

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DONALD H. BESKIND, KAREN BLUESTEIN, MICHAEL D. CASPER, SR.,
MICHAEL Q. MURRAY, D. SCOTT TURNER, MICHAEL J. WENIG, MARY
A. WENIG and OAKSTONE WINERY, INC.,
Plaintiffs-Appellees

v.

MICHAEL F. EASLEY, in his official capacity as Governor of the State of North
Carolina; ROY COOPER, Attorney General of North Carolina, BRYAN
BEATTY, Secretary of the North Carolina Department of Crime Control and
Public Safety; and GEORGE BASON, Chairman of the North Carolina Alcoholic
Beverage Control Commission all in their Official Capacities,
Defendants-Appellants

On Appeal from the United States District Court
Western District of North Carolina at Charlotte
Honorable Graham C. Mullen

BRIEF AMICUS *CURIAE* OF THE STATE OF MICHIGAN
IN SUPPORT OF APPELLANTS

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Statement of Identity and Interest of Amicus Curiae

Amicus Curiae is the State of Michigan. FED. R. APP. P. 29(a) permits a "... State ... [to] file an amicus-curiae brief without the consent of the parties or leave of court."

As in North Carolina, the laws of *Amicus Curiae* State of Michigan prohibit unlicensed and unregulated out-of-state alcohol producers and retailers from selling and delivering alcoholic beverages directly to the state's residents. All sales and deliveries of alcoholic beverages must be made in accordance with the statutorily prescribed regulatory structure. Also, as here, individual and winery plaintiffs have challenged the state's Twenty-first Amendment authority to regulate alcohol trafficking within its borders, suggesting that requirements of licensing and accountability violate the Commerce Clause. The District Court's decision in Michigan's favor is on appeal to the Sixth Circuit, waiting the scheduling of oral argument. *Heald, et al v. Engler, et al*, (6th Cir. No. 01-2720).

In challenging direct shipping laws, plaintiffs contend that enforcement and regulation of out-of-state entities can be accomplished as readily as with in-state entities. The plaintiffs suggest that direct shippers will voluntarily pay appropriate taxes. They assert that adequate protection against sales to minors can be accomplished by placing responsibility for verifying age on the delivery personnel for common carriers such as United Parcel Service. They contend that the direct

shipping issue is limited to "fine" wineries that want to ship and wine "connoisseurs" who want such wines delivered to their doorsteps. They provide no support, however, for these contentions.

The purpose of this amicus brief is to demonstrate that these contentions are not borne out by Michigan's actual direct shipping enforcement experience'.

Because the premises upon which plaintiffs build their case are flawed, the legal conclusion they ask this Court to make is wrong.

‡ We are confident that the parties will fully brief the law on the Twenty-first Amendment and Commerce Clause as they relate to direct shipping, and so will not provide an extensive analysis here.

Statement of the Issue

Whether state laws requiring licensure and accountability for those trafficking in alcohol, and which preclude out-of-state, unlicensed alcohol sellers from shipping unregistered, unapproved products directly to the homes of state residents, are an appropriate exercise of the broad authority over alcohol conferred on the states by the Twenty-first Amendment of the Constitution.

Argument

Nature of the case

Plaintiffs claim that liquor laws that preclude unlicensed, out-of-state producers of alcohol from selling and shipping alcohol directly to residents' homes without state regulation violate the Commerce Clause, U.S. Const. art I § 8.

Defendants assert that these laws are an appropriate and necessary exercise of the state's authority to regulate alcohol trafficking under the Twenty-first Amendment of the Constitution.

Section 2 of the Twenty-first Amendment provides for state control over alcohol trafficking within state borders:

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

Pursuant to this authority, many states, including North Carolina and Michigan, enacted laws establishing a three-tier system of alcohol distribution within their borders, which require that purchases by consumers be from in-state licensed retailers. Licensed in-state wineries and breweries may make limited retail sales of their products only. Licensed retailers, wineries and microbreweries may also deliver the alcohol product they are authorized to sell to purchasers within the state.

The term "direct shipping" refers to the practice of an unlicensed and unauthorized out-of-state producer or retailer of wine, spirits, or beer, shipping alcoholic products directly to residents at their homes. Michigan's and North Carolina's systems of licensure and regulation preclude the practice, as do most other states. Contrary to the impression Plaintiffs would leave with the Court, NOT A SINGLE STATE permits unlimited, unregulated direct shipping of alcohol to its residents.

