No. 21-1906

In the
United States Court of Appeals
for the Fourth Circuit

B-21 WINES, INC., MIKE RASH, JUSTIN HAMMER,
LILA RASH, and BOB KUNKLE,
Plaintiffs-Appellants,

v.

A.D. GUY, JR., Chair of the North Carolina Alcoholic Beverage Control
Commission, in his official capacity,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of North Carolina

BRIEF OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

I certify, pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, that appellee is not in any part a publicly held corporation, a publicly held entity, or a trade association, and that no publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation.

Dated: November 29, 2021

/s/ Ryan Y. Park
Ryan Y. Park

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JURISDICTIONAL STATEMENT

Plaintiffs brought this action under 42 U.S.C. § 1983, alleging that certain North Carolina alcohol laws violate the Commerce Clause. J.A. 9-12. The district court had jurisdiction over this claim under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

The Twenty-first Amendment grants States expansive authority to regulate the sale and distribution of alcohol within their borders. The dormant Commerce Clause limits this authority in certain ways, but does not prevent States from regulating alcohol to promote legitimate interests, like public health and safety. Like many States, North Carolina advances such interests by funneling alcohol through a comprehensive three-tier regulatory system.

Does the Constitution require North Carolina to allow out-of-state retailers to ship alcohol directly to North Carolina consumers, and thereby bypass the State's three-tier system?

INTRODUCTION

The Twenty-first Amendment grants States considerable latitude to regulate the sale of alcohol within their borders. The dormant Commerce Clause limits this power, but only to a narrow extent. Although States may not use their Twenty-first Amendment authority as a pretext for economic protectionism, alcohol regulations are valid if they advance legitimate nonprotectionist state interests—such as to promote public health and safety.

Since the end of Prohibition, like many States, North Carolina has regulated alcohol through a three-tier system. In a three-tier system, alcohol producers, wholesalers, and retailers are licensed and regulated separately. Before any alcohol may reach consumers, it must usually pass through all three tiers of the distribution scheme. This regulatory structure advances vital state interests. For example, it enables the State to ensure that products are safe, and to prevent sales to minors. It also prevents unbridled alcohol consumption and the resulting social evils. For these reasons, the Supreme Court has repeatedly affirmed that three-tier systems like North Carolina's are "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005).

Of course, a three-tier system only works if alcohol actually flows through it. Thus, to prevent retailers from bypassing its system, North Carolina generally prohibits direct-to-consumer sales from outside the State. N.C. Gen. Stat. §§ 18B-102.1, -109.

In this lawsuit, Plaintiffs claim that such laws violate the dormant Commerce Clause. They assert that the Constitution requires North Carolina to allow out-of-state retailers to ship alcohol directly to North Carolina consumers. But granting such relief would be fundamentally incompatible with the State's three-tier system. For this reason, courts across the country have recently rejected near-identical challenges by wine retailers seeking to bypass other States' three-tier systems. *See Lebamoff Enters., Inc. v. Whitmer*, 956 F.3d 863, 868 (6th Cir. 2020), *cert. denied* 141 S. Ct. 1049 (2021); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171 (8th Cir. 2021), *cert. denied* — S. Ct. —, 2021 WL 4733325 (Oct. 12, 2021). Likewise here, the district court below was right to affirm the constitutionality of North Carolina's alcohol laws.

STATEMENT OF THE CASE

A. North Carolina uses a three-tier system to regulate alcohol.

Like most States, North Carolina regulates alcohol by routing it through a system of three distinct "tiers."

The first tier is for producers—wineries, breweries, and distilleries. N.C. Gen. Stat. §§ 18B-1101, -1104, -1105. The second tier is for wholesalers—"middlemen" who purchase alcohol from producers and sell it to retailers. *Id.* §§ 18B-1107, -1109. The third tier is for retailers—bars, bottle shops, grocers, and other businesses that sell alcohol directly to consumers.[1] *Id.* § 18B-1001.

Before it reaches the general public, nearly all alcohol must pass through all three tiers. With limited exceptions, producers sell only to wholesalers. *Id.* §§ 18B-1101, -1104. Wholesalers can buy alcohol from producers, but they cannot sell it to consumers. *Id.* §§ 18B-1107, -1109. And retailers can sell alcohol to consumers, but only if they buy it from wholesalers. *Id.* §§ 18B-1113, -1114, -1006(h). As a result, alcohol

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[1] North Carolina regulates liquor slightly differently. To maintain uniform pricing and control, the State channels retail liquor sales through local Alcoholic Beverage Control stores. N.C. Gen Stat. §§ 18B-800, -804, -1001(10). Liquor regulations are not challenged here.

generally flows from producers, to wholesalers, to retailers, and finally to consumers.

This basic framework has been in place for the better part of a century. *See* J.A. 280-83 (Expert Report of William C. Kerr, Ph.D.). Prior to Prohibition, alcohol producers controlled a vast network of "tied-house" saloons. *Id.* Under these arrangements, producers paid to set up saloonkeepers with locations and equipment. In exchange, saloonkeepers agreed to sell only their backers' products and to meet strict sales quotas. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2463 & n.7 (2019).

These "tied-houses" led to excessive consumption of alcohol and, in turn, "a greater amount of crime and misery" in their time than "any other source." *Crowley v. Christensen*, 137 U.S. 86, 91 (1890); *see* J.A. 281 (same). And because they were "absentee owners," producers "knew nothing and cared nothing" about the resulting ills. J.A. 280-81 (citing Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 33 (Ctr. for Alcohol Policy 2011) (1933)). To address these social problems, North Carolina prohibited alcohol statewide in 1908. *See* An Act to Prohibit the Manufacture and Sale of Intoxicating Liquors in

North Carolina, ch. 71, §§ 1-11, 1908 N.C. Sess. Laws 83-87. North Carolina was the first State in the South to enact Prohibition—twelve years before the Eighteenth Amendment banned the manufacture, sale, and transportation of alcohol nationwide. *See* Daniel J. Whitener, *Prohibition in North Carolina, 1715-1945* 153-97 (1945).

Prohibition technically solved the "tied-house" problem. But it led to other serious social problems, such as "[b]ootlegging, racketeering and a host of other crimes," as well as a significant decline in tax revenue. J.A. 281. So when the Twenty-first Amendment returned authority over alcohol to the States, North Carolina "grapple[d] with the question of whether to regulate alcoholic beverages, and how to regulate them." J.A. 282. To this end, the state legislature appointed a commission "to study the question of the control of alcoholic beverages in North Carolina." A Survey of Statutory Changes in North Carolina in 1935, 13 N.C. L. Rev. 355, 388 (1935); *see* Act of May 11, 1935, ch. 476, § 1, 1935 N.C. Sess. Laws 836.

According to the commission's report, "[t]wo problems immediately confronted the various Legislatures" after the repeal of the Eighteenth Amendment. J.A. 296. States needed to address the "well recognized

evils of the intemperate use of alcohol." *Id.* But they also needed to avoid "excessive restrictions which, however sincere, would result in defeating the desired ends." *Id.* To thread the needle, the commission recommended that the State take over the distribution and sale of alcohol itself. J.A. 299. It also implored the State to adopt a regime that would "promote temperance" while also "driving . . . the illicit dealer out of business." J.A. 305.

The General Assembly largely implemented the commission's recommendations. For example, in 1937, it created an administrative body with general supervisory powers over commerce in alcohol—today known as the Alcoholic Beverage Control Commission ("ABC Commission"). *See* Act of Feb. 22, 1937, ch. 49, §§ 1-28, 1937 N.C. Sess. Laws 84. For a brief time, the legislature channeled all alcohol sales through a network of county boards. *Id.* at 89-90. However, in 1939, it switched to a three-tier system for distribution of beer and wine.[2] Act of Mar. 24, 1939, ch. 158, §§ 500-528, 1939 N.C. Sess. Laws 176, 332-50.

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[2] Throughout this brief, "wine" is used to describe unfortified wine. Fortified wine (like port, sherry, and vermouth) contains a greater amount of alcohol. N.C. Gen. Stat. § 18B-101. The market for unfortified wine far exceeds the market for fortified wine.

