In the United States Court of Appeals
for the Seventh Circuit

No. 21-2068

CHICAGO WINE CO., STAN SPRINGER, CYNTHIA SPRINGER,
DENNIS NEARY, and DEVIN WARNER
Plaintiffs - Appellants

vs.

ERIC HOLCOMB, Governor of Indiana, THEODORE E. ROKITA, Attorney-General of Indiana, and JESSICA ALLEN, Chairwoman of the Indiana Alcohol and Tobacco Commission, in their official capacities
Defendants - Appellees

and

WINE AND SPIRITS DISTRIBUTORS OF INDIANA,
Intervening Defendant - Appellee

On appeal from the United States District Court for the Southern District of Indiana, No. 1:19-cv-02785, Hon. Tanya Walton Pratt, District Judge

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Brief and Appendix of All Appellants

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Appellate Court No: 21-2068

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Chicago Wine Co., Stan Springer, Cynthia Springer, Dennis Neary, and Devin Warner

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

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I) Identify all its parent corporations, if any: None

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Jurisdictional Statement

1. District court jurisdiction. Plaintiffs-Appellants brought this action in the Southern District of Indiana pursuant to 42 U.S.C. § 1983, alleging that provisions in the Indiana Alcohol and Tobacco Code which allow Indiana wine retailers to deliver wine to consumers, but prohibit out-of-state retailers from doing so, violate the Commerce Clause. U.S. Const. art. I, § 8. They sued Indiana officials with responsibilities for enforcing these laws in their official capacities, and seek declaratory and injunctive relief. Amended Complaint, Doc. No. 7.[1] The district court had federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), which confer original jurisdiction on district courts to hear suits alleging the violation of rights and privileges under the U.S. Constitution.

2. Court of appeals jurisdiction. The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291. This is an appeal from a final judgment disposing of all claims and terminating the case entered on May 19, 2021. Doc. No. 94, App 1. Plaintiffs filed a timely notice of appeal on June 9, 2021. Doc. No. 95.

[1] All Doc. No. citations refer to the District Court docket, submitted as part of the Record as Doc. No. 97, PageID # 1177-1192.

Statement of the Issues

Plaintiffs challenge the constitutionality of Indiana law prohibiting out-of-state wine retailers from delivering wine to consumers in Indiana. The district court upheld the law, and Plaintiffs raise two issues on appeal:

1. Considering both the Commerce Clause and the Twenty-first Amendment, may Indiana prohibit the delivery of wine from out-of-state retailers to Indiana consumers when it allows in-state retailers to do so? Plaintiffs contend that this difference in treatment discriminates against interstate commerce in violation of the Commerce Clause and is not justified by § 2 of the Twenty-first Amendment because nondiscriminatory alternatives are available that could adequately protect the State's regulatory interests.

2. If the Court rules that the cross-border delivery ban is unconstitutional, is Indiana's further ban on using common carriers to make such deliveries also unconstitutional? Plaintiffs contend that it violates the Commerce Clause in practical effect because most out-of-state retailers have no other way to deliver wine to Indiana residents, and the ban is not justified by § 2 of the Twenty-first Amendment because nondiscriminatory alternatives are available that could adequately protect the State's regulatory interests.

Two matters raised below are not at issue. (1) Plaintiffs challenged Indiana's 5-year residency requirement for obtaining a liquor license, but that statute (Ind. Code § 7.1-3-21-3) has been repealed, so the issue is moot. (2) Plaintiffs have voluntarily dismissed their claim under the Privileges and Immunities Clause. Doc. No. 91.

Statement of the Case

A. The law at issue

An out-of-state retailer is prohibited from delivering wine to an Indiana consumer. No provision in the Indiana Code explicitly forbids it, but this prohibition is accomplished by the combined effect of three provisions.[2]

1. Section 7.1-5-11-1.5(a) makes it unlawful for an out-of-state retailer to *ship* wine to a consumer, but does not address whether an out-of-state retailer could use its own vehicles to hand-deliver the wine.
2. Section 7.1-5-10-5(a) makes it unlawful for an out-of-state retailer to transport wine into Indiana unless specifically authorized by the code, and the State concedes that the code contains no such authorization. State Resp. to Interrog. no. 2, Exh. 22 (Doc. No. 49-23).
3. Section 7.1-5-10-5(b) makes it unlawful for a consumer to receive an alcoholic beverage from an entity that does not hold a permit, and the State concedes that no permit exists which would allow out-of-state retailers to make such deliveries. State Resp. to Interrog. no. 1, Exh. 23 (Doc. No. 49-24).

By contrast, an Indiana retailer is authorized to deliver wine to consumers, Ind. Code § 7.1-3-15-3(d), even if the wine was bought online and the customer never set foot in the store. State Admission no. 3, Exh. 22 (Doc. No. 49-23).[3]

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[2] The full text of these statutes is included in the Appendix, App 14-16.

[3] There is no clear statutory authority allowing in-state retailers to sell online, but the State interprets Ind. Code § 7.1-3-15-3(d) to allow it, and many Indiana retailers do so. See, e.g., https://www.kahnsfinewines.com/;https://noblespirits.com/ (last viewed July 13, 2021).

B. Proceedings below

On July 8, 2019, a wine retailer from Chicago and three Indiana consumers filed a lawsuit in the Southern District of Indiana challenging the constitutionality of the ban on cross-border deliveries. They contend that the law discriminates against interstate commerce in violation of the dormant Commerce Clause, U.S. Const., Art. I, § 8,[4] and is not justified by § 2 of the Twenty-first Amendment.[5] They sued the chairperson of the Indiana Alcohol and Tobacco Commission,[6] the attorney-general,[7] and the governor of Indiana[8] in their official capacities for declaratory and injunctive relief. An amended complaint was filed on July 10, 2019. Doc. No. 7.

The State defendants filed an answer on September 23, 2019 (Doc. No. 16). The Wine & Spirits Distributors of Indiana intervened and filed its answer on October 22, 2019 (Doc. No. 26). The defendants denied all the material allegations.

On July 2, 2020, the Plaintiffs filed a motion for summary judgment accompanied by 24 exhibits. Doc. No. 49. On August 19, 2020, the defendants filed cross-motions for summary judgment and responses in opposition to the Plaintiffs' motion. Doc. Nos. 61-63 (State), 57-58 (Wholesalers). On September 16, 2020, the Plaintiffs filed their response/reply brief. Doc. No. 67. On September 30, 2020, the

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

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

[6] David Cook, who has since been replaced by Jessica Allen.

[7] Curtis Hill, who has since been replaced by Theodore E. Rokita.

[8] Eric Holcomb.

defendants filed their reply briefs. Doc. Nos. 70 (State), 68-69 (Wholesalers). On October 5, 2020, Plaintiffs filed a surreply brief to respond to new evidence submitted by the Wholesalers in their reply. Doc. No. 71.

On March 30, 2021, the district court ruled on the cross-motions for summary judgment without having held oral argument. Doc. No. 81, App 2 *et seq*. The court granted summary judgment to the defendants[9] and found the cross-border delivery ban did not violate the Commerce Clause. It erroneously applied the minimal scrutiny standard for nondiscriminatory laws (*Pike* balancing) rather than the more demanding scrutiny required for laws that discriminate against out-of-state entities and protect the economic interests of their in-state competitors.

The district court did not rule on the Plaintiffs' claim that these same laws violated the Privileges and Immunities Clause because the issue was not presented in the summary judgment motions. Opinion, *infra* at App 13. Plaintiffs voluntarily dismissed this claim on May 18, 2021, and the district court then entered final judgment on May 19, 2020. Doc. No. 94, *infra* p. App. 1.

On June 9, the Plaintiffs filed a timely notice of appeal. Doc. No. 95.

C. Facts

1. Wine cannot be sold in the United States until it is approved by the federal Tax and Trade Bureau (TTB). There are currently more than 443,000 different wines that have been approved, most of which are available in California or New

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[9] The court granted summary judgment to the Plaintiffs on one issue, ruling that Indiana's 5-year residency requirement for obtaining a liquor license was unconstitutional, Opinion, App 8, *infra*, but the General Assembly has since repealed that statute (Ind. Code § 7.1-3-21-3), so that issue is moot.

York. Wark Report ¶¶ 11-13, Exh. 19 (Doc. No. 49-20). However, in states like Indiana, only about 10-20% of that wine is actually brought into the state by wholesalers, and individual retail stores generally stock only 1000-4000 labels. *Id.* ¶¶ 13-14; Pl. Ex. 7 (Doc. No. 49-12); Cordes Aff. ¶ 9, Exh. 7 (Doc. No. 49-8). In most states, including Indiana, consumers have access to some additional wine that can be purchased directly from the winery, but this option is available only for domestic wine. State Resp. to Interrog. No. 2, Exh. 23 (Doc. No. 49-24). Wine from France, Italy and other foreign countries can be purchased only from retailers, Wark Report § 15, and the retailers can offer for sale only the limited selection carried in the portfolios of the wholesalers in their state. *Id.* ¶¶ 10, 16, 18.

2. Indiana has a quota system limiting each city to one package store per 8000 residents. Ind. Code § 7.1-3-22-5. Evansville has a population of 118,588; South Bend is 102,037; Lafayette/West Lafayette in 121,132; and Bloomington is 84,116. *See* https://www.indiana- demographics.com/ (last visited July 14, 2021).[10] That means residents of those cities would have access to 11-16 local wine stores. Wine stores carry 1000-4000 different wines, Wark Report ¶¶ 11-14, so that even if every store carried entirely different wines, consumers would have access locally to only 11,000-64,000 wines, or 3% - 16% of the total number of wines available in the U.S. Actual availability is far less, because some inventory of wine stores overlaps.

3. Consumer access to old, rare and collectible wine is even more difficult. Wholesalers and local retailers do not usually stock them. They tend to be expensive

[10] The court may take judicial notice of demographic facts pursuant to Fed. R. Evid. 201.

compared to most wines, making the market for them relatively small and sales slow. The retailer has to be prepared to store the wine for long periods of time in controlled refrigeration units. Ordinary retailers have limited shelf and storage space and cannot afford to allocate space to rare wines that sell more slowly than more common wines. Wark Report ¶ 16. Therefore, a small number of specialty wine retailers exists around the country which handle most of the sales of rare wines. They are located primarily in California, New York and Florida. For example, K&L Wine Merchants in California offers a deep selection of rare, expensive and collectible California wines that are unavailable at other retailers outside California because they are sold directly by the winery or acquired at auction, and not generally distributed through wholesalers. *Id.* ¶ 17. Magnum Wine and Tastings in Florida carries rare wines costing up ro $1500 per bottle that cannot be found at ordinary retail stores. Cordes Aff. ¶ 4, Exh. 7 (Doc. No. 49-8). Such wine must be purchased from out-of-state specialty retailers. Arger Aff. ¶ 7, Exh. 8 (Doc. No. 49-9); Gralla Aff. ¶ 12, Exh. 20 (Doc. No 49-21).

4. A growing part of the wine retail business is the demand for wine gift baskets. Only a few retailers, such as Wine Country Gift Baskets in California, are willing to create and ship wine gift baskets to friends, family, colleagues and clients. Wark Report ¶ 19, Exh. 19 (Doc. No. 49-20).

5. There are approximately 400,000 outlets across the country that sell wine at retail, including package stores, grocery stores, convenience stores, pharmacies, bars and restaurants. However, only around 1170 retailers conduct any online

business and make home deliveries, and the number making such deliveries outside their home states is even smaller. Wark Report ¶ 23, Exh. 19 (Doc. 49-20).

6. Forty-five states allow consumers to purchase wine directly from out-of-state wineries and have it delivered to their homes. Sixteen states and the District of Columbia allow consumers to purchase wine from out-of-state retailers and have it delivered. Wark Report ¶ 24, Exh. 19 (Doc. No. 49-20). Most of these states regulate direct deliveries from out-of-state sellers through a licensing and reporting system in which out-of-state businesses obtain permits, consent to state jurisdiction and agree to require age verification upon delivery. *Id.* ¶ 21. There is no evidence from these states that home deliveries increase consumption by minors, nor that licensed online wine retailers sell tainted or unsafe products, evade paying taxes, or cause any other problems. *Id.* This was the finding of a Federal Trade Commission study, FTC Report 4, Exh. 21 (Doc. No. 49-22) and has been the experience in states that allow direct deliveries. Connecticut Liq. Control Div. Statement, Exh. 10B; Oregon Liq. Control Com'n Statement, Exh. 10C; Wyoming Liq. Div. Statement, Exh. 10D (Doc. No. 49-11).

