

No. 02-1432

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DONALD H. BESKIND, *et al.*,

Plaintiff-Appellees,

v.

MICHAEL F. EASLEY, *et al.*,

Defendant-Appellants.

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

BRIEF OF WINE AND SPIRITS WHOLESALERS OF AMERICA, INC.,
NATIONAL ASSOCIATION OF BEVERAGE IMPORTERS,
NATIONAL ASSOCIATION OF BEVERAGE RETAILERS,
NATIONAL BEER WHOLESALERS ASSOCIATION,
NATIONAL LICENSED BEVERAGE ASSOCIATION, AND THE
PRESIDENTS' FORUM OF THE BEVERAGE ALCOHOL INDUSTRY
AS AMICI CURIAE

Of Counsel:

M. Craig Wolf

WINE & SPIRITS WHOLESALERS
OF AMERICA, INC.

805 15th Street, N.W., Suite 430

Washington, D.C. 20005

(202) 371-9792

Louis R. Cohen

C. Boyden Gray

Scott A. Shepard

WILMER, CUTLER & PICKERING

2445 M Street, N.W.

Washington, D.C. 20037-1420

(202) 663-6000

June 21, 2002

Counsel for Amici Curiae

STATEMENT OF THE ISSUES

Does the State of North Carolina have the authority under the Twenty-first Amendment to bar out-of-state suppliers of alcoholic beverages from shipping such beverages directly to North Carolina residents?

Is this authority nullified as to, wine because North Carolina allows licensed in-state wineries to sell wine at their in-state premises and deliver it to retail purchasers in the State?

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 2 of the Twenty-first Amendment states, "The transportation or importation into any State ... of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Appellees persuaded the district court to allow them to do exactly what the Amendment forbids: ship wines into North Carolina, to and for use by North Carolina residents, in violation of State statutes requiring out-of-state wineries to sell only to licensed in-state wholesalers.'-/

Our showing that the State statutes are constitutional is in six parts:

^{1/} Many States have similar statutes barring out-of-state suppliers from sending alcoholic beverages into the State to anyone other than the State itself or a licensed wholesaler. *See, e.g.*, ALA. ADMIN. CODE r. 20-X-8.04(1) (2002); ARIZ. REV. STAT. § 4-250.01 (WEST 2002); ARK. CODE ANN. § 3-7-106(a)(1) (2001); DEL. CODE ANN. tit. 4, § 501 (2001); FLA. STAT. ANN. § 561.545 (West 2002); GA. CODE ANN. § 3-3-32 (2001); HAW. REV. STAT. ANN. § 281-3 (MB 2001); IND. CODE §§ 7.1-5-1-9.5, 7.1-5-11-1.5 (West 2002); KAN. STAT. ANN. §§ 41-104, 41-306, 41-306a(a) (2002); KY. REV. STAT. ANN. § 244.165 (West 2002); ME. REV. STAT. ANN. tit. 28-A, § 2077-B (West 2002); MD. ANN. CODE art. 2B, § 16-506.1 (West 2002); MASS. GEN. LAWS ANN. ch. 138, § 2 (West 2002); MISS. CODE ANN. 97-31-47 (2002); MONT. CODE ANN. § 16-3-402 (2001); N.J. STAT. ANN. § 33:1-2 (West 2002); N.Y. ALCO. BEV. CONT. § 102(1)(c) (West 2001); OHIO REV. CODE ANN. §§ 4301.19, 4301.20 (West 2002); OKLA. STAT. ANN. tit. 37 § 505 (West 2002); PA. STAT. ANN. tit. 47, § 4-410 (West 2002); S.C. CODE ANN. § 12-21-1610 (2002); S.D. CODIFIED LAWS §§ 35-4-66, 35-4-67 (2002); TENN. CODE ANN. § 57-3-402 (West 2002); TEX. ALCO. BEV. CODE ANN. § 107.05 (West 2001); UTAH CODE ANN. § 32A-8-201, 32A-8-301 (2001); VT. STAT. ANN. tit. 7, § 305 (2001); WYO. STAT. ANN. §§ 12-2-203, 12-3-101 (2001).

1. Under consistent and *current* Supreme Court interpretation of the Twenty-first Amendment, States "unquestionably" have authority to bar out-of-state suppliers of alcoholic beverages from sending their products into the State to anyone other than a licensed in-state wholesaler. The Court said in 1936 and has since stated repeatedly that States have "virtually complete control" over the *physical importation* of alcoholic beverages across their borders.