Over the years, the North Carolina General Assembly has modified the State's alcohol laws to reflect changes in commerce. For example, since 2003, wineries have been able to obtain special permits to ship wine directly to consumers. N.C. Gen. Stat. § 18B-1001.1. And in 2019, the General Assembly created a special delivery-service permit. *Id.* § 18B-1001.4. Holders of such permits may deliver wine and beer on behalf of retailers located in North Carolina, so long as they first undergo ABC Commission-approved training. *Id.*

But throughout, the State has remained committed to its three-tier system. For example, in 1989, the State made it unlawful for beer producers to attempt to influence retail prices, *id.* § 18B-1303(c), or to coerce wholesalers into signing franchise agreements, *id.* § 18B-1304. The General Assembly explained that a goal of those provisions was to maintain a "stable and viable three-tier system of distribution of malt beverages to the public." *Id.* § 18B-1300. Likewise, and relevant here, the State has maintained limits on out-of-state retailers delivering alcohol directly to North Carolina consumers. *Id.* §§ 18B-102.1, -109.

Indeed, the legislature has gone so far as to explicitly "reaffirm its support" for the three-tier system in the text of the State's alcohol laws.

Act of July 18, 2019, S.L. 2019-18, 2019 N.C. Sess. Laws 163, 163-64. Just three years ago, the General Assembly amended the opening lines of its alcohol statutes to emphasize the State's objective to "limit rather than expand" commerce in alcohol, and to maintain "strict regulatory control . . . through the three-tier . . . system." *Id.* at 165-66, *codified at* N.C. Gen. Stat. § 18B-100. For this reason, if any portion of the State's alcohol code "is determined by a court . . . to be invalid or unconstitutional," the General Assembly has stated that "such provision shall be stricken" and the remainder of the three-tier system shall be disturbed as little as possible. *Id.*

B. The three-tier system furthers vital state interests.

North Carolina's three-tier system serves a number of important state interests. *Beskind v. Easley*, 325 F.3d 506, 516 (4th Cir. 2003). Specifically, as discussed below, the system's overlapping regulations promote product safety, help to prevent underage drinking, encourage responsible consumption, and assist in tax collection.

1. The system enhances safety.

The three-tier system ensures that North Carolina consumers can consume alcohol safely.

All products must be properly labeled. The federal Alcohol and Tobacco Tax and Trade Bureau requires wineries and breweries to list alcohol content and include health warnings on their bottles. 27 U.S.C. §§ 213-216; 27 C.F.R. § 4.32. In addition, the state ABC Commission must approve all beer and wine products sold in North Carolina. 14B NCAC 15C .0302. The Commission verifies that each label "truthfully describes the contents of the container" and includes the name and address of the manufacturer or bottler. *Id.* at 15C .0301, 15C .0304.

Once alcohol enters the North Carolina market, the three-tier system enables the State to respond swiftly to tainted or dangerous products. J.A. 285-86. There are currently 419 North Carolina-licensed wholesalers, each of which must maintain premises within the State. J.A. 314-15. Because all wine and beer must "come to rest" at a wholesaler before a retailer can sell it, N.C. Gen. Stat. §§ 18B-1113, -1114, the State "can easily and quickly trace [defective] products back to the source," perform inspections, and, if necessary, order recalls. J.A. 285-86.

Safety regulation continues at the retail level. All retailers must maintain physical premises in the State that are owned or managed by

a North Carolina resident and that are made available for inspection. N.C. Gen. Stat. §§ 18B-900(a)(2), -502. These requirements allow the State's Alcohol Law Enforcement ("ALE") agents—108 agents in total—to perform inspections efficiently. J.A. 331. They also allow ALE agents to build meaningful relationships with local law-enforcement officials, and collaborate on inspections and stings. J.A. 334-35.

2. The system encourages temperance and enables effective taxation.

The three-tier system also allows the State to restrain excess consumption and raise revenue through taxation.

As Defendant's expert William C. Kerr explained in his report, alcohol abuse has enormous societal costs—an estimated $7 billion for North Carolina in 2010 alone. J.A. 287. According to the Centers for Disease Control, around 1,400 North Carolinians die from acute alcohol-attributable causes each year, including drunk driving, poisoning, and suicide. Centers for Disease Control and Prevention, *Alcohol-Attributable Deaths Due to Excessive Alcohol Use, Annual Average for North Carolina 2011-2015*, *available at* https://bit.ly/3wU1NvN (last visited Nov. 22, 2021). Around the same number die from chronic causes like alcohol-related liver and heart disease. *Id.* And beyond

these premature deaths, alcohol abuse leads to lowered productivity, a wide range of crime, and increased healthcare costs. Jeffrey J. Sacks, et al., *2010 National and State Costs of Excessive Alcohol Consumption*, 49 Am. J. Preventive Med., Nov. 2015 at e73, e75-e76 (cited in J.A. 287, 292).

Fortunately, taxation is "one of the most effective policies for reducing alcohol-related harm." J.A. 289-94. Studies have shown that taxing alcohol products reduces rates of drunk driving, domestic violence, and other problems tied to overconsumption. J.A. 290-92. The causal mechanism here is clear: increasing prices reduces demand, and so taxes limit excessive consumption. *See* J.A. 289-90 (estimating that a 10% price increase would result in a 5% decrease in consumption).

Here, North Carolina achieves these results by taxing wine in two ways. First, wholesalers must pay approximately one dollar in excise tax on each gallon of wine. N.C. Gen. Stat. § 105-113.80; J.A. 360-62 ("An excise tax is a tax on a specific product or service."). Unlike a sales tax, which fluctuates based on price, this excise tax is tied to strictly to volume. N.C. Gen. Stat. § 105-113.80. As a result, wholesalers must pay the same per-unit tax no matter their resale price to retailers. *Id.*

This structure causes wholesalers to charge higher prices to retailers, who in turn charge higher prices to consumers. J.A. 289-90, 324. Second, retailers must collect and remit sales tax of at least 6.75% on all alcohol sales.[3] N.C. Gen. Stat. § 105-164.4; J.A. 365. When layered atop the excise tax, this tax results in higher prices and reduced demand.

In addition to reducing excessive alcohol consumption, these taxes also generate significant revenues for the State. In 2018, for example, the State raised an estimated $94 million in combined excise and sales taxes on wine alone. J.A. 286, 365.

Three other features of North Carolina's three-tier system are critical to preventing the evils of overconsumption that drove the State and nation to adopt Prohibition.

- First, by interposing wholesalers between producers and retailers, the State prevents the kind of vertical integration that led to excessive drinking under the pre-Prohibition era "tied-house" system. *See* N.C. Gen. Stat. § 18B-1119 ("A supplier . . . may not

[3] State sales tax is currently 4.75%. Beyond that, retailers must also collect local and transit tax, plus county tax of at least 2%. Thus, the effective sales tax is at least 6.75% across North Carolina.

. . . maintain an ownership interest in a wholesaler . . . .”); *Tennessee Wine*, 139 S. Ct. at 2463 & n.7 (“The three-tiered distribution model was adopted by States at least in large part to preclude [the tied-house] system.”).

- Second, the State bars wholesalers from offering volume discounts. 14B NCAC 15C .0704. This restriction prevents retailers from driving excessive consumer demand by purchasing and selling large quantities of alcohol at reduced prices. J.A. 287, 292.
- Third, the State bars retailers from buying alcohol on credit. 14B NCAC 15C .0604. Among other things, this restriction insulates retailers from market pressures that might encourage them to sell alcohol at below-cost prices—for example, retailers might otherwise need to quickly move inventory, even at a loss, in order to pay debts.

In sum, through taxes and other means, the State has carefully structured its regulatory system to prevent the worst excesses associated with overconsumption of alcohol.

3. The system helps to prevent sales to minors.

Finally, the three-tier system helps to combat underage drinking, even as buying patterns change in an age of online ordering.

For in-state retailers—that is, retailers operating in North Carolina under a license issued by the Commission—a single sale to an underage person can jeopardize their license and, therefore, their entire business. North Carolina law bars all alcohol sales to persons under the age of 21. N.C. Gen. Stat. § 18B-302(a). Violations are punishable as misdemeanors. *Id.* § 302.1(a). They may also give rise to tort liability to parties injured by negligent sales to minors. *Id.* §§ 18B-120 through -129. And relevant here, retailers may not hold alcohol permits if they have been convicted of an alcoholic beverage offense—including for underage sales—in the last two years. *Id.* § 18B-900(4); *see also id.* § 18B-104(a)(1)-(2) (ABC Commission may suspend or revoke a permit for "any violation of the [alcohol] laws").

The need to comply with the State's strict age-verification rules informs retailers' sales practices. In-state retailers have two ways to reach consumers outside of brick-and-mortar locations. First, they may ship alcohol to consumers by way of common carrier. *Id.* § 18B-1001.

