants.

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Jurisdictional Statement

District Court Jurisdiction. Plaintiffs allege that an Indiana law which restricts common carrier deliveries of wine ordered through the fulfillment process is unconstitutional because it violates the Supremacy and Commerce Clauses of the United States Constitution. It was brought in state court pursuant to 42 U.S.C. § 1983 to vindicate plaintiffs' rights to engage in interstate commerce. It was removed to the district court pursuant to 28 U.S.C. §§ 1441 et seq. The district court had federal question jurisdiction under 28 U.S.C. §§1331 and 1343(a)(3), which confer original jurisdiction on federal district courts to hear suits alleging the violation of rights and privileges under the United States Constitution.

Jurisdiction of Court of Appeals. This appeal is from a final order and judgment of the district court on cross-motions for summary judgment under Fed. R. Civ. P. 56 issued on December 6, 2010. Plaintiffs filed a motion for reconsideration under Fed. R. Civ. P. 59(e) and 60(b)(6) on January 3, 2011, which was denied on February 9, 2011. Plaintiffs filed a timely notice of appeal on February 14, 2011. This court has jurisdiction pursuant to 28 U.S.C. § 1291, which authorizes the courts of appeals to hear appeals from final judgments of the district courts.

Statement of the Issues

Indiana prohibits retail wine dealers from making deliveries by common carrier. Appellant Cap N' Cork is an Indiana wine dealer who, along with two consumers, is challenging the constitutionality of this rule as applied to deliveries of wine moving through the fulfillment process. Such wine has been purchased by a consumer from an out-of-state seller, is brought into the state by a wholesaler, picked up by Cap N' Cork pre-packaged and pre-addressed, and then picked up by UPS for final delivery to the purchaser.

The issues are:

1. Whether Indiana's ban on common carrier deliveries of fulfillment orders is preempted under the Supremacy Clause because 49 U.S.C. §§ 14501(c)(1) and 41713(b)(1) provide that a state "may not enact or enforce a law, regulation, or other provision ... related to a price, route, or service of any ... carrier." The Supreme Court in Rowe v. N.H. Motor Transp. Assn., 552 U.S. 364 (2008), held that these statutes preempted state laws restricting common carrier deliveries of tobacco, but this is the first case to consider whether Rowe should be extended to deliveries of alcohol.

2. Whether Indiana's ban on common carrier deliveries of fulfillment orders violates the Commerce Clause because it directly regulates interstate commerce or discriminates against interstate commerce. The Supreme Court and this circuit hold that if a statute "directly regulates or discriminates against interstate commerce," it is generally struck down without further inquiry. Granholm v.

Heald, 544 U.S. 460, 487 (2005); Wiesmueller v. Kosobucki, 571 F.3d 699, 703 (7th Cir. 2009).

3. Whether Indiana's ban on common carrier deliveries of fulfillment orders violates the Commerce Clause because it burdens interstate commerce by making sales from out-of-state entities through the fulfillment system unfeasible, but does not materially advance the state's interest in preventing youth access to alcohol. The Supreme Court and this circuit hold that a law is unconstitutional when "the burden on interstate commerce clearly exceeds the local benefits." Granholm, 544 U.S. at 487; Wiesmueller, 571 F.3d at 703 (both citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). The Pike test is applied to laws that have an adverse impact on interstate commerce that does not rise to the level of discrimination. The state must provide actual evidence that the law is "at least minimally reasonable," and cannot prevail in an evidentiary vacuum. Wiesmueller, 571 F.3d at 704.

Statement of the Case

This is a constitutional challenge to Indiana's statutory ban on retail wine dealers (package stores) using common carriers to make deliveries, as applied to deliveries of wine that pass through Cap N' Cork as part of the fulfillment process. The shipments at issue originate out of state when a consumer buys wine from an out-of-state seller that is not licensed to ship directly to Indiana residents. The wine order is packaged and pre-addressed by a fulfillment company, sent to an Indiana wholesaler, and then picked up by Cap N' Cork, a licensed wine dealer in

Fort Wayne, Indiana, which is authorized by Ind. Code § 7.1-3-15-3(d) to deliver the wine to the consumer. However, that authorization limits Cap N' Cork to using its own vehicles and employees to make deliveries and bars it from using a common carrier. This makes deliveries outside Cap N' Cork's immediate area economically unfeasible.

In 2009, after being cited by the Indiana Alcohol & Tobacco Commission for violating the ban on using common carriers, Cap N' Cork and two Indiana wine consumers brought suit under 42 U.S.C. § 1983 seeking a declaratory judgment that the ban was unconstitutional as applied to deliveries of fulfillment orders. The plaintiffs make three interrelated claims: (1) The law is preempted under the Supremacy Clause because it conflicts with the provision in 49 U.S.C. §§ 14501(c)(1) and 41713(b)(1) which prohibit a state from enforcing a law related to a service of any motor carrier or air carrier. (2) The ban violates the Commerce Clause under the heightened scrutiny given to laws that directly regulate or discriminate against interstate commerce. (3) The law violates the Pike v. Bruce Church balancing test because the burden placed on interstate commerce and carriers exceeds the minimal extent to which it advances the putative local benefit in reducing youth access to alcohol. Throughout the brief, we will refer to plaintiffs-appellants as Cap N' Cork.

The defendant is the Chairman of the Indiana Alcohol & Tobacco Commission. When the suit was brought he was Thomas Snow, but Snow has been succeeded in office by Mark Massa. The defendant denies all Cap N' Cork's claims and rests his

case primarily upon the assertion that the 21st Amendment gives Indiana the authority to ban common carrier deliveries of fulfillment orders if the state believes doing so will advance its interest in preventing youth access to alcohol. Throughout this brief, we will refer to the defendant-appellee as the Alcohol and Tobacco Commission, or ATC.

The case was originally filed in Marion County (Indiana) Superior Court on May 19, 2009, as case no. 49D11-0902-PL-023558. It was removed by the ATC to the U.S. District Court for the Southern District of Indiana on June 17, 2009.

After abbreviated discovery, Cap N' Cork filed a motion for summary judgment on December 11, 2009, and the ATC filed a cross-motion for summary judgment on February 9, 2010. After argument, the district court issued a final judgment that denied Cap N' Cork's motion, granted the ATC's motion, and dismissed the case on December 6, 2010. Cap N' Cork filed a motion for reconsideration under Fed. R. Civ. P. 59(e) and 60(b)(6) on January 3, 2011, which was denied on February 9, 2011. Cap N' Cork thereafter filed a timely notice of appeal on February 14, 2011.

Statement of Facts

Cap N' Cork operates fifteen licensed package stores in the greater Fort Wayne, Indiana, area. It delivers wine to consumers all over the state. Doust Aff. ¶2, Dkt. 18-2; ATC Incident Report at 13, Dkt. 18-6. At issue are deliveries made as part of an interstate transaction in which wine is ordered by an Indiana resident from an out-of-state winery, wine club, or other wine seller who is not licensed to ship the wine directly to the consumer. Press Release at 2, Dkt. 19-2. The out-of-state seller

must use a fulfillment company, such as Lionstone International, which packages and pre-addresses the wine to the consumer and consigns it to an Indiana wholesaler. Lucca Aff. ¶¶ 2-13, Dkt. 18-2. Cap N' Cork picks up the wine from the wholesaler and delivers it to the purchaser in the original pre-addressed package in which it arrived. None of the wine at issue comes from Cap N' Cork's own inventory Doust Aff. ¶¶ 3-13, Dkt. 18-2; Richardson Aff., ¶¶ 4-10, Dkt. 18-3; ATC Incident Report at 5, Dkt. 18-6.

The problem is that Indiana law prohibits Cap N' Cork from using the standard method by which small businesses deliver packages -- common carrier. The only way Cap N' Cork may deliver wine is by using its own vehicle and employees, ATF Incident Report at 11, Dkt. 18-6, and it is cost-prohibitive to do so simply to deliver small individual orders of wine outside of Cap N' Cork's immediate area. Doust Aff. ¶ 12, Dkt. 18-2. Although there are 1004 package liquor stores in Indiana, Poindexter Aff. ¶ 18, Dkt. 28-1, only two handle deliveries through the wine fulfillment process, Doust Supp. Aff. ¶ 4, Dkt. 30-6; Carmichael email, Dkt. 19-1., so this restriction has the effect of making most of the state inaccessible to out-of-state sellers who must use fulfillment companies. This means that local Indiana wine dealers are protected from interstate competition, and consumers who live outside the Fort Wayne area cannot obtain the wine they want. FTC Report at 3-4, Dkt. 30-2.

In 2008-09, Cap N' Cork was cited by the ATC for violating the law against making deliveries by common carrier. Citation Reports, Dkts. 18-5, 18-6. Prior to

that time, Cap N' Cork was handling approximately 13,000 cases of wine worth $1.5 million annually through the fulfillment process, on which it made $45,000 profit. Doust Aff. ¶ 14, Dkt. 18-2. Many of those orders were addressed to consumers in parts of the state far from Fort Wayne, for which the only economically feasible method of delivery was to use a common carrier. Doust Aff. ¶ 12, Dkt. 18-2. Cap N' Cork had a contract with UPS to make those deliveries under which the UPS driver was obligated to deliver the wine in a face-to-face transaction and obtain an adult signature. UPS Contract ¶ 6, Dkt.30-4.[1] Cap N' Cork has never knowingly delivered wine to a minor through the fulfillment process, Doust Supp. Aff. ¶ 3, Dkt. 30-6; nor is there any evidence that any wine has ever been delivered to a minor through this process.

Indeed, the evidence shows that using common carriers to deliver wine does not contribute to youth access to alcohol. Minors do not drink much wine to begin with, preferring beer and liquor. Minors rarely buy wine through special orders for delayed delivery via common carrier because they prefer to buy alcohol for immediate consumption and do not want to pay the additional shipping costs. FTC Report at 33-37, Dkt. 30-2; Nat. Research Council report at 174, Dkt 30-3. Minors lack the ability to pay for a direct shipment without their parents finding out because credit cards are required. Wine Club Info at 2, 13, Dkt. 19-4. Minors rarely

[1]James Purucker, who instigated the case against Cap N' Cork, claims that UPS left a package of wine from the Wall Street Journal Wine Club at his address without checking his ID. Press Release at 2, Dkt. 19-2. However, that was in 2009, before Indiana required that the IDs of adults be checked. See Ind. Code § 7.1-5-10-23 (eff. July 1, 2010), Dkt. 31-1 at page 14.

have their own separate credit card accounts. Cong. Rec. 14308 (June 10, 2003). In fact, the FTC recommends that businesses require credit cards to verify the age of on-line purchasers. 16 C.F.R. § 312.5 (2010). Minors also lack a safe address at which to receive packages of wine without detection, since most minors live with their parents or in a college dormitory. Minors obtain alcohol by having someone over 21 buy it for them, at parties, from parents, and by theft, and do not usually buy it in person either directly from a dealer or by special order for direct shipment. Nat. Research Council Report at 166-68, 175, Dkt. 30-3. States that allow wine to be delivered from a licensed shipper by common carrier have reported few or no problems with shipments to minors. FTC Report at 3, 4, 26-27, 32-33, Dkt. 30-2. Indiana allows farm wineries to ship wine by common carrier and has experienced no problems concerning shipments to minors. Snow Interrogs. 9, 11, Dkt. 30-5.

Indeed, the evidence shows that the problem is the exact opposite of the Indiana rule. Indiana prohibits common carrier deliveries of fulfillment orders despite the absence of any evidence this contributes to youth access. At the same time, it allows local retailers to deliver alcohol using their vehicles, despite the fact that studies show that minors can obtain alcohol in this way.[2] The Indiana ATC admits that the non-compliance rate at local retailers in the state is 35%. Poindexter Aff. ¶¶ 11-15, Dkt. 28-1.

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[2]Linda Fletcher, et al., Alcohol Home Delivery Services: a Source of Alcohol for Underage Drinkers, 61 J. STUD. ALCOHOL 81 (2000) (minors able to received home deliveries from local retailers, mostly of beer kegs). This article is cited in Nat. Research Council Report at 174, Dkt. 30-3, which implies that the study included Internet purchases delivered by common carriers, but that is not accurate. The study was from the 1990s and looked only at home deliveries from local retailers.

The other unsupported assumption behind the ban is that out-of-state wine sellers and common carriers are somehow even worse about verifying the age of purchasers than local retail sellers (liquor, grocery and drug stores). There is no evidence of this and it is implausible. All wineries, wine dealers and other entities engaged in the wine business are licensed and regulated by their home states. All must take the same precautions to make sure wine is not being purchased by minors because selling to minors is a crime in every state and could be grounds for a state regulatory agency to revoke their license, thereby putting them out of business. Gralla Aff. ¶¶ 5-6, Dkt. 30-7. All would commit a crime by knowingly or recklessly furnishing alcohol to a minor. Ind. Code § 7.1-5-7-8.

Banning common carrier deliveries of fulfillment orders effectively shuts the market to out-of-state wine sellers whose only access to Indiana consumers is through the fulfillment process. This includes the majority of America's 6000 wineries, most of which are too small or have too few Indiana customers to obtain wholesale distribution for all their products, FTC Report at 6, 24, Dkt. 30-2; Nelson Aff. ¶¶ 6-7, Dkt. 30-8 (beyond the top 50 national wineries, very few have national distribution), or to justify the expense of obtaining and maintaining a direct shipping license, posting a bond, and creating a separate bookkeeping system. Gralla Aff., ¶ 7, Dkt. 30-7. See Snow Interrogs. 3-5, Dkt. 16 (only 86 out-of-state wineries have obtained a Direct Wine Seller's permit). The only feasible way for wineries to send small quantities of wine to states where they have few customers is to use the cost-efficient fulfillment process. Gralla Aff. ¶ 7, Dkt. 30-7; Nelson Aff.

¶¶ 8-9, Dkt. 30-8. This also includes out-of-state wine clubs and other retailers who are totally prohibited from selling directly and whose only access to Indiana consumers is through the fulfillment process. Wine Club Info., Dkt. 19-4. Wine clubs typically select and send subscribers six to twelve bottles of wine at monthly or bi-monthly intervals. Wine clubs are sponsored by the Wall Street Journal, New York Times, USA Today, Zagat's, Bon Apetit, and the National Rifle Association. Press Release at 2, Dkt 19-2; Wine Spectator at 1, Dkt. 30-9; Wine Clubs Info., Dkt. 19-4.

Making it difficult for out-of-state sellers to deliver wine to consumers harms those consumers. It limits competition, raises local prices, and decrease selection of wines. FTC Report at 16-19, 22-26, Dkt. 30-2. It also tends to shift business from out-of-state to in-state sellers. Id. at 5-7. If a wine consumer cannot obtain wine from an out-of-state source, he or she will buy it from one of the approximately 10,667 retailers, dealers or wineries in Indiana licensed to sell wine to consumers. Snow Interrog. 12, Dkt. 30-5.

Summary of Argument

A. Preemption

Indiana's ban on common carrier wine deliveries is preempted by the Supremacy Clause, U.S. Const., Art. VI, cl. 2. It conflicts with the plain language in two federal statutes that a state "may not enact or enforce a law, regulation, or other provision ... related to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c)(1), or "air carrier." 49 U.S.C. § 41713 (b)(1). The handling,

transporting and delivery of wine is a special service of UPS, a combined motor/air carrier, and the law banning retail wine dealers from using common carriers is related to and interferes with that service.

The Supreme Court in Rowe v. N.H. Motor Transp. Assn., 552 U.S. 364 (2008), held that these same federal statutes preempted state laws restricting common carrier deliveries of tobacco, whether such laws directly restricted common carriers or indirectly did so by regulating the conditions under which businesses could use their services. The statutes contain no express exception for state tobacco or alcohol regulations, and the Court held there also was no implied exception for state regulations designed to keep such products out of the hands of minors. The only significant difference between this case and Rowe is that alcohol rather than tobacco is involved. In some contexts, states can probably regulate alcohol to a greater extent than tobacco products because of the 21st Amendment, but this is not one of them. The Supreme Court held in Capital Cities Cable, Inc., v. Crisp, 467 U.S. 691 (1984) that the 21st Amendment did not relieve states of their obligation to comply with federal law, and cannot save state alcohol laws from preemption.