Michigan and North Carolina have created no impediment to sales of beverage alcohol products from other states. Rather, they have specified a regulatory structure for alcohol sales that ensures seller accountability for injuries resulting from such sales and violations of liquor laws, prohibits the sale of alcohol

2 Direct shipping is completely prohibited in Alabama, Arizona, Arkansas, Connecticut, Delaware, Kansas, Maine, Massachusetts, Michigan, Mississippi, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, and North Carolina, with the prohibition a felony offense in Florida, Indiana, Kentucky, Maryland, North Carolina, Oklahoma, and Tennessee. So-called "reciprocal" states permit shipments of wine only between each other, but on a limited basis: California [2 cases/mo.], Colorado [2 cases/mo. - on-site sales only], Hawaii [2 cases/year], Idaho [2 cases/mo.], Illinois [2 cases/year], Iowa [2 cases/mo.], Minnesota [2 cases/year], Missouri [2 cases/year], New Mexico [2 cases/mo.], Oregon [2 cases/mo.], Washington [2 cases/year], West North Carolina [2 cases/mo.], and Wisconsin [1 case/year]. A few states permit limited direct shipping without a reciprocal agreement: Alaska ["reasonable quantity"], District of Columbia [1 btl./mo.], Georgia, Louisiana [4 cases/year], Nebraska [1 case/mo.], Nevada [1 case/mo.], New Hampshire [5 cases/year], North Dakota [1 case/mo.], and Wyoming [2 cases/year]. See, Duncan Baird Douglass, *Constitutional Crossroads: Reconciling the Twenty-first Amendment and the*

to minors or intoxicated persons, promotes an orderly market, and provides a verifiable method of tax collection.

Plaintiffs object that the particular producers of wine with which they wish to do business have chosen, for financial, marketing, or other reasons, to not sell their products in Michigan through the established regulatory framework.

There is no question that an exceptionally broad offering of fine wines is available through the regulated systems of both North Carolina and Michigan, the vast majority of which are produced outside these states. The individual plaintiffs, who style themselves wine "connoisseurs" and "enthusiasts" simply want wines not available to the general public in local stores.

The choice to not sell alcohol in a particular state within its regulatory system because it may be more costly to do so than to sell directly (and illegally) to individuals, does not render the regulatory system unconstitutional. Plaintiffs have no constitutional right to compel a state to permit sales of alcohol in a manner that would maximize an alcohol producer's profits or provide self-appointed wine "connoisseurs" with access to any alcoholic product produced anywhere in the world.

Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages, 49 Duke L.J. 1619, nn. 134-136.

Michigan's Experience

Because of concerns about the ability of minors to order and receive alcohol from Internet sites, in mid-1999, the Michigan Attorney General and Liquor Control Commission conducted a series of "stings", in which a minor with a valid credit card attempted to purchase various alcohol products for direct delivery. The results of these stings revealed that most alcohol sellers were far more concerned about the validity of the credit card number than the age of the purchaser.

Virtually none of the sellers were concerned about Michigan laws precluding such shipments. The alcoholic beverage products available for sale ranged from fine wines to 194 proof grain alcohol, a substance so dangerous that in Michigan, it can only be used in industrial applications and must be shipped and transported as a hazardous, highly flammable material.

About one in three sites contacted during these stings agreed to sell alcohol to the minor purchaser with no more age verification than a "click" of the mouse. The United Parcel Service personnel who delivered the parcels containing alcohol purchased under these stings did not properly verify the age of the minor recipient.

Although these stings confirmed the problem, they were costly and time-consuming to conduct. Proceeding against all of the thousands of alcohol sellers and shippers through the use of stings was considered to be an impossible task. Accordingly, the first action was taken against the common carrier used for the

deliveries, United Parcel Service. The resulting settlement required that UPS cooperate with the state to identify illegal alcohol shipments.

Since that settlement, 164 out-of-state shipments of alcohol have been intercepted and seized on their way to Michigan residents. These contained beer, various kinds of spirits, and wine, both cheap and expensive. In some cases, packages deliberately were disguised or mis-identified to avoid detection of the alcoholic beverage contents.

These shipments of alcohol to Michigan residents included 318 bottles of beer, as well as 20 bottles of various "hard" spirits. Although some of the 1,020 bottles of wine that were intercepted could be classified as high-end, the shipments contained many cheap wines as well, including a number of wines made from fruits not normally used in "fine" winemaking - blackberries, cranberries, currants, elderberries, chokecherries, apricots, raspberries, and plums, as well as six bottles of a wine labeled "Eye of Newt", of unknown content³.