Second, as mentioned above, since 2019, the State has allowed them to deliver beer and wine under special delivery-service permits.[4] *Id.* § 18B-1001.4.

Of these two options, most in-state retailers prefer direct delivery. J.A. 325, 335. The record shows that this preference is guided by their desire to ensure strict compliance with the State's ban on sale of alcohol to minors. J.A. 317, 325-26. Delivery-service permit holders are specially trained to verify that customers are of legal age, and are barred from leaving alcohol unattended at a place of delivery. *See* N.C. Gen. Stat. § 18B-1001.4(c) (permit holders may only deliver to "an individual who is at least 21 years of age and who immediately takes actual possession of the . . . beverages"). Although common carriers are likewise expected to confirm that recipients are of legal age, *e.g.*, *id.* §§ 18B-302(a), -1001.1, they do not receive the same training and lack the same incentives to ensure compliance. *See* J.A. 326 (reporting

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[4] The General Assembly recently clarified that employees of licensed retailers may deliver beer and wine without having to obtain delivery-service permits. Act of Sept. 10, 2021, S.L. 2021-150, § 26.1, 2021 N.C. Sess. Laws 21. However, such employees must still undergo Commission-approved delivery training—including training in age verification—before they can deliver. *Id.*

incidents of common carriers leaving wine unattended at customers' homes).

Thus, although North Carolina technically allows in-state retailers to ship alcohol via common carrier, the State's three-tier system encourages them to deliver alcohol directly instead, to ensure proper age-verification measures are followed. This aspect of the system reduces the ability of minors to obtain alcohol via online orders.

C. The district court rejected Plaintiffs' effort to bypass the three-tier system.

Plaintiffs are a Florida-based wine retailer, its owner, and three North Carolina residents who enjoy wine. J.A. 7-8. They claim that North Carolina violates the dormant Commerce Clause—and exceeds its authority under the Twenty-first Amendment—by prohibiting out-of-state retailers from shipping wine to North Carolina consumers while permitting in-state retailers to do so. J.A. 9-12.[5]

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[5] Plaintiffs sued A.D. Guy, Jr., in his official capacity as then-Chair of the ABC Commission. Chairman Guy resigned as Chair of the Commission on September 17, 2021. His successor has not yet been named. Plaintiffs also sued Joshua H. Stein, in his official capacity as the Attorney General of North Carolina. The district court dismissed the Attorney General as a defendant, J.A. 35, and Plaintiffs do not challenge that dismissal on appeal, J.A. 47; Br. at 5.

As Plaintiffs' complaint makes clear, they seek a sweeping injunction that would bar the State from enforcing all "laws, rules and regulations" that restrict direct sales by out-of-state retailers. J.A. 12. They specifically challenge three statutes—N.C. Gen. Stat. §§ 18B-102.1(a), -109, and -900(a)(2)—but also challenge all "related laws, practices, and regulations that individually and collectively prohibit [out-of-state retailers] from selling, delivering, or shipping wine directly to North Carolina residents." J.A. 6. Plaintiffs' brief in this Court narrows this request somewhat by identifying eight statutes that they say are at least "relevant" to their claim. *See* Br. at 3-4. Those statutes:

- Make it unlawful "for any person who is an out-of-state retail or wholesale dealer" to ship alcohol directly to North Carolina consumers, N.C. Gen. Stat. § 18B-102.1;
- Prohibit North Carolina consumers from receiving alcohol shipped from outside the state, *id.* § 18B-109;
- Allow licensed in-state retailers to ship wine directly to consumers, *id.* § 18B-1001(4);
- Authorize both in-state and out-of-state wineries to obtain wine-shipper permits and ship directly to consumers, *id.* § 18B-1001.1;

- Make it generally unlawful to "sell, transport, import, deliver, furnish, purchase, consume, or possess" alcohol except as authorized by the State, *id.* § 18B-102(a);
- Require all alcohol sellers to obtain a permit, *id.* § 18B-304;
- Require retailers to purchase their alcohol from North Carolina-licensed wholesalers, *id.* § 18B-1006(h); and
- Require retail locations to be owned or managed by a North Carolina resident, *id.* § 18B-900(a)(2).[6]

After discovery, the district court granted summary judgment to Chairman Guy. J.A. 12. The court began with an overview of the history of alcohol regulation in North Carolina—from tied-houses, to Prohibition, to the eventual adoption of the three-tier system. J.A. 16-17. It then proceeded to consider the interplay between the dormant Commerce Clause and the Twenty-first Amendment. Although the court believed the challenged statutes to discriminate against out-of-state commerce, J.A. 22, it recognized that the ordinary dormant

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6 Plaintiffs inaccurately state that "[r]etailer permits will be issued only to state residents." Br. at 4. In reality, nonresidents can obtain retail permits by designating a resident to receive service of process and "manag[e] the business for which permits are sought." N.C. Gen. Stat. § 18B-900(a)(2)b.

Commerce Clause analysis "changes . . . when the article of commerce being regulated is alcohol." J.A. 20. In this situation, a regulation is constitutional when it "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." J.A. 20 (quoting *Tennessee Wine*, 139 S. Ct. at 2474).

To analyze that issue, the court first observed that North Carolina has an important interest in maintaining its three-tier system for alcohol regulation—a system that is "inherently tied to public health and safety measures the Twenty-first Amendment was passed to promote." J.A. 21. It further observed that North Carolina's ban on out-of-state shipping was an "essential feature" of that system. J.A. 21-22. After all, the court reasoned, allowing out-of-state retailers to ship directly to North Carolina consumers would effectively enable them to bypass the three-tier system entirely. J.A. 22-24. Thus, the court held, Plaintiffs' challenge presents "a choice between virtually eliminating North Carolina's three-tier system, which the Supreme Court and multiple Courts of Appeals have determined is unquestionably legitimate, and maintaining the status quo." J.A. 24. Faced with this

choice, the court rejected Plaintiffs' claim and upheld North Carolina's challenged alcohol regulations as constitutional. *Id.*

Plaintiffs timely appealed. J.A. 47.

SUMMARY OF THE ARGUMENT

Section 2 of the Twenty-first Amendment grants States special authority to regulate the sale and distribution of alcohol. Thus, when considering challenges to state alcohol laws, courts eschew the typical dormant Commerce Clause analysis in favor of a "different inquiry." *Tennessee Wine*, 139 S. Ct. at 2474. Even if a law discriminates against interstate commerce, it is nonetheless constitutional if it can be "justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.*

The Supreme Court has been clear that three-tier systems like North Carolina's are "unquestionably legitimate." *Granholm*, 544 U.S. at 488-89. So, too, are the "essential" features of such systems. *Tennessee Wine*, 139 S. Ct. at 2471; *see also North Dakota v. United States*, 495 U.S 423, 432 (1990) (plurality opinion); *id.* at 441 (Scalia, J., concurring in judgment). Here, North Carolina's ban on out-of-state retail sales is integral to its three-tier system. The restriction ensures

that nearly all wine must pass through each of the system's three tiers before it reaches North Carolina consumers. By contrast, expanding shipping privileges to out-of-state retailers would open the market to less-regulated wine, undermining the three-tier system and the valid interests it promotes. The Twenty-first Amendment allows North Carolina to enact and enforce regulations to prevent that result.

In assessing this issue, this Court need not draw on a blank slate. Both the Sixth and Eighth Circuits have recently upheld identical shipping bans on the same grounds as the district court below. *See Sarasota Wine*, 987 F.3d at 1184; *Whitmer*, 956 F.3d at 871. As those courts recognized, allowing out-of-state retailers to ship wine directly to consumers "would create a sizeable hole in the three-tier system" and thwart the State's legitimate Twenty-first Amendment interests. *Whitmer*, 956 F.3d at 872.

This case is no different. The challenged provisions here easily pass muster for two specific reasons, each of which provides independent grounds to affirm.

First, the Chairman presented ample concrete evidence that the challenged provisions are nonprotectionist measures that are integral to

the State's three-tier system. Through that system, the State advances several key interests. The system ensures that alcohol products are safe. It curbs overconsumption while raising substantial revenue for the State. And it helps to limit underage sales. But absent the challenged provisions, out-of-state retailers would be able to circumvent the three-tier system entirely—and impair all of these important state interests. The Constitution does not require this result.