B. Commerce Clause

Indiana's ban on common carrier deliveries of fulfillment orders violates the Commerce Clause, U.S. Const., Art. I, § 8. The legal standard is set forth clearly in this court's most recent Commerce Clause case, Wiesmueller v. Kosobucki, 571 F.3d 699, 703 (7th Cir. 2009). Under a two-tier approach, when a statute directly regulates or discriminates against interstate commerce, it is usually struck down.

However, when a statute has only indirect adverse effects on interstate commerce, it is constitutional unless the burden on interstate commerce clearly exceeds the local benefits.

There is one situation in which the guiding principles are less clear -- whether a statute that is even-handed on its face but has a discriminatory effect is to be given heightened scrutiny or analyzed under the balancing test. The general rule announced by the Supreme Court and followed in all other circuits is that such laws are given heightened scrutiny. Discriminatory effect is treated like facial discrimination. However, cases in the Seventh Circuit have been inconsistent. Some, like Wiesmueller, adhere to the Supreme Court's analytical framework. Others give such laws only the lesser scrutiny of the Pike balancing test.

The law banning common carrier deliveries, as applied to wine moving through the interstate fulfillment process, violates the Commerce Clause in three respects:

(1) The law directly regulates interstate commerce. The deliveries at issue are cases of wine purchased from, packaged by and pre-addressed by out-of-state entities, consigned to an Indiana wholesaler, picked up by Cap N' Cork, and then delivered to the Indiana purchaser. These shipments are goods from out of state moving in interstate commerce and are not intra-state sales and deliveries that would fall under the state's broad power to regulate the "receipt, possession, sale, or use" of alcohol. Granholm, 544 U.S. at 482.

(2) The law explicitly discriminates against interstate commerce. It forbids the use of interstate carriers, such as UPS, but creates an exception allowing retail

wine dealers to deliver using their own trucks and employees. Granholm held that discriminatory wine regulations exceed the scope of a state's 21st Amendment power and are an unconstitutional violation of the Commerce Clause.

(3) The law has selective restrictions that favor in-state economic interests (local retail wine sellers) over out-of-state interests (wine clubs, small wineries and other retail sellers that use the fulfillment process). Indiana prohibits most out-of-state wine sellers from by-passing the three-tier system and shipping directly to consumers, so they must utilize the fulfillment process in which the wine passes through an Indiana wholesaler and is delivered by the Indiana retailer. It is economically unfeasible for Cap N' Cork to use its own trucks and employees to make deliveries outside its immediate area, so without common carrier deliveries, most of the state will be beyond the reach of these out-of-state sellers. They will be unable to compete for wine sales with local wine sellers. The ban therefore has an embargo-like effect that closes most of the market because there are only two Indiana dealers who handle fulfillment orders. In-state retail wine dealers benefit from this ban, because consumers have to buy wine from them if they cannot have it delivered from out-of-state sellers.

In this case, it does not matter whether this disparate effect is analyzed under heightened scrutiny or the balancing test, because even the balancing test requires the ATC to come forward with admissible evidence that the law actually advances a legitimate state purpose. The only purpose suggested by the ATC is that the restriction advances its interest in limiting youth access to alcohol. However, it

takes more than lawyers talk and "common sense" to prove it, and the ATC offered no admissible evidence that forbidding common carrier deliveries from wine dealers has the slightest impact on youth access. The ATC must provide actual evidence that the law is "at least minimally reasonable," and cannot prevail in an "evidentiary vacuum." Wiesmueller, 571 F.3d at 704. In this case, the ATC offered only the speculative opinions of two excise officers that they thought that requiring a face-to-face transaction was an effective barrier to youth access, but this circuit has previously held that such vague opinions, unsupported by any hard data, are not enough.

Standard of Review

The Court of Appeals reviews the decision to grant summary judgment de novo. Lummis v. State Farm Fire & Cas. Co., 469 F.3d 1098, 1099-1100 (7th Cir. 2006). Summary judgment is appropriate when the pleadings, depositions, affidavits and other evidence, taken in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56; Penn v. Harris, 296 F.3d 573, 575 (7th Cir. 2002). An issue of fact is "material" if it could affect the outcome of the case under the prevailing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A party opposing summary judgment may not rest upon pleadings, denials or speculation, but must present specific evidence showing there is a factual dispute that requires a trial. FED. R. CIV. P. 56(e).

When ruling on cross-motions for summary judgment, the Court must evaluate

each motion independently. Franklin v. City of Evanston, 384 F.3d 838, 842-43 (7th Cir. 2004). The Court is required in each instance to construe all facts and reasonable inferences in favor of the nonmoving party. Singer v. Raemisch, 593 F.3d 529, 533 (7th Cir. 2010).

ARGUMENT

I. Indiana's rule forbidding retail wine dealers from using common carriers is pre-empted by federal law.

Cap N' Cork is a licensed retail wine dealer operating 15 package stores in the Fort Wayne, Indiana, area. In addition to its regular retail liquor business, Cap N' Cork participates in the fulfillment process in which it receives pre-packaged, pre-addressed shipments of wine from various out-of-state sources and arranges for final delivery to Indiana consumers. Cap N' Cork has contracted with United Parcel Service (UPS) to handle deliveries to consumers who live outside the Fort Wayne area. Statement of Facts, supra at 5-6. UPS is a combined air and motor carrier which, in response to a growing demand for wine deliveries, has developed a special wine delivery service that includes age verification and special packaging and handling. See http://www.ups.com/wine (last visited March 17, 2011); Statement of Facts, supra at 7.

Indiana Code § 7.1-3-15-3(d) forbids wine dealers from using common carriers to make deliveries. It provides:

> [A] wine dealer who is licensed under IC 7.1-3-10-4[3] may deliver wine only in permissible containers to a customer's residence, office, or

[3]Ind. Code § 7.1-3-10-4 provides "The commission may issue a liquor dealer's permit to the proprietor of a package liquor store."

> designated location. This delivery may only be performed by the permit holder or an employee who holds an employee permit.[4]

This prohibition conflicts with federal law that expressly prohibits a state from enacting laws that restrict the services of common carriers. 49 U.S.C. § 14501(c)(1) provides that "a state ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. § 41713(b)(4)(A) contains the identical language and applies to air carriers and combined air/motor carriers.

State laws that conflict with federal law are preempted under the Supremacy Clause,[5] U.S. Const., Art VI, cl. 2, and are "without effect." Altria Group, Inc. v. Good, 129 S.Ct. 538, 543 (2008), citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981). In Aux Sable Liquid Products v. Murphy, 526 F.3d 1028, 1033-34 (7th Cir. 2008), this circuit explained that "[e]xpress preemption occurs when a federal statute explicitly states that it overrides state or local law," e.g., when it contains the phrase "[a] State may not enact or enforce a law" contrary to the federal law.

In Rowe v. New Hampshire Motor Transp. Ass'n, 552 U.S. 364 (2008), the Supreme Court unanimously held that these two federal statutes preempted a state law restricting common carrier deliveries of tobacco. The Court determined:

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[4]Although the statute does not mention common carriers explicitly, the parties agree that it prohibits wine dealers from using common carriers to make its deliveries.

[5]"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

> (1) that "[s]tate enforcement actions having a connection with, or reference to" carrier "rates, routes, or services" are pre-empted; (2) that such pre-emption may occur even if a state law's effect on rates, routes or services "is only indirect;" (3) that, in respect to pre-emption, it makes no difference whether a state law is consistent or inconsistent with federal regulation; and (4) that pre-emption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and pre-emption-related objectives [of] helping assure transportation rates, routes, and services that reflect "maximum reliance on competitive market forces," thereby stimulating "efficiency, innovation, and low prices," as well as variety and quality.

Id., 552 U.S. at 370-71 (citations omitted; emphasis in original).

Indiana's ban on common carrier deliveries of fulfillment orders has the same defects as the Maine restrictions on tobacco deliveries struck down in Rowe. It "forbids licensed ... retailers to employ a 'delivery service'" under terms mutually contracted for." Id at 371. It focuses its regulatory aim at common carrier services, "thereby creating a direct 'connection with'" such services. Id.. The Indiana law "has a significant and adverse impact in respect to the federal Act's ability to achieve its pre-emption-related objectives [and] produces the very effect that the federal law sought to avoid, namely, a state's direct substitution of its own governmental commands for "competitive market forces" in determining (to a significant degree) the services that motor carriers will provide." Id at 371-71.

The Indiana statute does not directly regulate carriers, but neither did the Maine tobacco law. Id. at 372 ("We concede that the regulation here is less 'direct' than it might be, for it tells shippers what to choose rather than carriers what to do"). Like the Maine law, the Indiana statute tells Cap N' Cork what delivery method to choose rather than directly regulating carriers. However, Rowe makes

clear that this distinction is not significant. Federal law pre-empts indirect regulation as well as direct regulation and forbids a state to interfere with "delivery services that ... , in the absence of the regulation, the market might dictate." Id.

There is one difference between the law at issue in Rowe and the law at issue here. The Maine tobacco shipping law not only prohibited carriers from using existing delivery services but required them to develop new ones. The Indiana law only prohibits carriers from using existing delivery services. Nothing in Rowe suggests that this difference is significant. The Court has given this particular preemption language a broad reading, holding that to permit one state to regulate any significant aspect of common carrier delivery services

> would allow other States to do the same. And to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations. That state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace. See H.R. Conf. Rep., at 87. If federal law pre-empts state regulation of the details of an air carrier's frequent flyer program, a program that primarily promotes carriage, see Wolens, supra, at 226-228,[6] it must pre-empt state regulation of the essential details of a motor carrier's system for picking-up, sorting, and carrying goods -- essential details of the carriage itself.

Rowe, 552 U.S. at 373.

So, the preemption issue boils down to whether there is an exception allowing states to regulate the carriage of wine because it is an alcoholic beverage. No such exception appears in the federal statutes themselves, although Congress included

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[6]American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) (federal law pre-empts application of a State's general consumer-protection statute to an airline's frequent flyer program).

several others, allowing states to regulate carriers for highway safety and insurance purposes, 49 U.S.C. §§ 14501(c)(2)(A), 41713(b)(4)(B)(i); moving companies that handle household goods, 49 U.S.C. §§ 14501(c)(2)(B), 41713(b)(4)(B)(ii); tow trucks, 49 U.S.C. §§ 14501(c)(2)(C), and to enforce general commercial laws on matters such as bills of lading. 49 U.S.C. §§ 14501(c)(3). Congress did not choose to permit states to regulate the delivery of wine by common carriers.

In Rowe, the state argued for an implicit exception based on the strong public policy that minors should not smoke. Maine argued that it could not have been Congress's intent to preempt a state's efforts to protect its citizens' public health, particularly when those laws regulate so dangerous an activity as underage smoking. 552 U.S. at 373-74. The Supreme Court rejected this argument in no uncertain terms.

> Despite the importance of the public health objective, we cannot agree with Maine that the federal law creates an exception on that basis, exempting state laws that it would otherwise pre-empt. The Act says nothing about a public health exception. To the contrary, it explicitly lists a set of exceptions (governing motor vehicle safety, certain local route controls, and the like), but the list says nothing about public health.

Id. at 374. Exactly the same argument has been consistently advanced in this case by the ATC, only they are concerned with underage drinking rather than underage smoking. Just as the Act says nothing about tobacco, it says nothing about an exception for wine deliveries.

This case presents an issue not decided in Rowe -- whether the 21st Amendment, which gives states authority to regulate alcohol sale, possession and

use within its own borders,[7] requires a different result. One possible argument can be immediately rejected. The fact that the 21st Amendment gives states the greater power to forbid the importation and sale of alcohol altogether does not give it the lesser power to allow such sales but regulate the manner of delivery. The Court said in Rowe:

> Maine adds that it possesses legal authority to prevent any tobacco shipments from entering into or moving within the State, and that the broader authority must encompass the narrower authority to regulate the manner of tobacco shipments. But even assuming purely for argument's sake that Maine possesses the broader authority, its conclusion does not follow. To accept that conclusion would permit Maine to regulate carrier routes, carrier rates, and carrier services, all on the ground that such regulation would not restrict carriage of the goods as seriously as would a total ban on shipments. And it consequently would severely undermine the effectiveness of Congress' pre-emptive provision. Indeed, it would create the very exception that we have just rejected, extending that exception to all other products a State might ban.

552 U.S. at 376. See also Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000) (under the 21st Amendment, "the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms").

Prior claims by states that the 21st Amendment shields their alcohol regulations from preemption have not succeeded. The case most directly on point is Capital Cities Cable, Inc., v. Crisp, 467 U.S. 691 (1984). At issue was a conflict between an Oklahoma law prohibiting the advertising of alcoholic beverages on cable television and regulations of the Federal Communications Commission, which

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[7]Section 2 of the 21st Amendment provides: "The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

prohibited cable operators from altering or modifying the television signals, including advertisements, they relay to subscribers. Id. at 705-06. The Court was clear that the 21st Amendment did not save the law from preemption. Although "States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders, ... the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." Id. at 712. The Court pointed to the fact that the state regulation of alcohol advertising on cable television was a narrow one. It did not apply to beer ads nor ads in newspapers and magazines. Id. at 715. By contrast, the federal interest in promoting the widespread availability of diverse cable television throughout the U.S. was comprehensive, significant, and would be frustrated by the state law. Id. at 716. The court held:

> We conclude that the application of Oklahoma's alcoholic beverage advertising ban to out-of-state signals carried by cable operators in that State is pre-empted by federal law and that the Twenty-first Amendment does not save the regulation from pre-emption.

Id. at 716. See also 324 Liquor Corp. v. Duffy, 479 U.S. 335, 346-52 (1987) (21st Amendment did not save state minimum alcohol pricing laws from preemption by the Sherman Act); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 113-14 (1980) (21st Amendment did not save alcohol pricing law that conflicted with federal antitrust laws).

Indiana's ban on common carrier deliveries of fulfillment orders contravenes the language of 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4), violates the principles

announced in Rowe, and "produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." Rowe, 552 U.S. at 372.

II. Indiana's rule forbidding retail wine dealers from using common carriers violates the Commerce Clause as applied to the delivery of wine moving through the fulfillment process.

Indiana Code § 7.1-3-15-3(d), which bans common carrier shipping by wine retailers, is unconstitutional as applied to Cap N' Cork's delivery of wine received from fulfillment companies. These orders originate out of state, are pre-packaged and addressed, and remain in those packages throughout the delivery process. Statement of Facts, supra at 5-6. By banning the final stage of the delivery process, Indiana has erected an insurmountable barrier that prevents a substantial stream of interstate commerce from entering the state, which violates the dormant Commerce Clause.[8]

The legal standard for determining the validity of a state law that interferes

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[8]The Commerce Clause grants to Congress the 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. The clause "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on [interstate] commerce." South-Central Timber Dev., Inc., v. Wunnicke, 467 U.S. 82, 87 (1984). Thus, although the Clause is phrased as an affirmative grant of congressional power, it is well established that it contains a negative or dormant aspect that "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Oregon Waste Sys., Inc. v. Dep't of Envt'l Quality, 511 U.S. 93, 98 (1994). The fundamental objective of the dormant Commerce Clause is to "preserve a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." Gen. Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997).

with interstate commerce is set forth in this court's most recent Commerce Clause case, Wiesmueller v. Kosobucki, 571 F.3d 699, 703 (7th Cir. 2009).

> The Supreme Court "has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986) (citations omitted). But immediately the Court added that "we have also recognized that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the ... balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." Id. at 579. This is an acknowledgment that the two tiers sometimes cannot always be distinguished in practice....

Under this approach, three situations are clear. (1) When a state statute directly regulates interstate commerce, it is generally unconstitutional. (2) When a statute discriminates against interstate commerce on its face, it is also generally invalid. (3) By contrast, when a statute is even-handed both on its face and in its effect, and has only indirect adverse effects on interstate commerce, it is presumptively constitutional and will be upheld unless the burden on interstate commerce clearly exceeds the local benefits.

