

Case No. 02-1432

**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, Governor 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 ANN SCOTT
FULTON, Chairperson of the North Carolina Alcoholic Beverage Control
Commission, all in their Official Capacities;

Defendants-Appellants

Appeal from the U. S. District Court for the
Eastern District of North Carolina

BRIEF OF PLAINTIFFS - APPELLEES

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copy of corporate disclosure statement

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STATEMENT OF THE ISSUES

1. Whether North Carolina's law prohibiting out-of-state merchants from selling and shipping wine directly to consumers, but permitting in-state merchants to do so, violates the Commerce Clause and exceeds the state's authority under the Twenty-first Amendment by discriminating against interstate commerce?

2. Whether the proper remedy for discrimination against interstate commerce is to enjoin the enforcement of the offending law, or whether the district court should have remedied the discrimination by striking all direct shipment provisions so that no one could sell and ship wine directly to consumers?

STATEMENT OF THE CASE

We agree with Appellants' Statement of the Case except with their implication that the case concerns the legitimacy of the state's overall liquor regulatory system or anything other than the prohibition against direct interstate sales and shipments of wine for individual consumption.

STATEMENT OF FACTS

The case arises against a complicated background concerning the way wine is produced, marketed and consumed, and the changing economics of the wine industry.¹ There are approximately 2100 wineries in the United States that produce and sell wine. A few large wineries, such as Gallo and Kendall-Jackson, dominate the national market. They supply most of the wine that is found in North Carolina retail stores. (Bridenbaugh Affidavit ¶ 4, Apx. p. 67). These wines are distributed through what is known as the three-tiered system: producers sell their wine to wholesalers who sell to retailers. (Bason Interrogatory #6, Apx. p. 86).

However, the vast majority of wineries are small enterprises with limited sales and small profit margins. (Siegl Affidavit ¶ 2, Apx. pp. 63-64). Some are able to distribute their wines through a separate wholesaler, but many do not produce enough wine or have a large enough customer base for wholesale distribution. The problem is becoming increasingly acute as the number of small wineries is growing, and the number of wholesalers is rapidly shrinking. (Id.). Wineries that do not have wholesale distributors depend for their economic existence on direct sales and

¹ This background has been thoroughly laid out in affidavits submitted to the district court by expert witness Russell Bridenbaugh (Apx. pp. 66-75) and by the president of the American Vintners' Association Simon Siegl (Apx. pp. 62-65). The nature of the wine industry is also summarized in James Molnar, *Under the Influence: Why Alcohol Direct Shipment Laws Are a Violation of the Commerce Clause*, 9 U. MIAMI BUS. L. REV. 169, 171-77 (2001).

shipments to customers who have discovered their wines from Internet advertising, wine periodicals such as *Wine Enthusiast*, visiting their tasting rooms, and word-of-mouth. (Id.) Such direct shipments can legally be made to some states, but are prohibited to others. (Bridenbaugh Affidavit ¶ 10, Apx. p. 70).²

There are tens of thousands of different wines produced. To wine enthusiasts, wines are not interchangeable; each is unique. (Bridenbaugh Affidavit ¶ 17, Apx. pp. 72-73). Retail stores cannot possibly carry them all, so only about 10% of the world's wine production is available on the shelves of North Carolina retailers. (Id.). Which wines end up on retail shelves depends on choices made by wholesalers and retailers concerning which wines to carry. (Id. at ¶ 23). Wine enthusiasts who want wines not selected for distribution in North Carolina can often find them for sale at retailers or auctions in other states, or directly from the winery. (Id. at ¶ 8-9, 17). Some of the wines most desired by enthusiasts are not sold through retail stores at all. Many allocated wines are sold exclusively by wineries directly to a waiting list of customers.³ (Id., at ¶ 7). Although sometimes these purchases can be arranged

²See also Duncan Baird Douglass, *Constitutional Crossroads: Reconciling the Twenty-first Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1648-53 (2000) (reviewing state laws).