7. Plaintiff Chicago Wine Co. is an Illinois limited liability company which operates a wine retail and auction business in Chicago, Illinois, under the trade name The Chicago Wine Company. Warner Aff. ¶¶ 1-3, Exh. 1 (Doc. No. 49-2). It is located within 30-50 miles of Lake and Porter counties in Indiana. *Id.* ¶ 7. Chicago Wine has had specific requests to deliver wine to Indiana consumers, and it is prepared to market to Indiana and sell, ship, and deliver wine to Indiana consumers who respond to these marketing efforts. *Id.* ¶ 5. Currently, Chicago Wine

delivers wine using its own truck or a third-party delivery service to make home deliveries within Illinois and to states where such deliveries are legal. *Id.* ¶ 3. Chicago Wine would like to be able to deliver wine to consumers in Indiana, especially the northwest corner, which is in its geographical area of delivery. It would also like to deliver wine elsewhere in Indiana by common carrier, because it is not economically feasible to use its own vehicles to drive to the farther regions of the state to deliver individual purchases. *Id.* ¶¶ 5-7. It cannot do so, because no permit is available that allows an out-of-state retailer to deliver or ship wine to an Indiana consumer; only retailers with a physical presence in Indiana may make deliveries. State Resp. to Interrog. no. 2, Exh. 22 (Doc. No. 49-23). Building a second set of premises in Indiana is an impossible economic burden. Warner Aff. ¶ 13, Exh. 1 (Doc. No. 49-2).

8. Plaintiff Devin Warner is a co-owner of Chicago Wine and lives in Illinois. Warner Aff. ¶ 1, Exh. 1 (Doc. No. 49-2). He has two reasons he would like to be able to do business in Indiana and believes he can be successful: He carries wines not available in Indiana, including older vintages and rare wines that are hard to find, and he gives personal attention to customers and helps them obtain hard-to-find wines, which has resulted in customer loyalty. *Id.* ¶ 3.

9. Plaintiffs Stan and Cynthia Springer reside in Indianapolis, Indiana. Springer Aff. ¶ 1, Exh. 2 (Doc. No. 49-3). Mr. Springer is a businessman and the owner of Safe Care Corp. which services industrial equipment. *Id.* ¶ 3. Ms. Springer is a practicing attorney and former partner at Faegre, Baker & Daniels. *Id.* ¶ 4. They enjoy drinking wine, particularly Argentinian Malbecs, some of which are difficult

to find in Indiana. *Id.* ¶¶ 5-6. Prior to filing this lawsuit, the Springers attempted to order wines from out-of-state retailers but were refused due to Indiana's prohibition. *Id.* ¶¶ 6-9. More recently, the Springers contacted Binny's Beverage Depot in Chicago, Illinois, which has an exceptionally large wine inventory. They were informed that Binny's will not currently deliver wine to Indiana consumers, but would do so if Indiana law is changed. *Id.* ¶ 10. Their testimony is corroborated by Steven St. Clair and Dennis Neary, who also have contacted Binny's and been informed that it will not currently deliver wine to Indiana but would do so if the law is changed. St. Clair Aff., ¶¶ 5-7, Exh. 6 (Doc. No. 49-7); Neary Aff. ¶¶ 3-4, Exh. 3 (Doc. No. 49-4). Other specialty wine retailers located out of state would also ship wine to Indiana if it were legal. Cordes Aff. § 8, Exh. 7 (Doc. No. 49-8).

10. Plaintiff Dennis Neary is a resident of Indianapolis, Indiana. Neary Aff. ¶ 1, Exh. 3 (Doc. No. 49-4). He has been a wine drinker for many years. *Id.* ¶ 3. Mr. Neary recently contracted (and recovered from) Covid-19. Due to the pandemic, Mr. Neary believes that his health condition requires that he order wine on the internet and have it delivered to his home, rather than visit local wine stores in person. *Id.* ¶¶ 5-6.

11. Other witnesses presented additional reasons for wanting access to online wine stores. Gregory Fehribach is an Indianapolis attorney who uses a wheelchair for mobility. He is an avid wine drinker, but finds it difficult to shop for wine at local retail stores and carry the wine home himself. Fehribach Aff., Exh. 4 (Doc. No. 49-5). Orhan Dermitas is of Turkish ancestry and owns the Bosphorus Restaurant, a Turkish restaurant in Indianapolis. He has difficulty finding Turkish wines from

retailers in the Indianapolis area, but can find a broad selection at online wine stores in other states. Dermitas Aff., Exh. 5, (Doc. No. 49-6).

12. When wine consumers are unable to buy the wine they want from out-of-state sources, they often shift their purchases to in-state retailers, which benefits local retailers. Springer Aff. ¶ 6, Exh. 2 (Doc. No. 49-3); Neary Aff. ¶ 9, Exh. 3 (Doc. No. 49-4).

13. Although excessive alcohol consumption in general causes a variety of public health and social problems, see Kerr Report ¶ 34, State's Exh. B (Doc. No. 63-2), there is no evidence in the record that home delivery of wine contributes to excessive consumption. Indeed, the evidence is to the contrary, that alcohol is available more cheaply and easily from local sources, Kroger Wine Sale, Exh. R-1 (Doc. No. 67-2), and that states which allow direct shipping by out-of-state retailers have experienced no increase in alcohol-related problems. Statements from State Regulators, Exh. 11 (Doc. No. 49-12).

14. Indiana has allowed out-of-state wineries to ship wine directly to consumers by common carrier for 13 years. There are 464 wineries which do so. State Resp. to Interrog. no 6, Exh. 23 (Doc. No. 49-24). The State has no evidence that such shipments have caused an increase, or been a significant factor, in alcohol-related public health and safety issues such as traffic accidents, crime, workplace absenteeism, and/or instances of domestic violence. State Resp. to Interrog. no. 11, Exh. 23 (Doc. no. 49-24). Other states which allow direct shipping report no increased problems. Statements of State Regulators, Exh. 10 (Doc. No. 49-11); Wark Report ¶ 17, Exh. 19 (Doc. No. 49-20). There is no evidence in the record that

shipments of wine from out-of-state retailers would be pose any problems related to alcohol consumption that are different from all the other wine shipments in Indiana and other states.

15. Indiana allows in-state retailers to take online orders and deliver wine to consumers' homes. There is no evidence that home deliveries have been utilized by minors to acquire alcohol, State Resp. to Interrog. no. 5, Exh. 22 (Doc. No. 49-23), nor that home deliveries from out-of-state retailers would increase youth access or cause any other problems not posed by local deliveries.

16. There is no evidence in the record that direct shipping of wine by out-of-state retailers would increase youth access. Indeed, the evidence shows to the contrary, that direct shipping does not increase youth consumption, FTC Report at 34, Exh. 21 (Doc. No. 49-22), because minors drink mostly beer and spirits, not wine, Erickson Report at 5, ¶4, State Exh. D (Doc. No. 63-4); FTC Report at 12. They have more direct and easier methods of obtaining alcohol, FTC Report at 12; Nat'l Survey on Drug Use & Health, Ex. 19 (Doc. No. 49-20), and want instant access rather than a several-day delay for the order to arrive. FTC Report at 33 and n. 137. Besides, if minors are going to order wine online, they already can do so from in-state retailers and out-of-state wineries.

17. Although the sale of contaminated wine over the internet is, in theory, a potential public health concern, the record shows that there have been no actual incidents of unsafe wine bring sold online and delivered to consumers' homes in Indiana or anywhere else in the United States. State Resp. to Interrog. no. 12, Exh. 23 (Doc. no. 49-24); Wark Report ¶ 17, Exh. 19 (Doc. No. 49-20).

D. There are no material facts in dispute

The Defendants' admissible evidence presented to the district court describes the general history of alcohol regulation in the United States, the three-tier system used in many states,[11] Indiana's current regulatory structure, and the public health risks from excessive alcohol consumption in general. *See* Statement of Facts, State SJM Mem. at 4-18 (Doc. No. 62). However, the defendants offered no evidence specific to the issues in this case. They demonstrated the obvious wisdom of regulating liquor sales in general, but presented no evidence showing why home deliveries of wine from out-of-state retailers must be banned rather than regulated, and no evidence that home deliveries by out-of-state retailers are any more problematic than deliveries by in-state retailers and out-of-state wineries, which the state allows. The defendants demonstrated the obvious adverse consequences of excessive alcohol consumption and binge drinking in general, but presented no evidence that wine obtained by home delivery (as opposed to liquor consumption generally) contributes to excessive consumption. Indeed, the defendants' own expert acknowledged that there is no research data linking direct wine shipping to excessive alcohol consumption. Kerr Report ¶ 34, State Exh. B (Doc. No. 63-2).

The defendants also presented personal opinions from several witnesses touting the merits of a three-tier system, the evils of alcohol consumption, and the cascade of social ills that might occur in the future if out-of-state retailers were allowed to

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[11] A "three-tier" system separates producers, wholesalers and retailers into distinct tiers, and prohibits vertical integration among them to minimize the possibility that a few large companies can control the market.

make home deliveries of wine. Little of this evidence is actually admissible.[12]

1. State's witnesses Stewart, Kerr, and Erickson submitted their personal opinions about the content of, reasons for, and purposes of Indiana's liquor laws, and why they thought the laws were constitutional.[13] These are obviously inadmissible legal opinions. *Antrim Pharmaceuticals LLC v. Bio-Pharm, Inc.*, 950 F.3d 423, 430 (7th Cir. 2020) (witnesses may not testify on issues of law such as the meaning of statutes or regulations).
2. State's expert witnesses Kerr and Erickson submitted opinions predicting that a cascade of social ills might occur in Indiana if out-of-state retailers were allowed to make home deliveries of wine.[14] Neither witness presented a data base or explained their methodology for reaching these conclusions, so the opinions are inadmissible under FED. R. EVID. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Neither witness had any explanation for why they thought these problems would arise in the future in Indiana when they have not occurred in other states which allow direct shipping, and did not arisen in Indiana after it began allowing home

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[12] Plaintiffs made extensive and specific objections to this evidence in the district court in their Response Memo at 19-24 and appendices 1-2. Doc. No. 67. If the defendants rely on any of this evidence in their Response Brief, we will go into more detail in our Reply.

[13] Stewart Aff., ¶¶ 5, 6, 8e, 8f, 9e, 10, State Exh. A (Doc. No. 63-1); Kerr Report ¶ 7, 12, 18, 23-31, 37-39, 41-47, 64, State Exh. B (Doc. No. 63-2); Erickson Report, State Exh. D (Doc. No. 63-4). The Erickson report was not subdivided into paragraphs. Objections to her legal opinions are designated as objections 1, 3, 4, 5, 8, 11, 19, 20, 21, 27, 32, 33, 35, 36, 37, and 39 in Appendix 2, Pl. Resp. Mem. (Doc. No. 67).

[14] Kerr Report ¶¶ 12, 19-20, 22, 32, 36, 37-43, 45-47, 52-65; Kerr. Aff. ¶ 8(c)-(f), State Exh. B (Doc. No. 63-2); Erickson Report, State Exh. D (Doc. No. 63-4), designated objections 2, 6, 9, 10, 13, 22, 29 in Appendix 2, Pl. Resp. Mem. (Doc. No. 67).

deliveries by in-state retailers and out-of-state wineries. Expert opinions that do not account for obvious contrary facts are unreliable and inadmissible. *Brown v. Burlington No. Santa Fe Ry. Co.*, 765 F.3d 765, 773 (7th Cir. 2014).

All of the defendants' admissible evidence goes to show that excessive alcohol consumption is a public health issue that needs to be regulated. None addresses either of the issues on which they have the burden of proof – that home deliveries of wine actually contribute to excessive consumption, and that the reasonable nondiscriminatory alternative of licensing and regulating, which works for other kinds of home deliveries, would suddenly be unworkable.

Summary of Argument

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

When alcohol is involved, the Twenty-first Amendment is also implicated. It gave states broad power to regulate alcohol but did not repeal the Commerce Clause or exempt liquor laws from the nondiscrimination principle. *Lebamoff Enterp., Inc. v. Rauner,* 909 F.3d 847, 854 (7th Cir. 2018). The Amendment and the Commerce Clause are both "parts of the same Constitution [and] each must be considered. in light of the ... issues and interests at stake in any concrete case." *Bacchus Imports*

Ltd. v. Dias, 468 U.S. 263, 275 (1984). Because a discriminatory ban on interstate commerce strikes at the core of the Commerce Clause, the State can justify it only by showing that the ban is necessary to advance a core concern of the Twenty-first Amendment which could not be furthered by nondiscriminatory alternatives. *Granholm v. Heald,* 544 U.S. at 489). Concrete evidence is required and unsupported assertions are insufficient. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2474 (2019) (hereinafter cited as *Tenn. Wine*).