However, there is a fourth situation in which the law is less clear -- when a statute is even-handed on its face but has a discriminatory effect upon application. The Supreme Court and all circuits other than this one consistently give heightened scrutiny to facially even-handed laws that have discriminatory effects. The leading

case is Hunt v. Washington State Apple Adv. Comm'n, 432 U.S. 333, 352 (1977) (even-handed regulation of apples had practical effect of depriving out-of-state producers of their competitive advantage; discriminatory effects given heightened scrutiny). See also Granholm v. Heald, 544 U.S. 460, 474-75, 487 (2005) (laws which have the effect of favoring in-state interests are given heightened scrutiny); Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Mktg. Bd., 298 F.3d 201, 210 (3d Cir. 2002) (statute invalid if it discriminates "either on its face or in practical effect").[9] Lesser scrutiny under Pike is not applied unless a law has "only incidental effects on interstate commerce." Camps Newfound/ Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 619 (1997).

Cases from the Seventh Circuit have been inconsistent. Some have followed the majority rule. E.g., Alliant Energy Corp. v. Bie, 330 F.3d 904, 911 (7th Cir. 2003) (strict scrutiny "is applied when a statute 'directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests'"); Gov't Suppliers Consolidating Serv., Inc. v. Bayh, 975 F.2d 1267, 1278 (7th Cir. 1992) (if a law "discriminates 'in practical effect' against interstate commerce, the fact that it purports to apply equally to citizens of all states does not save it"). Others have taken the opposite view and

[9]Accord Jelovsek v. Bredesen, 545 F.3d 431, 436 (6th Cir. 2008); Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 33 (1st Cir. 2007); Allstate Ins. Co. v. Abbott, 495 F.3d 151, 160 (5th Cir. 2007); Town of Southold v. Town of East Hampton, 477 F.3d 38, 48 (2d Cir. 2007); Jones v. Gale, 470 F.3d 1261, 1267 (8th Cir. 2006); Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc., 401 F.3d 560, 567 (4th Cir. 2005); S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461, 466 (9th Cir. 2001); American Target Advertising, Inc. v. Giani, 199 F.3d 1241, 1254 (10th Cir. 2000).

said that if a law is even-handed on its face, it is never given the same strict scrutiny as a facially discriminatory law, but will only be analyzed under the Pike balancing test even if it has discriminatory effect. See, e.g., Baude v. Heath, 538 F.3d 608, 611 (7th Cir. 2008); Nat'l Paint & Coatings Ass'n v. Chicago, 45 F.3d 1124, 1131 (7th Cir.1995). Most recently, the court has struck a note somewhere in between -- agreeing that even-handed laws whose effect is to favor in-state economic interests over out-of-state interests will sometimes be given heightened scrutiny, but pointing out that there is no clear dividing line between the two tiers. In every case the court must consider both the adverse effect on interstate commerce and the extent to which the statute benefits local interests. Wiesmueller, 571 F.3d at 703.[10]

Were it necessary to the outcome to resolve this inconsistency among panel opinions, the case would most appropriately be heard en banc. Fed. R. App. P. 35(a)(1) (en banc hearing may be ordered when necessary to secure uniformity among the court's decisions). In this case, however, it is unnecessary to do so, because there is one thing upon which all panels agree: If Cap N' Cork establishes that a law has a harmful effect on interstate commerce, then even if that burden does not rise to the level of discrimination or create a virtual embargo, and is analyzed under the Pike balancing test, the law is unconstitutional unless the ATC

[10]The district court below adopted the more extreme version, writing that "[s]trict scrutiny analysis is reserved for statutes that are explicitly discriminatory," and that "[i]f a law is not facially discriminatory ... but nevertheless has some discriminatory effect, courts apply the flexible balancing standard articulated in Pike." Opinion, Short Appendix at A-10. It did not cite Wiesmueller.

presents admissible evidence showing that it actually advances a legitimate local interest. Wiesmueller, 571 F.3d at 703-04. In this case, the ATC made no such showing.[11]

Therefore, Indiana's law that prohibits package stores from using common carriers, as applied to Cap N' Cork's delivery of orders received through the fulfillment process, violates the Commerce Clause for three reasons: 1) it directly regulates products moving in interstate commerce and is therefore invalid under heightened scrutiny, 2) it discriminates against interstate commerce and is therefore invalid under heightened scrutiny, and 3) it burdens interstate commerce without advancing any legitimate local purpose and therefore fails the Pike balancing test.

A. The law banning common carrier deliveries, as applied to wine moving through the fulfillment process, directly regulates interstate commerce

Cases that discuss the Commerce Clause are unanimous that, in principle, when a state statute directly regulates interstate commerce, it is generally invalid. E.g., Granholm, 544 U.S. at 487; Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); Wiesmueller, 571 F.3d at 703; Alliant Energy Corp., 330 F.3d at 911. However, only a few cases exist that involve the actual application of this principle to state law or explain what is meant by the phrase "directly regulates interstate commerce." Four types of state laws have been found to violate this principle:

Two of those categories are not implicated in this case: (1) Laws that explicitly

[11]See Statement of Facts, supra, at 7-9.

regulate a business activity located exclusively in another state, see e.g., NCAA v. Miller, 10 F.3d 633, 638-40 (9th Cir. 1993) (striking down a Nevada statute requiring the NCAA to follow strict procedures before it could discipline UNLV or coach Jerry Tarkanian); and (2) Laws that have the practical effect of regulating a business activity occurring wholly outside the state. See, e.g., Healy v. Beer Inst., 491 U.S. 324 (1989) (a law requiring beer distributors to sell in Connecticut at the lowest price they charged anywhere had the effect of preventing distributors from offering discounts in other states). The wine transactions at issue in the present case are not activities occurring wholly outside Indiana.

However, Indiana's ban on common carrier deliveries of fulfillment orders directly regulates interstate commerce in two other respects: It erects a formidable and arbitrary barrier to an interstate market, and restricts the carriage of products while they are still moving in the stream of interstate commerce.

The first principle comes from Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986), rev'd on other grounds, 481 U.S. 69 (1987), in which this circuit struck down an Indiana anti-corporate takeover law because it impeded interstate commerce in "corporate control" and the negative effects of restricting these transactions would be felt mostly outside the state. The court characterized corporate control as an important commodity which was routinely bought and sold in "an interstate, indeed international, market that the State of Indiana is not authorized to opt out of," especially since the state did not prove there was any real

and substantial local benefit to the law. Id. at 264. The anti-takeover law "erected a barrier at once formidable and arbitrary to tender offers whose principal effects if they succeed will be felt outside Indiana." Id..

The second principle comes from several Supreme Court cases that struck down state laws regulating the carriage of goods while they were still moving in interstate commerce. The Court held that states may not regulate products until they are received by the purchaser (either for personal use or resale), except as necessary to advance important local concerns, such as public health and safety. See Northern Natural Gas Co. v. State Corp. Comm'n of Kan., 372 U.S. 84, 90-91 (1963) (state could not regulate natural gas while it was still in interstate pipeline); McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330-31 (1944) (state lacked power to tax a transaction "forming an unbroken process of interstate commerce," and had to wait until goods were received by state resident). There is one narrow exception to this rule. Because of the 21st Amendment, a state "which chooses to ban the sale and consumption of alcohol altogether could bar its importation." Granholm, 544 U.S. at 488-89. A state could therefore restrict the carriage of alcohol while still in the stream of commerce, but only if the "receipt, possession, sale, or use" of alcohol is contrary to state law. Id. at 482. The exception is inapplicable in the present case because Indiana does not ban the sale, possession and use of wine, nor does it generally ban home delivery. See Ind. Code §§ 7.1-3-15-3(d) (wine dealer may deliver to residences and offices); 7.1-3-5-3(d) (beer dealer may deliver to residences and offices); 7.1-3-10-7(c) (liquor dealer may deliver liquor to residences); 7.1-3-26-

9(a) (winery holding direct wine seller permit may ship to a consumer).

Indiana's ban on common carrier deliveries of fulfillment orders violates these two principles. Although it involves a different commodity than corporate control, the law falls within the language of Dynamics Corp. of America v. CTS Corp. and impermissibly erects a formidable and arbitrary barrier to the interstate wine fulfillment process. The sale and delivery of wine from wine-of-the month clubs and other out-of-state users of the fulfillment process system is a "national, indeed international market," Statement of Facts, supra at 5-6, 10, and Indiana should not be allowed to opt out of it. No evidence shows that the selective ban on this kind of common carrier deliveries provides any real benefit to the public. See Statement of Facts, supra at 7-8. The ban is arbitrary, because Indiana allows other wine sellers (wineries) to deliver by common carrier and allows package stores like Cap N' Cork to deliver by other means. The principle effects of closing this market will be felt by wine sellers located outside Indiana.

The law also impermissibly regulates the method used to carry wine moving in interstate commerce rather than the use of the wine after it has been received by the purchaser, in violation of Northern Natural Gas Co. v. State Corp. Comm'n of Kan.. The deliveries at issue are cases of wine purchased from, packaged by and pre-addressed by out-of-state entities, consigned to an Indiana wholesaler, picked up by Cap N' Cork and then delivered to the Indiana purchaser. Statement of Facts, supra at 5-6. These shipments are out-of-state goods moving in interstate commerce and are not intra-state sales and deliveries that would fall under the

state's broad power to regulate the "receipt, possession, sale, or use" of alcohol. Granholm, 544 U.S. at 482. Indiana allows this wine to be delivered by the employees of local retailers in their own vehicles, but not by the employees of UPS in their vehicles. Indiana has not shown that it is necessary to ban common carrier deliveries of fulfillment orders to protect the public or advance important local concerns, and indeed, cannot make this showing because the state already allows other types of home deliveries, e.g., Ind. Code § 7.1-3-15-3(d), and allows common carriers to transport wine purchased directly from in-state and out-of-state wineries. Ind. Code § 7.1-3-26-9(a).

B. The law banning common carrier deliveries, as applied to wine moving through the fulfillment process, discriminates against interstate commerce

Commerce Clause cases unanimously hold that if a state law discriminates against interstate commerce and favors local economic interests, it is virtually per se invalid, and will be upheld only if the state can show that there is no reasonable non-discriminatory alternative by which it could advance its interests. The 21st Amendment cannot save it, because that amendment does not allow states to discriminate in favor of local liquor interests. E.g., Granholm, 544 U.S. at 472, 489; Wiesmueller, 571 F.3d at 703. In the court below, the ATC did not attempt to prove the absence of reasonable nondiscriminatory alternatives, see ATC Brief at 10-18, Dkt. 27, and probably could not do so because it already allows common carriers to make home deliveries of wine purchased from out-of-state wineries, Ind. Code § 7.1-3-26-9(a), if they obtain and abide by the terms of their permits. Ind. Code §§ 7.1-3-18-1 to 4. Therefore, the ban will be unconstitutional as applied to wine moving

through the fulfillment process, if it discriminates against the out-of-state wine sellers who use this system.

The ban on common carrier deliveries of fulfillment orders discriminates against interstate commerce in four ways. First, the law explicitly disadvantages interstate commerce and favors local interests by banning the use of interstate carriers while allowing local deliveries. The evidence shows that the ban closes the market only to wine from out-of-state sellers who use the fulfillment process -- wine clubs and small out-of-state wineries. Statement of Facts, supra at 6, 9-10. The Supreme Court has previously held that, if a consumer cannot obtain goods directly through interstate commerce, it favors local merchants who sell similar products. Best & Co. v. Maxwell, 311 U.S. 454, 455-56 (1940) (law restricting interstate shipping of goods impermissibly favors local merchants who sell similar products from retail stores). Second, the law explicitly shifts resources from interstate carriers (who are prohibited from handling deliveries) to the employees of local businesses. It prohibits Cap N' Cork from paying UPS to deliver the wine, which means it will have to pay additional money to its employees to make such deliveries. Third, it prohibits the interstate transportation of wine, which act by itself constitutes facial discrimination. See Hughes v. Oklahoma, 441 U.S. 322, 336-37 (1979) (law banning interstate transportation of minnows for resale "on its face discriminates against interstate commerce" because it "overtly blocks the flow of interstate commerce at [the] State's borders").[12]

[12]It makes no constitutional difference whether the state blocks the flow of good into or out of the state. H. P. Hood & Sons, Inc. v. du Mond, 336 U.S. 525, 539

Fourth, the ban on using common carriers discriminates against out-of-state wine sellers in practical effect. Most out-of-state wineries cannot afford the cost of an Indiana direct shipping license, let alone obtaining 50 licenses and complying with the rules of 50 different states. Gralla Aff. ¶ 7, Dkt. 30-7; Nelson Aff. ¶¶ 6-9, Dke. 30-8. See also Addendum to UPS contract, Dkt 30-4 (10 pages of small print describing shipping rules of all 50 states). It should come as no surprise that of the 6000 out-of-state wineries in the U.S., only 86 have gone to the time and expense to obtain a direct shippers permit. Def. Interrog. 4, Dkt. 30-5. The others must use the fulfillment process out of economic necessity.[13] Out-of-state wine retailers and clubs sponsored by organizations such as the Wall Street Journal cannot sell and deliver wine directly to Indiana residents under any circumstances because state law does not allow it. Ind. Code §§ 7.1-3-21-3 (out-of-state entity not eligible for any kind of retail or dealer permit); 7.1-3-26-5 to 7 (out-of-state entity must have direct wine seller permit to sell directly to consumers but only wineries are eligible for it). They must use the fulfillment process out of legal necessity, the last link of which is

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(1949):

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

[13]Some of the largest wineries do not engage in direct-to-consumer sales at all, but sell through wholesalers.

the delivery from Cap N' Cork to the purchaser. Because it is economically unfeasible for Cap N' Cork to use its own trucks and employees to deliver outside the Fort Wayne area, Doust Aff. ¶ 12, Dkt. 18-2, the ban on using common carriers has the practical effect of closing most of the Indiana market to most of the 6000 of out-of-state wineries and all the out-of-state wine clubs forced by Indiana law or the laws of economics into the fulfillment process. This benefits Indiana wine sellers, because as the Supreme Court pointed out in Best & Co., 311 U.S. at 455-56, if consumers cannot obtain goods directly through interstate commerce, local merchants who sell similar products will benefit. Indiana wine sellers face no such barriers -- Indiana wineries may deliver via common carrier, Ind. Code §§ 7.1-3-26-8(B), 7.1-3-26-9, and retail package stores may deliver wherever they want using their own employees.[14] Ind. Code § 7.1-3-15-3(d).

The ATC has not disputed that it is cost-prohibitive for Cap N' Cork to use its own employees to deliver all over the state, and the Supreme Court has twice said that economic impracticality constitutes discriminatory effect. In Granholm, 544 U.S. at 474-75, New York required a winery to go to the extra expense of establishing premises in the state before it could sell directly to consumers. The court noted that this would "drive up the cost of their wine" and that "[f]or most wineries, the expense of establishing a bricks-and-mortar distribution operation in 1 State, let alone all 50, is prohibitive." In Hunt v. Washington State Apple Adv.

[14]An in-state retailer makes its own decision whether to deliver to distant purchasers. An out-of-state retailer is at the mercy of the decision made by the Indiana dealer.

Comm'n, 432 U.S. at 351-52, North Carolina required all apple distributors to conform to standard packaging that would "raise the costs of doing business" for out-of-state dealers by requiring them to alter their marketing practices and deprive them of "competitive and economic advantages" they would have in a free market. The laws in both cases were declared unconstitutionally discriminatory.[15]

As discussed earlier at pp. 23-25, not all panel decisions from this circuit adhere to the Supreme Court's precedent that a facially even-handed state law which has a discriminatory effect in practice is given heightened scrutiny. Compare Gov't Suppliers Consolidating Serv., Inc. v. Bayh, 975 F.2d at 1278 (if a law "discriminates 'in practical effect' against interstate commerce, the fact that it purports to apply equally to citizens of all states does not save it") with Baude v. Heath,539 F.3d at 611 (only a law that "discriminates explicitly ... is almost always invalid; "[w]here the statute regulates even-handedly ... it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits"). Therefore, we proceed to the question whether the ban on common carrier deliveries of fulfillment orders imposes an excessive burden on interstate commerce.

C. The law banning common carrier deliveries of fulfillment orders impedes and burdens interstate commerce without advancing any legitimate local purpose, and therefore fails the Pike balancing test.