³ When the State discusses the availability of wines, it often confuses wines and wineries. See, e.g., Nelson Affidavit ¶ 5, Apx. p. 119 (responding to Plaintiffs' evidence that some *wines* were sold only by direct shipment with evidence that the *winery* sold other of its wines through wholesalers). A winery may distribute some

by special order through a North Carolina retailer,⁴ most can be completed only by a direct sale and shipment from the out-of-state source to the customer's residence. (Id., at ¶¶ 6-9, 23). The problem is that North Carolina law prohibits interstate direct shipments.

Six North Carolina residents, one Michigan resident, and an out-of-state winery are challenging North Carolina's direct shipment law. Donald H. Beskind is a collector of fine wines who would like to purchase rare and unusual wines not available in North Carolina except by direct shipment. (Beskind Affidavit ¶¶ 3-6, Apx. pp. 44-45). Karen Bluestein is an adult wine consumer who enjoys visiting small wineries when traveling and would like to be able to purchase wine at those tasting rooms which is not otherwise available in North Carolina, and have it shipped home. (Bluestein Affidavit ¶¶ 3-6, Apx. pp. 46-47). Michael D. Casper is an adult wine consumer who would like to be able to receive direct shipments of wine because he lives in Calabash, a small town with only a very limited selection of wine available at a grocery store. (Casper Affidavit ¶¶ 2-8, Apx. pp. 48-49). Michael Q. Murray, Mary A. Wenig and Michael J. Wenig are also adult wine consumers who would like to purchase and receive wines by direct shipment that are

of its wines through a wholesaler but sell its most exclusive wines only by direct shipment.

⁴ The cumbersome special-order processes are explained in the State's Brief at 13-15.

not available through North Carolina retailers. (Murray Affidavit ¶¶ 3-6, Apx. pp. 51-52; Wenig Affidavit ¶¶ 3-6, Apx. pp. 55-56). Plaintiff Scott Turner lives in Michigan.⁵ His parents live in North Carolina and are wine consumers. He would like to be able to ship wine from Michigan as a gift to his parents. (Turner Affidavit ¶¶ 3-7, Apx. pp. 53-54). All of these individual plaintiffs are unable to complete their purchases of out-of-state wine because of the direct shipment law. They would be willing to report all such purchases and shipments, pay taxes on them, and comply with any other reasonable state regulations. (Beskind Affidavit ¶ 7, Apx. p. 45; Bluestein Affidavit ¶ 7, Apx. p. 47; Casper Affidavit ¶ 9, Apx. p. 49; Murray Affidavit ¶ 7, Apx. p. 52; Wenig Affidavit ¶ 7, Apx. p. 56; Turner Affidavit ¶ 8, Apx. p. 54).

The other plaintiff is Oakstone Winery, Inc., a California winery. Because of its small size, it cannot obtain a wholesaler to distribute its wine nationally, and instead relies primarily on Internet sales and direct shipments. It has received requests for wine from North Carolina customers, including Plaintiff Beskind, but cannot fill them because North Carolina law forbids direct shipments from out of state, and will license only in-state businesses to make direct wine shipments. The only license Oakstone can get would limit it to distributing its wine through a

⁵ He lived in Michigan at the time the factual record was compiled. He has since moved, and now lives in North Carolina.

wholesaler, which it cannot afford to do.⁶ It would be willing to obtain a license, remit taxes and comply with other regulations on direct shipments on the same basis as similar small wineries in North Carolina. (Oakstone Affidavit ¶¶ 7-15, Apx. pp. 59-60). However, the State will not issue Oakstone a license to make direct shipments nor permit it to remit taxes. (Bason interrogatories 9, 10, 11; Apx. pp. 88-89). It reserves those privileges exclusively for in-state wineries and retailers. N.C. Gen. Stat. §18B-1101(3).

North Carolina treats in-state and out-of-state wine producers differently. It prohibits out-of-state wineries from shipping wine directly to consumers, but allows in-state wineries to do so. (Bridenbaugh Affidavit ¶ 14, Apx. p. 71). That means North Carolina wineries may sell their wines directly to consumers, bypassing the clogged three-tiered system through which out-of-state wines must travel, and avoiding the extra costs added by wholesalers and retailers. This scheme gives North Carolina wineries a competitive advantage in the marketplace. Their wines are relatively cheaper to consumers than out-of-state wines, and they realize more profit per bottle. (Id. ¶¶ 14-15).

