In the United States Court of Appeals
for the Fourth Circuit

No. 21-1906

B-21 WINES, INC., MIKE RASH, JUSTIN HAMMER,
LILA RASH and BOB KUNKLE,
Plaintiffs - Appellants
vs.
HANK BAUER,* 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, No. 3:20-cv-00099,
Hon. Frank D. Whitney, District Judge

Reply Brief of Appellants

James A. Tanford, *Counsel of record*
Robert D. Epstein
James E. Porter
Epstein Cohen Seif and Porter, LLP
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel. (317) 639-1326
tanford@indiana.edu
rdepstein@aol.com

William C. Trosch
Conrad Trosch & Kemmy, P.A.
301 S. McDowell St., Suite 1001
Charlotte, NC 28204
Tel. (704) 553-8221
troschbill@ctklawyers.com

Attorneys for Appellants

*Hank Bauer has been substituted for A.D. Guy, Jr., pursuant to Fed. R. Civ. P. 25(d).

Table of Contents

Table of Authorities

Cases:

Constitution, Statutes and Rules:

I. The direct shipping ban violates the Commerce Clause and is not saved by the 21st Amendment

This case is straightforward. North Carolina allows in-state retailers to sell wine online and ship it to consumers, N.C. GEN. STAT. § 18B-1001(4), but prohibits out-of-state retailers from doing so. N.C. GEN. STAT. §§ 18B-102.1, 18B-109. This difference in treatment discriminates against out-of-state retailers, protects in-state retailers from competition, and denies North Carolina consumers access to wines sold in other states. Each of these effects violates a central tenet of the Commerce Clause. *Granholm v. Heald*, 544 U.S. 460, 472-73 (2005). State liquor laws are subject to the nondiscrimination principle of the Commerce Clause and may be upheld only if the State proves with concrete evidence that they advance a legitimate 21st Amendment interest that could not be served by reasonable nondiscriminatory alternatives. *Id.* at 489-90; *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2474-75 (2019); *Beskind v. Easley*, 325 F.3d 506, 515-16 (4th Cir. 2003).

The State has presented little evidence that banning direct shipping by out-of-state retailers accomplishes anything other than protecting in-state retailers and wholesalers from competition, given that residents

who want home delivery of wine can already get it from in-state retailers, third-party delivery services, and out-of-state wineries. It has presented no concrete facts or data to prove that direct shipping by out-of-state retailers will cause any problems, given that no problems have arisen in other states that allow it, nor in North Carolina that allows shipping by wineries and in-state retailers. All it offers is speculation by witnesses and assertions by counsel.

The State presented no evidence whatsoever that it could not protect its interests through licensing and regulations, the alternative it currently uses to allow other wine sellers to ship wine to consumers. The absence of evidence is fatal because without concrete evidence explaining why direct shipments from out of state retailers must be banned, but not those from in-state retailers or out-of-state wineries, "the only [explanation] that comes to mind is protection of local economic interests, which the Commerce Clause will not tolerate." *Beskind v. Easley*, 325 F.3d at 512.

In its defense, the State makes five arguments: 1) This Court should rely on cases from the Sixth and Eighth Circuits instead of precedents from this circuit and the Supreme Court. 2) The direct-shipping ban is

not discriminatory. 3) Even if it were, its discriminatory character may be overlooked because the state's "three-tier system" as a whole is protected by the 21st Amendment. 4) The State has met its burden to prove that a its ban on interstate shipments promotes its 21st Amendment interests; it is not also required to prove that nondiscriminatory alternatives would be unworkable. 5) If the shipping ban is found to be unconstitutional, the proper remedy is to leave it in place anyway and take away shipping rights from in-state retailers. None of these arguments has merit.

A. *Granholm, Tenn. Wine* and *Beskind* provide the legal framework, not cases from other circuits

The State's first argument, which it makes repeatedly throughout its brief, is that this court should depart from the legal analysis used by the Supreme Court and this circuit, and rely instead on two cases from other circuits: *Lebamoff Enterp., Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), and *Sarasota Wine Market, LLC v. Schmitt,* 987 F.3d 1171 (8th Cir. 2021).[1] This is not surprising, because those cases are more favorable to the State than *Granholm, Tenn. Wine and Beskind.*

[1] The State cites the 6th and 8th Circuit cases more than ten times and cases from the 2nd, 5th and 7th circuits another six times. By contrast, it cites *Beskind v. Easley* only once. State Br. at 29.

The argument is obviously untenable. Courts rely on precedents from the Supreme Court and their own circuit, not cases from other circuits that are inconsistent with those precedents. The 6th and 8th Circuits ruled that direct shipping bans were authorized by the 21st Amendment and *exempt* from the nondiscrimination principle of the Commerce Clause, so the State was not required to present evidence that the laws advanced a legitimate state purpose that could not be furthered by nondiscriminatory alternatives. *Lebamoff,* 956 F.3d at 869, 875; *Sarasota Wine*, 987 F.3d at 1181-82. This is contrary to *Beskind* and ignores the Supreme Court's standards altogether. This circuit has cautioned that decisions from other circuits should not necessarily be followed.