Indiana's law banning common carrier deliveries of fulfillment orders clearly burdens interstate commerce. It impedes shipments of wine moving through

[15]The holding in Granholm is arguably dictum because the Court also found that in other respects the New York laws discriminated on their face.

interstate commerce and forces them into local delivery methods. It deprives UPS of revenue. It makes it all but impossible for national wine clubs to reach most residents of Indiana, because they are not eligible for any permit or license that would allow them to distribute directly. Ind. Code § 7.1-3-21-3. It eliminates the most cost-effective way that most out-of-state wineries can reach Indiana consumers, and makes them either forgo such sales or pay extra for the necessary security bond, Ind. Code § 7.1-3-26-7(a)(5), and licenses[16] or the cost of a wholesaler. FTC Report at 22-24, Dkt. 30-2. It will curtail most of the 13,000 cases of wine worth $15 million delivered annually through Cap N' Cork.

When a state law burdens interstate commerce, the courts undertake a balancing analysis that asks whether the state's interest in regulating commerce is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where 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 unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

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[16]A direct shipper's license is $100 annually, Ind. Code § 7.1-3-26-8(b), and wineries who sell some of their wine through wholesalers would have to also get a farm winery license, Ind. Code § 7.1-3-26-7(a)(8), which is $500. Ind. Code 7.1-4-4.1-15.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). This circuit has previously applied the Pike balancing test to state restrictions on the sale and delivery of wine. E.g., Baude, 538 F.3d at 611; Bridenbaugh, 227 F.3d at 853.

The constitutionality of state statutes is often affirmed under the Pike test because courts are wary of reviewing the wisdom of legislation. Baude, 538 F.3d at 611. But, state laws also "have been consistently invalidated" under this balancing approach. Pike, 397 U.S. at 142. Indeed, the law at issue in Pike itself -- that all cantaloupes had to be packed in-state before they could be shipped out of state -- was struck down as unnecessarily burdening interstate commerce. 397 U.S. at 145-46. Similarly, this circuit in Baude struck down an Indiana law that prohibited wineries with wholesaling privileges from selling directly to consumers because it imposed a "disproportionate" burden on interstate commerce. 538 F.3d at 611-12.

Pike balancing requires evidence. This court has said

> Any balancing approach, of which Pike is an example, requires evidence. It is impossible to tell whether a burden on interstate commerce is "clearly excessive in relation to the putative local benefits" without understanding the magnitude of both burdens and benefits. Exact figures are not essential (no more than estimates may be possible) and the evidence need not be in the record if it is subject to judicial notice, but it takes more than lawyers' talk ....

Baude, 538 F.3d at 612. This evidentiary requirement applies to both halves of the Pike equation -- the magnitude of the burden and the extent of local benefits.

Cap N' Cork proved the magnitude of the burden -- 13,000 cases of wine annually worth $15 million. All national wine clubs are excluded from the market because they are not eligible for any kind of permit that would allow them to

distribute directly. 6000 small wineries are denied the most cost-effective way to reach Indiana consumers and will have to either forgo such sales or pay extra for a direct shipper's license or a wholesaler. Statement of Facts, supra at 6, 9-10.

The ATC offered no evidence to the contrary, but rested its case on the assertion that the ban on using common carriers advanced the state's interest in limiting youth access to alcohol.[17] This is essentially a factual claim that underage drinkers are able to circumvent the age verification process and obtain alcohol by placing special orders through fulfillment companies and having wine delivered by common carrier. To prove evasion of age verification, the ATC would need to show that UPS does not require proof of age upon delivery, that UPS employees are less diligent about age verification than package store employees, or that age verification was more effective when done at the point of sale than at the point of delivery. To prove possession, the ATC would need to show that at least a few minors had actually managed to obtain wine by ordering it through the fulfillment process and having it delivered to their homes by common carrier (without their parents finding out).

However, the ATC offered no evidence in support of any of these propositions -- no affidavit from UPS that their age verification system is ineffective, no proof that UPS employees are not trained in age verification, no public health study showing that in-store age verification is more effective than point-of-delivery age verification, and no evidence that a single minor ever successfully took possession of

[17]Cap N' Cork does not dispute that this is a legitimate interest. The question is whether banning common carrier deliveries of fulfillment orders advances that interest.

wine ordered from the Wall Street Journal Wine Club or other seller who uses the fulfillment process. Nor can it be inferred that the employees of common carriers are any less motivated to verify age at the time of delivery than the employees of wine retailers. A carrier, like a wine dealer, needs a state license to deliver alcohol. Ind. Code § 7.1-3-15-3.[18] Both licensees are equally liable for criminal prosecution, fines and loss of that license if they are caught furnishing alcohol to a minor. Ind. Code §§ 7.1-5-7-8 (criminal offense); 7.1-3-23-26.1; 7.1-2-5-8 (vehicle used to deliver alcohol to minor may be forfeited).

If allowing common carriers to deliver wine actually posed any danger of increased access by minors, the ATC surely would know by now and would have presented the evidence. Indiana has allowed common carriers to deliver wine ordered from wineries since 2006. Ind. Code § 7.1-3-26-9. Direct shipping permits have been obtained by 120 wineries. Poindexter Aff., ¶ 21, Dkt. 28-1. The ATC assures compliance with Indiana's alcohol laws through stings and other enforcement efforts, and appears to pay special attention to access by minors. Poindexter Aff. at ¶¶ 3, 5, 11-13. Yet, the ATC presents no evidence that any common carrier wine deliveries go to minors or that such deliveries have actually caused a problem. The gathering, preserving and presenting of evidence related to enforcement is exclusively within the control of the ATC, Poindexter Aff. ¶ 3, Dkt. 28-1, so their failure to present any evidence that common carrier deliveries affect youth access raises the inference that no such evidence exists. See U.S. v. Addo,

[18]The carrier would also need the license to carry wine from wineries with direct shippers licenses.

989 F.2d 238, 242 (7th Cir. 1993) (if evidence is "peculiarly within [a party's] power to produce ... the fact that he does not do it creates a presumption that the testimony, if produced, would be unfavorable").

The only evidence offered by the ATC on the connection between banning common carrier deliveries of fulfillment orders and youth access is a one-sentence conclusory statement that "[t]he requirement of a direct, face-to-face transaction in any sale of alcohol to consumers is one effective barrier to youth access to alcohol." Poindexter Aff. ¶ 6, Doc. No. 28-1; Swallow Aff. ¶ 5, Doc. No. 28-2 (the statements in the two affidavits are identical). Neither witness says it is the only effective way, or that an in-store ID check is effective to prevent off-site delivery to minors,[19] or that age verification by UPS drivers upon delivery would not promote the state's interest "as well with a lesser impact on interstate activities." Pike, 397 U.S. at 142. This "creates an arbitrary distinction," Wiesmueller, 571 F.3d at 704, between the employees of Indiana package stores and the employees of common carriers.

In any event, both the Seventh Circuit and the Supreme Court have held such speculative opinions, unsupported by any data or hard evidence, to be insufficient on summary judgment. In Lucas v. Chicago Transit Authority, 367 F.3d 714, 726 (7th Cir. 2004), the Seventh Circuit held that conclusory statements which are not backed up by specific facts and details are not sufficient to avoid summary judgment. The ATC provided no such factual basis for these conclusory statements by its own employees. Bald conclusions standing alone, without some

[19]See Nat. Research Council Report at 166-68, Dkt 30-3 (common way for minors to obtain alcohol is to have someone over 21 buy it for them).

quantification of the benefit, are not adequate to defeat Cap N' Cork's motion for summary judgment. See Baude, 538 F.3d at 612 ("It is impossible to tell whether a burden on interstate commerce is 'clearly excessive in relation to the putative local benefits' without understanding the magnitude of [the] benefits").

The state's assertion that banning common carrier deliveries of fulfillment orders will significantly reduces youth access is not only unsupported by evidence, it is inconsistent with the Supreme Court's holding in Granholm, 544 U.S. at 490. In Granholm, the Supreme Court relied upon the same FTC Report offered in this case, Dkt. 30-2, accepted its factual findings that direct shipping of wine to residences does not contribute to youth access, rejected the State's claim to the contrary as "unsupported," and held that a ban on direct shipping cannot be justified on the basis that it prevents youth access. 544 U.S. at 490. The FTC Report is 46 pages long and details hundreds of underlying facts, studies, testimony, and data supporting its conclusion. Something more than one-sentence conclusory statements to the contrary were required to defeat summary judgment, and the ATC offered no such evidence.

The only evidence on these points that is in the record was submitted by Cap N' Cork. It showed that allowing common carrier deliveries in other states had not increased youth access. FTC Report at 26-38, Dkt. 30-2. It showed that it was unlikely in the first place that minors would even attempt to order wine for home delivery (especially those who live with their parents). Statement of Facts, supra at 7-8. The ATC cannot prevail in an "evidentiary vacuum," Wiesmueller, 571 F.3d at

704, and the court cannot simply assume that a set of facts exist which favor the ATC. Id. at 705-06. Summary judgment should be granted to Cap N' Cork.

III. If the factual record is not sufficient to grant summary judgment to Cap N' Cork, the case should be remanded for trial

When ruling on cross-motions for summary judgment, the court must evaluate each motion independently. Franklin v. City of Evanston, 384 F.3d 838, 842-43 (7th Cir. 2004). The Court is required in each instance to "construe all facts and reasonable inferences in favor of the nonmoving party." Singer v. Raemisch, 593 F.3d 529, 533 (7th Cir. 2010). Thus, the facts are construed most favorably to the defense when the court is considering the plaintiffs' motion, but must then be construed favorably to the plaintiffs when considering the defendant's motion.

The district court did not do this. It first considered Cap N' Cork's motion, construed the facts favorably to the ATC, and denied it. However, the court then used the same factual basis (the one construed favorably to the ATC) to grant the ATC's cross-motion. See Appendix at A-20 to A-21 (the court presumed that the ATC's factual assertions were correct, that it could rule in the ATC's favor even without evidence, and said that it was "skeptical" about Cap N' Cork's evidence). This was error, because the court was supposed to be construing the evidence most favorably to the plaintiffs when ruling on the ATC's motion for summary judgment.

There are three possible outcomes on cross-motions for summary judgment: (1) plaintiffs' motion can be granted and the defendant's motion denied, in which case judgment is entered for the plaintiffs. (2) Plaintiffs' motion can be denied and the defendant's motion granted, in which case judgment is entered for the defendants

and the case dismissed. (3) Both motions can be denied, no judgment entered, and the case set for trial.

Cap N' Cork's claims concerning preemption and discrimination against interstate commerce are essentially questions of law. If Cap N' Cork establishes the factual predicates, the judgment follows Q.E.D. It is therefore appropriate to test on summary judgment whether Cap N' Cork has established the factual bases, construing the facts most favorably to the defense. For reasons set forth above, Cap N' Cork asserts that it has met this burden and its motion should have been granted. However, even if it is denied, it does not flow automatically that judgment should be entered for the ATC. That is because of the third Commerce Clause issue -- whether Indiana's ban on common carrier deliveries of fulfillment orders fails the Pike balancing test.

The Pike test asks the court to weigh the burden on interstate commerce against the putative local benefit. Cap N' Cork offered evidence on both issues. On the first prong, its evidence showed that banning common carrier deliveries of fulfillment orders has a substantial adverse impact on interstate commerce by decreasing selection, raising prices, closing market access to many small wineries, and halting $1.5 million in annual wine sales to Cap N' Cork. Statement of Facts, supra at 7, 9-10. The defense did not dispute this evidence. On the second prong, Cap N' Cork provided evidence that the rule did little to advance the state's purpose of preventing youth access because minors rarely try to order wine for home delivery in the first place, other states that allow such deliveries have reported few

or no problems, UPS checks IDs in a face-to-face transaction upon delivery, and that requiring a face-to-face transaction at the point of sale was not any more effective than other types of age verification. Statement of Facts, supra at 7-9. Much of this evidence comes from two systematic and careful studies by federal agencies, the FTC and the National Academies of Science.

In response, the ATC offered only brief, one-sentence opinions of two ATC excise officers that the requirement of a face-to-face transaction at the point of sale was "one effective barrier to youth access to alcohol." See discussion supra at 39. This conclusion is actually inconsistent with the ATC's own evidence showing that this supposedly effective procedure fails to prevent sales to minors 35% of the time. Poindexter Aff. ¶ 15, Dkt. 28-1.[20] The ATC offered absolutely no evidence that age verification at the point of delivery was any less effective or that even a single bottle of wine had ever been delivered to a minor in Indiana by a common carrier. Statement of Facts, supra at 8-9. Indeed, the only evidence offered by the ATC -- the opinion of excise officers that point-of-sale age verification was "one" barrier to youth access -- conspicuously did not say it was the only or most effective barrier.

The ATC cross-moved for summary judgment on this point, asserting that it had made a sufficiently strong case on youth access that judgment should be entered in its favor. In essence, the ATC was claiming that undisputed facts showed that the ban helped limit youth access. However, in ruling on this motion, the court is

[20]This evidence from ATC compliance studies is consistent with data collected by the FTC and National Academies of Science showing the relative ineffectiveness of traditional face-to-face age verification.

required to interpret the evidence concerning youth access favorably to Cap N' Cork, even if these are the same facts it interpreted favorable to the ATC a few minutes earlier when ruling on Cap N' Cork's motion. It is entirely plausible that if the body of evidence submitted by both sides conflicts, it could show that a common carrier ban probably has no effect on youth access when viewed most favorably to the plaintiff, but also show that it might have at least a minimal ameliorative effect when viewed favorably to the ATC. In this situation, both motions should be denied and the case sent back to trial. Conflicts in the evidence are not supposed to be resolved on summary judgment, and certainly are not supposed to be automatically resolved in favor of the defendant. Fed. R. Civ. P. 56(a).

Conclusions

The district court's decision granting the ATC's motion for summary judgment, denying Cap N' Cork's motion for summary judgment, and dismissing the case should be reversed and:

1. The ATC's motion for summary judgment should be denied because the evidence, when construed most favorably to Cap N' Cork, demonstrates that the ban on common carriers burdens interstate commerce and does nothing to advance the state's interest in preventing youth access to alcohol.

2. Cap N' Cork's motion for summary judgment should be granted because the ban on common carrier deliveries of wine in the fulfillment process is preempted by federal law, discriminates against interstate commerce, and burdens interstate commerce disproportionately to the trivial extent to which it actually advances the

state's interest in limiting youth access.

3. If the court finds that it cannot grant Cap N' Cork's motion for summary judgment when construing the facts most favorably to the ATC, then both motions should be denied and the case sent back to the district court for discovery and trial under the authority of Wiesmueller v. Kosobucki, 571 F.3d 699, 703 (7th Cir. 2009).

Respectfully submitted:

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Certificate of Compliance With Fed. R. App. P. 32(a)(7)(C)

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C), this opening brief is proportionately spaced, has a typeface of 12 points or more, and contains 12,644 words, including footnotes, according to the word count program in WordPerfect X3, the program used to create this brief.

Date: March 28, 2011

_____
James A. Tanford

Certificate of Service

I certify that two copies of the foregoing brief of appellants were served on March 28, 2011, upon counsel for appellee, by first-class U.S. Mail, and that an electronic copy was served by electronic mail, to:

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Statement That Appendix Is Complete

I certify that all materials required by Cir. R. 30(a) and (b) are included in the appendix that follows, bound with the brief .

_____
James A. Tanford

Required Short Appendix

1. Judgment of the district court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LEBAMOFF ENTERPRISES, INC., d/b/a CAP N' CORK, RANDY LEWANDOWSKI, and LUTHER STRODER	)	
Plaintiffs	)	
vs	)	1:09-cv-0744-JMS-TAB
P. THOMAS SNOW, in his Official Capacity as Chairman of the Indiana Alcohol & Tobacco Commission,	)	
Defendant	)	

Final Judgment

Pursuant to this Court's Order on Cross-Motions for Summary Judgment, entered simultaneously on this day, the Court enters final judgment in favor of Defendant P. Thomas Snow, in his official Capacity as Chairman of the Indiana Alcohol & Tobacco Commission. The court further enters final judgment against Plaintiffs Lebamoff Enterprises, Inc. d/b/a Cap N' Cork, Randy Lewandowski, and Luther Stroder, such that no Plaintiff shall take anything by way of the Complaint.