The shipments came from 81⁴ different shippers in 15 states, South Africa and Australia. Ten of the shipments were from individuals to Michigan residents.

³ This should not be construed as a commentary on the merits of any particular alcoholic beverage, but rather, illustrative of the variety and extent of products shipped to Michigan.

⁴ A number of the shippers made multiple shipments into Michigan - this is why the number of shippers is much less than the number of shipments.

Of the remaining 71 commercially sent shipments, 46 (or 65%) were from out-of-state retailers. 25 shipments were from out-of-state wineries.

Not a single shipper contacted the state to pay sales or alcohol excise taxes voluntarily prior to seizure of the product. All tax payments have resulted from threatened legal action and negotiated settlements.

Based on Michigan's real world experience, several conclusions may be drawn, that refute many of the bases upon which plaintiffs' arguments rely.

A. Access by minors to alcohol from out-of-state sources is a real issue.

Plaintiffs contend that the states' concerns about access by minors to alcohol from out-of-state is pretense, insufficient to justify direct shipping prohibitions. In support of this, they assert that 1) no evidence exists that minors are buying from direct shippers, 2) minors are unlikely to buy costly, upscale wines, 3) minors want their alcohol purchase immediately, and will not purchase from a source for later delivery, and 4) training of common carrier delivery people can eliminate any access by minors.

1. Access by Minors

The results of the stings in Michigan showed that one in three Internet alcohol sites contacted sold to the decoy minor. Plaintiffs argue that only the minors who are participating in the stings are purchasing alcohol, that no evidence of such purchases exists outside of stings. This argument is virtually identical to

the argument made by bricks and mortar retailers when in-state minor stings were intensified. The fundamental flaw in this argument is that neither retailers nor minors voluntarily turn themselves in for prosecution following a sale. Absent decoy stings, sales to minors are only identified when the minor is arrested for drunk driving or found injured or dead in an accident. Accordingly, direct evidence of sales to minors outside of stings is very limited. The best evidence that minors have easy access to alcohol from remote sellers continues to be the results of decoy stings.

The Internet sellers who sold to the Michigan decoy did not know that the purchaser was a minor participating in a law enforcement sting. They simply sold to whoever could provide them with a valid credit card. That a greater percentage of remote sellers would sell to minors than the percentage of state retailers is to be expected, for two reasons.

First, a remote sale does not involve a face-to-face transaction. In-state retailers approached by a minor to purchase alcohol have an opportunity to observe the purchaser directly, to assess nervousness and other mannerisms that indicate the person may not be of legal age to purchase, and to closely scrutinize a government-issued picture identification. Michigan requires "diligent inquiry" to verify age, which is defined as, "at least an examination of an official Michigan's operator's or chauffeur's license, an official Michigan personal identification card,

or any other bona fide picture identification." MCL 436.1701(7)(b). This requirement simply cannot be met by a "click" of the mouse or a faxed (and easily altered) copy of a license.

Second, in-state licensed retailers risk their state liquor license - their very livelihood - if they sell to minors. Out-of-state unlicensed retailers have nothing to lose, since, in the rare event that the sale is identified, they have no license at risk and out-of-state prosecutions are exceptionally difficult and costly to pursue.

2. Type of Product Sold

Plaintiffs suggest that minors won't buy costly upscale wines. This premise presumes that minors have little discretionary money and limited knowledge of, or palate for, fine wines. Plaintiffs provide no support for either presumption.

The discretionary income of minors is not perceived as minimal by those who market to this demographic. Studies by Teen Research Unlimited (TRU) ⁵, a market-research firm that focuses on the teen market, estimated that teens in the United States from ages 12 to 19 spent \$155 billion in 2000, and \$172 billion in 2001, despite slowdowns in the general economy.

The second presumption, that minors have no palate, knowledge, or interest in wines is not true. 35% of all wine coolers sold in the United States are

⁵ www.teenresearch.com

consumed by junior high, middle school, and high school students ⁶. Moreover, current teen interest in expensive wines is irrelevant to this analysis. Although plaintiffs continuously characterize this case as limited to wine connoisseurs and enthusiasts seeking rare fine wines, however those are defined, in fact, the statutes plaintiffs seek to invalidate apply much more broadly. The alcohol controlled by the state's three-tier system includes wine coolers, beer, rums, tequilas, flavored vodkas, and other similar products heavily marketed to young drinkers.