2. The central purpose of Section 2 of the Twenty-first Amendment was to create a constitutional exception to the "dormant Commerce Clause," which prevents States from limiting the physical importation of any *other* product. The power to control and channel physical imports is a necessary part of the framework for achieving all other State objectives relating to alcohol, including regulation of retail sales, content requirements, labeling requirements, and collection of excise taxes.

3. The Supreme Court has never suggested a need to "balance" the Twenty-first Amendment power to control importation of alcoholic beverages against any dormant Commerce Clause obligation to admit them. No case suggests any commerce-related restriction on State power over physical importation. Cases acknowledging that the *federal* government *also* has power to regulate sales of alcohol under the Commerce Clause, and that States must observe other provisions

of the Constitution, do not create an exception allowing imports that the State has chosen to bar.

4. The fact that North Carolina has chosen to allow *licensed in-state wineries* to sell wine at their premises and deliver it to customers does not invalidate its power to require that imported beverages be sold to licensed in-state wholesalers. North Carolina requires that *all* wines sold in the State be sold by state-licensed firms that have a substantial and enduring presence there, and its statute is indistinguishable in this respect from the Indiana statute upheld in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849, 851 (7th Cir. 2000), *cert. denied*, 532 U.S. 1002 (2001). What the district court called the "discrepancy" between imported wine sales and sales by in-state wineries is entirely rational: Licensed in-state wineries are subject not only to thorough background checks but to inspection of their premises, attachment of their property if they fail to collect and remit taxes or otherwise fail to comply with State law, and a threat of license revocation-and they bear the costs of State licensing and compliance procedures. None of appellees' handful of "discrimination" cases deals with physical importation or control of physical distribution within the State, and none remotely suggests that a State cannot require all [wines.to](#) be sold through licensed firms with a substantial physical presence in the State, which in-state wineries have and California wineries lack.

5. There is no requirement that North Carolina "narrowly tailor" its laws to maximize out-of-state wineries' ability to sell alcohol to its citizens. The "narrow tailoring" doctrine arose in cases involving personal constitutional rights, particularly freedom of speech and freedom from racial and other invidious discrimination, which both Federal and State governments must interfere with as little as possible when they may interfere at all. There is no comparable right to be "as free as possible" to sell alcoholic beverages in interstate commerce: on the contrary, even apart from the Twenty-first Amendment, that activity is subject, like other economic activity, to wide-ranging rational economic regulation, and both Congress (under the Commerce Clause) and the States (under the Twenty-first Amendment) have broad power to design regulatory schemes they deem appropriate.

6. In any event, if, as the district court believed, the exemption for in-state wineries created a constitutional problem, the proper remedy would be to strike down the exemption. Nothing the district court said justifies striking down the State's control of imports.

ARGUMENT

I. THE SUPREME COURT HAS REPEATEDLY-AND RECENTLY-CONFIRMED STATE POWER TO PERMIT ONLY LICENSED IN-STATE WHOLESALERS TO SELL IMPORTED ALCOHOLIC BEVERAGES TO STATE CITIZENS.

The Supreme Court has confirmed over and over, as recently as 1990, that States have "plenary" power over physical importation of alcoholic beverages. No case-indeed, not a single Justice-has ever questioned State power to require that imported alcoholic beverages be sold through licensed in-state wholesalers. *See Bridenbaugh*, 227 F.3d at 853 ("No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause.").

In *North Dakota v. United States*, 495 U.S. 423 (1990), a case unmentioned by the district court, a majority spoke directly to the point at issue in the present case. Justice Scalia, writing only for himself, said (without any qualification whatever), "*The Twenty-first Amendment ... empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.*" *North Dakota*, 495 U.S. at 447 (emphasis added). Justice Stevens, writing for four Justices (himself, Chief Justice Rehnquist, and Justices White and O'Connor) used somewhat more words but said the same thing. He noted that "[un]der the State's regulatory system ... out-of-state ... suppliers may sell to only

licensed wholesalers or federal enclaves," [id. at 428](#), and he squarely endorsed this as within State power:

The Court has made clear that the States have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is *unquestionably legitimate*.

[Id. at 431-32](#) (emphasis added). No Justice disagreed (or has disagreed in any other case).

This conclusion of five Justices was the first step in the *holding* of the *North Dakota* case. The ultimate issue before the Court was whether North Dakota could impose special labeling requirements on alcoholic beverages destined for federal enclaves (such as military bases) within the State. The Court answered that question "yes," [id. at 430-33](#), and it did so precisely because the State (a) had the Twenty-first Amendment right to channel all sales for its residents through licensed in-state wholesalers, and (b) had the right to protect that controlled distribution system against diversion of beverage alcohol sold to the enclaves. *See id.* (Stevens, J.); [id. at 447](#) (Scalia, J.: "The Twenty-first Amendment ... is binding on the Federal Government like everyone else"). If appellees' position in this case were correct, and they had a constitutional right to ship alcoholic beverages directly

to retail customers, the Court could not have ruled as it did in *North Dakota*. The district court was not free to ignore this Supreme Court holding.