In order to sell and deliver wine directly to consumers, in-state wine sellers are

⁶ Both the wholesaler and retailer would mark up the price of the wine. Oakstone would have to discount the price to the wholesaler in anticipation of the mark-ups, which would mean lower profits per bottle. It cannot afford this reduction in revenue without putting itself out of business. (Oakstone Affidavit ¶ 14, Apx. p. 60).

required to obtain a license, take steps to assure that wine is not delivered to minors, remit taxes, and comply with a variety of administrative regulations. Oakstone and other out-of-state sellers would be willing to comply with these same requirements in order to engage in direct sales and shipments on an equal footing with their North Carolina competitors, (Oakstone Affidavit ¶ 15, Apx. p. 60); as they have done in other states; (Bridenbaugh Affidavit ¶¶ 10, 19, 22, Apx. pp. 70-74); but North Carolina will not allow them to do so. (Bason interrogatories 9, 10, 11; Apx. pp. 88-89).⁷

SUMMARY OF ARGUMENT

1. The direct shipment law is unconstitutional

North Carolina's direct shipment law violates the Commerce Clause on its face. It prohibits out-of-state wineries and retailers from selling and shipping wine directly to North Carolina residents, while permitting in-state businesses to do so. This unequal treatment gives North Carolina retailers and wineries a competitive price advantage and better access to the market. The Supreme Court has held that when a state liquor law discriminates against interstate commerce and favors in-state

⁷ The State suggests that if it decided to issue permits to out-of-state vintners, the cost would be so much higher than what it charges in-state wineries that it would not be economically feasible for a small out-of-state vintner to obtain one. State's Brief at 11. It overlooks the fact that charging a prohibitively high fee to out-of-state wineries but not in-state wineries would itself be unconstitutional discrimination.

interests, the law is invalid as a per se violation of the Commerce Clause, and is usually struck down without further inquiry. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Healy v. Beer Institute*, 491 U.S. 324, 341-42 (1989); *id.* at 344 (Scalia, J., concurring); *Bacchus Imports v. Diaz*, 468 U.S. 263, 275-76 (1983).

The Twenty-first Amendment cannot save North Carolina's discriminatory scheme. The Supreme Court has explicitly rejected the argument that the Amendment immunizes state liquor laws from Commerce Clause scrutiny. Discriminatory liquor laws are presumptively unconstitutional despite the Twenty-first Amendment, because the discriminatory character of a law eliminates its Twenty-first Amendment protection. *Bacchus*, 468 U.S. at 275-76. The State has not proved that discriminating against out-of-state sellers is necessary to advance its interests in raising revenue and regulating the sale and distribution of wine. These goals could be achieved by alternatives that are less restrictive than a total ban on interstate direct shipments, such as licensing and regulating out-of-state wine sellers and requiring them to remit taxes on the same basis as in-state sellers.

2. The proper remedy is to enjoin the enforcement of the unconstitutional portion of the direct shipment law.

After declaring the law against direct sales and shipments unconstitutional, the district court granted the remedy requested by Plaintiffs. It enjoined the

enforcement of the offending statutory provisions. The State argues for the first time on appeal that the Court should instead have struck down the provision giving in-state wineries the power to ship to consumers. The district court chose the correct remedy. The Supreme Court has held that when a state law that disseminates benefits unequally is found unconstitutional, “extension, rather than nullification, is the proper course.” *Califano v. Westcott*, 443 U.S. 76, 89 (1979). The alternative remedy proposed by the State would be inconsistent with the strong federal policy in favor of robust interstate commerce that is embodied in the Commerce Clause.