The Plaintiffs have shown that Indiana's prohibition against home deliveries by out-of-state wine retailers violates the Commerce Clause by discriminating against out-of-state retailers, protecting local retailers from competition, and denying consumers access to a vast array of wines sold only in the markets of other states. The State has presented no concrete evidence that the ban advances a core concern of the Twenty-first Amendment that could not be served by reasonable nondiscriminatory alternatives. Indiana already uses such a nondiscriminatory alternative. It allows out-of-state wineries to ship wine to consumers as long as they obtain direct-shipper permits, report their sales, remit taxes, and verify age on delivery. Many other states use this system also, and none (including Indiana) has experienced any problems. The State has not offered a shred of evidence as to why this alternative would not work equally as well to regulate deliveries from out-of-state wine retailers, so the ban is unconstitutional.

Argument

I. Introduction

Indiana prohibits out-of-state wine retailers from delivering wine to consumers but allows its own retailers to do so. This ban on cross-border deliveries discriminates against out-of-state retailers, protects the economic interests of local businesses, and denies consumers access to the markets of other states. These are core concerns of the Commerce Clause, so the ban is unconstitutional unless the State can justify it under the Twenty-first Amendment by proving that it advances a legitimate regulatory interest that could not be furthered by reasonable nondiscriminatory alternatives. *Granholm v. Heald,* 544 U.S. at 490-92; *Tenn. Wine,* 139 S.Ct. at 2474.

A. **Standard of Review**

The Court of Appeals reviews the district court's grant of summary judgment *de novo,* examining the record in the light most favorable to the nonmovants (the Plaintiffs) and construing all reasonable inferences from the evidence in their favor. Summary judgment is appropriate when there are no genuine disputes of material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(A); *Horne v. Electric Eel Mfr. Co., Inc.*, 987 F.3d 704, 713 (7th Cir. 2021). 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).

B. Burdens of proof

Plaintiffs have the initial burden to establish that the ban on wine deliveries discriminates against out-of-state economic interests. Discrimination simply means

differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Granholm v. Heald,* 544 U.S. 460, 472 (2005). The burden then shifts to the State to prove that the ban advances a legitimate non-protectionist purpose. *Id.* at 492; *Lebamoff Enterp., Inc. v. Rauner,,* 909 F.3d 847, 856 (7th Cir. 2018). To carry that burden, the state must produce "concrete evidence" clearly showing that the law advances a legitimate state interest that cannot adequately be served by reasonable nondiscriminatory alternatives. *Tenn. Wine*, 139 S.Ct. at 2474, *Granholm*, 544 U.S. at 489-92.

C. Background

Neither the Supreme Court nor this Circuit has ruled on the precise question presented – whether a state may ban out-of-state wine retailers from delivering wine to consumers when it allows in-state retailers to do so. The Supreme Court has ruled that states may not ban home deliveries of wine from out-of-state wineries if in-state wineries are allowed to do so, *Granholm v. Heald*, 544 U.S. at 493, and that, as a general rule, the nondiscrimination principle applies to laws regulating retailers, *Tenn. Wine,* 139 S.Ct. at 2470-71, but the Court has not heard a case specifically involving home deliveries by wine retailers.

This Circuit recently held that a complaint challenging a similar Illinois ban on home deliveries stated a valid claim under the Commerce Clause and could not be dismissed on the pleadings, but did not rule on the merits. *Lebamoff Enterp. v. Rauner*, 909 F.3d at 856. Some background may therefore be helpful.

1. The nondiscrimination principle of the Commerce Clause

In *Granholm v. Heald*, the Supreme Court summarized the nondiscrimination

principle of the Commerce Clause as follows:

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

544 U.S. at 472-73. The Court noted that discriminatory trade laws "deprive citizens of their right to have access to the markets of other States on equal terms" and risk "generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid." *Id.* at 473. Allowing States to discriminate against out-of-state interests "invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Id., citing Dean Milk Co. v. Madison,* 340 U.S. 349, 356 (1951).

2. The Twenty-first Amendment

The Court said that § 2 of the Twenty-first Amendment "constitutionalized the basic structure of federal-state alcohol regulatory authority that prevailed prior to [its] adoption." *Tenn. Wine*, 139 S.Ct at 2463. It summarized that historical context in *Tenn. Wine* as follows:

In the 19th century, states enacted a variety of regulations, including licensing requirements, age restrictions, and Sunday-closing laws, to combat excessive

drinking. Those laws were generally upheld under the states' inherent police power to protect the health, morals, and safety of their people, but the Court also cautioned that this objective could be pursued only by regulations that do not violate rights secured by the Constitution. 139 S.Ct. at 2463-64.

Those rights included the right to engage in interstate commerce, and states' attempts to ban importation of liquor were struck down under the Commerce Clause. The Court held: (1) The Commerce Clause prevented states from discriminating against the citizens and products of other states and giving preferences to in-state interests. (2) Laws regulating the alcohol trade must have a *bona fide* relation to protecting public health, morals or safety. (3) The Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce. (4) Liquor moving in interstate commerce could not be regulated by states while in their original packages and not yet commingled with domestic property. 139 S.Ct. at 2464-65.

This left dry States in a bind. They could ban the production and sale of alcohol within their borders, but could not stop citizens from importing liquor from other states. In response, Congress enacted the Wilson Act in 1890 (27 U.S.C. § 121), which provided that liquor became subject to state laws upon arrival, as long as those laws were valid exercises of the police power to protect public health and safety. However, the Act failed to stop mail-order liquor because the Court interpreted "upon arrival" as when it was received by the purchaser, not when it entered the state. 139 S.Ct at 2465-66.

In 1913, Congress tried again to give each State a measure of regulatory authority over the importation of alcohol, by enacting the Webb-Kenyon Act (27 U.S.C. § 122). It was drafted to eliminate the "original package" doctrine that had enabled liquor importers to evade state dry laws. The Act declared that the shipment of alcohol into a state for use therein, "either in the original package or otherwise," in violation of any state law was prohibited. Despite the use of the phrase "any law," the Webb-Kenyon Act did not repeal the limitation in the Wilson Act and the cases interpreting it that states could not enact protectionist measures. It thus protected state liquor laws from Commerce Clause scrutiny only where a State treated in-state and imported liquor on the same terms. 139 S.Ct at 2466-67.

The Eighteenth Amendment was ratified in 1919, and the manufacture, sale, transportation, and importation of alcoholic beverages were prohibited throughout the country. Prohibition was a disaster, of course, and the Eighteenth Amendment was repealed in 1933 by § 1 of the Twenty-first Amendment. Some states opposed repeal, so in order to garner sufficient support, the drafters included § 2, which gave each State the option of banning alcohol if its citizens so chose. It tracked the language of the Webb-Kenyon Act, and with it, the understanding that Webb-Kenyon did not did not permit the States to enact protectionist measures clothed as police-power regulations. 139 S.Ct at 2467-68.

The Supreme Court's earliest interpretations of § 2 were cursory holdings that it gave states plenary authority to regulate alcohol, including the power to discriminate against out-of-state liquor interests. *See, e.g., State Bd. of Equalization*

of Cal. v. Young's Market Co., 299 U.S. 59, 62 (1936). Subsequent cases, however, hold that § 2 cannot be read so broadly and that state liquor laws must comply with other constitutional provisions. *Tenn. Wine*, 139 S.Ct. at 2468-60, citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Free Speech Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig* v. *Boren*, 429 U.S. 190 (1976) (Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Due Process Clause); *Dept. of Rev. v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Import-Export Clause); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331–332 (1964) (federal Commerce Clause power). Nor did § 2 give States authority to restrict the importation of alcohol for protectionist purposes, to give a competitive advantage to in-state businesses, or to discriminate against out-of-state businesses. *Tenn. Wine,* 139 S.Ct at 2469-70, citing *Healy v. Beer Institute*, 491 U.S. 324 (1989); *Bacchus Imports, Ltd. v. Dias,* 468 U.S. at 276.

The Court concludes that the history of § 2 establishes that it gives the states broad power to regulate alcohol importations and distribution within its borders, but not to discriminate against out-of-state interests. A state may require that alcohol be distributed through a three-tier system that separates producers, wholesalers, and retailers to prevent market domination by a few large companies, but does not "sanction[] every discriminatory feature that a State may incorporate into its three-tiered scheme." Each provision must be judged individually based on its own features. *Tenn. Wine*, 139 S.Ct. at 2470-72.

3. Controlling Supreme Court cases

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

The Court then struck down state laws which allowed in-state wineries to ship directly to consumers but prohibited out-of-state wineries from doing so. The different treatment discriminated against out-of-state entities, triggering enhanced scrutiny, and the states had not proved that the ban advanced any important interest that could not be furthered by the nondiscriminatory alternative of licensing and regulation – the method by which most states regulate all other aspects of the distribution and sale of alcohol. 544 U.S. at 492. The laws banning home deliveries of wine at issue in *Granholm* were virtually identical to the ones being challenged in the present case. The only difference is that the underlying sale *Granholm* took place at out-of-state wineries, and the underlying sales at issue here take place at out-of-state wine stores.

Because the *Granholm* case involved wineries, the circuits split on whether the nondiscrimination principle and the enhanced scrutiny standard applied to sales and deliveries by retailers. Some circuits concluded that the regulation of retail sales methods was more "essential" to the three-tier distribution system than the regulation of wineries, so that *Granholm's* enhanced scrutiny standard did not apply when reviewing laws restricting home deliveries by retailers. *E.g., Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191-92 (2d Cir. 2009). The Court resolved this split in 2019, holding that there is no basis for a constitutional distinction between producers and retailers and the nondiscrimination principle applies to laws regulating all tiers. *Tenn. Wine,* 139 S. Ct. at 2470-71. The Court applied the *Granholm* standard to a Tennessee residency requirement for obtaining a wine retailer license, and struck it down because it discriminated against out-of-state interests and the State had produced no concrete evidence that the requirement was necessary to advance a legitimate Twenty-First Amendment purpose that could not be served by nondiscriminatory alternatives. *Id.* at 2474-75.

It is therefore indisputable that the enhanced scrutiny standard from *Granholm v. Heald* applies to state laws prohibiting out-of-state retailers from delivering wine to consumers but allowing in-state retailers to do so.

4. Seventh Circuit cases

One Seventh Circuit case decided before *Granholm* upheld a state law banning direct-to-consumer wine shipping despite its discriminatory effect. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 828 (7th Cir. 2000). It is no longer good law. One case

decided after *Granholm* upheld a requirement that all purchasers must appear in person at a winery and show an ID before the winery could ship wine to them. *Baude v. Heath*, 538 F.3d 608 (7th Cir., 2008). Although this requirement made it more burdensome to purchase wine from out-of-state wineries, it did not prohibit deliveries and was not discriminatory, because the same precondition applied to deliveries from in-state wineries. 538 F.3d at 613. It therefore tells us little about the validity of discriminatory laws that ban home deliveries from out-of-state entities altogether.

More recently, this circuit decided *Lebamoff Enterp., Inc. v. Rauner,* involving a Commerce Clausew challenge to a similar Illinois law banning home deliveries of wine by out-of-state retailers. It held that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," 909 F.3d at 854, and that the *Granholm* enhanced scrutiny standard would apply. The court did not rule on the merits, but remanded the for the development of an evidentiary record[15] on whether the state "could limit the dangers of mail-order sales through other requirements." *Id.* at 956.

5. Recent cases from other Circuits

There are two recent cases from other circuits on interstate wine shipping. Both have upheld state laws prohibiting out-of-state retailers from shipping wine directly to consumers. Neither is good law because neither applied the enhanced level of

[15] The district court had dismissed it on the pleadings, holding that state liquor laws were immune from scrutiny. It is currently pending in the district court.

scrutiny required by *Granholm*, and *Tenn. Wine* for state liquor laws that discriminate against interstate commerce.

Lebamoff Enterp., Inc. v. Whitmer, 956 F.3d 863 (6th Cir. 2020) upheld a Michigan law prohibiting out-of-state retailers from selling and shipping wine to consumers, citing the Twenty-first Amendment. It declined to consider the Commerce Clause violation and explicitly rejected the "skeptical" standard of review required by *Granholm* and *Tenn. Wine* for liquor laws that discriminate against out-of-state interests. 956 F.3d at 869. It held that state laws regulating wine deliveries by retailers were effectively immune from Commerce Clause scrutiny despite what the Supreme Court says, because "the Twenty-first Amendment leaves these considerations to the people of Michigan, not federal judges," 956 F.3d at 875.[16] The *Whitmer* decision has been widely criticized as inconsistent with *Granholm* and *Tenn. Wine*. *See* McDermott, Will & Emery, *Examining Lebamoff Enterprises v. Whitmer*, JDSUPRA (May 28, 2020).[17]

Sarasota Wine Market, LLC v. Schmitt, 987 F.3d 1171 (8th Cir. 2021) upheld a Missouri law prohibiting out-of-state retailers from shipping wine to consumers. The panel held that the Commerce Clause did not apply, in spite of *Granholm* and

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[16] Judge Sutton, who authored the *Whitmer* opinion with its thinly veiled criticism of the Supreme Court's decision in *Tenn.Wine,* had written the opinion in the underlying Sixth Circuit case which *Tenn. Wine* rejected. *Byrd v. Tenn. Wine & Spirits Retailers Ass'n,* 883 F.3d 608, 628-36 (6th Cir. 2018) (Sutton, J., concurring in part and dissenting in part). Judge Sutton's opinion in *Whitmer* that state liquor laws are immune from the Commerce Clause is virtually identical to his opinion in *Byrd* which the Court rejected.