Second, the dormant Commerce Clause is implicated only when States discriminate against interstate commerce, meaning that they favor in-state economic interests over out-of-state interests. Here, North Carolina imposes evenhanded requirements on all retailers. Although one of the challenged provisions pertains only to out-of-state retailers, it affords no practical advantage to in-state retailers. This is so because North Carolina provides a ready path for out-of-state retailers to also obtain a permit to deliver wine to consumers. Thus, while the challenged provisions clearly pass constitutional scrutiny, this Court could alternatively find that the dormant Commerce Clause is not implicated here at all.

Finally, even if this Court were to believe that North Carolina's scheme is unconstitutional, Plaintiffs have sought the wrong remedy. The appropriate remedy here would be to curtail shipping privileges for in-state retailers, not to extend them for out-of-state retailers. Equal treatment can be achieved either way. But North Carolina's alcohol statutes make clear that if any aspect of the State's regulatory scheme is found unconstitutional, its three-tier system should be disrupted as little as possible. N.C. Gen. Stat. § 18B-100. In harmony with that guidance, this Court and others have taken a "minimum-damage" approach to remedies in Twenty-first Amendment cases. *Beskind*, 325 F.3d at 519. If necessary, it should follow the same path here.

In sum, North Carolina's three-tier system for regulating alcohol advances a number of legitimate, non-protectionist interests. In this suit, Plaintiffs aim to sidestep the three-tier system altogether. Allowing them to do so would gravely weaken the system and undermine the public health and safety interests it serves.

ARGUMENT

Standard of Review

This Court reviews a district court's ruling on cross-motions for summary judgment de novo. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

Discussion

I. North Carolina's Ban on Direct Shipment of Wine by Out-of-State Retailers Is Constitutional.

A. States have broad authority to regulate the sale and distribution of alcohol.

The Twenty-first Amendment affords each State "virtually complete control" over the distribution of alcohol within its borders. *Granholm*, 544 U.S. at 488. Section 2 of the Amendment expressly bars the "[t]he transportation or importation" of alcohol in a manner inconsistent with state law. U.S. Const. amend. XXI, § 2. As the Supreme Court has held, Section 2's purpose was to "give each State the authority to address alcohol-related public health and safety issues" as it sees fit. *Tennessee Wine*, 139 S. Ct. at 2474.

This purpose is confirmed by the Amendment's history. At the time the Amendment was enacted, public support for Prohibition had

"substantially diminished but not vanished completely." *Id.* at 2467. Section 2's text reflects that political reality: rather than undo Prohibition entirely, it returned to each State the authority to decide how best to regulate alcohol. *Id.* at 2467, 2474.

That said, the Twenty-first Amendment forms part of a "unified constitutional scheme," one that must co-exist alongside other constitutional provisions. *Id.* at 2462-63. Relevant here, the Supreme Court has held that the Commerce Clause impliedly prohibits state laws that "unduly restrict interstate commerce." *Id.* at 2459. This dormant aspect of the Commerce Clause forbids States from enacting alcohol laws for purely protectionist purposes. *Id.* at 2469. Even so, States still retain considerable "leeway" when regulating alcohol. *Id.* at 2474. After all, alcohol is the only consumer product expressly mentioned in the Constitution. Thus, "Section 2 gives the States regulatory authority that they would not otherwise enjoy." *Id.*

Because of States' unique constitutional authority to regulate alcohol, dormant Commerce Clause challenges to alcohol laws require courts to "engage in a different inquiry" than for laws involving other products. *Id.*

The Supreme Court's most recent case in this area is *Tennessee Wine & Spirits Retailers Association v. Thomas*, 139 S. Ct. 2249 (2019). There, the Court considered Tennessee's extended durational-residency requirements for liquor retailers. New license applicants were required to have lived in the State for two years, and renewal applicants for ten years. *Id.* at 2456-57. The Court held that these requirements were unconstitutional, because they strongly favored Tennessee residents over outsiders and had little relation to any legitimate public health or safety interest. *Id.* at 2474-76.

In reaching this conclusion, the Supreme Court set forth a two-part test for evaluating dormant Commerce Clause challenges to state alcohol laws. A threshold question is whether a challenged provision "discriminates" against out-of-state economic interests, such that the Commerce Clause is implicated at all. *Id.* at 2469-70. If not, the analysis ends there. However, even if a law is discriminatory, a reviewing court must "ask whether the challenged requirement can [nonetheless] be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* at 2474.

As the Supreme Court has made clear, this second inquiry is deferential. So long as a law's "predominant effect" is to promote a legitimate Twenty-first Amendment interest, then section 2 "shield[s]" it from scrutiny under the dormant Commerce Clause. *Id.*

Moreover, the list of valid Twenty-first Amendment interests is expansive. It includes "promoting temperance, ensuring orderly market conditions, and raising revenue" in connection with alcohol. *Beskind*, 325 F.3d at 513 (quoting *North Dakota*, 495 U.S. at 432 (plurality opinion)). And as *Tennessee Wine* makes clear, this list of interests is not exhaustive. States may validly pursue any other interest tied to "regulating the health and safety risks posed by the alcohol trade." 139 S. Ct. at 2472, 2474.

Notwithstanding the Supreme Court's clear guidance that States have greater leeway to regulate alcohol than other products, Plaintiffs urge this Court to adopt a different standard. They say that North Carolina must allow out-of-state shipping of alcohol unless it can prove that its legitimate interests "cannot be adequately served by reasonable nondiscriminatory alternatives." Br. at 28, 46. But that is the rule for products *other than alcohol*. *See Dep't of Revenue of Ky. v. Davis*, 553

U.S. 328, 338 (2008) (noting that, under ordinary dormant Commerce Clause jurisprudence, state laws that discriminate against out-of-state economic actors "will survive only if [they] advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives").

As the Supreme Court explained in *Tennessee Wine*, the Twenty-first Amendment requires that laws relating to alcohol be treated "different[ly]." 139 S. Ct. at 2474. Because section 2 "gives the States regulatory authority they would not otherwise enjoy," the question is not merely whether a law discriminated against interstate commerce, but also "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.*

The goal of this latter inquiry is to suss out whether a law's predominant effect is protectionism, as opposed to advancing valid Twenty-first Amendment interests. For example, if a law is clearly "ill suited" to promote valid interests, that may offer a clue that economic protectionism is its true aim. *Id.* at 2467. But the fit between the state interest and the alcohol regulation need not be perfect. The State may

show that an alcohol-related law "can be justified [on] . . . legitimate nonprotectionist ground[s]" without ticking through every conceivable alternative means of achieving its interests. *Id.* at 2474. Otherwise, the "different inquiry" required by *Tennessee Wine* would merge with the regular dormant Commerce Clause test. Plaintiffs are wrong to conflate the two inquiries.[7]

In sum, Supreme Court precedent definitively establishes that States may regulate alcohol to advance legitimate public health and safety objectives. As shown below, the provisions challenged here easily satisfy this standard.

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[7] As explained above, the question of whether there are adequate-alternative means of achieving the State's interests is of only limited relevance. *See supra* at 30-31; *Tennessee Wine*, 139 S. Ct. at 2467. But even accepting that the existence of adequate alternatives could support a finding that a State was motivated by protectionism, the alternatives Plaintiffs propose are wholly *in*adequate to the State's needs. For example, Plaintiffs suggest that North Carolina could allow out-of-state retailers to ship wine to State-operated liquor stores instead of directly to consumers. Br. at 46-47. But that would simply be another means of circumventing core components of the three-tier system, including the requirement that retail alcohol first pass through a wholesaler.

B. The Twenty-first Amendment authorizes North Carolina to restrict shipping by out-of-state retailers.

At the outset, there can be no dispute that the State's practice of "funnel[ing] sales through [a] three-tier system" is an "unquestionably legitimate" use of its Twenty-first Amendment authority. *Granholm*, 544 U.S. at 466, 489 (quoting *North Dakota*, 495 U.S. at 432). In fact, "mak[ing] alcohol from every source equally amenable to state regulation" is "precisely what § 2 is for." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 854 (7th Cir. 2000) (Easterbrook, J.).

As detailed above, North Carolina's three-tier system furthers a number of important public health and safety interests. Among other things, it ensures product safety; it helps to curb overconsumption; and it prevents sales to minors. *See supra* at 10-18. But the system only works if alcohol actually moves through it. Opening the market to retail shipments from out of state "necessarily means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all." *Whitmer*, 956 F.3d at 872. And once that happens, "the least regulated (and thus the cheapest) alcohol will win."