ARGUMENT

I. NORTH CAROLINA’S LAW PROHIBITING INTERSTATE DIRECT SHIPMENTS OF WINE IS UNCONSTITUTIONAL

A. North Carolina’s direct shipment law discriminates against out-of-state wine sellers and favors in-state wineries, and therefore violates the Commerce Clause

North Carolina’s direct shipment law discriminates against interstate commerce. It establishes a trade barrier at the state line that blocks incoming shipments of wine from out-of-state sellers to individuals for personal consumption, while fully permitting such sales and shipments within the state. The law provides economic protection for North Carolina businesses by prohibiting out-of-state wineries and retailers from competing on equal terms with in-state wine sellers. The district court

therefore correctly declared the law unconstitutional under the dormant Commerce Clause.⁸

The Supreme Court has repeatedly held that state laws that discriminate against interstate commerce violate the Commerce Clause. The central purpose of that clause was to prevent “economic Balkanization” brought about by this kind of protectionist law and to eliminate the trade barriers that had plagued relations among the colonies. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 577 (1997); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 334 (1996); *Oregon Waste Sys. v. Dept. of Environmental Quality*, 511 U.S. 93, 98 (1994); *Bacchus Imports v. Dias*, 468 U.S. at 276; *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

The Court has also said repeatedly that this nondiscrimination principle applies to state liquor laws. Although Section 2 of the Twenty-first Amendment⁹ gives states the authority to regulate the transportation and sale of alcoholic beverages

⁸ The Commerce Clause states that “Congress shall have Power...to regulate Commerce with foreign nations, and among the several States...” U.S. Const., Art. I, §8. By implication, if Congress has the exclusive power to regulate interstate commerce, the States may not interfere with it. This is known as the “dormant” commerce clause principle, first suggested by Justice Johnson in his concurring opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231-232, 239 (1824). See also *South Carolina State Hwy. Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938) (Commerce Clause “by its own force” prohibits certain state actions that interfere with interstate commerce).

⁹ “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.

within their borders, all such regulations must be even-handed and non-discriminatory. Discrimination against interstate commerce remains a per se violation of the Commerce Clause even when alcohol is involved. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. at 579; *Healy v. Beer Institute*, 491 U.S. at 341-42; *id.* at 344 (Scalia, J., concurring); *Bacchus Imports v. Diaz*, 468 U.S. at 275-76.

The Supreme Court uses a two-tiered test for scrutinizing state liquor laws to decide if they violate the Commerce Clause:

This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. We have also recognized that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church*¹⁰ balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

Brown-Forman, 476 U.S. at 578-79. See also *Env'tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (summarizing two-tier approach). Under first-tier analysis, if a state liquor statute “on its face... discriminates against brewers and

¹⁰ 397 U.S. 137 (1970).

shippers... engaged in interstate commerce,” it violates the Commerce Clause, *Healy*, 491 U.S. at 340-41; and is “virtually per se invalid.” *Brown-Forman*, 476 U.S. at 579.

In *Healy*, the Court struck down a Connecticut law that required out-of-state beer shippers, but not in-state shippers, to affirm that their prices in Connecticut were no higher than in surrounding states. This discrimination between in-state and out-of-state shippers was fatal.

The Connecticut statute ... violates the Commerce Clause in a second¹¹ respect: On its face, the statute discriminates against brewers and shippers of beer engaged in interstate commerce. In its previous decisions, this Court has followed a consistent practice of striking down state statutes that clearly discriminate against interstate commerce, unless that discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

Healy, 491 U.S. at 340-41 (citation omitted). *See also id.* at 344 (Scalia, J. concurring) (statute’s invalidity established by finding of discrimination).

In *Bacchus*, the Court struck down a Hawaii law that exempted wine manufactured in the state from a 20% tax imposed on wine coming from out of state. The discrimination again proved fatal.

A cardinal rule of Commerce Clause jurisprudence is that “[n]o State, consistent with the Commerce Clause, may ‘impose a tax which discriminates against interstate commerce ... by providing a direct commercial advantage to local business.’

¹¹ Earlier in the opinion, the Court had held that the statute violated the Commerce Clause because it had extraterritorial effect. See pages 22-24, *infra*.

Bacchus, 468 U.S. at 268 (citation omitted).

North Carolina's direct shipment law has the same defects as the laws found unconstitutional in *Healy* and *Bacchus*. Like the law struck down in *Healy*, North Carolina's direct shipment law restricts the commercial activity of out-of-state businesses but not in-state businesses. In-state wine retailers (including small wineries) may sell wine directly to North Carolina residents and ship it to their homes; out-of-state retailers and wineries may not. See State's Brief at 8, 15.