> Congress deliberately created a system of regional courts of appeals whose decisions are not binding on one another. The Supreme Court has recognized that the motivation behind limiting intercircuit *stare decisis* was to avoid the possibility that "the indiscreet action of one court might become a precedent," such that "the whole country [would be] tied down to an unsound principle."

CASA de Maryland v. Trump, 971 F.3d 220, 260-61 (4th Cir. 2020) *(en banc*).

B. The ban on direct shipping discriminates against interstate commerce

The State briefly argues that the ban on direct shipping is not discriminatory because giving in-state retailers the exclusive right to make home deliveries does not benefit them. State Br. at 45. The argument is nonsense. It is obvious that giving direct-shipping privileges to in-state wine sellers and denying them to out-of-state is discriminatory, and the Supreme Court and this circuit have both so held. *Granholm v. Heald*, 544 U.S. at 473-74 (discrimination"obvious"); *Beskind v. Easley*, 325 F.3d at 515 ("little doubt" that law is discriminatory). Indeed, "protecting [local businesses] from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *West Lynn Creamery v. Healy*, 512 U.S. 186, 205 (1994).

C. Discriminatory liquor laws are subject to Commerce Clause analysis

In the alternative, the State argues that it does not matter whether the ban is discriminatory because it is part of North Carolina's three-tier system for distributing wine, which system as a whole is protected by the 21st Amendment. State Br. at 5-18, 32-37. Therefore, the State

argues, there is "no need to decide whether [individual provisions] discriminate against interstate commerce." State Br. at 42. The argument is unavailing for four reasons

First, North Carolina does not have a three-tier system for wine. A three-tier system is one in which producers may sell only to wholesalers, wholesalers sell to retailers, and retailers sell to consumers. That may have been the situation years ago, but it is no longer true. Wine producers (both in-state and out-of-state) are not required to send their products through a three-tier system. They may bypass the wholesaler tier and sell directly to retailers, N.C. Gen. Stat. § 18B-1101(7), and may bypass both the wholesaler and retailer tiers and sell directly to consumers.[2] N.C. GEN. STAT. § 18B-1001.1(a). Consumers may skip the retail store and buy wine from the producer, *id.,* at auction, N.C. GEN. STAT. § 18B-1002.1, at stadiums and ballparks, N.C. Gen. Stat.§ 18B-1009, and at golf courses. N.C. GEN. STAT. § 18B-

[2] The State also argues that the three-tier system prohibits the "evil of tied houses " where a manufacturer aggressively marketed its own products directly to the public. State Br. at 6-8, 14-15. Whatever the history of this argument, North Carolina no longer is concerned about tied houses and allows direct sales and marketing by wineries, N.C. GEN. STAT. § 18B-1101(5-6), brewpubs, N.C. GEN. STAT § 18B-1104 (7-7b), and craft distillers. N.C. GEN. STAT. § 18B-1105(a)(4a).

1001(13). They may obtain wine from unsupervised hotel room minibars, N.C. GEN. STAT. § 18B-1001(13), or from third-party delivery services such as Drizly. N.C. GEN. STAT. § 18B-1001.4. The common element of North Carolina's wine distribution system is not that all wine must pass from producers to wholesalers to retailers. The common element is that everyone who distributes wine must hold a permit. North Carolina has a permit system, not a three-tier system, but it will not issue permits to out-of-state retailers that allow direct shipping as it has for in-state retailers..

Second, the issue is whether the specific statutes banning direct wine shipments are unconstitutional, not whether the overall system is legitimate. Individual state liquor laws are "limited by the nondiscrimination principle." *Granholm v. Heald,* 544 U.S. at 486-87. None is exempt. The Supreme Court "has repeatedly declined to read [the Amendment] as allowing the States to violate the 'nondiscrim-ination principle," *Tenn. Wine,* 139 S.Ct at 2470 and the legitimacy of the overall system tells us nothing about the validity of individual "discriminatory feature[s] that a State may incorporate into its three-tiered scheme." *Id.* at 2471. Courts have repeatedly held that

individual discriminatory laws may be invalidated without calling into question the constitutionality of the three-tier system as a whole. *Granholm v. Heald,* 544 U.S. at 488-89. *Accord Lebamoff Enterpr., Inc. v. Rauner*, 909 F.3d 847, 856 (7th Cir. 2018) (taking challenge to be to the three-tier system as a whole "was error"); *Beskind v. Easley*, 325 F.3d at 514-15 (issue was legitimacy of specific provisions).