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

Tenn. Wine, because the regulation of retail sales was an "essential element" of Missouri's three-tier system for in-state alcohol distribution. *Id.* at 1182. The court adhered to a pre-*Tenn. Wine* precedent, *So. Wine & Spirits v. Div. of Alco. & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013), which held that laws regulating retail sales were immune from Commerce Clause scrutiny. 987 F.3d at 1181-82. This is obviously inconsistent with *Tenn. Wine*, which struck down a law regulating in-state retailers (a residency requirement for operating a retail store). In any event, the Eight Circuit's view that laws regulating retailers are immune from the Commerce Clause has been explicitly rejected by this circuit, *Lebamoff Enterp., Inc. v. Rauner*, 909 F.3d at 854-55.

II. Indiana's ban on home deliveries by out-of-state wine retailers violates the Commerce Clause and is not saved by the Twenty-first Amendment

Resolution of this case turns on the interplay between the Commerce Clause, which prohibits economic discrimination against out-of-state interests, and § 2 of the Twenty-first Amendment, which gives states broad latitude to regulate the distribution of alcohol within its borders. *Granholm v. Heald,* 544 U.S. at 472, 488. The balance between these two provisions can be difficult, but one thing is clear. The Twenty-first Amendment does not override the nondiscrimination principle of the Commerce Clause, *Tenn. Wine,* 139 S.Ct. at 2470, and does not "empower States to favor local liquor interests by erecting barriers to competition." *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 276. A state must justify a discriminatory law with concrete evidence that nondiscriminatory alternatives would not be adequate to protect public health and safety. *Tenn. Wine*, 139 S.Ct. at 2474-76. The Amendment

gives states the option to decide that *all* home deliveries should be banned because they are too hard to police, but "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Granholm v. Heald,* 544 U.S. at 493.

The district court upheld the law but applied the wrong legal standard. It analyzed the law under the *Pike* balancing test, *see infra* at p. 29, and did not engage in the level of scrutiny required for discriminatory laws. Opinion, *infra* at p. App. 11. It relied on *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, which had upheld a discriminatory shipping law, without considering that *Bridenbaugh* had been superseded by the Supreme Court's contrary decision in *Granholm v. Heald.*

A. Commerce Clause violations

The Commerce Clause gives Congress the power to regulate commerce among the several States. U.S. Const., art. I, § 8, cl. 3. It has long been understood that the Clause also has a negative aspect that denies states the power to discriminate against the flow of goods moving in interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer,* 63 F.3d 652, 656-657 (7th Cir. 2000). The so-called "dormant" Commerce Clause is driven by concerns about economic protectionism, *i.e.*, regulatory measures that benefit in-state economic interests by burdening or banning out-of-state competitors. *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008). Protectionism is forbidden in all fields of commerce, including the sale of alcoholic beverages, *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 276, and is a question of effect, not intent. *Tenn. Wine,* 139 S.Ct. at 2474.

When faced with a Commerce Clause challenge, a court first determines what level of scrutiny is required. If a law discriminates against interstate commerce directly or in practical effect, courts apply "demanding scrutiny." *Regan v. City of Hammond*, 934 F.3d 700, 703 (7th Cir. 2019). Such laws are usually struck down without further inquiry. *Brown-Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. 573, 578–79 (1986). If a law is not discriminatory, courts use the lower-scrutiny balancing test from *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970), under which laws burdening interstate and intrastate commerce alike are usually upheld. Under *Pike,* the burden is on the plaintiff to prove that the burden on interstate commerce is clearly excessive in relation to the local benefit. However, under demanding scrutiny, the burden shifts to the State to prove that discrimination is necessary to advance a legitimate purpose that cannot adequately be served by less discriminatory alternatives. *Granholm v. Heald*, 466 U.S. at 492-93.

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

An Indiana alcoholic beverage retailer may "may deliver wine ... to a customer's residence, office, or designated location." Ind. Code § 7.1-3-15-3(d).[18] The customer need not have appeared in person at the store, but may have placed an order by telephone or internet. Def. Response to Req. for Admission No. 3, Exh. 22 (Doc. No. 49-23). The retailer must verify the age of the purchaser at some point, Ind. Code. § 7.1-5-10-23, but that may be at the point of delivery.

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[18] The retailer must also hold a package store permits under Ind. Code. § 7.1-3-10-4.

A wine retailer located outside the state may not deliver wine to Indiana consumers because Indiana will not issue it a license, and deliveries without a license are prohibited. Ind. Code § 7.1-5-10-5(a). Even if it had some kind of license, an out-of-state retailer still could not deliver any wine directly to Indiana consumers because Ind. Code § 7.1-5-11-1.5(a) prohibits out-of-state entities from delivering wine to anyone in Indiana other than a wholesaler. The State concedes that "Indiana's licensing standards... include maintaining a physical presence in Indiana," State Resp. to Interrog. No. 2, Exh. 22 (Doc. No. 49-23), and "there is no obvious permit" that would allow an out-of-state retailer to deliver wine to an Indiana consumer. State Resp, to Interrog. No 1, Exh. 23 (Doc. No. 49-24).

Different treatment of in-state and out-of-state businesses constitutes unlawful discrimination if it burdens out-of-state economic interests and benefits in-state ones. *Granholm v. Heald*, 544 U.S. at 472; *Lebamoff Enterp., Inc. v. Rauner,* 909 F.3d at 851. The different treatment here meets that standard.

The ban obviously burdens out-of-state wine retailers. Because they cannot deliver the wine, they lose sales, profits and potential customers. Facts ¶¶ 7-8, *supra* p. 9. Many consumers buy wine, like many other products, from online sellers who can deliver it to their homes. Facts ¶¶ 9-11, *supra* pp. 9-11. Chicago Wine cannot expand its business by delivering wine to Indiana consumers even though there is a demand for the wine, some of which is not available in Indiana. Facts ¶¶ 7-8, *supra* p. 9.

The ban benefits in-state wine retailers by protecting them from competition and giving them the exclusive right to make home deliveries, a significant economic advantage, especially during the current pandemic. Facts ¶¶ 10-11, *supra* pp. 10-11. When consumers cannot obtain wine from out-of-state retailers, many will buy substitute wine from in-state retailers. Facts ¶ 12, *supra* p. 11. This shifts economic resources from out-of-state to in-state businesses. It benefits in-state wine wholesalers by giving them the exclusive right to process all wine to be delivered to Indiana consumers.[19] Indiana retailers buy their wine exclusively from Indiana wholesalers, Ind. Code § 7.1-3-15-3, so if only in-state retailers may make home deliveries, then all such wine will be processed by in-state wholesalers. The Supreme Court has consistently "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Granholm v. Heald,* 544 U.S. at 475.

It does not matter whether the legislature *intended* to provide economic protection for local interests. The question is whether the *effect* of the law is protectionist. *Tenn. Wine,* 139 S.Ct. at 2474; *Granholm v. Heald,* 544 U.S. at 487. Indiana's ban home deliveries, which givens exclusive rights to distribute wine to Indiana retailers and wholesalers, clearly is protectionist in effect.

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[19] In its memorandum in support of intervention, the Wine & Spirits Distributors of Indiana noted that if the plaintiffs were successful, "it would allow a potentially large number of out-of-state wine retailers from across the country to sell and direct-ship to Indiana residents an unlimited amount of wine without that wine being purchased from Indiana wine wholesalers." Doc. No. 19 at p. 3. They called this consequence "serious" and potentially "disastrous," *id.*, and would cause them substantial loss of revenue. *Id.* at 7.

There is no question that the law prohibiting out-of-state retailers from delivering wine to Indiana consumers is discriminatory. State laws that discriminate against out-of-state sellers face "a virtually *per se* rule of invalidity" under the Commerce Clause. *Granholm v. Heald,* 544 U.S. at 476. The nondiscrimination rule applies to state liquor laws because the Twenty-first "Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Id.* at 484-85; *Lebamoff Enterp., Inc. v. Rauner*, 909 F.3d at 854-55. A discriminatory state liquor law is therefore unconstitutional unless the State proves that it is narrowly tailored to advance a legitimate non-protectionist public health and safety purpose that cannot be served by nondiscriminatory alternatives. *Tenn. Wine,* 139 S.Ct at 2460; *Granholm v. Heald*, 544 U.S. at 489. The issue of nondiscriminatory alternatives will be discussed *infra* at pp. 42-43.

2. Requiring physical presence in the state violates the Commerce Clause

There is a second reason why Indiana's retailer delivery rules violate the Commerce Clause. Although the statute governing retailer deliveries is not entirely clear, the State admits that even if it had a license, Chicago Wine would have to establish physical premises in Indiana and make its deliveries from there – not from its premises in Chicago. State Resp. to Interrog. No. 2, Exh. 22 (Doc. No. 49-23). Chicago Wine cannot afford to build separate facilities in Indiana and every other state where it delivers. Facts ¶ 7, *supra* p. 9. If one state could require it, so could all fifty, and the financial burden on out-of-state firms would be prohibitive

and effectively shut down interstate commerce. For that reason, the Supreme Court has said unequivocally that states cannot require physical presence as a precondition to making home deliveries of wine. *Granholm v. Heald*, 544 U.S. at 474-75 ("States cannot require an out-of-state firm to become a resident in order to compete on equal terms"). The physical-presence requirement places a burden on out-of-state firms not shared by in-state firms – establishing a second facility – and is another form of discrimination which can only be justified by the State if it proves that no reasonable nondiscriminatory alternatives are available.

3. Denying consumers access to the markets of other states violates their Commerce Clause rights[20]

Out-of-state wine retailers are not the only ones whose rights to engage in interstate commerce are infringed by banning interstate commerce. Consumers are adversely affected also because trade barriers are two-sided. "[E]very interstate sale has two parties, and entitlement to transact in alcoholic beverages across state lines is as much a constitutional right of consumers as it is of shippers." *Bridenbaugh v. Freeman-Wilson,* 227 F.3d at 850. Indiana's refusal to issue delivery licenses to out-of-state retailers means that in-state consumers cannot receive wine from them. It is unlawful for a consumer to receive a delivery of wine from an unlicensed seller, Ind. Code § 7.1-5-10-5 (b), even if the consumer lawfully purchased the wine at the seller's out-of-state location.

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[20] The district court did not separately address the violation of the consumers' right to engage in interstate commerce.

The Commerce Clause guarantees consumers access to the markets of other states because "free competition from every producing area in the Nation [will] protect [them] from exploitation" by their home state. *H.P. Hood & Sons v. Du Mond,* 336 U.S. 525, 539 (1949). When a state prohibits deliveries from out-of-state sellers, it effectively bans online sales, frees local businesses from competition, and results in just such exploitation. Bans on online wine sales from out-of-state sources leads to higher prices and less variety locally. FTC Report at 3-4, Exh. 21 (Doc. No. 49-22). Local retailers do not carry anywhere near a majority of wines for sale in the United States, so consumers searching for rare, out-of-stock, hard-to-find or older wines are out of luck, even though the wine may be offered for sale at several out-of-state retailers. Facts ¶¶ 1-4, *supra* pp. 6-7. The consumers in Indiana are being denied their rights to engage in interstate commerce.

4. The ban on using common carriers violates the Commerce Clause because it effectively prohibits sales by most out-of-state retailers

Although Indiana allows in-state and out-of-state wineries to use common carriers to deliver wine to consumers, it inexplicably prohibits retailers from doing so. Retailers must use their own vehicles and employees. Ind. Code § 7.1-3-15-3(d). As a practical matter, this rule would continue to prevent most out-of-state retailers from delivering wine to consumers even if the direct prohibition were struck down. The common carrier facially neutral because it applies to both in-state and out-of-state wine retailers, Ind. Code § 7.1-5-11-1.5(a), but it discriminates against out-of-state retailers in practical effect. Out-of-state retailers have no other economically feasible way to make home deliveries. Facts ¶ 7, *supra* p. 9. The discrimination and

protectionism of this rule is obvious when one places it the context of other retail sales. If online retailers could not use common carriers like FedEx, they would go out of business, while local stores would not.