Like the law struck down in *Bacchus*, North Carolina's direct shipment law gives impermissible economic protection to in-state wineries, and protects in-state wholesalers and retailers from direct-shipment competition. The State's own witness, William Daniel, expresses his concern that without the law, "many regular purchasers of wine would buy from the cheapest source available [and] would purchase from out-of-state sources ... from which he could get the best price." (Daniel Affidavit ¶ 3, Apx. p. 103). Although the State protests that it did not *intend* to engage in protectionism; State's Brief at 37; its protest is unavailing. The Supreme Court in *Bacchus* held that a finding of economic protectionism may be based on the *effect* of a law regardless of its purpose; 468 U.S. at 270; and North Carolina's direct shipment law has obvious protectionist effects. An in-state winery may sell and deliver its wine directly to consumers; an out-of-state winery may not. The out-of-state winery may only sell through a separate wholesaler, who marks up

the price and re-sells it to a separate retailer, who will mark up the price again before re-selling the wine to consumers.¹² North Carolina wineries can therefore sell their wines to consumers at a price advantage. (Bridenbaugh Affidavit ¶¶ 14-15, Apx. p. 71). In addition, in-state wineries and retailers may make direct shipments to consumers' homes, but out-of-state sellers may not. This rule gives in-state businesses a monopoly on serving customers who desire home delivery. This is a significant advantage in North Carolina where many parts of the state, from Plaintiff Casper's coastal hometown of Calabash to the Blue Ridge Mountains, are a long way from the nearest well stocked wine store.

Because the North Carolina direct shipment law discriminates against interstate commerce and has the effect of providing economic protection to the in-state wine business, it is a per se violation of the Commerce Clause.

B. The State's interest in regulating alcohol must be advanced through even-handed laws that do not discriminate against interstate commerce

The State concedes that the direct shipment law discriminates against interstate commerce and gives favorable treatment and better access to the market to its domestic wine industry; State's Brief at 8, 15; but argues that it has two important state interests in doing so -- raising revenue, and regulating the wine business. The mere assertion of an important state interest is not enough, however. The State does

¹²See Molnar, *supra* note 1, at 186 (quoting Wall Street Journal as calling this the most expensive distribution system for any package good).

not have unlimited power to regulate alcoholic beverages in furtherance of those interests in any fashion it chooses. The Supreme Court has held that a state must advance its goals by even-handed regulations that do not discriminate against out-of-state merchants or give economic protection to local businesses. *See, e.g., Camps Newfound/Owatonna*, 520 U.S. at 581-82 (discriminatory tax exemption struck down); *Oregon Waste Sys.*, 511 U.S. at 101 (surcharge imposed only on out-of-state waste struck down); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (discriminatory tax exemption struck down); *Philadelphia v. New Jersey*, 437 U.S. at 617, 623-24 (1978) (statute prohibiting interstate shipment of trash struck down). Discriminatory laws, such as the direct shipment law, are “virtually per se invalid” even when related to an important state interest such as regulating alcohol. *Brown-Forman*, 476 U.S. at 579. *See also Hughes*, 441 U.S. at 337 (“facial discrimination by itself may be a fatal defect”).

The Supreme Court has acknowledged one possible scenario in which a discriminatory law might conceivably be constitutional: if the state proves it is unable to achieve its goals in a nondiscriminatory manner.

Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. This is perhaps just another way of saying that what may appear to be a “discriminatory” provision in the constitutionally prohibited sense --

that is, a protectionist enactment -- may on closer analysis not be so. However it be put, the standards for such justification are high.

New Energy Co., 486 U.S. at 278. *Accord Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. at 581-82; *Oregon Waste Systems, Inc. v. Dept. of Envirtl. Quality*, 511 U.S. at 101 (both containing similar language). To Plaintiffs' knowledge, the Court has never actually found such a compelling situation to exist.

This "less-discriminatory alternative" principle appears to extend to liquor law cases, although direct precedent is sparse. In his concurring opinion in *Healey*, Justice Scalia indicated his understanding that the rule applied in liquor cases:

[A state liquor] statute's invalidity is fully established by its facial discrimination against interstate commerce ... and by [the state's] inability to establish that the law's asserted goal ... cannot be achieved in a nondiscriminatory manner.