The alcohol industry may contend otherwise, but the marketing "intended" to reach those in the 21 - 25 age group has been, unfortunately, very effective at also selling to the under -21 crowd. One research study reported that 56% of students in grades 5 to 12 said that alcohol advertising encourages them to drink.

One of the first studies to explore Internet marketing of alcohol and tobacco to minors was conducted by the Center for Media Education (CME):

The study found that alcohol and tobacco companies are using the online media to advertise and promote their products, through a variety of marketing techniques that capitalize on the medium's strong and unique attraction for young people. §

⁶ Office of the Inspector General, United States Department of Health and Human Services, *Youth and Alcohol, Law and Enforcement: Is the 21-year-old drinking age a myth?*

⁷ Scholastic/CNN Newsroom Survey on Student Attitudes about Drug and Substance Abuse.

⁸ *Alcohol and Tobacco on the Web: New Threats to Youth*, March 1997.

In December 1998, the CME published an update to the original study.⁹ This study examined 77 beer, wine and spirits Internet sites, and concluded that 62% of the sites included elements appealing to youth. The study discussed the marketing techniques:

The sites that appear to appeal to youth often strive to create a community of brand-loyal enthusiasts, a place where lonely teens can talk, find peers and support for risky activities like binge drinking. Known among marketers as relational advertising, this effort to build a relationship between the user and the product is the dominant trend in marketing on the Web and is already heavily exploited by the alcohol industry.

Plaintiffs contend that wineries do not market to youthful drinkers. Again, this case is not about wineries, exclusively. The statutes in question regulate beer and spirits sales as well. Moreover, even if the case were limited to wine, many wine sites either are directed at youth, or contain links to youth oriented wine sites. Sites such as Wine X Wired'^o, with regular features "Wine Bitch" and "X-Rated Wines", and Winebrats" ¹¹ with its "Vino-versity" and "WineRave Tour", clearly are aimed toward youth.

And all types of alcohol are being offered by remote sellers.

⁹ *Alcohol Advertising Targeted at Youth on the Internet: An Update*, December 1998.

to www.winexwired.com/toc.htm

¹¹ www.winebrats.org

The first purchase made by the minor in the Michigan stings from one Illinois retailer¹² was a \$6.85 bottle of blackberry wine. Even after the retailer was notified of the sale and charged with a misdemeanor sale to a minor, he sent a follow-up email to the minor, inquiring whether he wanted to purchase again. The minor then purchased a \$6.66 bottle of wine, which again was delivered directly to his residence. This retailer, who pled guilty to misdemeanor sale of alcohol to a minor, claimed that his targeted customers were upscale wine connoisseurs. However, in addition to webpages devoted to beer, tequila, and vodka, at the time of the purchases, his website, www.intemetwines.com, devoted an entire webpage to 192+ proof grain alcohol, being sold as a beverage alcohol. As of this writing, this website continues to sell grain alcohol.

3. Immediate Possession of Purchase

Plaintiffs contend that minors want immediate access to alcohol, and won't wait for shipment from a remote seller. The Wirthland Worldwide'³ study of college students, conducted for Americans for Responsible Access for Alcohol¹⁴, suggests

¹² Randall's Wines & Spirits, a/k/a [www/intemetwines.com](http://www.intemetwines.com)

¹³ www.wirthlin.com

¹⁴ ARAA's members and supporters include, *inter alia*, the North Carolina Attorney General, Students Against Destructive Decisions (SADD), the National Association of Governors' Highway Safety Representatives, the American Academy of Pediatrics, the North Carolina Alcohol Control Board, the American Council on Alcoholism, and the National Transportation Safety Board.

otherwise, finding that 17,600 students in the survey reported having purchased beer, wine or liquor over the Internet, by toll-free phone order or by mail-order catalog. Obviously, the delay in receiving the alcohol did not stop these sales. The Wirthland Worldwide study also found that 80% of the students surveyed said their peers are likely to purchase alcohol online if no age verification is required.

Moreover, the delay between ordering and delivery of alcoholic products can be minimal. Most alcohol sale sites offer a variety of delivery options, ranging from UPS Ground to FedEx Preferred Overnight, the latter of which guarantees delivery by 10:30 a.m. the morning following the order.