A state law violates the dormant Commerce Clause when it "discriminat[es] against interstate commerce, either expressly or in practical effect.*" Hirst v. Skywest, Inc.*, 910 F.3d 961, 967 (7th Cir. 2018); *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047, 1059 (7th Cir. 2018). The Commerce Clause "forbids discrimination, whether forthright or ingenious," and in each case the issue is whether the statute "will in its practical operation work discrimination against interstate commerce." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). This principle applies to discriminatory liquor laws. *Brown-Forman Dist. Corp. v. N.Y. State Liq. Auth.,* 476 U.S. at 578–79; *Granholm v. Heald,* 544 U.S. at 474-75. Discrimination *de jure* and *de facto* are equally unconstitutional and the State may not accomplish indirectly that which it is prohibited from doing directly. This principle is enshrined in Indiana's alcoholic beverage laws themselves. Ind. Code § 7.1-1-2-5 ("whenever a person is prohibited from doing a certain act ... he shall be prohibited also from doing that act ... indirectly").

Seventh Circuit precedent places state laws into one of three categories for purposes of commerce clause analysis, depending on the degree to which they affect interstate commerce: (1) laws that expressly discriminate against interstate commerce; (2) laws that, although neutral on their face, bear more heavily on interstate than local commerce; and (3) laws that may have a mild effect on

interstate commerce but in practice do not give local firms any competitive advantage over firms located elsewhere.

> A law falling into the first category is presumed to be almost *per se* unconstitutional and is subject to rigorous scrutiny that will allow the law to stand only if it serves a legitimate governmental interest and there is no reasonable non-discriminatory means of furthering that interest. A law falling into the second category is analyzed according to its effect. If the impact is so strong that the law effectively operates as an embargo on interstate commerce, *it is treated as the equivalent of a facially discriminatory law and is subject to the same demanding scrutiny* given to such a law. But if the law regulates even-handedly and only incidentally burdens interstate commerce, then it is examined under the balancing test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), to determine whether it is animated by a legitimate public purpose and, if so, whether the burden the law imposes on interstate commerce is excessive in relation to that interest. A law falling into the third category is examined solely to determine whether it has a rational basis.

Regan v. City of Hammond, 934 F.3d at 703 (emphasis added).

The ban on using common carriers falls into the second category. It is neutral on its face but bears more heavily on interstate than local commerce. The impact is so strong that the law effectively operates as an embargo on interstate commerce. Although a handful of out-of-state retailers located adjacent to Indiana could deliver using their own vehicles, most cannot afford to do so and are closed out of the online market with no alternative way to get their products into the state.

The Seventh Circuit is the only circuit that uses the term "embargo," and it has never defined it, other than to say that an embargo restricts the importation of out-of-state goods and gives a competitive advantage to in-state entities. *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 502 (7th Cir. 2017). It distinguishes an embargo from an "incidental burden," *Regan v. City of Hammond*, 934 F.3d at 703,

or a "mild effect," *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d at 1058, but does not provide much guidance for where to draw the line. One thing is clear, however. An embargo does not have to amount to a 100% ban. *See GoodCat, Inc. v. Cook,* 202 F. Supp. 3d 896, 915-16 (S.D. Ind. 2016) (discriminatory effect when a law reduced interstate commerce from 90% of the market to 33%); *Baude v. Heath*, 538 F.3d at 612 (ban affecting 93% of out-of-state wine was an embargo).

The restriction in Ind. Code § 7.1-3-15-3(d) that wine "delivery may only be performed by the permit holder" in its own vehicles, and not by common carrier[21] amounts to just such an embargo. Most of the wine (around 80%) being sold in the United States is available only from out-of-state retailers, especially old, rare, and unusual wine. Facts ¶¶ 1-3, *supra* pp.6-7. Most of the out-of-state retailers who sell wine online are located far beyond Indiana's borders, Facts ¶ 1, *supra* p. 6, and obviously cannot afford to deliver a few cases of wine by driving their own vehicles from California to Indiana. It is cost-prohibitive even for Chicago Wine to use its own vehicles to deliver wine to much of Indiana. Facts ¶ 7, *supra* p. 9. The wine stores in major cities such as Evansville, South Bend, Lafayette and Bloomington, carry only about 3%-16% of the total number of wines available in the U.S. Facts ¶ 2, *supra* p.6. The effect of this restriction is discriminatory and protectionist, and effectively operates as an embargo on interstate commerce.

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[21] The statutory language, which appears also in Ind. Code § 7.1-3-10-7[c], is unclear. It says that home deliveries may only be made by the permit holder, but does not say whether the permit holder may hire a common carrier. The Indiana Court of Appeals has construed the statute to limit home deliveries to those made personally by the permit holder in its own vehicles. *Ind. Alco. & Tobacco Com'n v. Lebamoff Enterp., Inc.*, 27 N.E.3d 802, 813-14 (Ind. Ct. App. 2015).

True, the discriminatory effect of the law is not 100%. Some out-of-state retailers located close to Indiana's borders could use their own vehicles to make some home deliveries, Facts ¶ 7, *supra* p. 8-9, and some Indiana retailers located at one end of the state probably could not afford to deliver to the other end. These facts are irrelevant. A statute discriminates against interstate commerce if the *overall effect* of the law is to disadvantage out-of-state businesses and benefit in-state ones, *Govt. Suppliers Consolidating Serv., Inc. v. Bayh,* 975 F.2d 1267, 1277 (7th Cir. 1992), even if a few out-of-state firms are not harmed and a few in-state firms may also be burdened. *See Baude v. Heath*, 538 at 611-12 (striking down law that had practical effect of excluding 93% of out-of-state firms).

B. The Twenty-first Amendment is not a defense

The Twenty-first Amendment gives states authority to regulate the distribution of alcohol within their borders, as long as the regulations are nondiscriminatory and nonprotectionist. "[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Lebamoff Enterp., Inc. v. Rauner,* 909 F.3d at 854 (citing *Granholm v. Heald,* 544 U.S. at 486-87). "The Amendment did not give States the authority to pass nonuniform laws [which] discriminate against out-of-state goods." *Lebamoff Enter., Inc. v. Huskey,* 666 F.3d 455, 459 (7th Cir. 2012) *(citing Granholm,* 544 U.S. at 484-85). "[D]iscrimination is contrary to the Commerce Clause and is not saved by the 21st Amendment." *Granholm,* 544 U.S. at 489. "[T]he Court has repeatedly declined to read § 2 as allowing the States to violate the 'nondiscrimination principle.'" *Tenn. Wine,* 139 S.Ct at 2470.

What the Amendment adds to normal Commerce Clause analysis is to give states broader (but not absolute) authority to regulate local alcohol sales because excessive consumption is a threat to public health and safety, and each state may have different ideas how to do that most effectively. *Tenn. Wine,* 139 S.Ct at 2472-73. However, the Commerce Clause still applies, so the state must prove that home deliveries by out-of-state retailers poses a threat different from and more dangerous than deliveries by other sellers, to "show that the differential treatment is *necessitated* by permissible Twenty-first Amendment interests." *Lebamoff Enterp., Inc. v. Rauner,* 909 F.3d at 856 (emphasis in original). The State bears the burden of proving that a ban only affecting out-of-state entities serves a genuine purpose and is not just a pretext for protectionism. *Granholm v. Heald,* 544 U.S. at 492-93.

This case comes down to whether the State can prove two things: (1) the law "actually promotes public health or safety," not just that it was intended to, *Tenn. Wine,* 139 S.Ct. at 2474; and (2) no reasonable non-discriminatory alternative exists that would adequately protect the state's interest. *Granholm v. Heald*, 544 U.S. at 489. The burden is on the State. *Id*. at 493. An extensive and clear evidentiary record is required, and the State's purported justification is subject to "demanding scrutiny." *Regan v. City of Hammond*, 934 F.3d at 703. "Speculation" and "unsupported assertions" that a law advances important public health and safety issues are insufficient to sustain a law that would otherwise violate the Commerce Clause. *Tenn. Wine,* 139 S.Ct. at 2474. It "takes more than lawyers' talk" to prove the actual effect of a restrictive liquor law. *Baude v. Heath*, 538 F.3d at 612.

In order for a restriction to actually promote public health and safety, there first must be a specific public harm that the restriction would alleviate. The State must prove that the harm exists and is not merely hypothetical, and is specifically related to home delivery of wine. It is not enough for the State to show that excessive alcohol consumption in general poses public health and safety risks, because Indiana allows alcohol to be sold by grocery stores, pharmacies, package stores, restaurants, bars, hotels, stadiums, race tracks, riverboats, casinos, caterers, microbrewers, craft distillers, farm wineries, and civic centers. ATC License Types, https://www.in.gov/atc/2454.htm (last visited July 12, 2021). It is not enough for the State to show that home deliveries of wine poses risks because Indiana allows in-state retailers to make home deliveries. Ind. Code § 7.1-3-15-3(d), It is not enough for the State to show that using common carriers poses risks because Indiana allows out-of-state wineries to use common carriers. Ind. Code §§ 7.1-3-26-9, 7.1-3-26-13. It is not enough for the State to show that sales and deliveries by out-of-state businesses may be harder to regulate, because Indiana allows out-of-state wineries to ship to consumers.

To justify singling out and prohibiting wine deliveries by out-of-state retailers when so many similar ways to acquire alcohol are lawful, the State must prove that there is some specific problem associated with home deliveries by out-of-state sellers. The State has introduced no such evidence. Sixteen states allow direct wine shipments from out-of-state retailers, but the State presented no evidence from any of them that direct shipping caused any problems. Indeed, the evidence is to the

contrary. Facts ¶ 14, *supra* p. 11. Indiana has allowed direct-to-consumer shipping from out-of-state wineries for 13 years, but the State presented no evidence that this has resulted in any problems of unsafe wine being sold or any other threat to public health. Facts ¶¶ 14-17, *supra* pp. 11-13. This is hardly surprising because wine is among the most heavily regulated products in the country -- regulated, inspected and tested by every state, by the federal Tax and Trade Bureau, see 27 C.F.R. 24.1 *et seq*. (more than 200 TTB wine regulations), and by the Food and Drug Administration. 21 C.F.R. 110.35.

Nor is there any evidence that home deliveries of wine increase youth access. Facts ¶ 15-16, *supra* p. 12. The Supreme Court reviewed this issue in *Granholm v. Heald*, 544 U.S. at 490, and concluded:

> States currently allowing direct shipments report no problems with minors' increased access to wine. FTC Report 34 [Exh. 21]. This is not surprising for several reasons. First, minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor. *Id*., at 12. Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who, in the words of the past president of the National Conference of State Liquor Administrators, "'want instant gratification.'" *Id*., at 33, and n 137 (explaining why minors rarely buy alcohol via the mail or the Internet).

Even if there were unique risks to public health associated with home deliveries from out-of-state sellers, a complete ban on such deliveries would still be unconstitutional for two reasons. First, the law is protectionist. Since the ability to deliver is essential to online sales, the ban gives in-state retailers the exclusive ability to sell wine online. Only legitimate nonprotectionist interests support a Twenty-first Amendment defense. *Tenn. Wine,* 139 S.Ct at 2461, 2470, 2474. The Indiana Code

itself makes clear that its alcohol laws are intended, in part, to protect the economy of the state. Ind. Code § 7.1-1-1-1 (one purposes of title is "[t]o protect the economic welfare ... of the people of this state."). That makes it especially incumbent on the State to prove that the law actually serves an important state interest "unrelated to economic protectionism," *Tenn. Wine,* 139 S.Ct. at 2470

Second, the State would still have to prove that there are no reasonable non-discriminatory alternatives. *Granholm v. Heald.*, 544 U.S. at 492-93; *Tenn. Wine,* 139 S.Ct 2474-76; *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 911 (7th Cir. 2003). It offered no evidence on this issue whatsoever. In all other contexts, Indiana furthers its interests in minimizing potential adverse effects of alcohol consumption through licenses, regulations, reporting requirements, and age verification rules. It allows 464 out-of-state wineries to deliver wine to consumers which was sold online or at the winery's out-of-state location under a direct shipper permit Facts ¶ 14, *supra* p. 11. They must obtain a permit, verify age at the time of sale, maintain records, label boxes as containing alcohol, require an adult signature on delivery, use a licensed carrier whose drivers are trained, limit the quantity shipped, and remit all excise and sales tax. Ind. Code § 7.1-3-26-9. This is the kind of reasonable nondiscriminatory alternative used by other states, Facts ¶ 6, *supra* p. 8, and endorsed by the Supreme Court and other circuits. *See Granholm v. Heald*, 544 U.S. at 492; *Bainbridge v. Turner,* 311 F.3d 1104, 1110 (11th Cir. 2002).