The Supreme Court has said this same thing repeatedly. It said it first in Justice Brandeis's opinion in *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59, 62 (1936): "The words used [in Section 2] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." The Court reiterated the point in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964):

This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is *totally unconfined* by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. [discussion of *Young's Market* omitted]. This *view of the scope of the Twenty-first Amendment ... has remained unquestioned*.

Id. at 330 (emphasis added).^{2/}

²ⁱ The *Idlewild* Court rejected as "an absurd oversimplification" and "bizarre" the suggestion, made in that case, that Section 2 had eliminated all *federal* power over the distribution of alcoholic beverages. *Idlewild*, 377 U.S. at 331-32. It was in that context that the Court said the Twenty-first Amendment and the Commerce Clause are "parts of the same Constitution." *Id.* at 332. That is, both Congress and the States have the power to regulate commerce in alcoholic beverages, and conflicts between these exercises of power must sometimes be resolved. There is no such conflict with respect to physical importation for two reasons. First, the Twenty-first Amendment was designed to eliminate the Commerce Clause restriction. *See pp. 13-14, infra*. Second, Congress has *exercised* its positive Commerce Clause power by adopting and in 1935 reenacting the Webb-Kenyon Act, 27 U.S.C. § 122 ("An Act Divesting Intoxicating Liquors of Their Interstate

Still later, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court said unanimously: "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110.3 "[T]ransportation or importation into" a State, for "use" by its citizens, is the very activity covered by the words of the Twenty-first Amendment, and the Supreme Court has never upheld *any* restriction on a State's power to regulate that activity.^{4/}

Character in Certain Cases"), which gives States the same power of exclusion as the Twenty-first Amendment put in the Constitution. *See p. 13 & n.6, infra.*

The decisive point in *Idlewild* itself was that the relevant beverages were *not* destined for "delivery or use" within New York (but rather for export) and the Twenty-first Amendment was therefore inapplicable. *See 377 U.S. at 325, 332-33.*

^{3/} Other Supreme Court cases squarely recognizing State power to restrict importation include *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939); *Carter v. Virginia*, 321 U.S. 131, 137 (1944); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984) ("The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders."); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) ("[T]he Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders").

^{4/} On the contrary, when, for example, the Court ruled that federal regulation of broadcast advertising of alcoholic beverages preempted State regulation, it carefully noted that federal authority could prevail only because the State regulations

II. THE CENTRAL PURPOSE OF SECTION 2 OF THE TWENTY-FIRST AMENDMENT WAS TO CREATE A CONSTITUTIONAL EXCEPTION TO THE DORMANT COMMERCE CLAUSE, GIVING THE STATES PLENARY POWER TO RESTRICT THE IMPORTATION OF ALCOHOLIC BEVERAGES.

Section 2 of the Twenty-first Amendment is not merely a constitutional "nod" toward the States' interests in temperance and raising tax revenue, to be implemented however the courts deem "reasonable." Section 2 restructured federal and State regulatory authority to allow States to design their own regulatory schemes and enforce them against out-of-state products. It prohibits "transportation or importation" of alcohol "into any State ... for delivery or use therein ... in violation of the laws thereof" U.S. Const. amend. XXI, § 2.

This language empowers States to bar alcoholic beverage imports that do not comply with their regulatory requirements—something States could not do with respect to any *other* product because of the dormant Commerce Clause. *See North Dakota*, 495 U.S. at 432. That grant of power in turn enables the States to achieve vitally important objectives with respect to alcoholic beverages, but the power to restrict how this particular product may cross their borders is "*the central power reserved by § 2 of the Twenty-first Amendment.*" *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984) (emphasis added). The States, not appellees and were *not* a State "attempt[] directly to regulate the sale or use of liquor within its borders." *Capital Cities Cable*, 467 U.S. at 713.

not the courts, determine "the structure of the liquor distribution system," *North Dakota*, 495 U.S. at 431, to achieve their particular objectives.

The Court explained the history and purpose of the Twenty-first Amendment in *Craig v. Boren*, 429 U.S. 190, 204-07 (1976), and the Seventh Circuit recently offered a similar review in *Bridenbaugh*, 227 F.3d at 851-53.⁵ In summary:

(1) Nineteenth-century Supreme Court cases, culminating in *Leisy v. Hardin*, 135 U.S. 100 (1890), held that States had plenary police power to regulate sales of alcoholic beverages *within* the State, but that the dormant Commerce Clause denied States the power to prevent importation of alcohol *from other* States or countries, which meant that they could not effectively control commerce within their borders in alcoholic beverages still in their "original packages." *See Craig*, 429 U.S. at 205; *Bridenbaugh*, 227 F.3d at 852.