Thus, a minor wishing to purchase a case of grain alcohol from Randall's Wines and Spirits (www.intemetwines.com) for a Friday "party punch" could order it on the preceding Monday for regular delivery, or he could wait to order it until late Thursday, and still have it arrive on Friday morning by adding only \$20 more to the shipment cost.

4. Common carrier delivery personnel training.

Plaintiffs contend that the delivery personnel can be trained to properly validate age. The results of Michigan's stings showed that common carrier delivery personnel were not effective at verifying that the recipients of packages containing alcohol were at least 21 years old. This was true even where the

contents were clearly identified on the box as alcoholic beverages, and a sticker stated that the package could only be delivered to an adult.

The failure to properly verify age is not surprising. Common carrier delivery personnel are trained to deliver packages - that is the business of and source of revenue for the delivery company. Delivery personnel, whose mission is to deliver as many packages in as short a time as possible, are only hampered in achieving their goal by requirements of age verification.

Moreover, as a matter of policy, should delivery personnel be held to the strict diligent inquiry standard for verifying age? The common carrier and its personnel are not making money from selling alcohol. Plaintiffs would pass off the responsibility and liability for deliveries to minors to delivery personnel, with limited, if any training in verifying age for alcohol purchases.

B. Enforcement efforts against out-of-state entities are prohibitively difficult and costly.

This should be self-evident.

But, plaintiffs assert that, if direct shipping is allowed, the states simply can subject out-of-state shippers to the same standards and enforce laws in the same way as the state does with its in-state retailers. To understand how simplistic and unreasonable this assertion is, one must have an understanding of the obligations placed on licensed in-state retailers and wineries and the extent of in-state enforcement efforts to ensure that these sellers are accountable.

In-state retailers and wineries are subject to rigorous investigation in order to become licensed, which requires, among other things, extensive disclosure of financial documents, on-site inspections of proposed license premises, and police background checks. Once licensed, they must comply with a multitude of statutory requirements and rules designed to protect the consuming public. Retailers bear the burden of ensuring that sales are not made to minors or intoxicated persons, that sales are made only during hours authorized by statute, that sales are not made in violation of local option laws, that only state approved products are sold, that spirit sales are made in accordance with state-mandated price controls, and that appropriate taxes are collected and remitted to the state. Retailers are held responsible for improper or illegal sales, with penalties ranging from fines to suspension or revocation of their liquor licenses. Dram-shop laws place liability on retailers for injuries and deaths resulting from sales to minors or intoxicated individuals.

These stringent requirements protect consumers from unlawful sales by requiring that alcoholic beverages be sold and distributed to consumers only by persons who are responsible and can be held accountable. In-state retail licensees are accountable to and reachable by the State, because non-compliance with the law may subject them to fines, suspension or revocation of their liquor licenses, and even criminal prosecution.

Attempting to impose and enforce all of these obligations on out-of-state wineries and retailers is virtually impossible, given the number of such sellers, their locations, and the overwhelming costs involved. Plaintiffs have estimated that approximately 2100 wineries are operating in the United States. Because wineries selling and shipping their own products are acting as retailers for their wines, little distinction exists between these wineries and retailers who want to ship alcohol beverages produced by others¹⁵. And literally hundreds of thousands of alcohol retailers in the United States are affected in the same way as the wineries by the direct shipping laws. Add to these the wineries, breweries distilleries, and retailers from around the world, and the numbers become mind-boggling.

In addition to several thousand investigations for in-state license applications, Michigan issued 3,453 complaints against in-state licensees in calendar year 2001, based on violations of the Liquor Code discovered by state investigators and local law enforcement agencies. The 2000+ hearings that resulted were held all over the state, and required, at a minimum, the attendance of a hearing commissioner, a court reporter, the investigator or police officer, the

¹⁵ That out-of-state retailers have the same goal of direct delivery is evidenced by the fact that 65% of illegal shipments seized in Michigan were from discount beverage shops, party stores, wine clubs, beer clubs, and other retailers.

licensee, and counsel. Eight Assistant Attorneys General are dedicated nearly exclusively to this work.

The problems with attempting this level of oversight, investigation, and enforcement with a virtually unlimited number of out-of-state alcohol sellers are obvious.

A decoy sting on an in-state retailer is simple: the minor attempts to make a purchase with cash furnished by law enforcement, and immediately is either sold to or turned away. A decoy team can make many stops in a single outing.