Id.; *see also Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 n.3 (2d Cir. 2009) (same).[8]

To be sure, section 2 does not authorize every regulation tethered to a three-tiered system; "each variation must be judged based on its own features." *Tennessee Wine*, 139 S. Ct. at 2472. For example, in *Tennessee Wine*, the Supreme Court struck down a two-year residency requirement for retail liquor-store license applicants. *Id.* at 2476. Although that requirement was a feature of Tennessee's three-tier

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[8] Plaintiffs fault the district court for acknowledging that out-of-state shipping would put in-state retailers at a "competitive price disadvantage." Br. at 34 (quoting J.A. 24). But the district court did not hold that the ban could be justified on that basis. Rather, the court merely observed that out-of-state retailers have the potential to destabilize the three-tier system by undercutting their in-state counterparts. Thus, when "[g]iven a choice between virtually eliminating North Carolina's three-tier system . . . and maintaining the status quo," the district court "ch[ose] the latter." J.A. 24.

Plaintiffs also argue that the district court erred by distinguishing producers from retailers. Br. at 34 (citing J.A. 23). It is true that the district court's analysis overlooked that *Tennessee Wine* called for the same test to apply to all alcohol laws, regardless of whether they regulate producers, wholesalers, or retailers. 139 S. Ct. at 2470-71. But any excessive focus on the different tiers of the system is of little consequence. Overall, the district court's decision rests on a sound application of Twenty-first Amendment principles. *See* J.A. 24 (holding that the challenged laws are justified as essential to maintaining the integrity of the three-tier system).

system, it was clearly discriminatory, poorly served Tennessee's only proffered nonprotectionist interest (vetting applicants), and could not fairly be called an "essential" feature of the three-tier scheme. *Id.* at 2471, 2475.

Here, by contrast, the record shows that allowing direct shipping of alcohol by out-of-state retailers would significantly undermine North Carolina's three-tier system and the interests it promotes. This is true for at least three reasons.

First, the three-tier system enhances safety. By funneling all beer and wine through a limited number of wholesalers, the State can easily monitor for defective and dangerous products and, if needed, order recalls. J.A. 285-86. In the same vein, there are relatively few licensed off-premises wine retailers in North Carolina (8,474), all of which are subject to routine inspections by the State's 108 ALE agents. J.A. 315. But there is no feasible way for the State to inspect the 400,000-plus wine retailers located throughout the United States or, for that matter, any out-of-state wholesalers they may purchase from. J.A. 314-16. Thus, allowing out-of-state retail shipping would hamstring North Carolina's safety efforts.

Second, the three-tier system reduces consumption and raises revenue. Taxation is "one of the most effective policies for reducing alcohol-related harm." J.A. 289-94. North Carolina's excise and sales taxes drive down alcohol consumption by preventing the product from becoming unduly cheap. *See* J.A. 289-90, 323-24. And they generate significant revenues that the State can use to combat alcohol's adverse societal effects. J.A. 289, 365. But the State cannot tax alcohol as effectively if it comes from elsewhere. The record shows that North Carolina loses out on any excise taxes that may be collected when out-of-state retailers purchase alcohol from out-of-state wholesalers or other suppliers. J.A. 286, 361-62. And although out-of-state retailers are supposed to collect and remit North Carolina sales tax, they often do not. J.A. 365. Allowing shipping from out of state would therefore substantially weaken North Carolina's ability to influence alcohol prices and raise revenue via taxation. And of course, an influx of cheap alcohol would increase the risk of excess consumption and related public health problems.

Third, the three-tier system helps to limit underage drinking. According to one study, minors who attempt to purchase alcohol online

succeed in receiving it around 45% of the time, largely due to insufficient age verification. J.A. 337-342 (Rebecca S. Williams & Kurt M. Ribisl, *Internet Alcohol Sales to Minors*, Arch. Pediatr. Adolesc. Med. 808-13 (2012)). As part of its three-tier system, North Carolina offers licensed retailers the option to deliver alcohol to consumers. N.C. Gen. Stat. § 18B-1001.4. Permit holders must undergo state-approved training in age verification and are prohibited from leaving alcohol unattended at a place of delivery. *Id.* § 18B-1001.4(b)-(c). In-state retailers prefer to use this delivery option instead of shipping by common carrier, in part because a single sale to an underage person can jeopardize their licenses. J.A. 322, 325-26, 335. In contrast, out-of-state retailers are more likely to use common carriers, who are supposed to conduct age verification, but often do not. J.A. 326. Thus, allowing shipping by out-of-state retailers will increase the risk that minors obtain alcohol.

Plaintiff B-21 illustrates the problems with extending shipping privileges to out-of-state retailers. It ships wine to many other States, but has never been inspected by any State other than Florida. J.A. 345. Although it discusses age verification in its website's terms of service, it

otherwise relies on common carriers to confirm its customers' ages. J.A. 249-51. And it has given no indication that it would be willing to limit its sales to wine purchased from a North Carolina wholesaler, meaning that the State will not collect excise taxes on the wine that it sells. J.A. 286, 361-62.

In sum, the record evidence shows that the challenged provisions are essential to the three-tier system, and advance numerous important state interests that the system is designed to protect. They are therefore constitutional.[9]

Indeed, even since *Tennessee Wine* was decided in 2019, two Courts of Appeals have already evaluated laws indistinguishable from the ones challenged here. Both concluded that States may ban wine

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[9] Plaintiffs are right that States should ordinarily come forward with "concrete evidence" to support their interests in regulating alcohol. Br. 14-15, 42 (quoting *Tennessee Wine,* 139 S. Ct. at 2474). But Plaintiffs are wrong to the extent they suggest that this standard means that Twenty-first Amendment claims can never be resolved on the pleadings. *See Sarasota Wine*, 987 F.3d at 1184 (affirming 12(b)(6) dismissal). Regardless, as the summary-judgment record here shows, the Commission has built a substantial evidentiary record that amply demonstrates that the challenged provisions advance public health and safety.

shipments from out of state in order to protect their three-tiered systems. And in both cases, the Supreme Court later denied certiorari.

In *Lebamoff Enterprises v. Whitmer*, the Sixth Circuit considered a Michigan law that allowed licensed, in-state retailers to deliver wine directly to consumers, but barred unlicensed, out-of-state retailers from doing the same. 956 F.3d at 867 (Sutton, J.). The Sixth Circuit upheld this practice against a dormant Commerce Clause challenge. *Id.*

In so ruling, the Sixth Circuit relied on precedents that predated *Tennessee Wine*. Specifically, at least three Circuits had held that States may permit in-state retailers to deliver directly to consumers, even while prohibiting out-of-state retailers from doing so. *See Bridenbaugh*, 227 F.3d at 853-54 (7th Cir.); *Arnold's Wines*, 571 F.3d at 191 (2d Cir.); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010). Drawing on those holdings, the Sixth Circuit reasoned that "[n]ew delivery options"—including intrastate delivery by common carrier—do not violate the Commerce Clause. *Whitmer*, 956 F.3d at 873. Instead, they "are simply new ways of allowing the heavily regulated third tier to do business." *Id.*

Furthermore, the court noted that absent the challenged delivery restrictions, Michigan faced "a substantial risk that out-of-state alcohol [would] get diverted into the retail market," thereby "disrupting the alcohol distribution system and increasing alcohol consumption." *Id.* at 872 (cleaned up). Put another way, "Michigan could not maintain a three-tier system, and the public-health interests the system promotes, without barring direct deliveries from outside its borders." *Id.* at 873. For this reason, the court held that the Twenty-first Amendment allowed Michigan to bar out-of-state retailers from shipping wine to in-state consumers. *Id.* at 870.

The Eighth Circuit agreed in *Sarasota Wine Market, LLC v. Schmitt*. 987 F.3d at 1184. Like Michigan, Missouri's alcohol control laws permit only licensed in-state retailers to ship alcohol directly to consumers. *Id.* at 1176. And like in *Whitmer*, an out-of-state wine retailer brought a dormant Commerce Clause challenge to Missouri's interstate shipping ban. *Id.* at 1177. The *Sarasota Wine* court followed *Whitmer* in recognizing that Missouri's ban is "an essential feature" of the State's three-tier system. *Id.* at 1184. And because eliminating the shipping ban would "create[] a sizeable hole" in that system, the court

upheld Missouri's law. *Id.* at 1183-84 (embracing the reasoning in *Whitmer*, 956 F.3d at 869-75).

