

No. 02-1432

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Donald H. Beskind, *et al.*,

Plaintiff-Appelanes

v.

Michael F. Easley, *et al.*,

Defendant-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

BRIEF OF THE
NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION, INC.
AND
NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL

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STATEMENT OF ISSUE

Whether North Carolina's statute (N.D. Gen. Stat. § 18B-102.1) restricting the interstate shipment of alcohol beverages directly to consumers is permissible under the Twenty-First Amendment to the Constitution of the United States and the Webb-Kenyon Act.

INTEREST OF THE *AMICUS CURIAE*

The National Alcohol Beverage Control Association, Inc. (NABCA) is a Wyoming non-profit corporation whose members are the 19 jurisdictions' that directly control the distribution and sale of alcohol beverages through the operation of state-owned wholesale and, in some cases, retail outlets; these jurisdictions also regulate the sale of alcohol beverages by private outlets such as package stores, restaurants and taverns. The National Conference of State Liquor Administrators (NCSLA) is an unincorporated membership association whose members are the remaining jurisdictions' that only regulate private sellers of alcohol beverages.

| NABCA's members include the Alabama Alcoholic Beverage Control Board, Idaho State Liquor Dispensary, Iowa Division of Alcoholic Beverages, Maine State Liquor & Lottery Commission, Michigan Liquor Control Commission, Mississippi State Tax Commission, Montana Department of Revenue Liquor Division, Montgomery County (MD) Department of Liquor Control, New Hampshire State Liquor Commission, North Carolina Alcoholic Beverage Control Commission, Ohio Department of Liquor Control, Oregon Liquor Control Commission, Pennsylvania Liquor Control Board, Utah Department of Alcoholic Beverage Control, Vermont Department of Liquor Control, Virginia Alcoholic Beverage Control Board, Washington State Liquor Control Board, West Virginia Alcoholic Beverage Control Administration and Wyoming Department of Revenue Liquor Division.

NCSLA's members include the Alaska Alcoholic Beverage Control Board, Arizona Department of Liquor Licenses and Control, Arkansas Alcoholic Beverage Control Division, Baltimore (MD) Board of Liquor License Commissioners, California Department of Alcoholic Beverage Control, Colorado Department of Revenue Liquor Enforcement Division, Connecticut Department of Liquor Control, Delaware Alcoholic Beverage Commission, District of Columbia Alcoholic Beverage Control Division, Florida Department of Business Regulation Division of Alcoholic Beverages and Tobacco, Georgia Department of Revenue (Alcohol and Tobacco Tax Unit), Guam Department of Revenue and Taxation, City and County of Honolulu Liquor Commission, County of Hawaii Department of Liquor Control, County of Kauai Department of Liquor Control, County of Maui Department of Liquor Control, Illinois Liquor Control

Some jurisdictions are members of both organizations. Taken together, NABCA and NCSLA represent the state, and, in some cases, local government agencies charged with regulating the distribution and sale of alcohol beverages in each of the 50 states. Several of these agencies - in Florida, North Carolina, Michigan, New York, Texas, Virginia and Washington - are or have been defendants in litigation similar to the instant case pending in other jurisdictions and all will have their ability to regulate alcohol beverages impacted by the decision in this matter.

This brief is filed with the consent of all parties.