Third, North Carolina's overall system as a whole is not actually even-handed; it discriminates against interstate commerce and protects the interests of in-state businesses. JA 267 (Lassiter Report ¶ 3). The State contends it is only asking out-of-state retailers to comply with "even-handed" licensing and physical presence requirements, State Br. at 43-44, but that is nonsense. Its permit system is not even-handed because it has a permit available for in-state retailers but not for out-of-state retailers. JA 061 (Def. Admission 2); JA 064-65 (Def. Interrog. 2). Its requirement that a retailer must have a physical presence in the state and may only ship from that location is not even-handed because it discriminates on its face against wine sellers in other states. The Supreme Court in *Granholm* said quite clearly that once a state authorizes direct shipping from in-state businesses, it violates the

Commerce Clause to not provide a license to out-of-state entities unless they establish an in-state presence.

> Out-of-state wineries are ... required to establish a distribution operation in New York in order to gain the privilege of direct shipment. New York ... defend[s] the scheme by arguing that an out-of-state winery has the same access to the State's consumers as in-state wineries: All wine must be sold through a licensee fully accountable to New York; it just so happens that in order to become a licensee, a winery must have a physical presence in the State... [This] in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm to become a resident in order to compete on equal terms.... In addition to its restrictive in-state presence requirement, New York discriminates against out-of-state wineries in other ways. Out-of-state wineries [are] ineligible for a "farm winery" license, the license that provides the most direct means of shipping to New York consumers.... We have no difficulty concluding that New York ... discriminates against interstate commerce through its direct-shipping laws.

544 U.S. at 474-75 (citations omitted).[3]

Fourth, even if North Carolina had a three-tier system for wine and had presented any evidence that requiring wine to pass through an in-state wholesaler furthered the state's interests in public safety, reducing consumption, and raising revenue, this would not be enough to justify it. The State would also have to prove that nondiscriminatory

[3] The State makes the bizarre argument that *Granholm* did not hold the physical-presence requirement unconstitutional. State Br. at 47-48. The quoted paragraph speaks for itself.

alternatives would be unworkable. *Granholm v. Heald*, 544 U.S. at 489; *Tenn. Wine*, 139 S.Ct. at 2474; *Beskind v. Easley*, 325 F.3d at 515. It has not done so, and has not even addressed the issue in its brief.

North Carolina currently allows wine producers to sell directly to the public if they obtain a permit and comply with regulations. N.C. GEN. STAT. §§ 1001.1, 1001.2. They do not have to use a wholesaler. The State has presented no evidence and provided no explanation why this one-tier system it has used for eighteen years, JA 253 (Wark Supp. Report ¶ 3) has suddenly become unworkable.

D. The State has not shown that the law advances an interest that could not be served by nondiscriminatory alternatives

The State's fourth argument is that it has met its evidentiary burden to justify a total ban on wine shipments by out-of-state retailers. It contends (1) that it only has to show that the law promotes a 21st Amendment interest and is not required to prove that other alternatives would be unworkable, and (2) that its burden is minimal and subject only to "deferential" scrutiny. State Br. at 28-31. The argument is untenable.

This circuit has said that a discriminatory state liquor law "must be invalidated unless [the State] can show that it advances a legitimate

local purpose *that cannot be adequately served by reasonable nondiscriminatory alternatives*." *Beskind v. Easley*, 325 F.3d at 515 (emphasis added). The Supreme Court holds the same: a court "*must*" consider whether a discriminatory liquor law "advances a legitimate local purpose *that cannot be adequately served by reasonable nondiscriminatory alternatives*." *Granholm v. Heald* 544 U.S. at 489 (emphasis added)."

The State argues repeatedly that the Court in *Tenn. Wine* abandoned the *Beskind/Granholm* analysis in favor of a different inquiry under which a discriminatory state law could be upheld without any showing that reasonable nondiscriminatory alternatives would be unworkable. State Br. at 22, 27-28, 30, 31. The argument is baseless and the State cites no language that actually says that.[4] To the contrary, the Court

[4] When the Court said that a "different inquiry" was used in liquor-law cases, it did not mean different from the one used in *Granholm*, but different from the inquiry in non-liquor cases where the Court uses a rule of virtual *per se* invalidity. *E.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997). When analyzing liquor laws, the Court gives states the opportunity to prove that discrimination is necessary to advance a core concern of the 21st Amendment that could not adequately be served by nondiscriminatory alternatives. This "different inquiry" is not new; it has been used in prior cases in which the Court applied rigorous scrutiny and required "the clearest showing." *E.g., Granholm*. 544 U.S. at 489.

cites *Granholm* approvingly forty times, reaffirms that the nondiscrimination principle applies to liquor laws, and strikes down a Tennessee law because the State had presented no "concrete evidence showing ... that nondiscriminatory alternatives would be insufficient." *Tenn. Wine,* 139 S.Ct at 2474. It then spent seven paragraphs discussing alternatives, noting that the state's interests could "easily be achieved by ready alternatives," *id*. at 2475, and "there are obvious alternatives that better serve [its goals] without discriminating." *Id*. at 2476.