491 U.S. at 344 (citations omitted). In *Cooper v. McBeath*, 11 F.3d 547, 553 (5th Cir. 1994), the Fifth Circuit stated its view that discriminatory liquor statutes theoretically "may survive a Commerce Clause challenge if the State can demonstrate that the statutes advance 'a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives,'" but that the state faces a "towering" burden of proof.¹³

¹³See Douglass, *supra* note 2, at 1625-27, 1653 (direct shipment laws invalid unless state shows they are least discriminatory means); Molnar, *supra* note 1, at 185 ("where a law affirmatively discriminates against interstate commerce the burden is on the state to show that the statute serves a legitimate local purpose and that this purpose could not be achieved through available nondiscriminatory means").

The State of North Carolina has not satisfied its towering burden of proof. It presented some evidence explaining why *regulation and licensing* may be necessary to advance its goals; State's Brief at 38-40; but none establishing that *discrimination* against out-of-state sellers by totally banning interstate direct sales and shipments is necessary.

With respect to its interest in licensing and regulation, the State offered only the speculative opinion of Defendant Bason that it is "conceivable" that the administrative costs of licensing out-of-state dealers for direct shipment might be prohibitively high, but conceding that it is not possible to estimate the additional cost with any precision. Bason Affidavit ¶¶ 3-4, Apx. pp. 122-23; quoted in State's Brief at 11. The State also argues that it is difficult or expensive to inspect and audit an out-of-state wine seller; State's Brief at 40; but introduced no evidence on this point.

With respect to its asserted interest in collecting taxes, the State offered only the speculative opinion of the Director of the Corporate, Excise and Insurance Tax Division that because many residents do not voluntarily report and pay sales taxes on Internet sales of other products, he "assumes" that wine purchasers would not pay excise taxes on direct shipments of wine. Daniel Affidavit ¶ 3, Apx. p. 103; quoted

in State's Brief at 15-16. The State offered no evidence at all showing that it would be unable to collect excise taxes from licensed out-of-state shippers as it currently does from in-state shippers, and no evidence that the states which allow direct shipments have had any problems collecting taxes.

Speculation and bald assertions are not enough. For summary judgment, factual allegations must be supported by evidence. FED. R. CIV. P. 56 (conclusory allegations inadequate); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (claims of state interest require evidence in the record). This requirement of proof extends to assertions that liquor laws advance a state's Twenty-first Amendment interests. *See California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97, 114 (1980) (unsubstantiated concerns not enough; state must demonstrate that a liquor regulation directly serves a 21st Amendment interest); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 350 (1987) (rejecting state's avowed interest in protecting small retailers as "unsubstantiated"); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 212 (4th Cir. 2001) (state must prove its avowed interests; trial judge cannot rely on common sense); *Miller v. Hedlund*, 813 F.2d 1344, 1352 & n.7 (9th Cir. 1987) (Twenty-first Amendment issues "ultimately rest upon findings and conclusions having a large factual component"). *See also* Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 367, 381 (1999) (in Twenty-first Amendment cases, courts "are requiring that a proffered

rationale be borne out by evidence”).

The evidence shows that the State could achieve its goals by reasonable nondiscriminatory alternatives. All of the state’s concerns could be achieved by issuing permits to out-of-state wineries and retailers on the same basis as in-state sellers, and imposing on them the same investigation, inspection, reporting, labeling and financial regulations. Out-of-state wineries are already heavily regulated (Bridenbaugh Affidavit ¶ 19, Apx. p. 73); and are perfectly willing to abide by North Carolina regulations; (Oakstone Affidavit ¶ 15, Apx. p. 73); as they have done in other states where direct shipments are allowed. (Bridenbaugh Affidavit ¶¶ 10, 22, Apx. pp. 70-74). The mere fact that a seller’s main office may be out of the state cannot justify excluding it from the market altogether. As one court put it, “[i]n this age of ... computer networks, fax machines, and other technological marvels,” it is no harder to inspect and regulate out-of-state license holders than in-state ones. *Cooper v. McBeath*, 11 F.3d at 554. Indeed, the State by its own admission has been able to license and regulate 21,230 wine products for shipment to *wholesalers*; State’s Brief at 13. It defies logic to think it would suddenly find it impossible to license and regulate additional wine products for shipments to *individuals*.