Commission, North Carolina Alcoholic Beverage Control Commission, Iowa Alcoholic Beverage Division (Department of Commerce), Kansas Alcoholic Beverage Control Division (Department of Revenue), Kentucky Department of Alcoholic Beverage Control, Louisiana Department of Revenue and Taxation Office of Alcoholic Beverage Control, Maryland Comptroller of the Treasury Alcohol & Tobacco Tax Unit, Massachusetts Alcoholic Beverage Control Commission, Minnesota Department of Public Safety Liquor Control Division, Missouri Department of Public Safety Division of Liquor Control, Nebraska Liquor Control Commission, Nevada Department of Taxation, New Jersey Department of Law and Public Safety Division of Alcoholic Beverage Control, New Mexico Alcohol and Gaming Division, New York State Liquor Authority, North Dakota Office of the State Treasurer Alcohol Beverage Division, Oklahoma Alcoholic Beverages Laws Enforcement Commission, Puerto Rico Bureau of Alcoholic Beverage Taxes, Rhode Island Liquor Control Administration, South Carolina Department of Revenue and Taxation, South Dakota Department of Revenue, Tennessee Alcoholic Beverage Commission, Texas Alcoholic Beverage Commission, Wisconsin Department of Revenue.

SUMMARY OF ARGUMENT

The plain meaning and the judicial interpretation of the Twenty-First Amendment clearly supports the validity of the state law that is under attack herein. Further, North Carolina's regulation of the interstate shipment of alcohol beverages directly to its consumers is an inherent part of the state's structure of its alcohol beverage industry, a function that clearly falls within the so-called "core" powers of the Twenty-First Amendment and that also acts to immunize North Carolina's action from Commerce Clause scrutiny.

Alternatively, even if one accepts the premise that North Carolina's regulation is precluded by the Commerce Clause, one must consider the impact of the Webb-Kenyon Act, a federal statute that both pre-dates and post-dates the adoption of the Twenty-First Amendment and that serves to strip alcohol beverages of their normal interstate commerce protection, thus allowing North Carolina to impose the kind of regulation on the importation of alcohol beverages that is at issue here.

ARGUMENT

I. NORTH CAROLINA'S STATUTE IS A PERMISSABLE REGULATION UNDER THE PLAIN MEANING AND JUDICIAL INTERPRETATION OF THE TWENTY-FIRST AMENDMENT

The production, sale and regulation of alcohol beverages has long been a source of controversy and litigation within the United States. In the early days of the country, the new federal government sparked an agrarian uprising - known as the "Whiskey Rebellion" - when it sought to impose, for the first time, a federal excise tax on distilled spirits, in part to fund the debt of the Revolutionary War.

While the federal government thus staked its "claim" to the right to tax alcohol beverages, it generally did not seek to impose other restrictions on its production and distribution. That responsibility fell to the individual states, which sought to exercise control over the product's distribution by licensing sellers, an action that was upheld by the Supreme Court in *The License Cases*, 46 U.S. 5 How. 504 (1847).

A strong anti-alcohol movement emerged in the latter half of the nineteenth century. Several states attempted to legislate a totally "dry" environment in which

the sale of alcohol was prohibited, the National Prohibition Party was formed in an effort to impact federal elections, and such groups as the Women's Christian Temperance Union and the Anti-Saloon League were born out of a concern about the adverse effect that overconsumption of alcohol beverages was having on the country's moral fabric.

Some states opted for virtually unrestricted commerce in alcohol beverages while others opted to be "dry," that is, they prohibited virtually all traffic in alcohol beverages. Still others adopted "local option" statutes, giving cities, towns and municipalities the authority to determine whether to allow the sale and distribution of alcohol beverages.

Although Congress generally adopted a "hands-off" policy with regard to alcohol beverage regulation, except for federal taxation of the product, state regulation of trade in alcohol beverages soon ran afoul of the Constitution's grant to Congress -- and Congress alone -- of the authority to regulate commerce among the states. U.S.Const. Art. I., Sec. 8, cl. 3. Expressly overruling a 50-year-old precedent, the Supreme Court of the United States declared invalid an Iowa law

regulating the sale of alcohol beverages which had been shipped from outside the state. *Leisy v. Hardin*, 135 U.S. 100 (1890).

Reacting to *Leisy*, Congress passed the so-called "Original Packages Act," also known as the Wilson Act, which declared that, upon arrival into a state, alcohol beverages became subject to the regulatory scheme of the state, in the same manner as alcohol beverages produced within the state. Act of August 8, 1890, c. 728, 26 Stat. 313 (current version at 27 U.S.C. § 121).