1. The ban does not actually advance a state interest

The State asserts that it has satisfied the first step in the analysis by proving that the direct shipping ban advances its interests in assuring product safety, curbing excessive consumption, and preventing sales to minors. State Br. at 32-36. It has not even come close. The State presented evidence that alcohol in general can be a dangerous product (which everyone already knows), *id*. at 12-13, but no evidence that direct shipping of wine by out-of-state retailers contributes to any particular problem. It presented evidence that its 108 agents occasionally[5] inspect the premises of the 21,000 in-state licensees for

[5] Glenn Lassiter, a former staff attorney with the ABC, says inspections are rare and many stores not inspected for years. JA 270, ¶¶ 8-9.

the purpose of checking financial records and educating the permit holder about North Carolina ABC laws, JA 332-33 (Morrow Decl. ¶¶ 8-11), but no evidence that it conducts any inspections having anything to do with product safety or shipping of wine to consumers. In fact, the state admits it has no program to investigate and enforce direct shipping laws. JA 260 (NC Report to Congress). It has offered no concrete evidence about direct wine shipping at all -- only assertions that if shipping were allowed, it *might* increase consumption and *might* result in unsafe products being shipped or more youth access. Speculation and assertions are not adequate to meet the concrete evidence standard. *Tenn. Wine*, 139 S.Ct at 2474.[6]

North Carolina has allowed out-of-state wineries to ship directly to consumers for eighteen years, N.C. GEN. STAT. § 18B-1001.1, JA 253 (Wark Supp. Report ¶ 3), and has presented no evidence that any problems with excessive consumption, unsafe products, taxes, or regulatory oversight have occurred. The defendant is the official

[6] To support its argument that direct shipping might increase youth access, Br. at 36, the State cites only inadmissible evidence -- an article "Internet Alcohol Sales to Minors," JA 337-42, which is hearsay, and a statement by John Kerr not based on his own knowledge or experience. JA 326 ¶ 22. Objections were made in the District Court, see Addendum ¶¶ 3(f), 5.

responsible for administering and enforcing the ABC laws and imposing sanction for violating them, N.C. GEN. STAT. § 18B-203, so surely he would have been aware if any problems had arisen. It is well settled that the unexplained failure of a party to produce material evidence within its control yields the inference that no such evidence exists. *See Vodusek v. Bayliner Marine Corp.,* 71 F.3d 148, 156 (4th Cir. 1995). Indeed, the State admits it knows of no incident in which any direct wine shipment contained any unsafe wine or threatened public health or safety, JA 072-073 (Def. Interrog. 13), JA 078 (Def. Interrog. 19), or was delivered to a minor. JA 066-070 (Def. Interrogs. 4 & 8), or is correlated to any alcohol-related public health and safety issues. JA 068 (Def. Interrog. 12).

The concrete record evidence shows that none of the predicted problems have occurred in the sixteen jurisdictions[7] that allow direct shipping by out-of-state wine retailers. Regulators from those states report that they have not experienced any problems, JA 148-161 (Statements from six state agencies), JA 268-69 (Lassiter Report ¶ 5), JA 254 (Wark Supp. Report § 7), and the data back them up.

[7] See JA 091 (Wark Report ¶¶ 18-19); JA 245-246 (Table of state statutes).

1. Youth access is not a problem. JA 169 (Maryland Comptroller report at 8). Minors rarely use direct shipping to acquire alcohol, JA 202 (HHS Nat'l Survey), because they want instant gratification and can easily and cheaply obtain alcohol locally. JA 174, 178-80 (FTC Report at 3, 33-36).
2. Unsafe wine is not a problem. There are no known incidents of any unsafe wine being sold or shipped to a consumer in North Carolina, JA 270-72 (Lassiter Report ¶¶ 9, 14), or anywhere in the United States. JA 097 (Wark Report ¶ 52); JA 256 (Wark Supp. Report ¶ 14). This is not surprising because all wine sold by retailers is in sealed bottles that have been approved by the federal Tax and Trade Bureau. *Id.*
3. Collecting taxes is not a problem. Revenues actually increase when licensed shipping is allowed as sellers who previously shipped wine illegally without paying taxes are brought into the system, pay for direct shipping permits, and begin remitting taxes. JA 165-167 (Maryland study), JA 185 (FTC Report at 40).
4. Direct shipping will not cause more consumption. It has not done so in states that allow it. JA 188-191 (NIH table on per capita

consumption). It cannot possibly do so in North Carolina because the state already allows its citizens to buy an almost unlimited amount of liquor locally -- 50 liters of wine, 8 liters of spirits, and 80 liters of beer *at one time*. N.C. GEN. STAT. § 18B-303. If that is not enough, an individual can buy the same amount again ten minutes later. The State's suggestion that wine might be cheaper online and lead to flood of purchases is irrational.[8] Wine is already available at every Harris-Teeter supermarket in the state for $4.99 a bottle for anyone who wants cheap wine. JA 261-63 (Kunkle Decl. and photo).