(2) In response, Congress exercised *its* power under the Commerce Clause to enable the States to block alcoholic-beverage importation. In particular,

^{si} *Craig* held that the Twenty-first Amendment did not empower Oklahoma, in the course of regulating sales of alcoholic beverages, to engage in gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court distinguished sharply between the gender discrimination at issue in that case and the regulation of "importation" at issue here. It said, "[I]mportation of intoxicants [is] a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear" *Craig*, 429 U.S. at 207. In *Bridenbaugh*, after reviewing the history of the Twenty-first Amendment, the Seventh Circuit rejected a challenge to a direct sale law essentially identical to the law challenged in this case. *See Bridenbaugh*, 227 F.3d at 851-54.

the Webb-Kenyon Act of 1913 (re-enacted in 1935) prohibited "[t]he shipment or transportation ... of any ... intoxicating liquor of any kind, from one State ... into any other State ... in violation of any law of such State ..." 27 U.S.C. § 122; *see Craig*, 429 U.S. at 205 n.19?

Prohibition intervened, but when it ended, Section 2 was made a part of the Twenty-first Amendment to place in the Constitution the power statutorily conferred on the States by Webb-Kenyon-the power to bar imports not conforming to the State regulatory scheme. Granting the States a power denied them for all other products by the dormant Commerce Clause was the point of Section 2. As the Supreme Court explained in *Craig*:

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.

429 U.S. at 205-06 (footnote omitted).

^{6/} The Webb-Kenyon Act, formally titled "An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases," was re-enacted by Congress in 1935 following the repeal of Prohibition. *See* 27 U.S.C. §§ 122; 49 Stat. 877 (1935). Accordingly, the Commerce Clause is in no sense "dormant" in this case: Congress has exercised its own authority under the Commerce Clause to grant and confirm plenary State power to regulate importation of alcoholic beverages-the power exercised here. *Cf. Sporhase v. Nebraska*, 458 U.S. 941, 960 n.21 (1982).

State power over interstate commerce in alcoholic beverages granted by Webb-Kenyon and the Twenty-first Amendment is part of the foundation for achieving all other State regulatory objectives. All States, including North Carolina, prohibit the sale of alcoholic beverages to minors, *see* N.C. GEN. STAT. § 18B-302, but that is by no means the States' only regulatory objective. Virtually all States, including North Carolina, impose labeling requirements, so that people electing to drink can do so knowledgeably and responsibly. *See* N.C. GEN. STAT. § 18B-206(a) (West 2002). Many States allow sale of all, or some kinds of, alcoholic beverages only in some parts of the State. *See, e.g.,* N.C. GEN. STAT. § 18B-600, *et seq.* Many States control the alcoholic strength or quantity of beverages that may be sold in the State or in particular locations. *See, e.g.,* N.C. GEN. STAT. §§ 18B-101, -206(a), -303. Most States, including North Carolina, impose excise taxes on alcoholic beverages from which they derive important revenues. *See* N.C. GEN. STAT. §§ 105-113.80, *et seq.*

Import restrictions are essential to all these important requirements. In North Carolina and many other States, such requirements are enforced by requiring out-of-state suppliers to sell alcoholic beverages only to the State itself or to state licensed firms with a substantial permanent physical presence in the State. Such a firm can be effectively held responsible for assuring compliance with all other

regulatory requirements. That may not be the only way to make State regulation effective, but it is the Twenty-first Amendment's way.

States could not as effectively impose *any* of their alcohol-marketing, alcohol-consumption, or revenue obligations if they were required to allow out-of-state suppliers to sell and ship directly to their residents. Even if North Carolina regulators could require a California winery to obtain North Carolina licenses before shipping wine to its residents, North Carolina regulators could not as effectively check backgrounds, insist on inspecting premises where alcoholic beverages are sold, attach in-state property if State taxes were not collected or remitted to the State, or wield the same threat of license revocation, because the California winery would have far less at stake. The district court appeared to believe that North Carolina's revenue-collection problem could be solved by allowing out-of-state sellers to pay the taxes, but the proverbial difficulty States have in collecting "use" taxes on sales originating out-of-state, as compared with sales taxes on in-state transactions, *see Bridenbaugh*, 227 F.3d at 853, shows exactly why North Carolina and other States have insisted on in-state licensees as taxpayers.