There is no meaningful difference between the claims brought in *Whitmer* and *Sarasota Wine* and the claim at issue here. Thus, to accept Plaintiffs' challenge, this Court would be required to break with its sister Circuits. Indeed, Plaintiffs do not seriously claim otherwise. *See* Br. at 30.

However, in an attempt to counter the above analysis, Plaintiffs claim that North Carolina has abandoned its three-tier system because it allows *wineries* to ship directly to consumers. Br. at 33 & n.10. It is true that both in-state and out-of-state wineries may obtain specialized wine-shipper permits that allow them to ship directly to consumers. N.C. Gen. Stat. § 18B-1001.1. But compared to retailers, wineries are far fewer in number and make up just a small fraction of total sales to consumers.

Even if that were not the case, the Twenty-first Amendment is not an either-or proposition. Instead, it "gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable." *Tennessee Wine*, 139 S. Ct. at 2474. North

Carolina has determined that its three-tier system can tolerate a limited exception for wineries. That judgment is the State's to make; it does not mean that concerns about out-of-state retail sales somehow evaporate.

In fact, other courts have rejected the argument that States must abandon their entire three-tier systems if they allow limited direct sales between producers and consumers. For example, in *Whitmer*, the Sixth Circuit upheld Michigan's ban on out-of-state delivery even though that State also allows wineries to deliver directly to consumers. 956 F.3d at 875. And likewise, Indiana's decision to ban out-of-state retail shipping while allowing wineries to ship directly to consumers has recently survived a dormant Commerce Clause challenge as well. *Chicago Wine Company v. Holcomb,* No. 1:19-cv-02785-TWP-DML, 2021 WL 1196175, at *2 n.2, *10 (S.D. In. Mar. 30, 2021), *appeal docketed* No. 21-2068 (7th Cir.).

Plaintiffs' statement that sixteen jurisdictions have experienced "no problems" with interstate retail shipping is beside the point. Br. at 10, 44. Some States are more permissive than North Carolina, while others are more restrictive. But the Twenty-first Amendment means

that North Carolina can decide for itself how best to structure its "unquestionably legitimate" system. *Granholm*, 544 U.S. at 488-89.

In sum, North Carolina is free to "funnel" sales through its particular version of the three-tier system, which serves many legitimate interests. The challenged provisions prevent out-of-state retailers from undercutting that system—and the important public health and safety interests that the system protects. "There is nothing unusual about the three-tier system, about prohibiting direct deliveries from out of state to avoid it, or about allowing in-state retailers to deliver alcohol within the state." *Whitmer*, 956 F.3d at 872. The district court was therefore right to uphold North Carolina's scheme for regulating wine sales as constitutional.

C. The kind of discrimination targeted by the dormant Commerce Clause is not present here.

Because the challenged provisions are authorized by the Twenty-first Amendment, there is no need to decide whether they discriminate against interstate commerce. *See Whitmer*, 956 F.3d at 870-71 (doubting "whether the kind of discrimination targeted by the dormant Commerce Clause [was] afoot," but upholding Michigan's shipping ban without reaching the issue). However, as an alternative basis for

affirmance, this Court could find that the State's evenhanded licensing requirements for alcohol retailers do not implicate the dormant Commerce Clause at all. *See United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005) ("[The Court] may affirm on any grounds apparent from the record.").

The district court thought several of the challenged statutes were facially discriminatory and, accordingly, did "not go into an extensive dormant Commerce Clause analysis." J.A. 22. But the dormant Commerce clause does not apply when States regulate alcohol via "evenhanded licensing requirement[s]." *Granholm*, 544 U.S. at 492-93. And nearly all of the statutes challenged here apply exactly the same way to in-state and out-of-state retailers alike.

For example, in order to sell to North Carolina consumers, *every* retailer must (1) maintain physical premises in the State and submit to inspections, N.C. Gen. Stat. § 18B-502; (2) collect and remit the same sales tax, *id.* § 105-164.4; and (3) limit their sales to alcohol that has passed through a North Carolina wholesaler, *id.* § 18B-1006(h). Regardless of residency, a retailer may obtain permits by designating a North Carolinian to "manag[e] the business for which permits are

sought." *Id.* § 18B-900(a)(2)b. And all retailers licensed to do business in North Carolina may deliver on the same terms, or ship directly to consumers via common carrier from an in-state location. *Id.* §§ 18B-1001, -1001.4.

Each of these requirements is facially neutral, and far afield from alcohol regulations that have been invalidated by courts in the past. For example, the Supreme Court has invalidated Hawaii's practice of exempting certain locally produced alcohol from a 20% excise tax applied to all other alcohol. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265 (1984). In that case, the record revealed that the tax exemption was discriminatory on its face, in its purpose, and in its effect. *Id.* at 271. Likewise, in *Granholm*, the Supreme Court held that Michigan and New York "obvious[ly]" discriminated against wineries from out of state by allowing only in-state wineries to bypass their respective three-tier systems. 544 U.S. at 466-67, 473. The inverse is true here: North Carolina imposes the same requirements on all wine retailers under its three-tier system.

To be sure, one of the challenged provisions, N.C. Gen. Stat. § 18B-102.1, states that it applies only to retailers from out of state.

That statute makes it unlawful for "any person who is an out-of-state retail[er]" to ship alcohol directly to a North Carolina consumer. But even this law is not discriminatory in the relevant sense. For a law to be discriminatory under the dormant Commerce Clause, it must actually afford preferential treatment to in-state economic interests. *Granholm*, 544 U.S. at 472 ("[S]tate 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.'" (quoting *Or. Waste Sys., Inc. v. Dep't of Envir. Quality of State of Or.*, 511 U.S. 93, 99 (1994)).

Here, as a practical matter, section 18B-102.1 affords no tangible benefit to in-state retailers. This is so because it is generally unlawful for North Carolina consumers to "have any alcoholic beverage mailed or shipped to [them] from outside this State," no matter who sends it. *Id.* § 18B-109(a). Thus, even if a North Carolina retailer wants to ship alcohol into the State (say, from an out-of-state warehouse), there are no eligible consumers to receive it. So the one challenged law that facially distinguishes between in-state and out-of-state retailers does not have any impermissible discriminatory effect.

For similar reasons, the Eighth Circuit has recently upheld the dismissal of a nearly identical challenge to Missouri's limits on direct-to-consumer shipping by out-of-state retailers. *Sarasota Wine*, 987 F.3d at 1184 (upholding the Missouri laws at issue both as "essential feature[s] of its three-tiered scheme" and, separately, because they "apply evenhandedly to all who qualify for a Missouri retailers license"). As here, an out-of-state wine dealer and several in-state consumers challenged Missouri's requirements that retailers (1) maintain a physical presence in that State and (2) only sell wine purchased from a Missouri wholesaler. *Id.* at 1177, 1182. And as here, Missouri imposes the same licensing requirements "on in-state *and* out-of-state retailers" alike. *Id.* at 1184 (emphasis added). Precisely because Missouri treats all retailers evenhandedly, the court concluded that the challenged requirements "do not discriminate against out-of-state retailers." *Id.* The same is true of North Carolina.

Finally, Plaintiffs mistakenly argue that two of the challenged statutes are *per se* discriminatory. These statutes prohibit shipments from out of state, and require retailers to purchase their alcohol from North Carolina wholesalers. N.C. Gen Stat. §§ 18B-102.1, -1006(h).

Plaintiffs claim that these statutes violate a supposed "holding" from the Supreme Court's decision in *Granholm*, 544 U.S. 460. Br. at 38. But they misquote *Granholm*'s language and, in doing so, overstate its import.

In that case, Michigan and New York had established nearly insurmountable barriers to entry for out-of-state wineries. In finding those laws to be discriminatory, the Supreme Court reiterated two rules of thumb. *Granholm*, 544 U.S. at 475. First, it said that courts should "view[] with particular suspicion state statutes requiring business operations" to be done in state if it would be more efficient to do them elsewhere. *Id.* Plaintiffs take liberties with that cautionary statement, which they transform into a hard-and-fast rule by asserting incorrectly that the Court held that "States . . . *cannot*" adopt such laws. Br. at 38 (emphasis added).

Second, the Court advised that States may not "require an out-of-state firm to become a resident" in order to compete on equal terms. *Granholm*, 544 U.S. at 475 (quotations omitted). That point has little relevance here. As noted above, North Carolina does not require firms to become residents in order to obtain retail permits. N.C. Gen. Stat.