The State seeks to get around the lack of evidence by arguing that the level of scrutiny is so "deferential" that it may prevail merely by asserting a plausible argument that the ban on direct shipping

[8] The State speculates wine online might be cheaper because the State's excise taxes drive up the price and deter consumption. Br. at 35. The taxes are 20 cents/bottle, JA 252 (state tax table). Other states also have taxes, so the difference would be 0-16 cents per bottle. It also suggests that its law prohibiting volume discounts makes wine more expensive, but provides no evidence that *when one takes shipping costs into account*, JA 097 (Wark Report ¶ 46), any wine could be obtained through direct shipping cheaper than Harris-Teeter's $4.99. Harris-Teeter needs no volume discount because it is part of the Kroger grocery chain, the largest in the United States.

promotes its interests. State Br. at 29. The only authority it cites is *Tenn. Wine*, but that case provides no support for a new minimalist standard that excuses the lack of evidence. Indeed, it clearly rejected using a deferential standard, 139 S.Ct. at 2459, and applied the "concrete evidence" standard used in *Granholm*. Because discrimination against out-of-state interests "violates a central tenet of the Commerce Clause," *Beskind v, Easley*, 325 F.3d at 515, it requires concrete evidence and the "clearest showing"[9] to justify discriminatory state regulations. *Granholm v. Heald,* 544 U.S. at 490.

2. Nondiscriminatory alternatives are available

The State makes no argument that it can satisfy the second prong of the concrete evidence standard -- a clear showing that reasonable nondiscriminatory alternatives would be unworkable. This alone is fatal to the State's case, because it has the burden to do so. *Beskind v. Easley*, 325 F.3d at 515 ("burden falls on the State to justify... the unavailability of nondiscriminatory alternatives").

[9] In other Commerce Clause contexts, the Court has called this a "rigorous" scrutiny test. *E.g., United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007).

North Carolina has an obvious alternative that it already uses. It allows out-of-state wineries to sell wine online and ship it to residents without a physical presence in the state or the wine passing through an in-state wholesaler, if they obtain a permit and comply with regulations. N.C. GEN. STAT. §§ 1001.1, 1001.2. It allows in-state retailers to take online orders and ship to consumers with a permit. N.C. GEN. STAT. § 18B-1001(4). It allows home deliveries by third-party consolidators and third-party delivery services if they get a permit. N.C. GEN. STAT. §§ 18B-1001.3, 18B-1001.4. It allows deliveries to be made by common carriers and age verification to be handled by the delivery driver if they get a permit. Other states use a permit system for direct wine shipping, JA 096 (Wark Report ¶ 40); JA 255 (Wark Supp. Report ¶ 10) and the Supreme Court has endorsed this as a reasonable alternative to a total ban. *Granholm v. Heald*, 544 U.S. at 492; *Tenn. Wine,* 139 S.Ct. at 2475.

The State suggests that the permit system might not work effectively because there are 400,000 retailers throughout the country who might overwhelm regulators. The suggestion is not supported by

any evidence. For one thing, there are not 400,000 retailers that have nationwide direct wine shipping operations. Fewer than 1200 do any shipping at all, and fewer than 100 have actually applied for permits in states that issue them. JA 096 (Wark Report ¶¶ 47-50). They would not be difficult to monitor. JA 256=57 (Wark Supp. ¶ 16).

The State also argues that it can more easily regulate wine distribution and collect taxes if the retailer and wholesaler are physically located in the state. State Br. at 11-12, 34. The Supreme Court has twice rejected this argument as justification for a total ban. In *Tenn. Wine,* the Court said that "[i]n this age of split-second communications by means of computer networks ... there is no shortage of less burdensome, yet still suitable, options." 139 S.Ct. at 2475. In *Granholm* it held that ensuring regulatory accountability was not a justification for a total ban because "[t]hese objectives can also be achieved through the alternative of an evenhanded licensing requirement." 544 U.S. at 492. In any event, the state essentially concedes that a permit system is an acceptable alternative to a total ban because it allows out-of-state wineries ship with a permit.

In the absence of evidence showing why direct shipments from out of state retailers must be banned but not those from in-state businesses, "the only [explanation] that comes to mind is protection of local economic interests, which the Commerce Clause will not tolerate." *Beskind v. Easley*, 325 F.3d at 512.

II. The proper remedy is to strike the direct shipping ban

The State argues that if the shipping ban is found unconstitutional, the proper remedy would be to leave it in place and eliminate the discrimination by taking away shipping rights from in-state retailers. It argues that this is the intent of the legislature, citing a boilerplate provision that the ABC Code is to be construed to "limit rather than expand commerce in alcoholic beverages." N.C. GEN. STAT. § 18B-100. State Br. at 48-53. There are three problems with the argument.