III. THE SUPREME COURT HAS NEVER SUGGESTED A NEED TO "BALANCE" THE TWENTY-FIRST AMENDMENT AGAINST THE "DORMANT" COMMERCE CLAUSE; CASES CONCERNING FEDERAL REGULATORY POWER OR OTHER PROVISIONS OF THE CONSTITUTION DO NOT SUGGEST ANY LIMIT ON STATE POWER TO REGULATE IMPORTS.

The district court believed that its mission was to "balance" Section 2 of the Twenty-first Amendment and the dormant Commerce Clause in a "reasonable" manner, but that misstates the issue. The former creates an exception to the latter.

Since both Congress (under the Commerce Clause) and the States (under Section 2) have express constitutional authority to regulate interstate commerce in alcoholic beverages, the question occasionally arises which of these powers prevails over the other in a particular instance. The Supreme Court has weighed the interests and, where physical importation is not involved, has sometimes found the federal regulatory interest superior. *See, e.g., Capital Cities*, 467 U.S. at 714-716; *Midcal Aluminum*, 445 U.S. at 113-14. It is in this context, irrelevant here, that the Court has referred to "core" State interests in promoting temperance and collecting revenue. There is no such federal-regulation vs. State-regulation issue in this case.

This Court's decision in *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001), cited by the district court as "control[ing] every important aspect of [its] decision," *Beskind v. Easley*, 197 F. Supp. 2d 464, 472 (W.D.N.C. 2002), actually concerned a question irrelevant to this case: whether State price regulation was immune from challenge under the Sherman Act because of the Twenty-first

Amendment. Carefully applying the Supreme Court's decision in *Midcal Aluminum, supra*, the Court first found the pricing scheme was a *per se* antitrust violation; the Court then ruled that the scheme could nevertheless survive if, on remand, the State could show "interests ... of sufficient weight to prevail against the federal interest in enforcement of the antitrust laws."¹ But as the Supreme Court itself explained in *Midcal*, no balancing is required where (as here) the State law controls imports, not prices, or where (again, as here) there is no conflicting federal regulation. See *Midcal*, 445 U.S. at 106-10. Indeed, in *Midcal*, the Court reiterated without qualification that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." [Id. at 110](#). Its discussion of balancing explicitly concerned only "other [State] liquor regulations." *Id.* (emphasis added).

The Court has also explained that States exercising Twenty-first Amendment power are subject to other constitutional provisions. See *Craig v. Boren*, 429 U.S. 190 (1976) (gender discrimination); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S.

¹ TFWS, 242 F.3d at 212 (internal quotation marks omitted). On remand, the district court found that Maryland's Twenty-first Amendment interests in promoting temperance outweighed federal commerce clause interests. See *TFWS v. Schaefer*, 183 F. Supp. 2d 789, 790-91 (D. Md. 2002), appeal docketed sub nom. *TFW Inc. v. Schaefer*, No. 02-1199 (4th Cir. Feb. 20, 2002).

484 (1996) (freedom of speech); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (First Amendment's Establishment Clause). But, again, there is no such issue in this case: Section 2 indisputably *did* override the dormant Commerce Clause prohibition of State barriers to physical importation. As noted in *Craig*, 429 U.S. at 206, "[T]he [Twenty-first] Amendment primarily created an exception to the normal operation of the Commerce Clause."

IV. THE BAR AGAINST DIRECT SALES OF IMPORTED ALCOHOLIC BEVERAGES IS NOT RENDERED INVALID BY THE STATE'S DECISION TO ALLOW LICENSED IN-STATE WINERIES TO SELL AND DELIVER THEIR WINES.

The district court recognized that North Carolina's requirement that all imported alcoholic beverages be sold to the State or to licensed in-state wholesalers serves important State purposes and, standing alone, would be valid. *See Beskind*, 197 F. Supp. 2d at 472. The court ruled, however, that the whole admittedly important regulatory structure fails, as to wines, because the State allows licensed in-state wineries to sell and deliver wines at retail. *Id.* But the regulatory structure, although it necessarily treats imports differently from in-state sales, is entirely rational: every drop of wine sold in the State must be sold by a licensed seller with a substantial in-state physical presence; this enables North Carolina to regulate sales and labeling effectively and collect taxes; the "discrepancy," [id. at](#) 467, between the

treatment of imports and in-state winery sales follows directly from the need for a licensee with a large, permanent physical presence in the State.g /