To justify only prohibiting out-of-state retailers from making home deliveries, when in-state retailers and out-of-state wineries may do so, the State must prove

that it poses some unique problem that would render its normal regulatory methods unworkable in this one situation. The State did not do so in the district court, and no evidence in the record explains why it needs to ban this one method of acquiring alcohol. As the Fourth Circuit said in another wine-shipping case, "In the absence of a reasonable explanation from Defendants for the lack of uniformity, the only one that comes to mind is protection of local economic interests, which the Commerce Clause will not tolerate." *Beskind v. Easley,* 325 F.3d 506, 511-12 (4th Cir. 2003).

III. Remedy

The court of appeals generally defers to the district court's choice of remedy, respecting its proximity to the evidence, *Morris v. BNSF Railway Co.*, 969 F.3d 753, 767 (7th Cir. 2020), including in constitutional cases. *Preston v. Thompson*, 589 F.2d 300, 303 (7th Cir. 1978). Because the district court granted summary judgment for the State, it has not yet had the opportunity to consider remedy. The better course is therefore to remand the case to the district court for such consideration.

However, if this court decides to address the question of remedy, it should enjoin State officials from enforcing the laws banning out-of-state retailers from delivering wine to Indiana consumers and using common carriers, and prohibiting consiumers from receiving them. That will eliminate the unconstitutional discrimination ans allow out-of-state retailers to compete with in-state retailers for online business.

In theory, at least, a court could also eliminate discrimination and level the economic playing field by striking down the provisions giving in-state retailers the right to make home deliveries. This is not a valid option in this case, however,

because it would not vindicate the Commerce Clause violation. *See Al-Alamin v. Gramley,* 926 F.2d 680, 685 (7th Cir. 1991) (remedy should relate to the nature of the violation). It would harm, rather than help, plaintiff Neary who relies on home delivery because of Covid-19. Facts ¶ 10, *supra* p. 10. It would improperly take away delivery rights from in-state retailers who are not represented here. *Cook, Inc. v. Boston Scientific Corp.*, 333 F.3d 737, 744 (7th Cir. 2003). It would nullify a valid portion of a state law rather than an invalid one. *See Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). The proper remedy is to enjoin the Defendants from enforcing the laws that prevent out-of-state retailers from delivering wine it to consumers.

Conclusion

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

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Certification of Word Count

I certify that this brief, including footnotes and the statement of issues, but excluding tables and certificates, contains 12,202 words according to the word-count function of WordPerfect, the word processing program used to prepare this brief.

s/ James A. Tanford
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Certificate of Service

I certify that on July 18, 2021, I electronically filed the foregoing with the Clerk of the Court for the U. S. Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ James A. Tanford
James A. Tanford
Attorney for Appellants

Certification as to Appendix

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

s/ James A. Tanford
James A. Tanford
Attorney for Appellants

Appendix

1. Final judgment (Doc. No. 94)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE CHICAGO WINE COMPANY, et al., Plaintiffs, vs. ERIC HOLCOMB, et al., Defendants, and WINE & SPIRITS DISTRIBUTOR OF INDIANA, Intervenor.	)	Case No: 1:19-cv-2785-TWP-MG

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

The Plaintiffs, having voluntarily dismissed their Privileges and Immunities Claim (Docket No. 91), and this Court having ruled on all other aspects of this claim in its Preliminary Order (Docket No. 81), the Court now enters a FINAL JUDGMENT.

Judgment is GRANTED in favor of the Plaintiffs in that the five-year residency requirement of Indiana Code § 7.1-3-21-3 is declared violative of the Commerce Clause of the United States Constitution and Defendants are enjoined from enforcing it.

Judgment is GRANTED in favor of the State Defendants and WSDI as to Indiana Code §§ 7.1-5-11-1.5(a) and 7.1-3-15-3(d).

Judgment is entered accordingly, and this action is TERMINATED.

IT IS SO ORDERED.

Date: 5/19/2021

Roger A.G. Sharpe, Clerk

Hon Tanya Walton Pratt, Chief Judge
United States District Court
Southern District of Indiana

2. Opinion and entry on cross-motions for summary judgment (Doc. No. 81)

United States District Court
S.D. Indiana, Indianapolis Division.

CHICAGO WINE COMPANY, Devin Warner, Stan Springer,
Cynthia Springer, and Dennis Neary, Plaintiffs,

v.

Eric HOLCOMB, Todd Rokita, and Jessica Allen,[1] Defendants.
Wine & Spirits Distributors of Indiana, Intervenor Defendant.

Case No. 1:19-cv-02785-TWP-DML

ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Tanya Walton Pratt, Chief Judge

This matter is before the Court on Cross-Motions for Summary Judgment filed pursuant to Federal Rule of Civil Procedure 56 by the parties. Plaintiffs Chicago Wine Company ("Chicago Wine"), Devin Warner ("Warner"), Stan Springer ("Mr. Springer"), Cynthia Springer ("Ms. Springer"), and Dennis Neary ("Neary") (collectively, "Plaintiffs") filed their Motion on July 2, 2020, (Filing No. 49). Thereafter, Defendants Eric Holcomb ("Governor Holcomb"), Todd Rokita ("Rokita"), and Jessica Allen ("Allen") (collectively, "State Defendants") (Filing No. 61), and Intervenor Defendant Wine & Spirits Distributors of Indiana ("WSDI"), (Filing No. 57), filed cross motions. The Plaintiffs initiated this lawsuit against the State Defendants to challenge the constitutionality of Indiana Code §§ 7.1-3-21-3, 7.1-5-11-1.5(a), and 7.1-3-15-3(d). After WSDI intervened as a defendant, the parties filed their Cross-Motions for Summary Judgment on the constitutional challenge. For the reasons explained below, the Court grants in part and denies in part each of the Motions.

I. BACKGROUND

The Plaintiffs brought this civil action against the State Defendants pursuant to 42 U.S.C. § 1983 to challenge the constitutionality of three Indiana statutes that the Plaintiffs allege prohibit out-of-state wine retailers from selling and delivering wine directly to Indiana consumers but allow in-state wine retailers to do so.

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[1] Subsequent to the filling of this cause of action, Todd Rokita was elected as Indiana Attorney General thereby replacing Curtis Hill as a Defendant in this matter, and Defendant David Cook was replaced as Chair of the Indiana Alcohol and Tobacco Commission by Jessica Allen (see Filing Nos. 75 and 77, respectively)

Plaintiff Chicago Wine is a wine retailer located in Chicago, Illinois. It delivers wine to its customers in Illinois and in other states where it is legal to do so. It has customers in Indiana who have asked for delivery of wine, but cannot not ship wine to Indiana customers because it does not have an Indiana liquor permit, which it cannot get because it is not an Indiana resident. Chicago Wine would apply for a license to deliver wine directly to Indiana consumers if one existed and if there were no residency requirements. Chicago Wine would then deliver wine in its own vehicles to Indiana customers who live near Chicago and would deliver wine by common carrier to those who live beyond its delivery area if it were legal to do so. Plaintiff Warner is a professional wine consultant, advisor and merchant who resides in California, and one of the principals of Chicago Wine (Filing No. 49-2 at 1–2).

Plaintiffs Mr. and Ms. Springer are a married couple residing in Indianapolis, Indiana. Mr. Springer is a businessman, and Ms. Springer is a practicing attorney. They are wine collectors and consumers of fine wine. They enjoy drinking wine, particularly Argentinian Malbecs, some of which are difficult to find in Indiana. They have attempted to order wine from out-of-state retailers to add to their wine collection, but were refused because of Indiana's prohibition. They contacted Binny's Beverage Depot in Chicago, Illinois, but were informed that it will not deliver wine to Indiana consumers but would do so if Indiana law is changed (Filing No. 49-3 at 1–2).

Plaintiff Neary is a resident of Indianapolis, Indiana, and he has his own video production business. In the past, Neary has tried to order wine and have it delivered to him, but out-of-state wine retailers have not shipped wine to him because of Indiana's prohibition. Neary recently contracted Covid-19 and has since recovered. However, this has caused Neary to be more careful about in-store shopping. He looks to the internet to be able to purchase wine and have it delivered to his home (Filing No. 49-4 at 1–2).

The State Defendants are Governor Holcomb, the Governor of Indiana, the chief executive officer of the State; Rokita, who is the Attorney General of Indiana; and Allen, who is the Chairwoman of the Indiana Alcohol and Tobacco Commission. The State Defendants are sued in their official capacities (Filing No. 16 at 5–6; Filing No. 75; Filing No. 77).

Intervenor Defendant WSDI is an unincorporated association composed of members holding wine and liquor wholesaler's permits in Indiana. WSDI is an affiliate of the Wine & Spirits Wholesalers of America, which represents wine and liquor wholesalers nationwide. WSDI represents members before the Indiana General Assembly, state agencies, regulatory bodies, courts, alcohol beverage industry organizations, and the general public, (Filing No. 19 at 1–2).

Title 7.1 of the Indiana Code governs all things alcohol-related in the State of Indiana. Indiana Code § 7.1-3-21-3 provides, "The commission shall not issue an alcoholic beverage retailer's or dealer's permit of any type to a person who has not been a continuous and bona fide resident of Indiana for five (5) years immediately preceding the date of the application for a permit."

Indiana Code § 7.1-5-11-1.5(a) states,

> Except as provided in IC 7.1-3-26,[2] it is unlawful for a person in the business of selling alcoholic beverages in Indiana or outside Indiana to ship or cause to be shipped an alcoholic beverage directly to a person in Indiana who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network (as defined by IC 35-43-2-3(a)).

And Indiana Code § 7.1-3-15-3(d) provides,

> However, 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 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.

The Plaintiffs' Amended Complaint challenges Indiana Code §§ 7.1-3-21-3 and 7.1-5-11-1.5(a) specifically. The Plaintiffs allege these code provisions violate the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution. In their Amended Complaint, "[t]he plaintiffs seek an injunction barring the defendants from enforcing these laws, practices and regulations, and requiring them to allow out-of-state wine retailers to sell, ship, and deliver wine to Indiana consumers upon equivalent terms as in-state wine retailers." (Filing No. 7 at 2.)

The Plaintiffs expanded their constitutional challenge in their Motion for Summary Judgment to explicitly include Indiana Code § 7.1-3-15-3(d) with §§ 7.1-3-21-3 and 7.1-5-11-1.5(a). However, the Plaintiffs noted in their summary judgment brief that "[t]he Complaint also alleged a violation of the Privileges and Immunities Clause, but Plaintiffs are not seeking summary judgment on that issue." (Filing No. 49 at 6.) In their summary judgment brief, the Plaintiffs assert, "The laws should be declared unconstitutional and the defendant[s] enjoined from enforcing them." *Id.* at 30.

After the Plaintiffs filed their Motion for Summary Judgment, the State Defendants and WSDI each filed Cross-Motions for Summary Judgment, asking the Court to uphold the three challenged statutes as constitutionally valid as part of Indiana's three-tier system for the manufacture, distribution, and sale of alcoholic beverages.

II. SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if "the pleadings, depositions, answers to

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[2] Indiana Code § 7.1-3-26 concerns the issuance of a direct wine seller's permit and the requirements related to such a permit. This chapter of the Indiana Code allows wineries (not wine retailers) to sell and ship directly to consumers.

[3] Indiana Code § 7.1-3-10-4 concerns the issuance of a liquor dealer's permit to a package liquor store.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 489–90 (7th Cir. 2007). In ruling on a motion for summary judgment, the court reviews "the record in the light most favorable to the non-moving party and draw[s] all reasonable inferences in that party's favor." *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009) (citation omitted). "However, inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." *Dorsey v. Morgan Stanley*, 507 F.3d 624, 627 (7th Cir. 2007) (citation and quotation marks omitted). Additionally, "[a] party who bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hemsworth*, 476 F.3d at 490 (citation omitted). "The opposing party cannot meet this burden with conclusory statements or speculation but only with appropriate citations to relevant admissible evidence." *Sink v. Knox County Hosp.*, 900 F. Supp. 1065, 1072 (S.D. Ind. 1995) (citations omitted).

"In much the same way that a court is not required to scour the record in search of evidence to defeat a motion for summary judgment, nor is it permitted to conduct a paper trial on the merits of [the] claim." *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001) (citations and quotation marks omitted). "[N]either the mere existence of some alleged factual dispute between the parties nor the existence of some metaphysical doubt as to the material facts is sufficient to defeat a motion for summary judgment." *Chiaramonte v. Fashion Bed Grp., Inc.*, 129 F.3d 391, 395 (7th Cir. 1997) (citations and quotation marks omitted).