First, legislative intent is not the only factor to be considered in fashioning a remedy for a constitutional violation. The remedy should vindicate the Constitution itself, and the State's proposal does not. The core concern of the Commerce Clause is free commerce among the states without trade barriers, *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S.

525, 539 (1949), not simply equal treatment. Even laws that treat in-state and out-of-state interests evenly can still offend the Commerce Clause if they impose an undue burden on interstate commerce or operate extraterritorially. *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. 573, 578–79 (1986). To allow the ban to remain in place frustrates the entire purpose of the Commerce Clause.

Second, the State is incorrect when it equates legislative intent with platitudes inserted into the code. It means "what the legislature would have done had it been apprised of the constitutional infirmity." *Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1699 (2017). Actions are more important than words, and in this case we know what the North Carolina legislature would have done because it faced this situation once before. When the ban on direct shipping by out-of-state wineries was struck down in *Beskind v. Easley* and the court's remedy was to take away shipping rights from in-state wineries, the legislature promptly restored privileges to in-state wineries and extended them to those located out of state. N.C. GEN. STAT. § 18B-1001.1.

Third, it is absurd to suggest that the North Carolina legislature really intends to "limit rather than expand commerce in alcoholic

beverages." Over the past 20 years, it has consistently expanded the market, not limited it. It has extended home delivery privileges to in-state retailers, N.C. GEN. STAT. § 1001(4), third-party consolidators that ship wine on behalf of multiple wineries, N.C. GEN. STAT. § 18B-1001.3, and third-party delivery services. N.C. GEN. STAT. § 18B-1001.4. It has expanded alcohol distribution to Tribal lands, N.C. GEN. STAT. § 18B-112, common areas of apartment complexes, N.C. GEN. STAT. § 18B-1001(21), minibars in hotel rooms, N.C. GEN. STAT. § 18B-1001(13), auction houses, N.C. GEN. STAT. § 18B-1002.1, stadiums and ballparks, N.C. GEN. STAT.§ 18B-1009, golf courses, N.C. GEN. STAT. § 18B-1001(13), and on the premises of craft distilleries. N.C. GEN. STAT. §18B-1105(a)(4a).

Fourth, the statute relied on by the State does not say what the State claims. It does not say that when deciding on a remedy a court should limit rather than expand commerce in alcohol. It says that when deciding on a remedy, "[i]f any provision [has been] determined by a court ... to be invalid or unconstitutional, such provision shall be stricken." N.C. GEN. STAT. §18B-100. It does not say a court may strike different provisions that are perfectly lawful. Indeed, in constitutional

cases, courts should not normally nullify a valid portion of a law because a different portion is invalid. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). In this case, striking in-state shipping rights would cause significant harm to those in-state retailers that have invested resources into developing a direct-shipping business, were not represented in the litigation, and have not had an opportunity to be heard. *See Heckler v. Mathews*, 465 U.S. 728, 733, 738-40 (1984); *Nguyen v. INS*, 533 U.S. 53, 95-96 (2001) (Scalia J., concurring). What N.C. GEN. STAT. §18B-100 says is that the offending statutes are stricken first, and only then are the "remaining provisions" construed to limit rather than expand alcohol distribution.

Finally, the State asserts that in order to grant relief to the plaintiffs, the Court would have to issue a sweeping injunction that nullifies large portions of North Carolina's alcohol code. State Br. at 19, 53-54. It does not otherwise explain this claim nor identify any other provisions that would have to be enjoined. If the court enjoins enforcement of the two statutes banning shipping and receiving wine through interstate commerce, N.C. GEN. STAT. §§ 18B-102.1, 18B-109, direct shipping may take place. This may implicate other statutory

provisions that require permits, tax payments, reports, and age verification (which the State may want to amend), but no other statute has to be nullified to provide relief to the plaintiffs.

III. Other objections to the State's evidence

The State has offered evidence in support of several of its arguments that is not admissible. Although this evidence is offered on issues that are not critical to the resolution of this case, we object to the Court considering the following evidence for any purpose.

1. The following opinions of expert witness William Kerr violate Fed. R. Evid. 702 (b-c) because they are speculative, not based on adequate facts or data, and no foundation has been laid that he used reliable methodology. Nowhere in his report, JA 275-93, does he describe either his source of information or his methodology.

a. The state would not collect tax revenue on wine shipped by out-of-state retailers. ¶¶ 42-44.

b. The cost to the consumer is lower for wine shipped by out-of-state retailers and would increase consumption and alcohol abuse. ¶60.

c. State regulators cannot prevent out-of-state retailers from shipping unsafe products. ¶¶ 38-39.

d. Excise taxes on wine make such a significant difference in cost that they reduce consumption. ¶¶ 57-68.