12/06/2010

Hon. Jane Magnus-Stinson,
Judge
United States District Court
Southern District of Indiana

2. Opinion of the district court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LEBAMOFF ENTERPRISES, INC., d/b/a CAP N' CORK, RANDY LEWANDOWSKI, and LUTHER STRODER	)	
Plaintiffs	)	1:09-cv-0744-JMS-TAB
vs	)	
P. THOMAS SNOW, in his Official Capacity as Chairman of the Indiana Alcohol & Tobacco Commission,	)	
Defendant	)	

ORDER

JANE MAGNUS-STINSON, District Judge.

Indiana law permits a wine dealer to make off-premises deliveries of wine to a location designated by a customer only if the delivery is made by the dealer itself or a dealer's employee who holds an employee permit. Ind.Code § 7.1-3-15-3(d). Plaintiffs Lebamoff Enterprises, Inc. d/b/a Cap N' Cork, is a Fort Wayne, Indiana wine dealer that would prefer to make off-premises deliveries through a common carrier rather than through its permitted employees. Randy Lewandowski, and Luther Stroder are wine consumers who live in the Indianapolis area, who do not want to travel to Fort Wayne to pick up wine at Cap N' Cork, and who would prefer to have it delivered directly. The Plaintiffs will be referred to collectively "Cap N' Cork" as none makes any unique argument. Cap N' Cork claims the Indiana law at issue is both unconstitutional and preempted by federal statute.

Presently before the Court are Cross-Motions for Summary Judgment filed by Cap N' Cork and Defendant P. Thomas Snow, in his official Capacity as Chairman of the Indiana Alcohol & Tobacco Commission ("ATC").

I.
STANDARD OF REVIEW ON MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment asks that the Court find that a trial based on the uncontroverted and admissible evidence would-as a matter of law-conclude in the moving party's favor and is thus unnecessary. See Fed. R. Civ. Pro. 56(c). When evaluating a motion for summary judgment, the Court must give the non-moving party the benefit of all reasonable inferences from the evidence submitted and resolve "any doubt as to the existence of a genuine issue for trial ... against the moving party." Celotex Corp. v. Catrett, 477 U.S. 317, 330 n. 2, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Nevertheless, "the Court's favor toward the non-moving party does not extend to drawing inferences that are supported by only speculation or conjecture." Singer v. Raemisch, 593 F.3d 529, 533 (7th Cir.2010). The non-moving party must set forth specific facts showing that there is a material issue for trial and cannot rely upon the mere allegations or denials in the pleadings. Fed. R. Civ. Pro. 56(e); Celotex, 477 U.S. at 317, 106 S.Ct. 2548. Moreover, the non-moving party must do more than just demonstrate a factual disagreement between the parties; it must demonstrate that the disputed factual issue is "material." Outlaw v. Newkirk, 259 F.3d 833, 837 (7th Cir.2001). The key inquiry is the existence of evidence to support a plaintiff's claims or affirmative defenses, not the weight or credibility of that evidence, both of which are assessments reserved to the trier of fact. See Schacht v. Wis. Dep't of Corrections, 175 F.3d 497, 504 (7th Cir.1999).

Cross-motions for summary judgment do not automatically mean that all questions of material fact have been resolved. Franklin v. City of Evanston, 384 F.3d 838, 842 (7th Cir.2004). The Court must evaluate each motion independently, making all reasonable inferences in favor of the nonmoving party with respect to each motion. Id. at 843.

After having assessed the claims of the parties in accordance with the standards outlined above, the Court concludes that ATC is entitled to summary judgment on both counts. There-fore, in what follows, the Court makes all reasonable factual inferences in favor of Cap N' Cork. See Fed. R. Civ. Pro. 56(c).

II.
BACKGROUND

A) Indiana's Three-Tier System of Wine Distribution

Indiana, like many states, has chosen to regulate the distribution of wine

within itsborders by requiring that producers sell exclusively to permitted wholesalers who, in turn, may sell only to permitted retailers. See generally Ind.Code §§ 7.1-3 et seq. This is a nationally recognized scheme known as "the three-tier system." In the three-tier system, the chain of commerce begins at the winery and ends with the consumer. First, the winery, which can be in-state or out-of-state, receives the order-either through direct purchases from customers, through solicitation of business from fulfillment companies, or through retail entities such as Cap N' Cork that place orders on behalf of customers. [Id.]

When the fulfillment process is in play, the wine is pre-packaged and pre-addressed by the winery. [Dkt. 18-3 at 1-2.] Second, the winery ships the wine to an Indiana wholesaler. Third, the wholesaler transfers the wine to an Indiana retailer (permitted as a wine dealer)-here, Cap N' Cork-for eventual delivery to the Indiana consumer. [Dkt. 17 at 2.] Within this framework, consumers may purchase wine for off-premises consumption only from permitted retailers and may do so only in face-to-face transactions.

In accordance with the three-tier system, any wine retailer within Indiana's borders must obtain a "wine dealer permit." Ind.Code § 7.1-3-15-1. Holders of wine dealer permits are allowed to make off-premise deliveries of up to three cases of wine per transaction, but only if the face-to-face requirement of the three-tier system is met. To meet the face-to-face requirement, a retailer must have a delivery permit and use its own employee to deliver the alcohol to consumers within Indiana:

> [A] wine dealer ... may deliver wine ... to a customer's residence, office, or designated location ... by the permit holder or an employee who holds an employee permit. The permit holder shall maintain a written record of each delivery for at least one (1) year that shows the customer's name, location of delivery, and quantity sold.

Ind.Code § 7.1-3-15-3(d).

Wine dealers, or wine dealer employees who have employee permits, are required to receive server training pursuant to Indiana Code § 7.1-3-1.5-4.3. Server training is designed to educate employees on the selling, serving, and consumption of alcoholic beverages, with an emphasis on preventing the distribution of alcohol to minors. Ind.Code § 7.1-3-1.5-4.3. Such training is required to include methods for properly and effectively:

> (i) checking the identification of an individual;

(ii) identifying an illegal identification of an individual; and
(iii) handling situations involving individuals who have provided illegal identification.

Ind.Code § 7.1-3-1.5-6(e).

B) Two Exceptions to the Three-Tier System

Indiana recognizes two exceptions to the three-tier system with respect to the sale and delivery of wine. The first exception applies to wineries in any state that sell no more than 1,000,000 gallons of per year wine to Indiana. See Ind.Code § 7.1-3-12-4. Any such winery is eligible for a "farm winery permit," which allows wineries to sell directly to customers on premises, to conduct business at up to three off-premise locations, to sell wine directly to consumers at a farmer's market operated on a not-for-profit basis, and to sell wine directly to a holder of a wholesaler's permit. Ind.Code § 7.1-3-12-5(a)(3), (b), (a)(4), (a)(5).

The second exception to the three-tier system is likewise available to wine producers who sell no more than 1,000,000 gallons of wine per year to Indiana. See Ind.Code § 7.1-3-26-7(a)(7). Such a producer is eligible for a "direct wine seller's permit." A direct wine seller's permit holder may ship no more than 3,000 cases of wine per year and no more than 24 cases of wine per year to any given customer. See Ind.Code §§ 7.1-3-26-9(2)(e), 7.1-3-26-12. Holders of this permit are allowed to bypass the three-tier system by selling and shipping wine directly to a customer, provided:

A) The consumer provides the winery with the following information in an initial face-to-face transaction:
1. Name, telephone number, Indiana address, or Indiana business address;
2. Proof that the consumer is twenty-one years of age or older;
3. A verified statement that the consumer is twenty-one, has an Indiana address, and intends to use the wine for personal purposes;
B) The Permit holder labels the shipping container with the following,
C) "CONTAINS WINE. SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED
D) FOR DELIVERY";
E) The Permit holder ships the wine using the holder of a valid carrier's alcoholic beverage permit;
F) The Permit holder directs the carrier to verify that the recipient is twenty-one or older;

G) The Permit holder does not ship more than 216 liters (24 cases) of wine to
H) any consumer in a calendar year; and
I) The Permit holder remits all excise, sales, and use taxes on a monthly basis.

Ind.Code § 7.1-3-26-7.

Though the laws providing for the farm winery and direct wine sellers allow direct sales to a consumer without the intervention of a retailer or wholesaler, they preserve the requirement of a face-to-face transaction. For farm winery permit holders, they sell directly and in person to the consumer. For direct wine sellers the face-to-face requirement is fulfilled at the time the wine is ordered, as opposed to the time of delivery.

With the exception of farm winery permit holders and direct wine seller's permit holders, as well as the delivery statute at issue, a separate provision in Title 7.1 contains an explicit and general ban on the direct shipment of alcoholic beverages. Ind.Code §§ 7.1-3-12-4, 7.1-3-26-9(2)(e); 7.1-3-26-12; 7.1-5-11-1.5(a). Neither the three-tier system itself, the exceptions to the three-tier system, nor the more general ban on direct shipment is being challenged here.[1]

C) Situating Cap N' Cork Within the Three-Tier System

Cap N' Cork is among the approximately 10,667 wine dealers in Indiana permitted to sell wine to consumers through the three-tier system. [Dkt. 30-5 at 9.] Specifically, Cap N' Cork is permitted under a wine dealer permit, the only permit for which it is eligible. [Dkt. 27 at 7.] It operates approximately 15 package liquor stores in the greater Fort Wayne area. [Dkt. 1-1 at 36.] Cap N' Cork delivers a total of 13,000 cases of wine per year, which totals about $1.5 million in sales. [Dkt. 30-6 at 1.]

Some of Cap N' Cork's wine sales are referred to it by out-of-state wine fulfillment companies. [Dkt. 17 at 2-3.] Wine fulfillment companies are businesses

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[1]ATC contends that Cap N' Cork also seeks to invalidate Indiana Code § 7.1-5-11-1.5(a), which generally bans the direct shipment of all alcoholic beverages directly to Indiana consumers unless a permittee holds a direct wine seller's permit issued pursuant to Indiana Code § 7.1-3-26-7(a) permit which no wine retailer, or any other alcoholic beverage retailer or dealer is eligible to hold. Ind.Code § 7.1-5-11-1.5(a); [dkt. 31 at 1]. Nothing in the briefing here, however, suggests that Cap N' Cork in fact raises such a challenge, so the Court will not address any challenge to the statutory scheme reflected by § 7.1-5-11-1.5(a).

that receive orders from consumers who seek to purchase wine that may not be available from a local retailer, and/or who prefer direct delivery of wine to their business or personal residence. Sales are generated in response to advertisements, the internet, magazine reviews, or other media sources. [Id. at 3.] The wine ordered from fulfillment companies is then shipped to Indiana and delivered to consumers through the three-tiered system. [Id. at 3.]

Because Cap N' Cork chooses to deliver wine throughout Indiana, and because Indiana law requires Cap N' Cork to deliver only via a permit holder or its permitted employees, some distant deliveries are less convenient and more costly for Cap N' Cork. [Dkt. 17 at 3-5.] According to Cap N' Cork, it is not economically feasible for the company to use its own delivery vehicles to make small consumer deliveries beyond a fifteen mile radius of its stores, nor is it feasible for the consumers to travel to Fort Wayne to pick up shipments. [Id. at 4.] As noted, the two consumer plaintiffs live in the Indianapolis area. [Dkt. 1-1 at 37.]

Cap N' Cork stated in oral argument that it does not seek to bypass the three-tier system. But in December 2008, it entered into a shipping contract with UPS [dkt. 30-4] to make deliveries of wine to Indiana customers in contravention of the face-to-face delivery requirement of § 7.1-3-15-3(d). Cap N' Cork has received three citations from ATC for using UPS to deliver to its customers. [Dkt. 18-5.] Based on these citations, Cap N' Cork filed a lawsuit in state court challenging the constitutionality of § 7.1-3-15-3(d) within the three-tier system. [Dkt. 17 at 3-4.] The Indiana Attorney General removed the case to this Court. [Id. at 5.]

III.
DISCUSSION

Cap N' Cork now brings Commerce Clause and preemption challenges against § 7.1-3-15-3(d), which requires that a permitted wine dealer use its own permitted employees to make off premises delivery of wine to consumers within Indiana.[2]

A) Commerce Clause Challenge

Although Cap N' Cork has struggled to articulate a cogent or consistent basis for its constitutional challenge, at oral argument counsel asserted that its Commerce Clause challenge to § 7.1-3-15-3(d) is predicated on three distinct claims: "that [the

[2] The original Complaint also alleged that § 7.1-3-15-3(d) violated the Indiana Constitution, Art. I, § 23, and the Equal Protection Clause, but Cap N' Cork abandoned those claims during briefing on the instant motions. [Dkt. 29 at 1.]

statute] discriminates against UPS, the interstate carrier, which is direct discrimination against interstate commerce; that it discriminates against interstate sellers like the New York Times Wine Club compared to the local sellers like Cap N' Cork Retail; and [that] it discriminates in practical effect against out-of-state wineries ... whose only feasible access [to] the market is through this fulfillment process." [Dkt. 43 at 61-62.] Because the statute is alleged to be facially discriminatory, Cap N' Cork argues that the Court should apply a strict scrutiny analysis, under which it would find the statute unconstitutional. [Dkt. 17 at 6.] Furthermore, Cap N' Cork contends that even if the Court does not apply strict scrutiny, this statute has a disparate impact on interstate commerce such that it fails the Pike v. Bruce Church, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) balancing test under the authority of Granholm v. Heald, 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005). [Id. at 3.]

ATC maintains, however, that § 7.1-3-15-3(d) is not discriminatory at all because it regulates wine deliveries by Indiana wine dealers the exact same way regardless of whether the wine was sold through intrastate or interstate commerce. [Dkt. 27 at 11.] Alternatively, ATC argues that even if the statute has a disparate impact on interstate commerce, the local government interest the statute effectuates outweighs any burden, such that it passes muster under Pike. Moreover, because the statutes at issue in Granholm were invalidated based on their facial discrimination against out of state commerce, ATC argues the statute at issue in this case is distinguishable from Granholm and is instead analogous to Baude v. Heath, 538 F.3d 608 (7th Cir.2008), a more recent case wherein a similar Indiana statute requiring a face-to-face transaction survived the Pike balancing test. [Dkt. 27 at 12.]

In bringing its challenge to § 7.1-3-15-3(d), Cap N' Cork must overcome the strong presumption that the statute is constitutional. See Bowen v. Kendrick, 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988); Hines v. Elkhart Gen. Hosp., 603 F.2d 646 (7th Cir.1979). Consistent with Seventh Circuit authority, this Court will construe a statute to be constitutional if possible. See Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 508 (7th Cir.1998).

1) Teachings from Granholm

The Supreme Court in Granholm v. Heald provided significant guidance concerning Commerce Clause challenges to state laws regulating the delivery of wine. Granholm v. Heald, 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005). The court addressed the tension between two constitutional provisions, the Commerce Clause and the Twenty-First Amendment. It articulated the principles that frame this Court's analysis

of the constitutionality of the challenged statute under the Commerce Clause. See 544 U.S. 460, 125 S.Ct. 1885.

In Granholm, the Supreme Court invalidated two laws that were explicitly discriminatory because they permitted in-state wineries to ship directly to customers while requiring out-of-state wineries either to ship via in-state distributors or to establish a distribution operation in-state. 544 U.S. at 473-74, 125 S.Ct. 1885. The Supreme Court's decision in Granholm rested on the dispositive fact that wine-distribution laws at issue were "straightforward attempts to discriminate in favor of local producers." Granholm, 544 U.S. at 489, 125 S.Ct. 1885. In invalidating those laws under the Commerce Clause, the Granholm court emphasized that the wine-importation and distribution laws were unconstitutional because they deprived out-of-state wineries of "their right to have access to the markets of other States on equal terms." Id. at 473, 125 S.Ct. 1885.