These same standards apply even when each side files a motion for summary judgment. The existence of cross-motions for summary judgment does not imply that there are no genuine issues of material fact. *R.J. Corman Derailment Serv., LLC v. Int'l Union of Operating Eng'rs.*, 335 F.3d 643, 647 (7th Cir. 2003). The process of taking the facts in the light most favorable to the non-moving party, first for one side and then for the other, may reveal that neither side has enough to prevail without a trial. *Id.* at 648. "With cross-motions, [the court's] review of the record requires that [the court] construe all inferences in favor of the party against whom the motion under consideration is made." *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 983 (7th Cir. 2001) (citation and quotation marks omitted).

III. DISCUSSION

Plaintiffs bring three claims in their Amended Complaint: Count I: Commerce Clause Violation for Discrimination; Count II: Violation of the Commerce Clause for Economic Protectionism; and Count III: Privileges and Immunities Clause Violation. In their Cross-Motions for Summary Judgment, the parties argue the constitutionality of Indiana Code §§ 7.1-3-21-3, 7.1-5-11-1.5(a), and 7.1-3-15-3(d) under the Commerce Clause of the United States Constitution. The Court will first discuss legal principles governing Commerce Clause and Twenty-first Amendment claims and then turn to each of the challenged statutes.

A. Legal Principles Governing Commerce Clause and Twenty-First Amendment Claims

The Commerce Clause provides that "the Congress shall have Power ... to regulate

> Commerce ... among the several States." Art. I, § 8, cl. 3. Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a "negative" aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.

Or. Waste Sys. v. Dep't of Envtl. Quality, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994).

The Twenty-first Amendment to the United States Constitution provides, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const., Amend. XXI, § 2. Section two of the Twenty-first Amendment gives power to the states to regulate transportation and importation of alcoholic beverages.

The tug-of-war between the Commerce Clause's prohibition against states unjustifiably burdening interstate commerce and the Twenty-first Amendment's grant of power to the states to regulate the flow of alcoholic beverages has generated much litigation. The United States Supreme Court and the Seventh Circuit have provided guidance to the district courts for deciding Commerce Clause challenges to states' liquor laws.

The Seventh Circuit has noted,

> The Commerce Clause grants Congress the power to "regulate Commerce ... among the several States." Art. 1, § 8, cl. 3. The positive grant of power implies that "state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' " *Granholm*, 544 U.S. at 472, 125 S.Ct. 1885.

Lebamoff Enters. v. Rauner, 909 F.3d 847, 851 (7th Cir. 2018). The court further noted,

> [T]he states [have] greater leeway to regulate alcoholic beverages than they enjoy with respect to any other product. But the Supreme Court has decided that this leeway is not boundless. Drawing lines that are sometimes difficult to follow, it has decreed that states may not infringe upon other provisions of the Constitution under the guise of exercising their Twenty-first Amendment powers.

Id. at 849.

The United States Supreme Court has explained,

> 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.... State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.

Granholm v. Heald, 544 U.S. 460, 488–89, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) (internal citations and quotation marks omitted).

Very recently, the Supreme Court discussed the relationship between the Commerce Clause and the Twenty-first Amendment:

> [B]ecause of § 2 [of the Twenty-first Amendment], we engage in a different inquiry. Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy, but as we pointed out in *Granholm*, "mere speculation" or "unsupported assertions" are insufficient to sustain a law that would otherwise violate the Commerce Clause. 544 U. S. at 490, 492, 125 S. Ct. 1885, 161 L. Ed. 2d 796. Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2.

Tenn. Wine & Spirits Retailers Ass'n v. Thomas, ––– U.S. ––––, 139 S. Ct. 2449, 2474, 204 L.Ed.2d 801 (2019). "[T]he Twenty-first Amendment can save an otherwise discriminatory regulation only if it is demonstrably justified by a valid factor unrelated to economic protectionism." *Lebamoff*, 909 F.3d at 853 (internal citation and quotation marks omitted).

In distilling the Supreme Court's Twenty-first Amendment decisions, the Seventh Circuit summarized that the

> [Supreme] Court extracts three principles from its Twenty-first Amendment case law: (1) the Amendment does not save state laws that violate other provisions of the Constitution (*i.e.* clauses other than the Commerce Clause), (2) the Amendment "does not abrogate Congress' Commerce Clause powers with regard to liquor," and (3) "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm*, 544 U.S. at 486–87, 125 S.Ct. 1885.

Id. at 854.

"A state law that discriminates explicitly ('on its face,' lawyers are fond of saying) is almost always invalid under the Supreme Court's commerce jurisprudence." *Baude v. Heath*, 538 F.3d 608, 611 (7th Cir. 2008). However, on the other hand,

> "[W]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). State laws regularly pass this test, see *Davis*, 128 S. Ct. at 1808-09, for the Justices are wary of reviewing the wisdom of legislation (after the fashion of *Lochner*) under the aegis of the commerce clause.

Id.

The Seventh Circuit explained,

> When some form of heightened scrutiny applies--as it does if a law's own terms treat in-state and out-of-state producers differently--then the burdens of production and

> persuasion rest on the state. But when challenging a law that treats in-state and out-of-state entities identically, whoever wants to upset the law bears these burdens.

Id. at 613.

B. Indiana Code § 7.1-3-21-3

The first statute challenged by the Plaintiffs, Indiana Code § 7.1-3-21-3, explicitly requires a person or entity to be an Indiana resident for five years preceding the date of their permit application in order to be eligible to receive an alcoholic beverage retailer's or dealer's permit of any type. The Plaintiffs argue that this statute, on its face, discriminates against out-of-state wine retailers to the benefit of in-state wine retailers and, thus, violates the Commerce Clause. The Plaintiffs note, "The Supreme Court has ruled that a 'residency requirement for retail license applicants blatantly favors the State's residents and has little relationship to public health and safety, [so] it is unconstitutional' under the Commerce Clause. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. at 2457." (Filing No. 49 at 18–19.)

The State Defendants respond, "The Indiana Alcohol and Tobacco Commission ('the Commission') has been enjoined from enforcing ... Ind. Code § 7.1-3-21-3, so any claim stemming from that statute is moot." (Filing No. 62 at 6.) They further explain,

> The District Court for the Southern District of Indiana has enjoined the Commission from enforcing the Residency Requirement for alcoholic beverage permits. *See Indiana Fine Wine & Spirits, LLC v. Cook, et al.*, 459 F.Supp.3d 1157, [1171] (S.D. Ind. 2020). The State does not analyze the Plaintiffs' claims regarding this requirement because the issue is moot.

Id. at 7. WSDI makes a similar concession regarding Indiana Code § 7.1-3-21-3. (*See* Filing No. 58 at 5 ("The District Court for the Southern District of Indiana has entered an injunction against Indiana enforcing its residency requirements for alcoholic beverage permits.").)

Indeed, this Court recently analyzed an Indiana alcohol permit residency requirement under Indiana Code § 7.1-3-21-5.4(b) in the case of *Indiana Fine Wine & Spirits v. Cook*, 459 F. Supp. 3d 1157 (S.D. Ind. 2020). The Court reviewed and applied the Supreme Court's recent decision in *Tennessee Wine & Spirits Retailers Association v. Thomas*, ––– U.S. ––––, 139 S. Ct. 2449, 204 L.Ed.2d 801 (2019), and determined that Indiana's residency requirement violated the Commerce Clause and could not be enforced. The same applies in this case as acknowledged by the State Defendants and WSDI. Therefore, summary judgment is granted in favor of the Plaintiffs, and the State Defendants (and their agents) may not enforce Indiana Code § 7.1-3-21-3 as a statutory requirement for the issuance of "an alcoholic beverage retailer's or dealer's permit of any type." The five-year residency requirement of Section 7.1-3-21-3 is declared violative of the Commerce Clause of the United States Constitution and may not be enforced.

C. Indiana Code § 7.1-3-15-3(d)

The Plaintiffs also challenge the constitutionality of Indiana Code § 7.1-3-15-3(d), which requires that any wine delivery to consumers be made by the permit holder or an employee who

holds an employee permit.

Indiana wine retailers may obtain a wine dealer permit under Section 7.1-3-15-3 and a package store permit under Section 7.1-3-10-4, and the combination of these two permits allows the permit holder to sell wine at retail and deliver the wine to the consumer. Consequentially, Plaintiffs argue, a wine retailer outside of Indiana may not sell wine and deliver it to Indiana consumers because Indiana will not issue a permit to out-of-state retailers. They argue that the State Defendants have conceded that "[a]ny application would need to meet Indiana's licensing standards, which would include maintaining a physical presence in Indiana," and "there is no obvious permit" that would allow a retailer to sell and deliver wine directly to consumers from an out-of-state premises (Filing No. 49-23 at 2; Filing No. 49-24 at 1–2).

The Plaintiffs assert that different treatment of in-state and out-of-state businesses constitutes unlawful discrimination if the discrimination benefits in-state economic interests and burdens out-of-state interests, and the different treatment in this case meets that standard. The statute benefits in-state wine retailers by shielding them from competition and giving them the exclusive right to make home deliveries, which is a significant economic advantage especially during the current pandemic. When a consumer cannot buy wine from an out-of-state retailer, they will buy from an in-state retailer, which shifts economic resources from out-of-state to in-state businesses. The Plaintiffs argue the statute plainly is economically protectionist. Plaintiffs argue that Chicago Wine cannot establish and maintain a physical presence in Indiana for the purpose of delivering wine to Indiana consumers because such a physical presence would be economically unfeasible. This, Plaintiff's assert, is another way the State Defendants are unlawfully discriminating against out-of-state businesses and burdening interstate commerce.

The Plaintiffs further contend that the restriction in Section 7.1-3-15-3(d) that wine "delivery may only be performed by the permit holder" in its own vehicles, and not by common carrier, is an indirect form of discrimination. Most wine sold in the United States is available only from out-of-state retailers. Most out-of-state retailers who sell wine online are located far beyond Indiana's borders--a majority of which are state of California--and they cannot afford to deliver a few cases of wine by driving their own vehicles from California to Indiana. It is cost-prohibitive even for Chicago Wine to use its own vehicles to deliver to much of Indiana. The effect of this restriction is discriminatory and protectionist. And even if Indiana were to license out-of-state retailers and permit them to deliver using their own vehicles, Plaintiffs contend the effect would be the same as an explicit ban.

The Plaintiffs argue the statute additionally violates the Indiana consumer plaintiffs' right to purchase wine in interstate commerce. Plaintiffs point out that they have a right to transact in alcoholic beverage sales across state lines, however, Indiana's laws make it difficult if not impossible to buy rare and older wines that are not available in Indiana. Thus, they are being denied their right to engage in interstate commerce. Moreover,

> The discriminatory effect of the ban on using common carriers is not 100%. Some out-of-state retailers located close to Indiana's borders could use their own vehicles to make home deliveries, and some Indiana retailers located at the far ends of the state

> cannot deliver to the opposite end as a practical matter. These facts are irrelevant. A statute discriminates against interstate commerce if the *overall effect* of the law is to disadvantage out-of-state businesses and benefit in-state ones, even if a few out-of-state firms are not harmed and a few in-state firms may also be burdened.

(Filing No. 49 at 25 (emphasis in original; internal citations omitted).)

The State Defendants and WSDI argue that statutes having a disparate impact on interstate commerce (rather than facial discrimination) are subject to strict scrutiny only if the impact is "powerful, acting as an embargo on interstate commerce without hindering intrastate sales." *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995). If, instead, the discriminatory effect is "weak" or "mild," the flexible balancing standard articulated in *Pike v. Bruce Church* applies. *Id.* They argue that Indiana's alcohol laws challenged by the Plaintiffs do not violate the nondiscrimination principles of *Granholm* and do not manifest the kinds of blatant economic protectionism and facial discrimination that cannot be shielded by the Twenty-first Amendment. The requirement of face-to-face delivery is not facially discriminatory and likely has no disparate impact on out-of-state commerce. Thus, the law's impact is only on the method of distribution, which the Commerce Clause does not affect and the Twenty-first Amendment specifically protects.

The State Defendants and WSDI next argue the Plaintiffs have not shown that Indiana is treating Indiana wine any differently from wine produced in any other state. If wine is delivered by a wine dealer, delivery must be made by the permit holder or a trained employee. The statute makes no distinction between in-state and out-of-state wine dealers; both may deliver wine only by the permit holder or an employee who holds an employee permit.

They assert that, even if there is some incidental impact on interstate commerce, any burden is far outweighed by the public health and safety benefits of the regulation. Afterall, ease of access and availability of alcohol impacts the health and safety of Indiana citizens in the form of drunk driving, domestic violence, binge drinking and its health effects, and the transmission of sexually-transmitted diseases due to increased risky sexual behavior. Indiana's regulation is part of its overall three-tier system to control the amount of alcohol in the State, which helps limit health and safety concerns.