2. The following opinions of Asheville retailer John Kerr about state-wide practices violate Fed. R. Evid. 701. Nowhere in his declaration, JA 319-27, has any foundation been laid showing that he has adequate personal knowledge of the markets outside Asheville.

a. Most in-state retailers do not use common carriers because they pose a higher risk of delivery to minors. ¶ 21

b. Common carriers sometimes leave deliveries of wine without verifying age. ¶ 22. This statement was based on what some people told him and is also hearsay.

IV. Arguments made by amici

A. Wine & Spirits Wholesalers of America *et al.*

Wine & Spirits Wholesalers of America *et al.* have filed an amicus brief arguing (not surprisingly) that wholesalers serve a critical role in North Carolina's three-tier system. Allowing out-of-state retailers to bypass them would not just deprive the wholesalers of the opportunity to profit from the transaction, they assert it would eviscerate state regulatory efforts. The entire brief contends that the three-tier system

and the wholesalers are what keeps the public safe and that requiring wine to pass through a wholesaler is essential to effective regulation. Because North Carolina does not actually have a three-tier system for wine and does not require wine to pass through a wholesaler, their brief may be safely disregarded.

The brief should be disregarded for another reason: it consistently misstates the issue, evidence, and case law. The misstatements are too numerous to respond to all of them within the time and page limits allowed for a reply brief, but several examples should suffice. They assert that the case is about deregulation of the sale of alcohol, WSWA Br. at 3, and the focus on direct shipping is a "red herring." *Id.* at 15. They assert (without evidence) that most states, including North Carolina, require wine to pass through a wholesaler, *id.* at 4-5, when the record shows that forty-four states do not require wine to pass through a wholesaler but allow producers to sell wine directly to consumers. JA 091 (Wark Report ¶ 36). They assert that 400,000 retailers nationally engage in wine shipping, WSWA Br. at 14, when the record shows that the actual number of retailers who engage in any wine shipping is under 1200. JA 093 (Wark Report ¶¶ 49-50).

Nor are their legal arguments reliable. They cite cases from the 2d, 5th, 6th, 7th, and 8th Circuits, fifteen times (including cases overruled by *Granholm* and *Tenn. Wine)* while citing *Beskind v. Easley* just once, and then only to say that it is erroneous to rely on it. *Id.* at 6. They twice cite language from *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006) without properly disclosing that they are citing the opinion of a single judge and not of the panel. WSWA Br. at 9, 16. They claim that *Granholm v. Heald*, said on page 489 that the three-tier system promotes public health and safety (Br. at 16), said on page 469 that brick-and-mortar retailers play a vital role in advancing state regulatory objectives (Br. at 20-21), said on page 484 that states are constitutionally empowered to decide how best to advance citizen preferences (Br. at 19). None of those statements appear in *Granholm*.

Amici claim that *Granholm* established a lenient standard of scrutiny under which any minimal evidence will justify a discriminatory law, Br. at 34-35, that the state does not need to present any evidence at all, and that a law can be upheld if other states have similar laws. Br. at 35-36. *Granholm* actually held that a discriminatory liquor law is unconstitutional unless the State can prove with concrete evidence that

it advances an important regulatory interest that could not be furthered by reasonable nondiscriminatory alternatives, and that the "clearest showing" is required. 544 U.S. at 492.

The WSWA brief is based on so many misstatements, errors of law and mischaractizations that it is not reliable and should be disregarded.

B. Center for Alcohol Policy *et al.*

The Center for Alcohol Policy *et al.* have filed an amicus brief arguing that the history of Prohibition and the 21st Amendment justify the three-tier system and give states the right to require in-state presence as a precondition to selling wine. Because North Carolina does not have a three-tier system for wine, and does not require out-of-state wineries to have a physical presence in the state, the brief is irrelevant.

In any event, the Supreme Court has extensively reviewed the history of the 21st Amendment (twice) and concluded that the authority it grants states to develop their own unique regulatory systems "did not give States the authority to pass nonuniform laws in order to discriminate againstout-of-state goods, a privilege they had not enjoyed at any earlier time." *Granholm v. Heald*, 544 U.S. at 484-85. The Amendment "grants States latitude with respect to the regulation of

alcohol, but the Court has repeatedly declined to read § 2 as allowing the States to violate the "nondiscrimination principle." *Tenn. Wine,* 139 S.Ct at 2470. The Supreme Court is a better source for what history tells us about the scope of the 21st Amendment than amici.

V. Conclusion

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

s/ James A. Tanford
James A. Tanford, *Counsel of record*
Robert D. Epstein
James E. Porter
Epstein Cohen Seif and Porter, LLP
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel. (317) 639-1326
Fax (317) 638-9891
rdepstein@aol.com
tanford@indiana.edu

William C. Trosch
Conrad Trosch & Kemmy, P.A.
301 S. McDowell Street, Suite 1001
Charlotte, NC 28204
Tel. (704) 553-8221
troschbill@ctklawyers.com

Attorneys for Appellants

Certification of Word Count

I certify that this brief, including footnotes and the statement of issues, but excluding tables and certificates, contains 5954 words according to the word-count function of WordPerfect 9, the word processing program used to prepare this brief.