§ 18B-900(a)(2)b. Instead, out-of-state retailers may operate in North Carolina by designating a North Carolinian to "manag[e] the business for which permits are sought" and complying with the three-tier system. *Id.*

In sum, North Carolina regulates all alcohol retailers evenhandedly. All but one of the challenged requirements apply to in-state and out-of-state retailers alike. And the single provision that is limited to out-of-state retailers does not result in any preferential treatment to in-state retailers. *Granholm*, 544 U.S. at 472. Thus, while this Court can and should affirm on Twenty-first Amendment grounds, it is also clear that Plaintiffs' claims of discrimination ring hollow.

II. If Plaintiffs Were to Prevail, the Proper Remedy Would Be to Ban All Direct Shipment of Wine.

The challenged provisions are constitutional. But even if this Court disagrees, the correct remedy is to restrict in-state shipping, not to extend shipping privileges to out-of-state retailers.

"When the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (quotations and emphasis omitted). A court may accomplish that result by either extending benefits to the

excluded class ("leveling up") or by withdrawing benefits from the favored class ("leveling down"). *Id.* at 740 & n.8; *see Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1806 (2015).

For several reasons, the correct choice in this case would be to curtail shipping privileges rather than expand them.

First and foremost, the choice of remedy is always "governed by the legislature's intent, as revealed by the statute at hand." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017) (citing *Heckler*, 465 U.S. at 427); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) (legislative intent is the "touchstone"). And here, there can be no doubt what North Carolina "would have preferred had it known of the constitutional problem." *Whitmer*, 956 F.3d at 876.

The opening lines of the State's alcohol statutes provide: "This Chapter is intended to establish a uniform system of control over" alcohol, which is "prohibited except as authorized." N.C. Gen. Stat. § 18B-100. They go on to say that "[i]f any provision . . . is determined by a court . . . to be invalid or unconstitutional, such provision shall be stricken." *Id.* And what remains must be construed to "limit rather than expand commerce in alcoholic beverages" and to "enhance strict

regulatory control over taxation, distribution, and sale[s] through the three-tier regulatory system." *Id.* In short, if part of its regulatory scheme is deemed unconstitutional, North Carolina has strongly declared its desire for its three-tier system to be disrupted as little as possible.

In *Whitmer*, the Sixth Circuit applied a similar severability clause to reverse a district court order that extended shipping privileges to out-of-state retailers. 956 F.3d at 876 (considering Mich. Comp. Laws § 436.1925). As here, that clause provided that courts "should invalidate [defective] provision[s] and leave the rest of the statute—and the rest of the three-tier system—intact." *Id.* Because the clause clearly conveyed the legislature's intent, the court held, the district court was wrong not to heed it. *Id.*

Likewise here, Plaintiffs' request that this Court "expand shipping rights" is wholly at odds with North Carolina's expressed legislative intent. Instead, the way to equalize shipping privileges without upending other core components of the three-tier system would be to "level down" and prohibit shipment by in-state retailers.

In an attempt to avoid this natural result, Plaintiffs offer a novel argument. Were this Court to "level down" and remove in-state retailers' shipping privileges, it would do so by striking portions of N.C. Gen. Stat. §§ 18B-1001(3) and (4)—the provisions that affirmatively authorize in-state retailers to ship wine to consumers. But Plaintiffs say they are not challenging those provisions. Br. at 49. For that reason, they argue, "leveling down" would be contrary to the instructions in N.C. Gen. Stat. § 18B-100 that, if any provision is determined to be unconstitutional, "*such provision* shall be stricken." *Id.* (emphasis added).

However creative, this argument is inconsistent with Plaintiffs' own complaint. From the outset of this litigation, Plaintiffs have challenged *all* North Carolina statutes and regulations that "individually and collectively" allow in-state retailers to ship wine while preventing out-of-state retailers from doing the same. J.A. 6, 12. And more fundamentally, even if this argument were consistent with their complaint, Plaintiffs could not, through artful pleading, "dictate the course that cures the constitutional violation." *Beskind*, 325 F.3d at 520.

Plaintiffs further argue that the statement of legislative intent in section 18B-100 "cannot be taken seriously" because North Carolina has cautiously moved to increase access to alcohol in recent years. Br. at 51 (collecting statutes). But virtually all of the recent statutes they cite pertain to alcohol that has passed through North Carolina's three-tier system. There is no contradiction between the General Assembly's support for a three-tier system and its incremental modernization of that system. After all, each State may regulate alcohol "in accordance with the preferences of its citizens." *Tennessee Wine*, 139 S. Ct. at 2474; *accord Sarasota Wine*, 987 F.3d at 1184 ("States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." (quotations omitted)).

The Twenty-first Amendment recognizes that States have the sovereign authority to expand access to alcohol at a measured pace. Through its three-tier system, North Carolina aims to "carefully balance[] fair competition with health and public safety concerns." S.L. 2019-18. To that end, if part of its regulatory scheme is found to be problematic, it prefers a small step back instead of a big leap forward.

Thus, the legislative intent here is clear, and this Court should not "use its remedial powers to circumvent" that intent. *Heckler*, 465 U.S. at 739 n.5 (quotations omitted). But even if the General Assembly had not been so explicit, the proper remedy would still be to ban in-state shipping.

This Court takes a "minimum-damage" approach to remedies in Twenty-first Amendment cases. *Beskind*, 325 F.3d at 519. The Constitution affords "special protection . . . to state [alcohol] control policies," so they receive "a strong presumption of validity and should not be set aside lightly." *Id.* (quoting *North Dakota*, 495 U.S. at 433 (plurality opinion)). Accordingly, the baseline assumption is that, "when presented with the need to strike down one or more" of a State's alcohol laws, the best course is the one "that least destroys the regulatory scheme" the State has established. *Id.*

To expand shipping rights as Plaintiffs request, however, this Court would have to nullify large portions of North Carolina's three-tier system. *See* J.A. 6 (challenging all "laws, practices, and regulations that individually and collectively prohibit [out-of-state retailers] from selling, delivering, or shipping wine directly to North Carolina

residents”). Such extensive relief would amount to “wholesale surgery” on North Carolina’s alcohol code. *Whitmer*, 956 F.3d at 876. And it would clash directly with the General Assembly’s stated desires and this Court’s past approach.

In sum, the challenged statutes are constitutional. But even if this Court disagrees, the legally correct remedy is to limit shipping privileges, not expand them.

CONCLUSION

The North Carolina Alcoholic Beverage Control Commission respectfully requests that this Court affirm the district court’s judgment.

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November 29, 2021

CERTIFICATE OF SERVICE

I certify that on this 29th day of November, 2021, I filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

/s/ Ryan Y. Park
Ryan Y. Park

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 9884 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a 14-point, proportionally spaced typeface.

/s/ Ryan Y. Park
Ryan Y. Park

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United States Constitution

Amendment XXI.

Section 1.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

North Carolina General Statutes

Chapter 18B

Regulation of Alcoholic Beverages

§ 18B-100 Purpose of Chapter

This Chapter is intended to establish a uniform system of control over the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in North Carolina, and to provide procedures to insure the proper administration of the ABC laws under a uniform system throughout the State. This Chapter shall be liberally construed to the end that the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages shall be prohibited except as authorized in this Chapter. If any provision of this Chapter, or its application to any person or circumstance, is determined by a court or other authority of competent jurisdiction to be invalid or unconstitutional, such provision shall be stricken and the remaining provisions shall be construed in accordance with the intent of the General Assembly to further limit rather than expand commerce in alcoholic beverages, and with respect to malt beverages, unfortified wine, and fortified wine, the remaining provisions shall be construed to enhance strict regulatory control over taxation, distribution, and sale of alcoholic beverages through the three-tier regulatory system and the franchise laws imposed by this Chapter.

. . .

§ 18B-102 Manufacture, sale, etc., forbidden except as expressly authorized

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

. . .

(b) Violation a Class 1 Misdemeanor.--Unless a different punishment is otherwise expressly stated, any person who violates any provision of this Chapter shall be guilty of a Class 1 misdemeanor. In addition the court may impose the provisions of G.S. 18B-202 and of G.S. 18B-503, 18B-504, and 18B-505.

§ 18B-102.1 Direct shipments from out-of-state prohibited

(a) It is unlawful for any person who is an out-of-state retail or wholesale dealer in the business of selling alcoholic beverages to ship or cause to be shipped any alcoholic beverage directly to any North Carolina resident who does not hold a valid wholesaler's permit under Article 11 of this Chapter.

. . .

(e) Whoever violates the provisions of this section shall be guilty of a Class I felony and shall pay a fine of not more than ten thousand dollars ($10,000).