The State’s concerns about raising revenue can be furthered by requiring out-of-state wineries to collect and remit taxes on the same basis as in-state wineries who

do not use a wholesaler, or by collecting taxes from consumers. Both out-of-state wineries and in-state consumers are willing to pay these taxes. (Oakstone Affidavit ¶ 15, Apx. p. 73; Beskind Affidavit ¶ 7, Apx. p. 45; Bluestein Affidavit ¶ 7, Apx. p. 47; Casper Affidavit ¶ 9, Apx. p. 49; Murray Affidavit ¶ 7, Apx. p. 52; Wenig Affidavit ¶ 7, Apx. p. 56; Turner Affidavit ¶ 8, Apx. p. 54). Out-of-state wineries already remit the appropriate taxes in other states where direct shipments are allowed. N.H. REV. STAT. § 178:14-a(II) (2000); LA. REV. STAT. § 26:359(B) (2000); Bridenbaugh Affidavit ¶ 22, Apx. p. 74. Consumers are already required to voluntarily report and pay other taxes that are difficult to verify, such as cash income and tips. Indeed, our entire income tax system upon which governments (including North Carolina) depend is a voluntary reporting system.¹⁴

Because the evidence shows that the State can achieve its goals by licensing and regulating wine shipments originating out of state on the same basis as they do in-state shipments, the law imposing a total ban on direct sales and shipments of wine by out-of-state sellers for personal consumption violates the Commerce Clause and

¹⁴ The State's attempt to analogize wine excise taxes to sales taxes on consumer mail-order goods is unconvincing. If in fact consumers do not voluntarily report and pay sales taxes on mail-order goods, it is because they know the state *has no record* of their purchases so they cannot possibly get caught. If the State wants to collect wine excise taxes from consumers, it need merely require a seller to report all such sales as a condition for keeping its license. The proper analogy is therefore to the income tax system in which individuals are asked to "voluntarily" pay their taxes knowing that their income will be reported to the state.

is not saved by the Twenty-first Amendment.

C. There is no “de minimis” exception to the Commerce Clause

The State argues in the alternative that the discriminatory treatment of out-of-state businesses can be overlooked if it is “incidental.” State’s Brief at 37. It cites no authority for this proposition,¹⁵ and the argument is unavailing. The Supreme Court has held that “there is no 'de minimis' defense to a charge of discriminat[ion] ... under the Commerce Clause.” *Camps Newfound/ Owatonna v. Town of Harrison*, 520 U.S. 564, 581 n.15 (1997). “The volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce.” *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992) (emphasis in original).

D. North Carolina’s direct shipment law burdens consumers’ abilities to engage in interstate commerce in wine

The direct shipment law not only discriminates against out-of-state wine sellers, it violates the individual consumers’ Commerce Clause rights. The Supreme Court has held that the Commerce Clause does not just protect businesses, but also gives individuals a personal right to engage in interstate commerce, which right is

¹⁵ Normally, failure to cite pertinent legal authority in the opening brief constitutes waiver of the issue on appeal. *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n. 6 (4th Cir. 1999); *Linc Finance Corp. v. Onwuteaka*, 129 F.3d 917, 921-22 (7th Cir. 1997).

enforceable in federal court. *Dennis v. Higgins*, 498 U.S. 439 (1991). *See also General Motors v. Tracy*, 519 U.S. 278, 299-300 (1997) (“every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any”).

North Carolina’s direct shipment law burdens the individual plaintiffs’ rights to engage in interstate commerce, and places its citizens at a discriminatory disadvantage in the national wine market compared to citizens of other states. Plaintiff Bluestein cannot complete a wine purchase that requires shipping while on vacation in California (Bluestein Affidavit ¶¶ 3-6, Apx. pp. 46-47), while citizens of other states may do so. Plaintiff Beskind cannot purchase rare wines for his collection that require shipping (Beskind Affidavit ¶¶ 3-6, Apx. pp. 44-45), while citizens of other states may do so. The law burdens these Plaintiffs’ rights to engage in interstate commerce without advancing any apparent state interest, and is therefore unconstitutional. *See Brown-Forman*, 476 U.S. at 578-79 (even statutes that regulate in-state residents evenhandedly may violate the Commerce Clause where the burden on interstate commerce clearly exceeds the local benefits).