It is both rational and constitutional to require out-of-state wineries to sell to licensed wholesalers, which necessarily have a substantial in-state presence. All other State objectives relating to sales, labeling, beverage content, and tax collection are served by channeling sales through firms that can be inspected, whose licenses can be denied or rescinded, and whose property can be attached. More generally, all State laws that come within the very words of the Twenty-first Amendment-that is, all laws that restrict "transportation or importation into [the] State"-apply to interstate commerce in ways that have no parallel in purely intra-state activities. The Twenty-first Amendment expressly permits the States to regulate hard core interstate commerce-physical carriage of goods across State borders. As the Seventh Circuit said in *Bridenbaugh* in response to a nearly identical challenge to a nearly identical statute, "Every use of § 2 could be called 'discriminatory' in the sense that plaintiffs use that term If that were the sort of

⁸ⁱ **Even if the discrepancy were constitutionally problematic, the proper remedy would be to strike down the narrow and clearly severable exception for in-state wineries. Plaintiffs have no right to invalidate otherwise-valid import regulations merely because that is the remedy they have demanded. See pp. 28-29, *infra*.**

discrimination that lies outside State power, then § 2 would be a dead letter." 227 F.3d at 853.⁹

Allowing in-state wineries to make direct sales at their premises and deliveries to customers is also entirely rational.¹⁰ An in-state winery is subject to direct State regulation and control. A wine maker must have a State license. *See* N.C. Gen. Stat. § 1813-1101. It may sell only on its licensed premises. *See N.C. Gen. Stat. § 1813-1101(3-5)*. The licensed premises are subject to State inspection. *See id.* § 1813-502. The winery necessarily has in-state property subject to attachment if it fails to meet obligations to the State. *See, e.g., id.* §§ 1813-503, -04. And its basic business license is subject to revocation if it violates State laws relating to alcohol. *See, e.g., §§ 1813-901(c)-(d), -903(a), 904(e)*. In-state wineries bear the burden of the licensing and compliance process. North Carolina rationally

⁹ The Indiana statute at issue in *Bridenbaugh*, like the statute at issue here, allowed "holders of Indiana ... permits [to] deliver directly to consumers' homes"; the Court rejected the claim of discrimination, noting that "these permit holders may deliver California and Indiana wines alike," while nonholders of Indiana permits "may not deliver wine from either (or any) source." 227 F.3d at 852-53. The State labeling statute at issue in *North Dakota* applied only to beverages imported from outside the State. *North Dakota*, 495 U.S. at 428.

¹⁰ The special provisions relate *only* to licensed in-state wineries. An ordinary resident of North Carolina may not manufacture intoxicating beverages for sale, *see* N.C. GEN. STAT. § 1813-306 (permitting an individual to make wines and beers only "for his own use and for the use of his family and guests"); *id.* § 1813-102 (forbidding all non-authorized manufacturing), and a licensed manufacturer must ordinarily sell to a licensed wholesaler who must sell to a licensed retailer. *Id.* § 1813-1001, *et seq.*

decided that no further regulation is necessary-and the State had no obligation to impose unneeded restrictions on in-state wineries merely because it was important to impose restrictions on out-of-state wineries. On the contrary, allowing unregulated direct sales by out-of-state wineries would distinctly favor those wineries over the in-state wineries that are subject to State licensing, regulation, and effective taxation.

No case cited by the district court supports its conclusion that North Carolina discriminates unconstitutionally against interstate commerce by requiring out-of-state wineries-which lack a substantial in-state physical presence-to sell only to licensed in-state wholesalers so that the State may control beverage distribution:

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), did not concern control over either importation or in-state distribution. The Court struck down, 5-3, a tax that contained an exemption whose sole purpose was to promote local industry. *See id. at* 276. The Court noted that the State (Hawaii) did not seriously attempt to defend the exemption on Twenty-first Amendment grounds, *id. at* 274 & n.12, and the Court struck it down as "*mere economic protectionism.*" *Id. at* 276 (emphasis added). In the present case, the district court said it could see "no purpose for the exception" other than "to promote local industry," *Beskind*, 197 F. Supp. 2d at 474, but the legitimate purpose is clear: to avoid imposing unnecessary burdens on

strictly limited sales by licensed firms with a substantial in-state presence, who already bear a substantial regulatory burden.

The author of the *Bacchus* opinion, Justice White, later joined the plurality opinion in *North Dakota* (stating that the provision that "out of state ... suppliers ... may sell to only licensed wholesalers" was "unquestionably legitimate"), see 495 U.S. at 428, 432. As the D.C. Circuit observed in *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996), "Nothing in *Bacchus* or the other later cases overrules the principles iterated in [earlier Supreme Court cases]," including the States' "plenary power to regulate and control ... the distribution, use, or consumption of intoxicants within [their] territory." 91 F.3d at 203 (quoting *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964)).