§ 18B-109 Direct shipment of alcoholic beverages into State

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

. . .

§ 18B-304 Sale and possession for sale

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

. . .

§ 18B-900 Qualifications for permit

(a) Requirements.--To be eligible to receive and to hold an ABC permit, a person must satisfy all of the following requirements:

. . .

(2) Be a resident of North Carolina unless:

. . .

b. He has executed a power of attorney designating a qualified resident of this State to serve as attorney in fact for the purposes of receiving service of process and managing the business for which permits are sought;

. . .

(4) Not have been convicted of an alcoholic beverage offense within two years.

§ 18B-1001 Kinds of ABC permits; places eligible

. . .

(4) Off-Premises Unfortified Wine Permit.--An off-premises unfortified wine permit authorizes (i) the retail sale of unfortified wine in the manufacturer's original container for consumption off the premises, (ii) the retail sale of unfortified wine dispensed from

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

. . .

§ 18B-1001.1 Authorization of wine shipper permit

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

. . .

(c) A wine shipper permittee may contract with the holder of a wine shipper packager permit for the packaging and shipment of wine pursuant to this section. The direct shipment of wine by wine shipper or wine shipper packager permittees pursuant to this section shall be made by approved common carrier only. Each common carrier shall apply to the Commission for approval to provide common carriage of wines shipped by holders of permits issued pursuant to this section. Each common carrier making deliveries pursuant to this section shall:

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

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

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

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

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

. . .

§ 18B-1001.4 Authorization of delivery service permit

(a) Authorization.--The holder of a delivery service permit, or the permit holder’s employee or independent contractor, may deliver malt beverages, unfortified wine, or fortified wine on behalf of a retailer holding a permit issued pursuant to subdivisions (1) through (6) and (16) of G.S. 18B-1001 to a location designated by the purchaser. A delivery service permittee may also facilitate

delivery through technology services that connect consumers and licensed retailers through the use of the Internet, mobile applications, and other similar technology.

(b) Training and Payment.--Prior to making any deliveries, each individual delivering alcoholic beverages pursuant to a delivery service permit shall successfully complete a course approved by the Commission related to the delivery of alcoholic beverages. Upon receipt of a proposed training program from a holder of a delivery service permit, the Commission shall have 15 business days to approve, deny, or request modifications to the proposed training program. An individual delivering alcoholic beverages pursuant to a delivery service permit shall not handle or possess funds used to purchase an alcoholic beverage that is to be delivered, but may facilitate the sales transaction in a manner that does not involve taking possession of funds.

(c) Age of Recipient and Notice.--An individual may only deliver alcoholic beverages pursuant to a delivery service permit to an individual who is at least 21 years of age and who immediately takes actual possession of the alcoholic beverages purchased. A delivery of alcoholic beverages in a package that obscures the manufacturer's original packaging shall have affixed to the outside of the package a notice in 26-point type or larger stating: “CONTAINS ALCOHOLIC BEVERAGES; AGE VERIFICATION REQUIRED.”

. . .

(e) Scope and Construction. – A delivery service permit is not required for a common carrier lawfully transporting or shipping alcoholic beverages. Nothing in this section shall be construed as exempting the delivery of alcoholic beverages pursuant to a delivery service permit from the requirements set forth in Article 4 of Chapter 18B of the General Statutes. Nothing in this section shall be construed to require a technology services company to obtain a delivery service permit if the company does not employ or

contract with delivery drivers, but rather provides software or an application that connects consumers and licensed retailers for the delivery of alcoholic beverages from the licensed retailer. Nothing in this section shall be construed to require a retailer that holds a permit issued pursuant to subdivisions (1) through (6) and (16) of G.S. 18B-1001 to obtain a delivery service permit in order for employees of the retail permittee to deliver malt beverages, unfortified wine, or fortified wine to a location designated by the purchaser, however, the other provisions of this section apply to the retailer.

§ 18B-1006 Miscellaneous provisions on permits

. . .

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

. . .

North Carolina Session Laws

Passed by the General Assembly
at its 2019 Regular Session

Session Law 2019-18

AN ACT TO CONFIRM THE STATE'S SUPPORT OF THE THREE-TIER SYSTEM FOR DISTRIBUTION OF MALT BEVERAGES AND THE FRANCHISE LAWS, TO MAKE ADJUSTMENTS TO MODERNIZE THE EXEMPTIONS TO THE THREE-TIER SYSTEM, AND TO PROMOTE THE GROWTH OF SMALL AND MID-SIZED INDEPENDENT CRAFT BREWERIES.

Whereas, the General Assembly reaffirms its support of the Beer Franchise Law and the three-tier system for the distribution of malt beverages and finds that the Beer Franchise Law and the three-tier system does all of the following:

(1) Promotes consumer choice and product variety by providing a platform that enables new malt beverage products to come to market that might not otherwise be available to the consumer. These laws encourage wholesalers to make investments in their businesses necessary to expand distribution of new products and to allow large and small breweries alike an opportunity to enter the market through independent distribution. Wholesaler investments include adding resources such as warehouses, personnel, vehicles, equipment, merchandise, and marketing. Consumers have access to an exceedingly wide array of malt beverage products, unlike other industries that foster closed distribution networks and vertical integration.

(2) Promotes the growth of the craft beer industry by providing suppliers with access to markets outside of the brewery. Brewers that use wholesalers are able to instantly access and utilize a wholesaler's established infrastructure in markets they may not otherwise be able to enter. Smaller

breweries further benefit because wholesalers are able to act independently to carry all brands, from large and small suppliers. The goal of these laws is to allow brewers of all sizes to fairly compete in the marketplace and to access retailers of all sizes.

(3) Helps ensure that the industry, as a whole, complies with the alcohol laws of this State. A wholesaler must remain independent and free from unfair conduct to promote responsible sales and marketing practices. Wholesaler independence also promotes and maintains fair dealing among industry participants. Ultimately, these measures protect consumers and the public from abuses that might occur absent the three-tier system.

(4) Promotes a vibrant marketplace that carefully balances fair competition with health and public safety concerns. The Beer Franchise Law and the three-tier system ensure that all three tiers operate independently and on a level playing field so that no one participant or sector of the industry becomes too dominant over the others. These laws allow for fair checks and balances in the beer industry. Wholesaler independence further creates a transparent and accountable distribution system that assists in identifying improper marketing practices and potentially unsafe products when issues arise and provides brewers that engage a wholesaler with an established means to access new markets.

(5) Prevents vertical integration of the manufacturing, distribution, and retail tiers. This still occurs in other countries today where adverse health and public safety effects are observed. The historical three-tier system model incorporated a deliberate regulatory structure that prevents monopolization. However, as the number of beer industry participants has grown substantially, it is necessary to make important adjustments to the three-tier system to promote the overall success of the beer manufacturing industry in

North Carolina by recognizing the different stages of brewery development.

(6) Assists in collecting excise taxes, particularly from nonresident suppliers. While self-distributing resident breweries are required to remit excise taxes directly to the Department of Revenue, wholesalers collect and remit the excise tax on malt beverages on behalf of resident and nonresident suppliers to the Department of Revenue, totaling approximately $140 million in excise taxes each year to the State.

(7) Promotes local regulatory control, temperance, and moderate consumption of malt beverages. The three-tier system in particular incorporates features to promote healthy competition in the marketplace while minimizing overly-aggressive marketing practices, such as limits on quantity discounts, requirements of nondiscriminatory treatment among wholesalers and retailers, and limits on advertising and promotional materials. The three-tier system also provides clear chain of custody for products in distribution, which enables law enforcement to easily track products in the marketplace when issues arise.

(8) Provides a vital platform that promotes product safety for consumers. Malt beverage distributors invest heavily in infrastructure, such as modern warehouses and vehicles, that maintain product integrity during distribution. There are also strict record-keeping requirements, which enable wholesalers to readily track malt beverage products sold in the market for prompt return in the event of a product recall.

(9) Encourages wholesalers, under the Beer Franchise Law, to invest capital and labor for suppliers of all sizes, large and small, to expand into new markets with new products. Unfair or arbitrary termination is prohibited, but suppliers who are subject to the Beer Franchise Law are still afforded

> the ability to terminate a distribution agreement for good cause. The Beer Franchise Law inhibits forced consolidation among wholesalers. The three-tier system also affords small retailers the same market access opportunities to the same wide selection of brands that other large-scale retailers have, and on equal terms.

. . .