The Granholm court made clear, however, that the Twenty-First Amendment gives the states broad power to regulate liquor distribution so long as state law does not burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. See U.S. Const. Art. I, § 8; Granholm, 544 U.S. at 462-63, 125 S.Ct. 1885. More specifically, "state laws cannot ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers; if a [s]tate chooses to allow direct shipment of wine, it must, under the Commerce Clause, do so on evenhanded terms." Id. at 461, 125 S.Ct. 1885. Indeed, in all but the narrowest circumstances, state alcohol laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Id. at 470, 125 S.Ct. 1885.

But "state policies are protected under the Twenty-First Amendment when they treat liquor produced out-of-state the same as its domestic equivalent." Id. at 489, 125 S.Ct. 1885. In that circumstance, states may go so far as to prohibit altogether the direct shipment of alcohol. See id. at 482-83, 125 S.Ct. 1885 (noting that the Webb-Kenyon Act, 27 U.S.C. § 122, explicitly allows states to prohibit direct shipment of alcohol to consumers). If out-of-state and in-state wine deliveries are treated the same way, "the Twenty-First Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." Id. at 488, 125 S.Ct. 1885.

The court in Granholm was also clear in blessing the three-tier system as "unquestionably legitimate" and compliant with the Commerce Clause. 544 U.S. at 489, 125 S.Ct. 1885. The validity of this system has been recognized by courts

nationwide-it is an efficient means of controlling the distribution of wine, an effective means of promoting temperance, and a facilitating means of collecting excise taxes. See Granholm, 544 U.S. at 488, 125 S.Ct. 1885.

In the wake of Granholm, the Seventh Circuit has confronted head-on the constitutionality of Indiana's wine distribution regime. Baude v. Heath, 538 F.3d 608 (7th Cir.2008). In this context, the Seventh Circuit articulated three possible tests for evaluating constitutionality depending on the extent to which the law burdens interstate commerce: strict scrutiny, Pike balancing, and rational basis review.

Strict scrutiny analysis is reserved for statutes that are explicitly discriminatory or that, in their terms, treat in-state and out-of-state producers differently. Baude, 538 F.3d at 613. Explicitly discriminatory statutes are invalid virtually per se. Granholm, 544 U.S. at 476, 125 S.Ct. 1885. Generally, strict scrutiny is only applied to regulations which insidiously operate to promote protectionist or isolationist objectives. See Hunt v. Washington State Apple Adv. Commn', 432 U.S. 333, 349-351, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). Whether strict scrutiny is a proper analytical tool in this context rests principally on whether a law directs alcohol produced out-of-state to be treated differently than that produced in-state. Granholm, 544 U.S. at 498, 125 S.Ct. 1885.

If a law is not facially discriminatory, does not act as a powerful, isolationist restriction on interstate commerce but nevertheless has some discriminatory effect, courts apply the flexible balancing standard articulated in Pike:

> Where 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 unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike, 397 U.S. at 142, 90 S.Ct. 844. "State laws regularly pass this test, for the Justices are wary ofreviewing the wisdom of legislation (after the fashion of Lochner) under the aegis of the [C]ommerce [C]lause." Baude, 538 F.3d 608; see also Cavel International, Inc. v. Madigan, 500 F.3d 551 (7th Cir.2007); Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124 (7th Cir.1995).

If a law is neither facially discriminatory nor burdensome on interstate commerce, courts use rational-basis review when evaluating its constitutionality. Nat'l Paint, 45 F.3d at 1131. Under the rational basis test, the challenged legislation "is presumed to be valid and will be sustained if the classification drawn by the statute is rationally

related to a legitimate state interest." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

2) Determining the Level of Analysis for Evaluating the Constitutionality of § 7.1-3-15-3(d)

In analyzing the statute at issue under the Commerce Clause, the Court must first determine the level of analysis the statute warrants; next, it must determine whether the statute overcomes the challenge. See Nat'l Paint, 45 F.3d at 1124.

a. Does strict scrutiny apply?

Cap N' Cork argues that § 7.1-3-15-3(d) is facially discriminatory and should therefore be subject to the heightened scrutiny test. [Dkt. 29 at 1-2.] First, Cap N' Cork argues that the statute prohibits retailers such as Cap N' Cork from using common carriers to deliver out-of-state wine but allows certain wineries (that hold permits for which wine retailers are not eligible) to do so. [Dkt. 29 at 27.] In its briefing, Cap N' Cork emphasizes that § 7.1-3-15-3(d) discriminates against two similarly situated entities-wine retailers and wineries-insofar as they market the same product. [Id. at 17.] Drawing on the authority of General Motors Corp. v. Tracy, 519 U.S. 278, 298-99, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997), Cap N' Cork argues that wineries and retailers are similarly situated insofar as they compete to sell similar products. [Id.] As such, Cap N' Cork argues, the statute is facially discriminatory by virtue of treating these entities differently. [Id. at 18.]

However, in oral argument, Cap N' Cork took its facial discrimination argument one step farther, saying that the law "discriminates against UPS, the interstate carrier, which is direct discrimination against interstate commerce...."[3] [Dkt. 43 at 61-62.] Also at oral argument, Cap N' Cork argued that the statute "discriminates against

[3] Cap N' Cork relies heavily on the "original package" doctrine, which was established in the late 19th Century to protect alcohol moving through interstate commerce from state regulation when it remained in its original package. Leisy v. Hardin, 135 U.S. 100, 119, 10 S.Ct. 681, 34 L.Ed. 128 (1890). Under this doctrine, even nondiscriminatory regulations "directly affecting interstate commerce" were prohibited by the Commerce Clause. Bowman v. Chicago & Northwestern R. Co., 125 U.S. 465, 496-97, 8 S.Ct. 689, 31 L.Ed. 700 (1888). However, the original package doctrine pre-dated the Twenty-First Amendment and has been described by the Supreme Court in Granholm as "since-rejected." 544 U.S. at 477, 125 S.Ct. 1885. The Court takes heed of the Supreme Court's characterization and declines to follow this "rejected" doctrine.

interstate sellers like the New York Times Wine Club compared to the local sellers like Cap N' Cork Retail ..." [Id.] To this point, Cap N' Cork presents the affidavit of William Nelson, to show that "small, family-owned farm-based [wineries] that produce fewer than 10,000 cases per year" are cannot effectively market independently through the three-tier system, so they rely on fulfillment companies to navigate they system for them. [Dkt. 30-8 at 2.]

ATC argues, to the contrary, that the statute at issue does not facially discriminate against any of the entities Cap N' Cork mentions. Rather, is facially neutral and operates as an evenhanded regulation that simply requires off premises delivery of all wine by a permitted employee in a face-to-face transaction. [Dkt. 27 at 16.] The statute does not address common carriers in any way. [Id. at 24.] Moreover, the statute makes "absolutely no distinction as to the origin of the wine" being delivered. [Id. at 16] And as a facially neutral statute, ATC argues that § 7.1-3-15-3(d) is not subject to strict scrutiny analysis. [Id.]

The Court agrees with ATC's assessment of the statute. Section 7.1-3-15-3(d) directly regulates wine dealers-not common carriers-and, on its face, the statute treats all wine that targeted for off premises delivery through Indiana wine dealers exactly the same way. The Court also finds merit in ATC's argument that wineries and wine retailers have a markedly different role in Indiana's highly regulated alcohol market, so their differential treatment under Indiana law does not constitute facial discrimination, [dkt. 27 at 11]. And wineries' sales (whether permitted as farm wineries or direct wine sellers) still require a face-to-face transaction at some point in the sales process. Finally, the statute in no way discriminates against wine clubs which are treated the same as any aspiring participant in the three-tier system. They have no special status to compel the Court, or more importantly the Indiana General Assembly, to treat them otherwise. The requirement that deliveries of wine by an Indiana wine retailer occur in a face-to-face transaction by a permit holder is a facially neutral regulation, and, as such, § 7.1-3-15-3(d) is not subject to strict scrutiny. Granholm, 544 U.S. at 487, 125 S.Ct. 1885.

b. Does § 7.1-3-15-3(d) pass the Pike balancing test?

In the absence of facial discrimination, Cap N' Cork argues that the "ban on delivery by common carriers discriminates against interstate commerce and favors local business interests" to the extent that it fails the Pike balancing test. [Dkt. 31 at 7.] At oral argument, Cap N' Cork restated this claim: "[the statute discriminates in practical effect against out-of-state wineries ... whose only feasible access [to] the market is through this fulfillment process]." This claim, which the Court

re-characterizes as Cap N' Cork's disparate impact claim, rests on the allegations that "evidence shows that the ban has a substantial adverse impact on interstate commerce by decreasing selection, raising prices, and closing market access to many small wineries." [Dkt. 29 at 3.]

ATC argues, however, that § 7.1-3-15-3(d) neither explicitly discriminates against nor excessively burdens interstate commerce. As a result, ATC argues that the statute should undergo rational basis review. [Dkt. 27 at 11.] Nevertheless, ATC suggests, "should this Court apply Pike to the current action, the State has identified local benefits advanced by the face-to-face delivery requirements which are not 'clearly excessive' as compared to the local benefits." [Id. at 16.]

Because ATC has chosen to defend the statute under the Pike test, and because even facially neutral statutes regulating wine distribution have historically been analyzed in light of their potential burdens, see Baude, 538 F.3d at 608, the Court will undertake a Pike analysis.[4] 397 U.S. at 142, 90 S.Ct. 844.

Recently, the Seventh Circuit evaluated several Indiana laws governing distribution of wine within Indiana's three-tier system in Baude v. Heath, 538 F.3d 608 (7th Cir.2008.) The plaintiffs in Baude challenged two Indiana laws. The first law stated that "a winery may sell direct to consumers only if it does not hold a permit or license to wholesale alcoholic beverages issued by any authority" and is not owned by an entity that holds such a permit. Ind.Code § 7.1-3-26-7(a)(6). The Baude court, in short order, found this provision discriminatory on its face, and therefore invalid. The statute was rejected because it prevented direct shipment of almost all out-of-state wine while allowing all wineries in Indiana to sell directly to Indiana customers and was clearly written to do the same. Id.

The second challenged statute frames the bulk of the court's analysis in Baude. This statute required any consumer who wanted to receive direct shipments of wine from any winery-inside or outside of Indiana-to visit the winery once and supply proof of name, age, address, and phone number, plus a verified statement that the wine was intended for personal consumption. Baude, 538 F.3d at 613; see also Ind.Code §§ 7.1-3-26-6(4), 7.1-3-26-9(1)(A). In assessing this statute, the Baude court determined that because "the rule applie[d] to every winery, no matter where it [wa]s located," it was not facially discriminatory. 538 F.3d at 611. Nevertheless, (although neutral in

[4] Because the statute ultimately survives Pike balancing, the Court will not go on to consider whether it overcomes rational basis review, which is an even less stringent test for constitutionality. Nat'l Paint & Coatings, 45 F.3d at 1131.

terms,) the statute had the effect of preventing interstate shipments directly to Indiana consumers, while allowing direct intrastate shipments. Id. at 612.

In light of the potential burden the statute posed on interstate commerce, the Baude court employed Pike balancing, noting: "If a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 538 F.3d at 611; see also Pike v. Bruce Church, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

In employing Pike balancing, the court in Baude first determined that "keeping alcohol out of minors' hands is a legitimate, indeed a powerful, [local] interest." Id. at 613. In response to plaintiffs' argument that the face-to-face identification did not in fact reduce the number of minors acquiring alcohol, the Baude court, even in the absence of compelling data to support the marginal benefits of in-person identification, stated:

> Indiana thinks that in-person verification with photo ID helps to reduce cheating on legal rules, for both buying wine and voting (and perhaps other subjects). After the Supreme Court held in Crawford v. Marion County Election Board, [553] U.S. [181], 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008), that a belief that in-person verification with photo ID reduces vote fraud has enough support to withstand a challenge under the first amendment, it would be awfully hard to take judicial notice that in-person verification with photo ID has no effect on wine fraud and therefore flunks the interstate commerce clause.

Id. Therefore, the court accepted Indiana's reasoning that face-to-face verification would reduce the wine shipments that went to minors, as intended by the state. Id. at 615.

In determining whether the statute's burden on interstate commerce was excessive, the Baude court also accepted the plaintiffs' assertion that the cost of verification per winery would undoubtedly rise with distance between the consumer and the wineries, thus favoring wineries closer to Indiana buyers. 538 F.3d at 613. The court further noted that such a regulation might favor larger wineries over smaller wineries. Id. These burdens alone, however, were not excessive enough to render the statute unconstitutional in light of the local interest the face-to-face requirement supported. Moreover, the court recognized that, although purchasing and selling wine through wine clubs may be profitable

for the dealer and potentially convenient for the consumer, there is no requirement that the Indiana General Assembly enact laws to permit the direct shipment of alcohol simply because the shipment may originate from out-of-state. Id. at 612.

With respect to plaintiffs' attempt to establish that the statute in Baude posed an excessive burden, the Baude court declared, "it is impossible to tell whether a burden on interstate commerce is "clearly excessive in relation to the putative local benefits without understanding the magnitude of both burdens and benefits." " 538 F.3d at 613. Although "exact figures are not essential (no more than estimates may be possible) and the evidence need not be in the record if it is subject to judicial notice ... it takes more than lawyers' talk to condemn a statute under Pike." Id. at 614. In light of the scarcity of empirical data concerning the effects on interstate commerce, the Baude court held that the plaintiffs did not establish the existence of an excessive burden that might undermine the legitimate state interest of keeping alcohol out of the hands of minors. 538 F.3d at 615. Therefore, the court in Baude upheld the second challenged law. Id.

ATC argues that the statute challenged here is similar to the second statute at issue in Baude. The Court agrees that the cases are analogous-both the statute in Baude and the statute at issue here require permitted wine retailers to make face-to-face contact with any Indiana consumer, regardless whether the consumer is buying wine shipped to the retailers from wineries inside or outside of Indiana. 538 F.3d at 611. But the Court finds that the statute at issue in Baude-upheld under Pike balancing-was actually far more burdensome than the statute Cap N' Cork challenges here.

1. Is there a legitimate local interest?

ATC argues that reducing minors' access to alcohol is a core policy of both federal and state governments, and that § 7.1-3-15-3(d) promotes this interest by ensuring that alcohol is only delivered by someone trained to ascertain whether the consumer is over 21. [Dkt. 27 at 16.] Cap N' Cork attempts to undermine the position that there is a legitimate government interest here by posing dismissive rhetorical questions: "Just what is the state's interest? Keeping the wine out of the hands of minors?" [Dkt. 17 at 8-9.]

In Baude, however, the Seventh Circuit answered Cap N' Cork's rhetorical question affirmatively: "keeping alcohol out of minors' hands is a legitimate,

indeed a powerful, interest." 538 F.3d at 613. Consistent with that direct precedent, the Court finds that reducing youth access to alcohol is a legitimate local interest.

2. Does the statute effectuate that interest?

Cap N' Cork argues here that, to the extent that keeping alcohol out of the hands of minors is a sufficient state interest, the statute at issue does little to effectuate this interest:

> It is matter of record that UPS drivers have been instructed in the proper method of checking for age verification. They will only leave the wine with an adult. This is true of FedEx and other common carriers which have been given training in permit states. Moreover, there are far fewer instances reported of wine getting into the hands of minors from delivery by common carriers than there [are] from minors getting alcoholic beverages from retail establishments themselves.

[Dkt. 17 at 9.] Unfortunately for Cap N' Cork and the Court, the "record" noted above does not exist in this case.

Citing to the Federal Trade Commission report, Cap N' Cork notes that "minors rarely buy wine over the Internet for delivery via common carrier because they prefer to buy alcohol for immediate consumption and do not want to pay additional shipping costs," and that "studies show that minors find it easy to buy wine in person at retail dealers." [Dkt. 29 at 6.] Cap N' Cork contends that "the UPS driver will obtain an adult signature upon delivery" of alcohol, thereby rendering § 7.1-3-15-3(d) unnecessary for effectuating the state interest.[5] [Dkt. 29 at 5.]