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986), did not involve either importation or discrimination. The Court struck down a New York liquor pricing statute because it effectively regulated transactions that took place entirely in other States and had no effect on New York except as points of comparison. Appellees may attempt to bring themselves within *Brown-Forman* by asserting that the North Carolina statutes affect transactions in California, but North Carolina does not bar or deter anyone from engaging in any California transaction that California permits; it merely bars unauthorized

importation of wine into North Carolina, a bar clearly permitted by the Twenty-first Amendment that has no parallel in the *Brown-Forman* case.

Healy v. Beer Institute, 491 U.S. 324 (1989), also involved a price regulation statute that "ha[d] the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." [Id. at](#) 337. The statute substantially affected prices in transactions having no relationship to the regulating State (Connecticut); it was struck down because of these extraterritorial effects. *See id. at* 337-40. That ruling, which has nothing to do with discrimination, has no bearing on the present case. The Court also objected, briefly and secondarily, to the fact that the Connecticut pricing statute applied only to interstate sellers and not to similar sellers whose operations were confined to [Connecticut. Id. at](#) 340-41. But the Court made clear that its objection was that there was no reason for applying the price regulation only to interstate sellers, and that even "discrimination" may be acceptable if it is "*demonstrably justified by a valid factor unrelated to economic protectionism.*" [Id. at](#) 340-41 (emphasis added).

In *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994), the Fifth Circuit assumed the *legitimacy* of Texas's requirement that only licensed persons may import beverage alcohol; it ruled only that three years' residency was an unreasonable requirement for a license. *See* 11 F.3d at 554 (noting that State has power to revoke permits and impose other civil and criminal penalties on licensees that violate State

law); *id.* at 555 (citing labeling and reporting requirements in *North Dakota*, 495 U.S. 423, as serving core concerns of the Twenty-first Amendment).

The district court gave short shrift, *see Beskind*, 197 F. Supp. 2d at 474-75, to the Seventh Circuit's decision in *Bridenbaugh*, a case directly on point. The Indiana statute under consideration in *Bridenbaugh* allowed "local wineries, but not wineries `in the business of selling ... in another state or country' to ship directly to Indiana consumers." *Bridenbaugh*, 227 F.3d at 851; *see I.C. § 7.1-5-11-1.5(a)*. The Seventh Circuit upheld this regulation, noting that "the main effect of Indiana's system is to subject [the plaintiffs' out-of-state wine purchases] to taxation, by requiring the beverages to pass through the hands of permit holders whose business is closely monitored to ensure tax collection [T]his is precisely what § 2 [of the Twenty-first Amendment] is for." *Bridenbaugh*, 227 F.3d at 854.

The district court quotes the Seventh Circuit's statement that "Indiana insists that every drop of liquor pass through its three-tiered system" *Beskind*, 197 F. Supp. 2d at 475 (quoting *Bridenbaugh*, 227 F.3d at 853). But Judge Easterbrook, the opinion's author, was not under the misimpression that in-state wineries could not make direct sales and deliveries. He had just explicitly noted that "local wineries" could ship directly to customers, *Bridenbaugh*, 227 F.3d at 851. His point was that "every drop of liquor," including Indiana wines sold directly by in-state wineries, passed through a regulatory system including licensees against

which Indiana's tax and other requirements could be enforced. There is no pertinent distinction between the Indiana law upheld in *Bridenbaugh* and the North Carolina statute at issue here.

V. THERE IS NO REQUIREMENT THAT STATE LAWS RESTRICTING THE IMPORTATION OF ALCOHOLIC BEVERAGES BE NARROWLY TAILORED.

It may be suggested that North Carolina's objectives could be achieved without limiting the right to sell wine directly to its residents.¹¹ But even were that true, the Supreme Court has never suggested that the States' "plenary power" and "virtually complete control" over importation of alcoholic beverages, *see pp.* 6-9, *supra*, must be exercised in a "narrowly tailored" manner to allow suppliers of such beverages maximum commercial freedom.