A decoy sting on an out-of-state retailer is more costly and time-consuming: the minor must have a credit card in his own name and must be present for delivery. Following such a sale and delivery, the actual seller must be identified for further enforcement effort.

Establishing the true identity of the seller from the Internet website name or assumed name is frequently difficult. The seller's website often provides few clues to the name of the seller or its location. As an example, the Internet site www.internetwines.com is operated by Randall's Wine & Spirits, and "Out of Africa" is the assumed name for S. A. Wines, Inc., a California company specializing in selling wines from Africa and South America. Further, once located, out-of-state sellers typically dispute jurisdiction, refuse service, or ignore communications sent to them. There is no state-issued license to fine or revoke;

the seller assumes little risk by selling in a manner that would never be permitted for in-state licensees.

Applying and enforcing the state's liquor laws "equally" on in-state and out-of-state wineries and retailers, so casually suggested by the plaintiffs as a panacea, is based on a superficial, simplistic, and flawed understanding of liquor control regulation and enforcement.

An understanding of the distinctions between licenses and why those distinctions exist is critical to this case. Plaintiffs believe that out-of-state wineries and retailers are equivalent to in-state wineries and retailers, and must be treated identically. In fact, because of the obligations imposed on licensed in-state wineries and retailers, the level of in-state enforcement efforts, the risks of financial penalties and suspensions or revocations of the licenses, and dramshop liability where injuries or death result from improper sales, any resemblance with out-of-state wineries and retailers is superficial and does not extend beyond the descriptive terms "winery" and "retailer".

There is not a state in the union that could afford to fund regulation of the hundreds of thousands of out-of-state retailers and wineries the same way it regulates its in-state retailers and wineries.

In-state retailers and wineries may make deliveries within the state of products they are authorized to sell, because they also are subject to intensive,

ongoing scrutiny and regulation, and risk loss of their licenses and their businesses if they fail to comply with state liquor laws and rules. Out-of-state retailers and wineries are prohibited from making such deliveries because the necessary controls to ensure the same level of accountability, responsibility and liability cannot be imposed within the funds and resources available to the states.

C. Direct shipping of alcohol from out-of-state compromises control over product quality.

Michigan and North Carolina maintain controls over the type of product to be sold as beverage alcohol as a protection to their residents. Alcoholic products from unapproved sources, such as home breweries, wineries and stills, are not permitted to be sold. Some products from established commercial sources are not permitted because of the concern that the product is dangerous, such as grain alcohol and certain liqueurs that change alcohol proof in the bottle over time. Products with obscene or offensive labels, or which have labels targeting children, are prohibited, as are products in certain size packaging. See, e.g., www.intemetwines.com/big-bottles.htm (a bottle the size of a "small child").

These types of restrictions cannot be enforced if direct shipping from out-of-state sellers is permitted. Grain alcohol, "Eye of Newt" wine, "Red Ass Ale", "Bad Frog Beer" (the frog on the label is giving the "finger"), and other such products will enter the state unrestricted.

Although public safety requires product review and approval, this in no way precludes out-of-state sellers from bringing their legitimate products to market. To the contrary, the regulatory structure is designed to do just this.

Out-of-state producers of spirits, wine and beer may sell their products to Michigan and North Carolina consumers through other types of licensees, including wholesalers and out-state sellers of wine and beer. These licensees arrange for distribution of the product through licensed retailers in the state. The system permits approved products to be sold while ensuring accountability of the seller.

That the system works is apparent from the wide range and variety of alcoholic products lining the shelves of the in-state retailers, the vast majority of which is produced outside the state.

D. Unlicensed out-of-state sellers do not voluntarily pay sales or excise taxes on alcohol shipments.

The plaintiffs suggest that state sales and alcohol excise taxes would be paid voluntarily if only the direct shipping laws are struck down. The basis for this particular fantasy is unknown.

Not a single out-of-state seller who shipped alcohol into Michigan in violation of the direct shipping laws voluntarily paid Michigan's sales or alcohol excise taxes. Not a one.

What possible incentive is there for a shipper to proactively offer to pay taxes on shipments that cannot be tracked, monitored, or taxed, if direct shipping is allowed?

Because these shipments are outside the ordinary stream of commerce, not going through licensed retailers, the shipments are not recorded or tracked by the state or its licensees. Little incentive or disincentive would exist for voluntary tax payment, and to expect that it would happen is naively optimistic.

In Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000), cert. denied, sub nom. Bridenbaugh v. Carter, 121 S.Ct. 1672 (2001), the Court discussed the tax issue thus:

Laws forbidding purchases from sellers that lack Indiana permits are devilishly difficult to enforce, however, for the same reason states have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes. Noncompliance is almost impossible to detect, and rampant civil disobedience ensures that a handful of prosecutions would not be effective. Private gains from violating the laws vastly exceed the anticipated legal penalties. Sales and alcohol excise taxes are the lifeblood that funds state liquor control enforcement efforts. Without such taxes, a state loses its ability to regulate the alcohol trade.

Alcohol regulation and control continues to be a necessary adjunct to alcohol sale and distribution.

The plaintiffs' goal of invalidating state laws governing who may sell alcohol and the methods by which it is sold and delivered would eviscerate the state's alcohol licensing, sale and delivery systems. No effective control can be

exercised over out-of-state sellers able to sell and ship alcohol to residents outside of the state's regulatory structure. This result requires a determination that the regulation of alcohol is no longer considered to be necessary.

Plaintiffs seek by this case to permit any North Carolina inhabitant with access to a credit card, including a minor, to have alcoholic beverages delivered to their doorstep, with the ease and anonymity of delivering products such as jeans or books. Plaintiffs make no distinction between the sale of other products that are generally not regulated, and the sale of alcohol, a substance that is always potentially dangerous and traditionally has been heavily regulated.

Alcohol is different from most other products, because of the damage that results from its overuse and abuse. The costs to society from alcohol-related deaths and injuries have long been recognized, and as a result, alcohol trafficking has a lengthy history of extensive regulation and control.

In *Craig v. Boren*, 429 U.S. 190, 205, 206 (1976) *reh'g denied*, 429 U.S. 1124 (1977) the Supreme Court provided a brief illuminating history:

The history of state regulation of alcoholic beverages dates from long before adoption of the Eighteenth Amendment. In the *License Cases*, 5 How. 504, 579, 12 L.Ed. 256 (1847), the Court recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause. Late in the century, however, *Leisy v. Hardin*, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed.128 (1890), undercut the theoretical underpinnings of *License Cases*. This led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the State's regulatory role through the passage of the Wilson and Webb-Kenyon

Acts.... With passage of the Eighteenth Amendment, the uneasy tension between the Commerce Clause and the state police power temporarily subsided.

The Twenty-first Amendment repealed the Eighteenth Amendment in 1933. The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.... (Omitting citations)

Section 2 of the Twenty-first Amendment provides:

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

The first purpose of the Twenty-first Amendment was to end Prohibition by repealing the Eighteenth Amendment. The "noble experiment" had failed.

However, one of the reasons understood to have contributed to the failure was that national regulation had not taken into account local conditions. *See, e.g.,* 76 Cong. Rec. 4146 (1933), statement of Senator Wagner ("The real cause of the failure of the Eighteenth Amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits.") Another concern was that a state wishing to protect its residents from alcohol crossing the border from other states might lack the power to do so. 76 Cong. **Rec. 4141 (1933)**, statement of Senator Blaine.

An additional concern was the loss of tax revenue during Prohibition because the trade in alcohol was illicit. See, e.g., *Ratification of the Twenty-first Amendment to the Constitution of the United States*, 142 (Everett Somerville Brown ed., 1938) ("It is both foolish and intolerable to go on submitting to a fallacious system under which an illicit, outlaw liquor traffic annually draws hundreds of millions of dollars of profits out of the nation's capital. . . .") (Indiana ratification convention.) The purpose of § 2 was summed up by Senator Blaine, "to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States," 76,Cong. Rec. 4143 (1933).

It is worth noting that a proposed, but unadopted, § 3 of the Amendment would have given Congress concurrent power to regulate the sale of alcohol for consumption on the premises. This section was dropped on the basis that it was inconsistent with § 2 and "would take away from every State in the Union the right to determine how it would regulate the liquor traffic within its boundaries," statement of Senator Black, 76 Cong. Rec. 4177 (1933).

Finally, still another important, clearly stated purpose of the Twenty-first Amendment was to moderate consumption of alcohol by separating producers from consumers through a mandated distribution structure, typically a three-tier system of manufacturers, wholesalers, and retailers. Before Prohibition, "tied-

houses," where alcohol producers controlled retailers, were considered to have contributed to irresponsible sales and increased consumption of alcohol. *See, e.g.,* H.R. Rep. No. 1542, at 12 (1935) (Federal Alcohol Control Act).