Passage of the Wilson Act, however, did not totally clarify the ability of states to regulate trade in alcohol beverages within their borders. Although the constitutionality of the Wilson Act was upheld, In *re Rahrer*, 140 U.S. 545 (1891), in *Rhodes v. Iowa*, 170 U.S. 412 (1898), the Supreme Court held that, although alcohol beverage products lose their character as items of interstate commerce after their delivery into a state, the Wilson Act did not authorize the laws of a state to be applied to such merchandise while in transit in the state and prior to delivery to a consignee within the state.

Similarly, in *Vance v. W.A. Vandercook Company*, 170 U.S. 438 (1898), the Supreme Court declared that the Wilson Act did not recognize the right of a state to

prevent an individual from ordering alcohol beverages from outside the state for his own consumption.

Congress moved to close this "loophole," but it was not until 1913 that Congress succeeded in passing what is now commonly referred to as the Webb-Kenyon Act. Act of Mar. 1, 1913, c.90, 37 Stat. 699 (current version at §27 U.S.C. 122). The title of the Act - "An Act divesting intoxicating liquors of their interstate character in certain cases" - is instructive in determining the real motivation behind the statute. Rep. Clayton, Chairman of the House Judiciary Committee, which extensively debated the bill prior to its consideration by the full House of Representatives, clearly explained its purpose when he declared

The purpose (of the bill) is to take the protecting arm of the Federal Government, by virtue of the interstate commerce clause of the Constitution, from around the illicit dealers in liquors, and is to allow the States which have passed police regulations restricting or forbidding the sale of liquor to better enforce those regulations.

49 Cong. Rec. H2864 (daily ed. February 8, 1913).

The Supreme Court upheld the validity of the Act, holding that there was no reason to state that because Congress had a power to forbid movement of a product in interstate commerce, it did not also have the authority to establish a regulation

making it impossible for one state to violate the prohibition of the law of another state in interstate commerce. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917).

This Commerce Clause exception was quickly swallowed up by the national experiment known as Prohibition when the Eighteenth Amendment was ratified by the requisite number of states.

When it became apparent that Prohibition was a failure, Congress moved to undo its Constitutional underpinning by adopting the Twenty-First Amendment. Congress could have completed its effort by adoption of Section 1 (repealing the Eighteenth Amendment) alone, but the lawmakers chose to add Section 2, which clearly declares

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.

To underscore the Congressional statement on the impact of the Amendment, the Webb-Kenyon Act was subsequently re-enacted without change in 1935. Act of Aug. 27, 1935, c.740 §202(b), 49 Stat. 877 (current version at 27 U.S.C. § 122).

The Supreme Court promptly recognized the impact of the Twenty-First Amendment, noting that it "sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). The Court has continued to recognize that the Twenty-First Amendment "primarily created an exception to the normal operation of the Commerce Clause," *Craig v. Boren*, 429 U.S. 190, 206 (1976), and that the resultant authority of the state under the Amendment over importation of alcohol beverages "is transparently clear." [Id.](#) at 207.

Even as the Court later appeared to suggest that the grant of authority under the Twenty-First Amendment must be balanced with Congress' power under the Commerce Clause under certain conditions, the scope of those conditions has been made abundantly clear:

The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.

***California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97, 110 (1980)**

In its most recent review of the Twenty-First Amendment, the Court noted that Section 2 delegated to the states the power "to prohibit commerce in" alcohol beverages and further stated that state "regulatory power over this segment of commerce is therefore largely `unfettered by the Commerce Clause.'" 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996), citing *Ziffrin*, supra.

The Supreme Court has thus clearly demarcated the scope of the Twenty-First Amendment: states have "virtually complete control" over the importation of alcohol beverages. As to "other regulations," however, the state's authority must be balanced against the Commerce Clause.