The State Defendants and WSDI assert that "keeping alcohol out of minors' hands is a legitimate, indeed a powerful, [local] interest." *Baude*, 538 F.3d at 614. The Seventh Circuit previously has accepted the State's reasoning that face-to-face verification for wine shipments would reduce the number of shipments that go to minors. *Id.* at 614–15. They contend,

> Under *Pike*, when statutes regulating wine distribution are facially neutral, and therefore the threshold question is the degree of burden on interstate commerce, Section 2 of the Twenty-first Amendment tips the scales in favor of the State, even in close cases. After all, "[t]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm*, 544 U.S. at 484, 125 S.Ct. 1885. *Granholm* expressly reaffirmed that "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. Moreover, the Seventh Circuit has recognized that *Pike* balancing does not "authorize a comprehensive review of [a] law's benefits, free of any obligation to accept the legislature's judgment." *See Nat'l Paint*, 45 F.3d at 1130.

(Filing No. 62 at 33.)

The Court notes that this same statute, Indiana Code § 7.1-3-15-3(d), was challenged nearly ten years ago in the case of *Lebamoff Enters. v. Snow*, 757 F. Supp. 2d 811 (S.D. Ind. 2010). There, the plaintiff challenged the statute's prohibition against using a common carrier to deliver wine to consumers and the requirement of the wine retailer to deliver the wine itself. While the plaintiff in that case was an in-state wine retailer, it advanced arguments that the statute violated the Commerce Clause because of its alleged facial discrimination and its burden on interstate commerce. In that case, the State advanced nearly identical arguments to support the statute as it advances in this case.

The court considered what level of scrutiny was appropriate to evaluate Indiana Code § 7.1-3-15-3(d) and determined that the statute was subject to the *Pike* balancing test rather than strict scrutiny because the statute was not facially discriminatory. *Snow*, 757 F. Supp. 2d at 820–21. The court went on to analyze Indiana Code § 7.1-3-15-3(d) under the *Pike* test and reached the conclusion that the statute serves legitimate local interests, and any burden on commerce was not clearly excessive in relation to the local interests. *Id.* at 821–26. The plaintiff appealed the district court's decision, and the Seventh Circuit affirmed. *See Lebamoff Enters. v. Huskey*, 666 F.3d 455 (7th Cir. 2012).

The Court concludes, like the court concluded in *Snow*, that Indiana Code § 7.1-3-15-3(d) is not facially discriminatory. The statute treats in-state and out-of-state wine retailers identically: their "delivery may only be performed by the permit holder or an employee who holds an employee permit." In reaching its decision in this case, the Court adopts the analysis and conclusions regarding Section 7.1-3-15-3(d) from the *Snow* decision. *See Snow*, 757 F. Supp. 2d at 820–26.

The Plaintiffs designated evidence from Tom Wark and a 2003 Federal Trade Commission study to suggest that online sales of wine and direct shipment do not result in minors obtaining alcohol more easily (Filing No. 49-20; Filing No. 49-22). This same 2003 Federal Trade Commission study was cited with approval in *Granholm* in 2005 but was subsequently considered and essentially rejected in the *Snow*, *Huskey*, and *Baude* cases, and the Seventh Circuit noted,

> 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.

Baude, 538 F.3d at 614.

Since the decision in *Snow* and its affirmance by *Huskey*, the United States Supreme Court has issued the 2019 decision in *Tennessee Wine & Spirits Retailers Association v. Thomas*. The Supreme Court explained that "because of § 2 [of the Twenty-first Amendment], we engage in a different inquiry." *Tenn. Wine*, 139 S. Ct. at 2474. "Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* "Section 2 gives the States regulatory authority that they would not otherwise enjoy, but ... [w]here the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2." *Id.*

The State Defendants have presented evidence in the form of a sworn declaration from Brian Stewart, an Indiana State Excise Police sergeant, (Filing No. 63-1), which supports the argument that the statute helps advance the State's interests in keeping alcohol out of the hands of minors, controlling the quantity of alcohol in the State to curtail public health concerns, and protecting against unsafe or counterfeit products. These public health and safety benefits justify Indiana Code § 7.1-3-15-3(d) on "nonprotectionist grounds". Indiana Code § 7.1-3-15-3(d) withstands the Plaintiffs' Commerce Clause challenge under *Tennessee Wine* and Seventh Circuit precedent; therefore, the Court grants summary judgment to the State Defendants and WSDI as to Section 7.1-3-15-3(d).

D. Indiana Code § 7.1-5-11-1.5(a)

The Plaintiffs additionally challenge Indiana Code § 7.1-5-11-1.5(a) as violative of the Commerce Clause. This statute states,

> Except as provided in IC 7.1-3-26, it is unlawful for a person in the business of selling alcoholic beverages in Indiana or outside Indiana to ship or cause to be shipped an alcoholic beverage directly to a person in Indiana who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network (as defined by IC 35-43-2-3(a)).

The Plaintiffs argue that Code § 7.1-5-11-1.5 prohibits an out-of-state seller from delivering wine to anyone in Indiana other than a wholesaler. This prohibition benefits in-state wholesalers to the detriment of out-of-state retailers. The Plaintiffs challenge the constitutionality of this statute alongside Section 7.1-3-15-3(d) and advance essentially the same arguments.

The State Defendants and WSDI likewise advance similar arguments in support of this statute alongside their arguments in support of Section 7.1-3-15-3(d). They argue that the statute does not discriminate against out-of-state wine dealers because it applies equally to both in-state and out-of-state dealers; both must go through a permitted wholesaler.

The Court first notes that the statute, on its face, applies equally to in-state and out-of-state sellers. The statute previously was challenged on the basis that it violated the Commerce Clause by prohibiting direct shipment of wine to Indiana consumers from out-of-state wine dealers—which is the same basis for the constitutional challenge here. *See Bridenbaugh v. Freeman-Wilson*, 227

F.3d 848 (7th Cir. 2000). When the statute was challenged in *Bridenbaugh*, the language of the statute explicitly applied only to "a person in the business of selling alcoholic beverages in another state or country." *Id.* at 849. Despite this explicit application to persons in another state or country, the Seventh Circuit upheld the law as a valid exercise of the State's power under Section Two of the Twenty-first Amendment to regulate importation of alcohol. The Seventh Circuit analyzed the statute and concluded that it did not "impose a discriminatory condition on importation" because all alcohol, regardless of its origination, had to pass through Indiana's wholesalers. *Id.* at 853–54. The statute has since been amended to apply to any "person in the business of selling alcoholic beverages in Indiana or outside Indiana."

For the reasons discussed in the section above concerning Section 7.1-3-15-3(d), the Court concludes that Section 7.1-5-11-1.5(a) is valid under the Twenty-first Amendment and is not violative of the Commerce Clause. The State Defendants' argument is well-taken and supported by evidence and case law that Section 7.1-5-11-1.5(a) advances legitimate local interests by controlling the quantity of alcohol in the State to curtail public health concerns, protecting against unsafe or counterfeit products, and keeping alcohol out of the hands of minors. This is sufficient to satisfy *Tennessee Wine*'s concern of "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." Thus, summary judgment is granted in favor of the State Defendants and WSDI as to Section 7.1-5-11-1.5(a).

IV. CONCLUSION

For the reasons explained above, the Court GRANTS in part and DENIES in part the parties' Cross-Motions for Summary Judgment (Filing No. 49; Filing No. 57; Filing No. 61). Summary judgment is GRANTED in favor of the Plaintiffs as to Indiana Code § 7.1-3-21-3. The State Defendants (and their agents) may not enforce Indiana Code § 7.1-3-21-3 as a statutory requirement for the issuance of an alcoholic beverage retailer's or dealer's permit of any type. Summary judgment is GRANTED in favor of the State Defendants and WSDI as to Indiana Code §§ 7.1-5-11-1.5(a) and 7.1-3-15-3(d).

This Order does not address the Plaintiffs' Privileges and Immunities claim, and that claim remains pending for trial. Accordingly, no final judgment will issue at this time.

The parties are directed to contact the Magistrate Judge to schedule a status conference.

3. Indiana statutes at issue

§ 7.1-3-10-4. The commission may issue a liquor dealer's permit to the proprietor of a package liquor store. An applicant for a liquor dealer's permit for a package liquor store shall not be disqualified under IC 7.1-3-4-2(a)(14).

§ 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.

§ 7.1-3-26-9. A direct wine seller's permit entitles a seller to sell and ship wine to a consumer by receiving and filling orders that the consumer transmits by electronic or other means if all of the following conditions are satisfied before the sale or by the times set forth as follows:

(1) The consumer provides the direct wine seller with the following:

(A) The consumer's name.

(B) A valid delivery address and telephone number.

(C) Proof of age by a state government issued or federal government issued identification card showing the consumer to be at least twenty-one (21) years of age. The proof under this clause may be evidenced:

(i) in person;

(ii) by a photocopy or facsimile copy that is mailed or electronically transmitted;

(iii) by a computer scanned, electronically transmitted copy; or

(iv) through an age verification service used by the direct wine seller.

(2) The direct wine seller meets the following requirements:

(A) Maintains for two (2) years all records of wine sales made under this chapter. If the records are requested by the commission, a direct wine seller shall:

(i) make the records available to the commission during the direct wine seller's regular business hours; or

(ii) at the direction of the commission, deliver copies to the commission.

(B) Stamps, prints, or labels on the outside of the shipping container the following: "CONTAINS WINE. SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY.".
(C) Causes the wine to be delivered by the holder of a valid carrier's alcoholic beverage permit under IC 7.1-3-18.
(D) Directs the carrier to verify that the individual personally receiving the wine shipment is at least twenty-one (21) years of age.
(E) Does not ship to any consumer more than two hundred sixteen (216) liters of wine in any calendar year.
(F) Remits to the department of state revenue monthly all Indiana excise, sales, and use taxes on the shipments made into Indiana by the direct wine seller during the previous month.
(G) Ships to a consumer in Indiana only wine manufactured, produced, or bottled by the applicant.

§ 7.1-3-26-13. A wine shipment purchased under this chapter must be delivered to:
(1) the consumer, who shall take personal delivery of the shipment at the:
(A) consumer's residence;
(B) consumer's business address;
(C) carrier's business address; or
(D) address displayed on the shipping container; or
(2) an individual who is at least twenty-one (21) years of age, who shall take personal delivery of the shipment at the:
(A) consumer's residence;
(B) consumer's business address;
(C) carrier's business address; or
(D) address designated by the consumer and displayed on the shipping container.

§ 7.1-5-10-5. (a) It is unlawful for a person, except as otherwise permitted by this title, to knowingly or intentionally purchase, receive, manufacture, import, or transport, or cause to be imported or transported from another state, territory, or country, into this state, or transport, ship, barter, give away, exchange, furnish, or otherwise handle, or dispose of an alcoholic beverage, or to possess an alcoholic beverage for purpose of sale.

(b) It is unlawful for a person to receive or acquire an alcoholic beverage from a person that the person knows does not hold, unrevoked, the appropriate permit under this title to sell, deliver, furnish, or give the alcoholic beverage to the person.

(c) A person who violates subsection (a) or (b) commits a Class B misdemeanor.

§ 7.1-5-10-7. It is a Class C infraction for a person knowingly to purchase, or to agree to purchase, an alcoholic beverage from a person who does not at the time of the purchase hold a permit authorizing the seller to sell, or agree to sell, the alcoholic beverage to the purchaser.

§ 7.1-5-11-1.5. (a) Except as provided in IC 7.1-3-26, it is unlawful for a person in the business of selling alcoholic beverages in Indiana or outside Indiana to ship or cause to be shipped an alcoholic beverage directly to a person in Indiana who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network (as defined by IC 35-43-2-3(a)).

(b) An in-state or an out-of-state vintner, distiller, brewer, rectifier, or importer that:

(1) holds a basic permit from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives; and

(2) knowingly violates subsection (a);

commits a Class A misdemeanor.

(c) A person who is not an in-state or an out-of-state vintner, distiller, brewer, rectifier, or importer that holds a basic permit from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives who knowingly violates subsection (a) commits a Level 6 felony.

(d) Upon a determination by the commission that a person has violated subsection (a), a wholesaler may not accept a shipment of alcoholic beverages from the person for a period of up to one (1) year as determined by the commission.

(e) If the chairman of the alcohol and tobacco commission or the attorney general determines that a vintner, distiller, brewer, rectifier, or importer that holds a basic permit from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives has made an illegal shipment of an alcoholic beverage to consumers in Indiana, the chairman shall:

(1) notify the federal Bureau of Alcohol, Tobacco, Firearms and Explosives in writing and by certified mail of the official determination that state law has been violated; and

(2) request the federal bureau to take appropriate action.

(f) The commission shall adopt rules under IC 4-22-2 to implement this section.