The regulatory statutes challenged by Plaintiffs provide that all alcohol sales to North Carolina consumers be through accountable licensees. Like many other states, North Carolina has established a three-tier system of manufacturers, wholesalers, and retailers, who deal in alcohol to be sold in the state.

Such three-tier systems have been upheld as legitimate under § 2. The 5th Circuit Court of Appeals stated, with respect to a similar Texas structure:

To avoid the harmful effects of vertical integration in the intoxicants industry, the state has effectively restricted manufacturers, wholesalers, . . . and retailers to one level of activity ... the state of Texas is surely acting within its discretion by placing reasonable restriction on the intoxicants industry in order to prevent these evils.

S. A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm'n, 709 F. 2d 291,293(5th Cir. 1983) *See also, North Dakota v. United States*, 495 U.S. 423, 432 (1990). (Such three-tier systems are "unquestionably legitimate."¹⁶)

¹⁶ Oddly, plaintiffs repeatedly refer to the laws against direct shipping as "economic protectionism" for wholesalers. The three-tier systems establishing wholesalers as a distinct tier were set up immediately following the repeal of prohibition. There was no wholesale tier to "protect". Certainly, licensed wholesalers have a long-standing financial investment in the three-tier system, which they would not want to see jeopardized. If the three-tier system has accomplished what was intended, the elimination of the harmful effects of vertical integration, why eliminate the value to the public from the system simply because a cost is associated with providing that value?

It would be wonderful to advise this court that the historical problems of alcohol abuse and misuse that led to Prohibition, the Wilson and Webb-Kenyon Acts, the Federal Alcohol Administration Act, Sec. 2 of the Twenty-first Amendment, and all of the myriad state laws regulating alcohol have been eliminated. It would be pure joy to announce that sales to minors, alcoholism, drunk driving deaths and injuries, drunken assaults and rapes, and toxic alcohol poisoning deaths are all a thing of the past. Unfortunately, these ills continue.

The National Council on Alcoholism and Drug Dependence" tells us that 75% of ninth graders have tried alcohol, and that alcohol related deaths are the leading cause of deaths among 15 to 20 year olds. A startling statistic from the Council is that at least 11 % of all alcohol consumed nationally is purchased by underage drinkers. Students in junior highs, middle schools and high schools consume an estimated 1.1 billion cans of beer each year." The Wirthland Worldwide¹⁹ study found that 59% of college students under the age of 21 admitted drinking alcohol.

Researchers estimate that alcohol use is implicated in one to two thirds of sexual assault and acquaintance or "date" rape cases among teens and college

" www.ncadd.org/facts/youthalc.html

^{1s} **Office of the Inspector General, United States Department of Health and Human Services, *Youth and Alcohol, Law and Enforcement: Is the 21-year-old drinking age a myth?***

¹⁹ **www.wirthlin.com**

students.²⁰ In 1999, it was estimated that the total cost of alcohol use by youth - including traffic crashes, violent crime, burns, drowning, suicide attempts, fetal alcohol syndrome, alcohol poisoning and treatment - was more than \$58 billion per year.²¹

It is sadly apparent that the need for strong alcohol regulation and control continues. The District Court's decision below seriously damaged the state's ability to regulate alcohol trafficking, solely because a number of self-proclaimed wine "connoisseurs" demand the right to have "exclusive" wines delivered to their doorsteps. Public policy considerations should not permit this decision to stand.

²⁰ Office of the Inspector General, United States Department of Health and Human Services, *Youth and Alcohol, Dangerous and Deadly Consequences*.

²¹ D. T. Levy, K. Stewart, et al, *Costs of Underage Drinking* (report prepared for the US Department of Justice, Office of Juvenile Delinquency Prevention), Pacific Institute for Research and Evaluation.

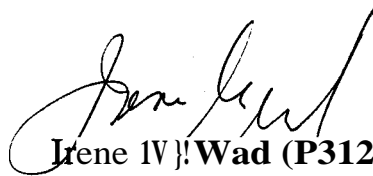
Conclusion and Relief Sought

Because state laws regulating alcohol distribution and sales are a proper exercise of state authority under the Twenty-first Amendment and the Supreme Court cases interpreting it, Amicus requests that this Court reverse the district court's decision.

Respectfully submitted,

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