In holding the North Carolina statute invalid because of a conflict with the Commerce Clause, the court below misapplied this long-standing and clear interpretation of the Twenty-First Amendment. In citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the court relied on an opinion that construed an example of the "other regulations" that the Supreme Court had in mind when it ruled in *Midcal*. Indeed, the fact pattern of the case relied on by the court below shows that it had nothing to do with the importation of

alcohol beverages into New York, but rather the regulation of those beverages - through a statute prescribing a pricing regime - once they had arrived in the state.

And the court below also erroneously relied on *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) to support its reasoning. That case also involved a state's regulation of alcohol beverages - in this case, taxation - once the beverages had arrived into the state. The state did not seek to justify the tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Amendment; in fact, the state acknowledged that the purpose of the discriminatory taxation scheme was to promote a local industry [Id. at 276](#). Indeed, the Twenty-First Amendment claim in that case was not even raised by the state until Supreme Court consideration.

Thus, based on the plain language and judicial interpretation of the Twenty-First Amendment, the opinion of the court below should be reversed and the validity of North Carolina's statute upheld.

**II. NORTH CAROLINA'S STATUTE CLEARLY FALLS WITHIN THE
"CORE POWERS" OF THE TWENTY-FIRST AMENDMENT
THAT HAVE BEEN RESERVED TO THE STATES**

Even if one takes the position that a balancing of the Twenty-First Amendment and the Commerce Clause should be considered, it is readily apparent that the court below erred in its construction of a state's "core powers" under the Amendment that are to be given precedence over the Commerce Clause.

The court below virtually ignored the concept of a state's "core powers" which have been held to be the type of regulation that is favored by the Twenty-First Amendment over normal Commerce Clause considerations. Many such powers have been recognized. For example, in upholding a state's right to require labeling of alcohol beverages destined for military installations within its borders, the Supreme Court noted that "ensuring orderly market conditions, and raising revenue" are "core powers" that must be recognized. *North Dakota v. United States*, 495 U.S. 423,432 (1990).

Other courts have also shed light on a state's "core powers." For instance, mere regulation of the sale of alcohol beverages is not sufficient to overcome a Commerce Clause challenge; a state's regulation "must effect the structure of the

state liquor distribution system." *Pete's Brewing Co. et al. v. Whitehead*, 19 F.Supp.2d 1004, 1020 (W.D.Mo. 1998).

There can be no question that North Carolina's decision to prohibit the direct shipment of alcohol beverages from a location outside of the state to consumers within the state is an integral part of the structure of the liquor distribution system that the state has chosen to implement. The sale of alcohol beverages does not take place in a free and unregulated market. Buyers of alcohol beverages must be twenty-one years of age or older. Sellers are limited to those who have been licensed by the state after an exhaustive check of their background. Many licensed sellers, especially those at the production or wholesale level, are frequently required to remit excise taxes to the state and licensed retailers are required to collect and remit applicable sales taxes when the product is transferred to the ultimate consumer. Some jurisdictions (e.g., cities and counties) have opted to be totally "dry," prohibiting the sale of alcohol beverages altogether.

To strike down North Carolina's statute as an impermissible burden on interstate commerce outside of the state's "core powers" under the Twenty-First Amendment would undermine the state's ability to structure any kind of distribution

system. If out-of-state sellers are permitted to ship into North Carolina directly to the state's consumers, the state will lack the ability to effectively enforce its laws governing age of purchaser, background of sellers and collection of revenue, all of which are central to the system of distributing and selling alcohol beverages.

North Carolina has not rendered it impossible for out-of-state vendors to reach its consumers. It has merely structured a system - and done so within the parameters permitted under the Twenty-First Amendment - that requires licensing and tax collection. Out-of-state vendors who wish to reach North Carolina consumers may do so within the regime laid out by the state.