In contrast, ATC offers testimonial evidence from state excise officers revealing that face-to-face age verification is the primary tool for reducing youth access to alcohol, [dkt. 28-1 at 2-3]; specifically, the mandatory server training program which all holders

[5] The Court is perplexed by Cap N' Cork's proffer of UPS as a viable surrogate in light of the preemption challenge discussed later. In one breath, it argues the ATC should be content to regulate UPS' delivery of wine, and in another it argues that the face-to-face delivery requirement illegally regulates a service of a common carrier in conflict with the Federal Aviation Administration Authorization Act of 1994. [Dkt. 29 at 1-2.]

of employee permits must undertake, combats underage access to alcohol, [dkt. 27 at 17].[6] Evidence from the excise officers responsible for this training program supports ATC's argument and likewise reveals that invalidating § 7.1-3-15-3(d) would create substantial enforcement burdens for the officers working to combat youth access to alcohol, as 1000 more wine retailers would be allowed to directly ship to customers with no face-to-face requirement. [Dkt. 28-1 at 2-3; dkt. 29 at 10.]

The Baude court made clear, and this Court agrees, that "the face-to-face requirement makes it harder for minors to get wine. Anything that raises the cost of an activity will diminish the quantity-not to zero, but no law is or need be fully effective." Id. Although Cap N' Cork expresses incredulity in its response brief about whether § 7.1-3-15-3(d) always results in face-to-face verification, [dkt. 29 at 8], the Court finds that it has presented virtually no quantifiable evidence to undermine the presumption that face-to-face requirements increase legality. Nor has it offered evidence that the requirement itself does nothing to reduce youth access to alcohol. Moreover, Cap N' Cork's contract with UPS does not specifically identify the manner in which UPS is to verify the age of the person whose adult signature is obtained, [dkt. 30-4], and the Court is skeptical that a prescription for the careful age verification procedures required by § 7.1-3-15-3(d) and its surrounding statutes would be implicit therein.

The Seventh Circuit has been clear that overcoming a motion for summary judgment requires more than mere speculation by the non-moving party. Singer, 593 F.3d at 533. In light of the paucity of evidence proffered by Cap N' Cork, the Court cannot find that § 7.1-3-15-3(d) does not effectuate the legitimate local interest of reducing youth access to alcohol.

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[6] Cap N' Cork objects to the admissibility of the personal opinions of Excise Officers Poindexter and Swallow, arguing that they are speculative under Fed.R.Evid. 601, 701 and 702. [Dkt. 29 at 9.] ATC responds that "these contentions are not only self-evident manifestations of the statutes, but that the personal knowledge of two long-time excise officers working for an agency "committed to reducing the availability of alcohol and tobacco products to minors" is sufficient to establish admissibility under Fed.R.Evid. 601 and 701. [Dkt. 31 at 4.] The Court agrees with ATC: evidence of the officers' personal knowledge is predicated on a properly laid foundation and admissible under Rules 601 and 701. Even if this were not the case, however, the court in Baude established that even without evidence of their effectiveness, face-to-face age verification requirements increase compliance with drinking age requirements. 538 F.3d at 614.

3. Is the burden on commerce clearly excessive
in relation to putative local interests?

Cap N' Cork argues that § 7.1-3-15-3(d) is unconstitutional because the burden it places on interstate commerce is "extreme," relative to its benefit. [Dkt. 17 at 9.] Many small wineries, it says, do not produce enough volume or have enough customers to obtain stable wholesale distribution for all of their products. [Dkt. 30-8 at 1-2.] They choose not to become permitted, and instead tend to use the fulfillment process. [Dkt. 30-6 at 1.] As such, Cap N' Cork contends that thousands of labels from smaller wineries throughout the United States, which are not available on the shelves of retail wine stores, are harmed by § 7.1-3-15-3(d). [Dkt. 29 at 7.] It further argues, "[m]any small out-of-state wineries cannot afford to pay the annual direct shipper's permit fee in Indiana to ship one or two cases of their wine each year." [Dkt. 29 at 3.] As Cap N' Cork explains, "Some small wineries have enough customers in a state other than its own to justify the expense of obtaining permits and setting up a direct shipping business, but many must use the more efficient fulfillment process to send small quantities of wine to states where they have few customers." [Dkt. 30-8 at 1-2.] Enforcing this law, Cap N' Cork argues, would "foreclose these wineries as well as the out-of-state fulfillment companies from engaging in interstate commerce." [Id.]

Again, Cap N' Cork relies heavily upon statements contained in the 2003 Federal Trade Commission Report, [dkt. 30-2], and the 2004 National Research Council Report, [dkt. 30-3], to substantiate its assertions. Insofar as these reports are admissible, nothing in them, however, establishes that the Indiana statute at issue in this case burdens interstate commerce.

Aside from the national reports, Cap N' Cork has presented no evidence to substantiate the notion that § 7.1-3-15-3(d) poses an excessive burden-or any burden at all-on interstate commerce. Cap N' Cork has not provided evidence to show any quantifiable reduction in sales that might result if Cap N' Cork complied with the delivery restrictions imposed by § 7.1-3-15-3(d). At best, the Court can reasonably infer that it will cost more for Cap N' Cork to deliver beyond a fifteen mile radius. But no cost figures have been presented for the Court to determine whether Cap N' Cork would operate at an actual loss, or just less profit.

Nor has any evidence been proffered to show that the individually named Plaintiffs' wine purchases will be unfulfilled if Cap N' Cork does not deliver. The absence of this evidence speaks volumes: nothing in the statute at issue prohibits Cap N' Cork from selling or delivering its product, nor does it prevent the individually named Plaintiffs

from buying it. Even if sufficient evidence were presented to show that any of the Plaintiffs would suffer actual loss, their financial loss would not be indicative of a burden on interstate commerce.

Furthermore, Cap N' Cork has offered no quantifiable evidence to show that § 7.1-3-15-3(d) burdens small wineries or out of state wineries. Section 7.1-3-15-3(d) does not prevent small or out-of-state wineries from offering their product in Indiana through the three-tier system or by purchasing permits that allow for direct shipping into Indiana-Cap N' Cork offers no evidence to suggest otherwise. Specifically, there is no evidence that small wineries cannot use the fulfillment process to sell to Indiana consumers through a wine dealer who may be more proximate to the consumer than Cap N' Cork. Even if the statute did disproportionately burden small wineries, the Seventh Circuit has made clear that "[f]avoritism for large wineries over small wineries does not pose a constitutional problem." Baude, 538 F.3d at 615.

Although Cap N' Cork has raised theoretical discrimination arguments on behalf of entities ranging from trucks to wine clubs, § 7.1-3-15-3(d) ultimately has nothing to do with any of them. Again, the inability of Cap N' Cork to substantiate any quantifiable harm reveals what is really at issue in this case: Cap N' Cork wants to reduce its delivery costs by using a common carrier; the individual Plaintiffs want to get their wine without driving across the state to pick it up. These incidental burdens have no bearing on interstate commerce and do not give the Court reason to invalidate § 7.1-3-15-3(d) under the Commerce Clause.

Even though ATC is moving for judgment as a matter of law, "when challenging a law that treats in-state and out-of-state entities identically, whoever wants to upset the law bears the[ ] burden" of showing that the law is unconstitutional. Baude, 538 F.3d at 613. Having brought the constitutional challenge at bar, Cap N' Cork's failure to come forth with admissible evidence at the summary judgment stage is fatal. Celotex, 477 U.S. at 323, 106 S.Ct. 2548 (holding that Rule 56(c) requires summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). Cap N' Cork failed to show that the face-to-face requirement imposes any quantifiable burden, let alone one great enough to supersede the benefits of the face-to-face requirement, which provides a barrier to youth access to alcohol and reduces enforcement costs of so doing. Although the law may have minimally harmful effects for certain wineries based on their size, model, or economic

position, it "takes more than lawyers' talk to invalidate a statute under Pike."[7] Baude, 538 F.3d at 613. Given that this statute passes muster under Pike in light of both Granholm and Baude, the Court finds it constitutional. Baude, 538 F.3d at 614.

Consequently, the Court awards summary judgment for ATC on Cap N' Cork's Commerce Clause challenge.

B) Cap N' Cork's Preemption Challenge § 7.1-3-15-3(d)

Cap N' Cork also argues that that the enforcement of the face-to-face delivery requirement set forth in § 7.1-3-15-3(d) regulates a service of a common carrier in a way that conflicts with the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), which says in relevant part that "a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). Cap N' Cork argues that the face-to-face delivery statute is preempted by the FAAAA, and that, accordingly, it must yield under the Supremacy Clause, Art. VI, cl. 2. [Dkt. 29. At 1-2.]

1. Preemption under Rowe

Cap N' Cork argues that § 7.1-3-15-3(d) is preempted by the FAAAA under Rowe v. N.H. Motor Transp. Assn., 552 U.S. 364, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008). [Dkt. 29 at 24.] In Rowe, the Supreme Court held that "[s]tate enforcement actions having a connection with, or reference to" carrier "rates, routes, or services" are preempted by FAAAA. 552 U.S. 364, 370, 128 S.Ct. 989. However, the Rowe court made clear that "not every state law that relates to a motor carrier's rate, route, or service is necessarily preempted." To be preempted, the statute at issue must have-directly or indirectly-a "significant and adverse impact in respect to the federal Act's ability to achieve its preemption-related objectives." Id. at 371-72, 128 S.Ct. 989. Therefore state laws that only have a tenuous, remote, or peripheral relationship to the rate, route or service of a motor carrier are not preempted. Id. at 370, 128 S.Ct. 989. Neither are statutes that do not adversely impact congressional objectives. Id. at 371-72, 128 S.Ct. 989.

[7] The Affidavit of Attorney James Tanford, [dkt. 30-1], does not substantively transform the "lawyers' talk"-it merely makes the same talk louder, and the Court must treat it as such. Cap N' Cork should be mindful that "a lawyer cannot ordinarily represent a client and simultaneously serve as the client's witness." United States v. Marshall, 75 F.3d 1097, 1106 (7th Cir.1996).

Cap N' Cork argues, "The parties agree § 7.1-3-15-3(d) prohibits the permit holder from using common carriers to make its deliveries." [Dkt. 29 at 24.] As such, it contends, the Indiana law conflicts with the FAAAA. However, ATC argues that the Indiana law only regulates the method of wine delivery, not the common carriers themselves, which distinguishes this case from Rowe and alleviates concerns of preemption by the FAAAA. [Dkt. 31 at 16.]

The Court agrees that the case at issue is clearly distinguishable from that in Rowe. In Rowe, the Supreme Court invalidated two provisions of Maine laws governing the delivery of tobacco, which required tobacco retailers engaged in delivery sales to "utilize a [specific] delivery service," and then imposed stringent requirements on the carriers. 552 U.S. at 372, 128 S.Ct. 989. In addition, the statute at issue in Rowe imposed civil liability upon the carrier, "not simply for its knowing transport of (unpermitted) tobacco, but for the carrier's failure sufficiently to examine every package." Id. at 372-73, 128 S.Ct. 989 (emphasis in original).

In contrast to the Maine statutes, the Indiana statute regulates wine dealers-not common carriers. Ind.Code § 7.1-3-15-3(d). There is no requirement, explicitly or implicitly, in § 7.1-3-15-3(d) that burdens carriers in any way. Prohibiting alcoholic beverage retailers from directly shipping alcohol in contravention of the three-tier system does not equate to fixing the "price, route, or service of any motor carrier" directly or indirectly. Rowe, 552 U.S. at 370, 128 S.Ct. 989. Moreover, neither § 7.1-3-15-3(d) nor § 7.1-5-11-1.5 imposes any liability on common carriers. Finally, the Indiana statute regulates alcohol, which-quite unlike tobacco-is afforded the protection of the Twenty-First Amendment. Granholm, 544 U.S. at 462, 125 S.Ct. 1885. Because the statute at issue does not regulate common carriers and is presumptively protected by the Twenty-First Amendment, the Indiana statute is not preempted by the FAAAA under Rowe.

2. Preemption under Murphy

In addition to claiming preemption under the authority of Rowe, Cap N' Cork also asserts that Indiana's direct shipping ban and delivery restrictions conflict with the federal policy promoted by FAAAA and is therefore preempted under Aux Sable Liquid Prods. v. Murphy, 526 F.3d 1028, 1032-33 (7th Cir.2008). [Dkt. 29 at 24.] Although Cap N' Cork does not provide a cogent argument on this point,[8] it appears that Cap N' Cork

[8] Cap N' Cork noted in its response brief that it was not prepared to argue this point on summary judgment because it anticipated genuine disputes about material facts. [Dkt. 29 at 4.] However, it says, "the State has elected not to question the adverse impact of the common carrier ban, but rather to make a purely legal

is making a conflict preemption claim, [dkt. 31 at 18], thereby implicitly arguing that "it would be impossible for a party to comply with both local and federal requirements, or that the challenged statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hoagland v. Town of Clear Lake, 415 F.3d 693 (7th Cir.2005).[9]

To determine whether state and federal laws are in conflict, it is necessary to "examine the federal statute as a whole and identify its purpose and intended effects." Murphy, 526 F.3d at 1033. This analysis requires that we "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." Frank Bros. v. Wis. Dep't of Transp., 409 F.3d 880, 894 (7th Cir.2005). Within this analytical framework, the Court must first determine the congressional objective for the statute at issue. Murphy, 526 F.3d at 1033.

Although Congress' objective with respect to the delivery of alcohol or youth access to alcohol cannot be gleaned from the FAAAA itself, Congress expressed support for state regulation of alcohol shortly after the enactment of the FAAAA when it enacted the Sober Truth on Preventing Underage Drinking Ac, Pub. L. No. 109-422. In this Act, Congress stated:

> Alcohol is a unique product and should be regulated differently than other products by the States and Federal Government. States have primary authority to regulate alcohol distribution and sale, and the Federal Government should support and supplement these State efforts.
>
> States also have a responsibility to fight youth access to alcohol and reduce underage drinking. Continued State regulation and licensing of the manufacture, importation, sale, distribution, transportation and storage of alcoholic beverages are clearly in the public interest and are critical to promoting responsible consumption, preventing illegal access to alcohol by persons under 21 years of age from commercial and non-commercial sources, maintaining industry integrity and an orderly marketplace and furthering effective State tax collection.

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argument that the law regulates wine retailers, not common carriers, ..." [Id.] As such, Cap N' Cork concedes that the issue can be decided as a matter of law. [Id.]

[9] Preemption can take on three different forms: express preemption, field preemption, and conflict preemption, Hoagland, 415 F.3d at 696, but the analysis in Murphy is limited to conflict preemption. See 526 F.3d at 1028.

42 U.S.C. § 290bb-25b(b)(7). Cap N' Cork does not dispute these objectives, nor does it provide alternative Congressional objectives that would change the assessment about whether either § 7.1-3-15-3(d) conflicts with those objectives.

In sum, Cap N' Cork has presented the Court no evidence or cogent argument that the Indiana law at issue conflicts whatsoever with congressional intent regarding state regulation of the delivery of alcohol or youth access to alcohol. Since Cap N' Cork has failed to provide evidence that it cannot comply with both state and federal law without compromising Congress' objectives, the Court finds that § 7.1-3-15-3(d) is not conflict-preempted under Murphy.

Because the Indiana statute is outside the scope of criticism under either Rowe or Murphy, the Court awards summary judgment for ATC on Cap N' Cork's preemption challenge.

IV.
CONCLUSION

For the foregoing reasons, the Court DENIES Cap N' Cork's Motion for Summary Judgment, [dkt. 16], and further GRANTS ATC's Motion for Summary Judgment, [dkt. 26]. Cap N' Cork shall take nothing by way of its Complaint. Judgment will issue accordingly.

12/06/2010

3. Order of the district court denying reconsideration

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LEBAMOFF ENTERPRISES, INC., d/b/a CAP N' CORK, RANDY LEWANDOWSKI, and LUTHER STRODER	)	
Plaintiffs	)	1:09-cv-0744-JMS-TAB
vs	)	
P. THOMAS SNOW, in his Official Capacity as Chairman of the Indiana Alcohol & Tobacco Commission,	)	
Defendant	)	

ORDER

JANE MAGNUS-STINSON, District Judge.

Plaintiffs Lebamoff Enterprises, Inc. d/b/a Cap N' Cork, Randy Lewandowski, and Luther Stroder ("Cap 'N Cork") brought this action against P. Thomas Snow, in his official capacity as Chairman of the Indiana Alcohol & Tobacco Commission ("ATC"), challenging the constitutionality of Ind.Code § 7.1-3-15-3(d), which only allows wine dealers to make off-premises deliveries through one of its permitted employees. The parties filed cross-motions for summary judgment, and the Court issued final judgment in favor of ATC. [Dkt. 46.] Presently before the Court is Cap 'N Cork's Motion for Reconsideration. [Dkt. 47.]