The requirement of narrow tailoring arose in cases involving freedom of speech and freedom from racial and other invidious personal discrimination. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The Constitution protects these important personal freedoms independently of, and antecedent to, any federal or State

¹¹ Such a "narrow tailoring" argument may have originated in a law-student note, *see* Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 379-83 (1999). As the Seventh Circuit suggested in *Bridenbaugh*, 227 F.3d at 851, the note ignores the pertinent Supreme Court cases and fundamentally misunderstands the relationship between the Twenty-first Amendment and the Commerce Clause. The note also erroneously imports concepts belonging to First Amendment analysis.

regulatory objectives, and the Supreme Court has repeatedly held that, where intrusion on these freedoms is justified at all (because of sufficiently compelling governmental interests), the intrusion must be as narrow as possible. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

A California winery's interest in selling wine is entirely different. The Constitution does not give the winery a right to sell wine either in California or in interstate commerce: the State of California has the power to limit the former, and Congress and other States equally clearly may limit the latter. Appellees have no constitutional right to insist that any such State or Federal regulation restrict them as little as possible-any more than persons regulated in myriad other ways have a constitutional right to the least regulation compatible with governmental objectives. On the contrary, as long as only commercial activities are being curtailed (and there is no taking of property or intrusion on other personal rights), Congress or a regulating State has wide latitude to design any rational regulatory scheme that it thinks will meet its objectives. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955). Sellers of goods may object to unconstitutional State interference with interstate commerce, but a State regulation does not *become* unconstitutional merely because a court thinks it could design an equally effective, narrower

regulation. As the Seventh Circuit has explained, "the dormant commerce clause does not replace the rational-basis inquiry with a `broader, all-weather, be-reasonable vision of the Constitution.'" *National Paint & Coating Ass'n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995). The dormant commerce clause does not "authorize a comprehensive review of the law's benefits, free of any obligation to accept the legislature's judgment" as to those benefits, and then, upon "disparag[ing] the law's benefits[, a finding] that unconstitutionality under the dormant commerce clause follow[s]." *Id.* The district court's disregard of the important reasons for North Carolina's statutory pattern resulted from just such an improper refusal of "any obligation to accept the legislature's judgment." *Beskind*, 197 F. Supp. 2d at 473.

The structure North Carolina and other States have chosen is both protected by the Twenty-first Amendment and abundantly justified by practical considerations; appellees have no right to have this Court order the States to "do better."

VI. THE DISTRICT COURT DID NOT EXPLAIN, AND LOGIC AND LAW DO NOT SUPPORT, INVALIDATING THE CONTROL SYSTEM FOR OUT-OF-STATE WINES RATHER THAN INVALIDATING THE IN-STATE WINERY SALES PROVISIONS.

The district court said, "Efficient administration of tax collection, safety, and the like would certainly balance in favor of retaining the existing general system, were it not for the exception for in-state wineries." *Beskind*, 197 F. Supp. 2d at 472. It nevertheless somehow concluded, apparently *because of* the in-state winery

exception, that "the Commerce Clause is violated when Defendants apply ... North Carolina's ABC laws [to] prohibit[] out-of-state dealers from shipping wine directly to North Carolina adult residents." [Id.](#) at 476. But the conclusion does not follow, and the proper remedy, if the Court concludes that the in-state exception renders the statute invalid, is to strike down the exception and save as much of the statute as possible.

The question is one of severability, which is a matter of State law. *See Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). In North Carolina, the test for severability is whether (a) "the remaining portion of the legislation can stand on its own" and (b) the legislature "would have enacted the remainder absent the offending portion." *Pope v. Easley*, 556 S.E.2d 265, 268 (N.C. 2001). Although the district court did not consider the issue, the answer to both questions is obviously yes. The North Carolina regulatory scheme, including the prohibition of direct shipments to residents from outside the State, is not dependent in any way on the small exception for licensed in-state wineries, and it is of substantial importance, acknowledged by the district court.

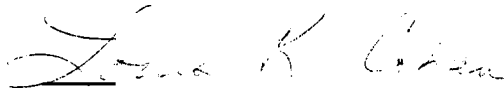
Moreover, the remedy for perceived discrimination should not be discrimination *against* in-state wineries. The district court's remedy would free out-of-state wineries from regulatory burdens and from effective tax enforcement, giving them distinct advantages over in-state firms that can be and are effectively

regulated and taxed. The result would resemble the States' pre-Prohibition dilemma (when they could effectively regulate and tax only in-state firms, see pp. 12, 19-20, supra)-which is precisely what the Webb-Kenyon Act and Section 2 of the Twenty-first Amendment were designed to eliminate.

CONCLUSION

For the foregoing reasons, amici curiae Wine and Spirits Wholesalers of America, [Inc. et al.](#) respectfully urge the Court to reverse the decision of the district court.

Respectfully submitted,



Louis R. Cohen
C. Boyden Gray
Scott A. Shepard
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Amici Curiae

OF COUNSEL:
M. Craig Wolf
WINE AND SPIRITS WHOLESALERS
OF AMERICA, INC.
805 15th Street, N.W., Suite 430
Washington, D.C. 20005
(202) 371-9792

June 21, 2002