While a trier of fact may believe that there is a less intrusive way for a state to regulate the importation of alcohol beverages into its borders, it is suggested that the Twenty-First Amendment gives the state legislature, and not the courts, the power to determine what kind, if any, of importation to allow. And the jurisprudence to date has nowhere indicated that a state must regulate importation of alcohol beverages in the same manner as it regulates in-state shipments.

III. EVEN IF ONE ASSUMES THAT THE COMMERCE CLAUSE
"TRUMPS" THE POWER ACCORDED TO THE STATE
UNDER THE TWENTY-FIRST AMENDMENT,
CONGRESS HAS UTILIZED ITS COMMERCE CLAUSE AUTHORITY
TO DELEGATE CONTROL TO THE STATES

There is yet another reason, however, why North Carolina's statute must be permitted to stand. Even if one accepts the reasoning of the court below, which we believe is erroneous, one is left with Congress' utilization of its interstate commerce power in the Webb-Kenyon Act.

As has been indicated previously herein, that Act both pre-dates and post-dates adoption of the Twenty-First Amendment. Its purpose was unmistakably clear: "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws." *Clark Distilling Co.*, supra.

Placed in the context of the earlier Wilson Act, the Webb-Kenyon Act represents a "further surrender to the states of the constitutional power'of Congress to regulate interstate commerce in intoxicating liquors." *Dugan v. Bridges*, 161 F.Supp. 694, 704 (D.N.H.), appeal dismissed 300 U.S. 684 (1936). The Act shows an intent to give the states an "entirely free hand" in regulating the importation of

alcohol beverages, *Id.*, and there appears to be no prohibition against discrimination between liquors produced within the state and those produced outside the state. Put another way, the Act sanctions differential treatment of sellers, depending on their location.

The re-enactment of the Webb-Kenyon Act in 1935, subsequent to the adoption and implementation of the Twenty-First Amendment underscores the principle that the Amendment does not withdraw from the states the power surrendered to them by the passage of the Act, regardless of whether one views the Act as an abdicated power that previously had been exercised by Congress, or as one having always been retained or reserved under the police powers of a [state](#). *Id.* [at](#) 707.

The chronological timing of Congress' action in re-enacting the Act subsequent to the Twenty-First Amendment and its clear language indicate that, notwithstanding any other Commerce Clause analysis, Congress did intend to allow the states a free hand to regulate, or even prohibit, the interstate shipment of alcohol beverages into their borders.

To hold otherwise would render the Act and more than a century of Congressional pronouncements on the power of states a nullity.

While a balancing test against the Commerce Clause may be appropriate in certain instances of state enactments arguably supported by the power bestowed under the Twenty-First Amendment - a balancing test that, as stated, we do not believe is appropriate here - there can be no balancing test utilized in construing what, in effect, is the grant of authority to the states under the Webb-Kenyon Act. Congress clearly determined to cede a portion of the federal government's interstate commerce authority to the states, and whether one agrees with the manner in which the state has exercised its authority or not, the clear result must be a deferral to state action in the area of regulating importation of alcohol beverages, regardless of whether a different approach is taken with regard to in-state shipments.

There is nothing more basic to the structure of a state's alcohol beverage distribution system than the ability to determine under what conditions the product may be brought into the state. Alcohol beverages are one of a handful of products (tobacco and firearms being two others) that the government has determined warrant special treatment by means of controlling who may sell and who may purchase the

product. There is not now, nor has there been for more than 150 years a "free" market in alcohol beverage distribution and sale. To disallow North Carolina's lawful attempt to control and regulate the distribution of this product would mean that no importation regulation would be allowed to stand, leading to the uncontrollable distribution of alcohol beverages.

Alcohol beverages should not be turned into the functional equivalent of polo shirts or blue jeans merely because a trier of fact believes there is a better way to regulate the product's flow.

CONCLUSION

For the reasons set forth herein, the opinion of the trial court should be overturned and the case remanded for further proceedings not inconsistent with the decision herein.

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