DISCUSSION

Cap N' Cork asks the Court to reconsider its order granting ATC summary judgment or, alternatively, to stay the order pending appeal. [Dkt. 47 at 1-9, dkt. 45.]
A) Reconsidering the Court's Order

A motion to reconsider is appropriate where the court has "misunderstood a party," "made a decision outside the adversarial issues presented," "made an error of apprehension (not of reasoning)," or "where a significant change in the law has occurred, or where significant new facts have been discovered." Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185, 1191 (7th Cir.1990). A motion for reconsideration must do more than simply "rehash[ ] the merits of the case based on the existing record." Tokh v. Water Tower Court Home Owners Ass'n, 327 Fed.Appx. 630, 631 (2009).

According to Cap N' Cork, the Court should reconsider this case because it erroneously employed the balancing test established in Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), failed to make all reasonable inferences in the light most favorable to Cap 'N Cork, and contravened the Supreme Court's holding in Granholm v. Heald, 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005). Additionally, Cap 'N Cork presents several pending bills that have been introduced-that it contends bear on the General Assembly's intent in enacting § 7.1-3-15-3(d). [Dkt. 49-1-4.]

First, Cap 'N Cork argues that the Court inappropriately employed the Pike balancing in-stead of strict scrutiny à la Granholm. It accuses the Court of failing to consider that a statute with discriminatory effects-not merely one that is facially discriminatory-is also subject to strict scrutiny analysis. [Dkt. 47 at 2-3.] String-citing to a list of out-of-circuit cases, Cap 'N Cork then argues that this law discriminates in practical effect and that the Court should therefore have analyzed it under strict scrutiny.

Cap N' Cork, however, has failed to recognize the law of this circuit, which the court discussed and applied in its ruling. As the Court previously stated, "Whether strict scrutiny is a proper analytical tool in this context rests principally on whether a law directs alcohol produced out-of-state to be treated differently than that produced in-state." [Dkt. 45 at 11, citing to Gran-holm, 544 U.S. at 498.] Cap 'N Cork has made no showing at any point during this litigation that the statute at issue is discriminatory-either on its face or in its effect. Indeed, as the Court has already explained in detail, this statute does not escape strict scrutiny merely because it is "not facially discriminatory;" rather, it is subject to Pike because it "regulates even-handedly." [Dkt. 45 at 11, citing to Pike, 397 U.S. at 142.] The Court will not consider Cap 'N Cork's rehashing of an argument that failed the first time around. Tokh v. Water Tower Court Home Owners, 327 Fed.Appx. at 631.

Second, Cap 'N Cork argues that when reviewing ATC's motion, the Court did not construe the facts in the light most favorable to Cap 'N Cork. [Dkt. 47 at 5.] Specifically, Cap 'N Cork claims that "its evidence showed that banning common carrier deliveries has a substantial adverse impact on interstate commerce by decreasing selection, raising prices, closing market access to many small wineries, and halting $1.5 million in annual wine sales to Cap 'N Cork." [Id.] Likewise, Cap 'N Cork claims to have provided evidence that "the rule did little to advance the state's purpose of preventing youth access because minors rarely try to order wine for home delivery in the first place, other states that allow such deliveries have reported few or no problems, and UPS checks IDs in a face-to-face transaction upon delivery." [Id.] The affidavits ATC offers pale by contrast, Cap 'N Cork argues.

As Cap 'N Cork correctly states (as did the Court in its order, [dkt. 45 at 2]), on cross-motions for summary judgment, the Court is required to evaluate cross-motions independently and to "construe all facts and reasonable inferences in favor of the nonmoving party" in each in-stance. Singer v. Raemisch, 593 F.3d 529, 533 (7th Cir.2010). In reviewing the record, however, the Court gave Cap 'N Cork more weight than its scant and unorganized presentation warranted. Cap 'N Cork did not submit a single piece of evidence to support its claim that this law would have the effect of "closing the market to small wineries," or of "halting the ... wine sales" to Cap 'N Cork. Cap 'N Cork simply established that it doesn't want to spend the money to personally deliver wine-in the requisite face-to-face manner-outside the vicinity of its current retail locations. It hasn't introduced any evidence that small or large wineries won't be able to deliver to Indiana consumers, or that any consumer has been unable to receive the wine they want delivered. Despite the Court's favorable inferences, Cap 'N Cork's inconsequential showings, coupled only with two national reports that do not address § 7.1-3-15-3(d) whatsoever, are not enough to show that this law in fact discriminated against out-of-state entities, let alone that it is unconstitutional. The affidavits offered by ATC, on the other hand, provide direct evidence that the face-to-face delivery requirement effectuates a legitimate local interest (and, as the Court stated in its order, ATC was not required to show that § 7.1-3-15-3(d) is flawless). [Dkt. 45 at 18, citing to dkt. 28-1 at 2-3.] See also Baude, 538 F.3d at 613. As the Court made clear, "the Court's favor toward the non-moving party does not extend to drawing inferences that are supported by only speculation or conjecture." Singer, 593 F.3d at 533. Cap N' Cork's failure to come forth with admissible evidence at the summary judgment stage was fatal, and the Court will not reconsider its order simply because Cap 'N Cork thinks its bare allegations should be given more weight. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Additionally, Cap 'N Cork argues that the Court "evaluated important evidence inconsistently with the Supreme Court and Seventh Circuit precedent." [Dkt. 45 at 7.] Specifically, it argues, that in undertaking Pike balancing, the Court should not have considered the mere "conclusory statements" of the excise officers as evidence of the putative local benefit the face-to-face requirement of § 7.1-3-15-3(d) requires. [Dkt. 47 at 8.] Citing to Baude v. Heath, 538 F.3d 608, 612 (7th Cir.2010), Cap 'N Cork argues that ATC's "bald assertions" are not enough to overcome Cap 'N Cork's motion for summary judgment. [Id.]

In making this argument, however, Cap 'N Cork undermines its own understanding of the case to which it cites: The Baude court clearly held that "keeping alcohol out of minors' hands is a legitimate, indeed a powerful, interest." [Dkt. 45 at 17, citing to 538 F.3d at 613.] Likewise, the Baude court also made explicit, "when challenging a law that treats in-state and out-of-state entities identically, whoever wants to upset the law bears the[ ] burden" of showing that the law is unconstitutional." 538 at 613. Moreover, just as when reviewing ATC's motion, the Court made all reasonable inferences for Cap 'N Cork, when reviewing Cap 'N Cork's motion, the Court reviewed the evidence in the light most favorable to ACT. Singer, 593 F.3d at 533. Because Cap 'N Cork failed to come forth with sufficient evidence to support its claim of unconstitutionality, the Court will not reconsider granting ATC's motion.

Cap N' Cork further argues that "the [C]ourt's conclusion that banning direct shipping[10] significantly reduces youth access is not only unsupported by evidence, it is inconsistent with the Supreme Court's holding in Granholm [ ]" because that case took into consideration the national reports that Cap 'N Cork submitted as evidence. [Dkt. 47 at 8.]

The Court, however, acknowledged the existence of these reports in considering the potential burden imposed by § 7.1-3-15-3(d) but found them ultimately irrelevant because neither of these reports address the specific circumstances in Indiana. [Dkt. 45 at 20-21.] Furthermore, although the Court credited Granholm for galvanizing the constitutionality of the three-tier system, [id. at 10], it did not rely exclusively on

[10]The Court once more reminds Cap 'N Cork that a general ban on direct shipment is not at issue in this litigation. Cap N' Cork has not challenged Indiana Code § 7.1-5-11-1.5(a), which generally bans the direct shipment of all alcoholic beverages directly to Indiana consumers unless a permittee holds a direct wine seller's permit issued pursuant to Indiana Code § 7.1-3-26-a permit which no wine retailer, or any other alcoholic beverage retailer or dealer is eligible to hold. [Dkt. 45 at 6, citing to Ind.Code § 7.1-5-11-1.5(a).] Cap 'N Cork's consistent reference to this law as "banning direct shipment" is incorrect

Granholm because that case is easily distinguished from this one for the reasons previously stated. [Id. at 9-10.]

Moreover, despite Cap 'N Cork's unsupported contention that Baude was "a different case that involved an entirely different record and different issue," [dkt. 47 at 6], this Court maintains that the issue the Seventh Circuit confronted in Baude is analogous to this one. [Id., (citing to 538 F.3d at 476).] As the Court noted in its order, Baude addressed a statute which re-quired face-to-face age verification by any winery holding a direct wine shipper's permit (inside or outside Indiana); the challenged statute applied equally to all buyers; and the plaintiff asserted that a face-to-face requirement on sellers was a undue burden on interstate commerce that was not outweighed by the local interest in reducing access to alcoholic beverages by minors. [Id . at 15, (citing to Baude, 538 F.3d at 611).] Because Baude and the case at bar are analogous-and to the extent that they differ, the Baude statute created an even greater burden on interstate commerce-this Court's reliance on Baude's authority was proper and does not warrant reconsideration.

Finally, in an addendum to its motion to reconsider, Cap 'N Cork introduces for the first time House Bills 1080-1081 and Senate Bill 133, any of which could modify the language of the existing wine statutes, but none of which has actually been passed by the legislature. Cap 'N Cork offers these bills to "at a minimum cast new doubt on the [ATC]'s claim that prohibiting common carrier deliveries through the fulfillment process is necessary to advance its interest in restricting youth access." [Dkt. 52 at 2.]

Cap 'N Cork makes no showing, however, that any of the draft provisions would eventually affect Ind.Code § 7.1-3-15-3(d). Moreover, based on the test properly employed by the Court, ATC's burden is not to show that the license requirement is "necessary to advance its interest"-rather, it is Cap 'N Cork's burden to show that the law at issue does not "effectuate a legitimate local public interest" or that the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142. Moreover, the Supreme Court has made clear that "the task of analyzing a proposed statute ... before the statute is put into effect is rarely if ever an appropriate task for the judiciary." Younger v. Harris, 405 U.S. 37, 52 (U.S.1971). None of the legislation Cap 'N Cork offers, all of which is subject to change, and none of which is currently law, is relevant to the Court's decision in this case.

Because Cap 'N Cork has made no showing that the Court misunderstood a party, made a decision outside the adversarial issues presented to the court by the parties, made an error of apprehension, or that significant change of law or fact has occurred, its motion for reconsideration is properly denied. Bank of Waunakee, 906 F.2 at 1191.

B) Staying the Order Pending Appeal

A motion to stay a district court ruling pending appeal "is a request for extraordinary relief." Chan v. Wodnicki, 67 F.3d 137, 139 (7th Cir.1995); see also Hinrichs v. Bosma, 410 F.Supp.2d 745, 748-49 (S.D.Ind.2006) ("a stay is considered extraordinary relief for which the moving party bears a 'heavy burden' "). Under Fed.R.Civ.P. 62(c) and Fed. R.App. P. 8(a), such extraordinary relief is appropriate only where a movant demonstrates the propriety of a stay according to the balance of four factors: (1) the movant's likelihood of success on the merits; (2) the likelihood of irreparable injury to the movant absent a stay; (3) whether a stay will substantially injure other parties to the litigation; and (4) "where the public interest lies." Glick v. Koenig, 766 F.2d 265, 269 (7th Cir.1985).

Cap N' Cork requests a stay pending appeal or pending the potential passage of the pending litigation in a single paragraph, without so much as a nod to the standard for obtaining a stay. [Dkt. 47 at 9.] In furtherance of their request, Cap 'N Cork merely argues that "hundreds of Indiana consumers ... will be affected by the ultimate decision." [Id.] Although this scant argument is supplemented by proposed legislation that is currently under consideration, it has done no more to show how-even if these bills are passed as written-this would alleviate any "irreparable injury" that Cap 'N Cork would face while the legislation is pending. Without giving this Court any reason to believe it will be likely to succeed on appeal, that it will be injured absent a stay, that other parties to the litigation will not be similarly injured, or that the public interest lies in the stay, it fails to meet any of the four required showings-much less all of them. ick, 766 F.2d at 269.

The Court therefore finds that Cap 'N Cork has wholly failed to make the requisite showing to justify a stay pending appeal.

CONCLUSION

For the going reasons the Court DENIES Cap 'N Cork's motion for reconsideration and its request for a stay pending appeal. [Dkt. 47.]

February 9, 2011

4. Indiana statute at issue

Ind. Code § 7.1-3-15-3.

(a) The holder of a wine dealer's permit shall be entitled to purchase wine only from a permittee who is authorized to sell to a wine dealer under this title. A wine dealer shall be entitled to sell wine for consumption off the licensed premises only and not by the drink.

(b) A wine dealer shall be entitled to sell wine in permissible containers in a quantity of not more than three (3) standard cases, as determined under the rules of the commission, in a single transaction. However, a wine dealer who is licensed under IC 7.1-3-10-4 may possess wine and sell it at retail in its original package to a customer only for consumption off the licensed premises.

(c) Unless a wine dealer is a grocery store or drug store, a wine dealer may not sell or deliver alcoholic beverages or any other item through a window in the licensed premises to a patron who is outside the licensed premises. A wine dealer that is a grocery store or drug store may sell any item except alcoholic beverages through a window in the licensed premises to a person who is outside the licensed premises.

(d) However, a wine dealer who is licensed under IC 7.1-3-10-4 may deliver wine only in permissible containers to a customer's residence, office, or designated location. This delivery may only be performed by the permit holder or an employee who holds an employee permit. The permit holder shall maintain a written record of each delivery for at least one (1) year that shows the customer's name, location of delivery, and quantity sold.

5. Federal statutes relevant to preemption

49 U.S.C. § 14501. Federal authority over intrastate transportation

(a) Motor carriers of passengers.-- [section omitted]

(b) Freight forwarders and brokers.-- [section omitted]

(c) Motor carriers of property.--

(1) General rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.--Paragraph (1)--

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices.--

(A) Continuation.--Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to

enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to--

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements.--A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if--

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election.--Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii.--This subsection shall not apply with respect to the State of Hawaii.

(5) Limitation on statutory construction.--Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

(d) Pre-arranged ground transportation.--

(1) In general.--No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law requiring a license or fee on account of the fact that a motor vehicle is providing pre-arranged ground transportation service if the motor carrier providing such service--

(A) meets all applicable registration requirements under chapter 139 for the interstate transportation of passengers;

(B) meets all applicable vehicle and intrastate passenger licensing requirements of the State or States in which the motor carrier is domiciled or registered to do business; and

(C) is providing such service pursuant to a contract for--
(i) transportation by the motor carrier from one State, including intermediate stops, to a destination in another State; or
(ii) transportation by the motor carrier from one State, including intermediate stops in another State, to a destination in the original State.

(2) Intermediate stop defined.--In this section, the term "intermediate stop", with respect to transportation by a motor carrier, means a pause in the transportation in order for one or more passengers to engage in personal or business activity, but only if the driver providing the transportation to such passenger or passengers does not, before resuming the transportation of such passenger (or at least 1 of such passengers), provide transportation to any other person not included among the passengers being transported when the pause began.

(3) Matters not covered.--Nothing in this subsection shall be construed--

(A) as subjecting taxicab service to regulation under chapter 135 or section 31138;

(B) as prohibiting or restricting an airport, train, or bus terminal operator from contracting to provide preferential access or facilities to one or more providers of pre-arranged ground transportation service; and

(C) as restricting the right of any State or political subdivision of a State to require, in a nondiscriminatory manner, that any individual operating a vehicle providing prearranged ground transportation service originating in the State or political subdivision have submitted to pre-licensing drug testing or a criminal background investigation of the records of the State in which the operator is domiciled, by the State or political subdivision by which the operator is licensed to provide such service, or by the motor carrier providing such service, as a condition of providing such service.

49 U.S.C. § 41713. Preemption of authority over prices, routes, and service

(a) Definition.--In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.--

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.--

(A) General rule.--Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle

(whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.--Subparagraph (A)--

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1).--This paragraph shall not limit the applicability of paragraph (1).