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

Certificate of Service

I certify that on December 20, 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. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

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

Addendum: Objections in District Court

In their Memorandum in Opposition to Defendant's Motion for Summary Judgment, Doc. No. 31 at 3-6, plaintiffs made the following objection to the District Court. Not all the evidence offered by the State to this Court was offered in the District Court, and those objections are separately listed in section III, *supra*.

1. Def. Ex. 1, Expert Report of William Kerr.

a. Kerr's opinion that the state would not collect tax revenue on wine shipped by out-of-state retailers (¶¶42, 44) violates Rule 702(b) because it is not based on adequate facts showing that North Carolina would not require tax payments.

b. Kerr's opinion that the *possibility* that out-of-state retailers would not pay taxes *could* reduce revenues and increase regulatory costs (¶¶43, 44) violates Rule 702(b-c) because it is purely speculative, not based on adequate data, and no foundation shows that his methodology was reliable.

c. Kerr's opinion that the cost to the consumer is lower for wine shipped by out-of-state retailers and would therefore increase consumption and alcohol abuse (¶60) violates Rule 702(bc) because it is

not based on adequate data and is purely speculative. To the extent that it implies that differences in excise taxes alone would make wine obtained by direct shipping cheaper than locally purchased wine, it is based on no data whatsoever, fails to consider the cost of shipping, and was not arrived at using reliable methods.

d. Kerr's opinion that allowing out-of-state retailers to ship directly would "exponentially" increase the number of retailers who had to be regulated. (¶33) violates Rule 702(b-c). No foundation shows adequate data or the use of reliable methodology.

2. Def. Ex. 5, Metz declaration.

Metz's lay opinion that minors would try to purchase alcohol from out-of-state retailers if that were available (¶13) violates Rules 602 and 701. It is speculation about the future and no foundation shows any personal knowledge about whether minors currently buy from out-of-state retailers upon which this opinion could be rationally based.

3. Def. Ex. 6, John Kerr declaration.

a. Kerr's lay opinions about the relative availability of wines in North Carolina compared to those available for sale in other states (¶¶5, 8) violate Rules 602 and 701. They are speculation and no foundation

shows any personal knowledge about activities in states other than North Carolina upon which the opinions could be rationally based.

b. Kerr's opinion that the wine market in North Carolina is robust and competitive (¶9) violates Rule 701 because no foundation shows any personal knowledge of the markets outside Asheville upon which he could base an opinion.

c. Kerr's opinion that North Carolina's laws create a level economic playing field (¶¶18, 20) violates Rule 701. No foundation shows any personal knowledge of retail markets outside Asheville or sufficient training in economics upon which he could base this opinion.

d. Kerr's opinion that allowing direct shipping would result in a race to the bottom (¶20) violates Rules 602 and 702. It is speculation about the future and no foundation shows any personal knowledge about what has happened in other states that allow direct shipping.

e. Kerr's opinion that most in-state retailers do not use common carriers (¶21) violates Rule 701 because no foundation shows any personal knowledge of the markets outside Asheville upon which he could base an opinion about 8000 retailers around the state.

f. Kerr's opinion that using a retailer's employees rather than

common carriers reduces the risk of delivery to minors (¶22) violates Rule 701. No foundation shows any personal experience using common carriers nor any basis for an opinion about the other 8000 North Carolina retailers.

g. Kerr's opinion about the purposes served by state inspections and stings (¶¶11-12) violates Rules 602 and 701. No foundation shows any personal knowledge of the state's purposes or sufficient experience to give an opinion about the State's purposes.

4. Def. Ex. 7, Morrow declaration.

Morrow's opinion that young people frequently obtain alcohol by ordering it online so that allowing direct shipping will "certainly" increase youth consumption (¶15) violates Rule 701. Morrow was not disclosed as an expert under Rule 26 and has submitted no expert report, so his opinion is offered as a lay witness. It violates Rule 701 because no foundation shows any personal knowledge or experience with youth access to wine shipments sufficient to support rational opinions about online ordering of wine by minors.

5. Def. Ex. 8, Internet Sales to Minors.

The article is hearsay and violates Rules 801-802 because no exception

applies. The hearsay could not be cured by calling the author as a witness at trial because she was not disclosed as a potential expert under Rule 26.

6. Def. Ex. 9, Hammer Deposition.

a. Hammer's opinions about North Carolina's interests that might be advanced by the direct shipping ban (p. 38) violate Rules 602 and 701. It is speculation and no foundation shows any personal experience with North Carolina's laws upon which he could rationally base the opinion.

b. Hammer's opinions about the scope and effect of Florida law (pp. 15, 23) violate Rule 704(a) and *U.S. v. McIver,* 470 F.3d 550, 561-62 (4th Cir. 2006). They are legal opinions about the scope and effect of statutes.