E. North Carolina’s direct shipment law also violates the Commerce Clause because it regulates commerce occurring in other states

The Supreme Court holds that a state liquor law is unconstitutional when it regulates commerce occurring in other states. The “extraterritorial effect”

establishes a per se violation of the Commerce Clause. The Court in *Healy* explained:

[O]ur cases concerning the extraterritorial effect of state economic regulations stand at a minimum for the following propositions: First, the “Commerce Clause...precludes the application of a State statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the state....” Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial effect was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.

491 U.S. at 336. A liquor law’s extraterritorial effect also removes it from the protection of the Twenty-first Amendment, which gives states authority to regulate alcohol only within their own borders.

[T]he Twenty-first Amendment does not immunize State laws from invalidation under the Commerce Clause when those laws have the practical effect of regulating liquor sales in other states. A finding of extraterritorial effects disposes of the Twenty-first Amendment issue.

Healy, 491 U.S. at 341. See also *Brown-Forman*, 476 U.S. at 579-80 (law which regulates price of liquor in other states has impermissible extraterritorial effect); *Edgar v. MITE Corp.*, 457 U.S. 624, 643-46 (1982) (Illinois law regulating takeovers of companies doing business in Illinois was unconstitutional because it regulated some transactions occurring outside the state); *Baldwin v. G.A.F. Selig, Inc.*, 294 U.S. 511, 528 (1935) (New York milk-price statute that effectively

regulated milk prices in Vermont had impermissible extraterritorial effect).

The North Carolina direct shipment law has the prohibited extraterritorial effect. Like the statute struck down in *Healy*, the direct shipment law “by its plain terms... applies solely to interstate ... shippers” located in other states; 491 U.S. at 341; and prohibits only those shipments originating outside the state. The law has the practical effect of interfering with commercial transactions that take place in another state. The law prohibits Plaintiff Bluestein from buying a case of wine at a tasting room in the Napa Valley while on vacation, and having it shipped home. (Bluestein Affidavit ¶ 4, Apx. p. 46; Oakstone Affidavit ¶ 8, Apx. p. 59). The law prohibits Plaintiff Turner who lives in Michigan from buying a bottle of wine in Michigan and having it sent to his parents in North Carolina. (Turner Affidavit ¶¶ 2-5, Apx. pp. 53-54).

Because North Carolina’s direct shipment law has the practical effect of regulating wine sales that take place in other states, its extraterritorial effect renders it unconstitutional.

F. The Twenty-first Amendment cannot save the constitutionality of North Carolina’s direct shipment law

The State argues that because we are challenging a state *liquor* law, the Commerce Clause is irrelevant, and the case is controlled solely by the Twenty-first Amendment. The argument is inconsistent with controlling precedent from the

Supreme Court and this Circuit establishing that state liquor laws are not immune from Commerce Clause scrutiny:

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964); quoted favorably in *TFWS, Inc. v. Schaefer*, 243 F.3d 198, 212 (4th Cir. 2001).

Since 1964, the Supreme Court has decided only three Commerce Clause/Twenty-first Amendment cases: *Healy v. Beer Institute*, 491 U.S. 324, 342 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986); and *Bacchus Imports v. Diaz*, 468 U.S. 263 (1983). In each, the Court struck down a state liquor law and rejected the State's assertion that alcoholic beverages were exempt from Commerce Clause scrutiny. In *Healy*, 491 U.S. at 342, the Court said explicitly:

[T]he Twenty-first Amendment does not immunize state laws from invalidation under the Commerce Clause ...

In *Bacchus*, 468 U.S. at 275-76, the Court said:

It is by now clear that the [21st] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause.... "[B]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the context of the

issues and interests at stake in any concrete case." [O]ne thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition.

In *Brown-Forman*, 476 U.S. at 584, the Court reiterated the passage from *Bacchus* and said:

It is well settled that the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause. Rather, the Twenty-first Amendment and the Commerce Clause ‘each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case.’

In this regard, the Supreme Court’s interpretation of the relative powers of the Commerce Clause and Twenty-first Amendment has changed since the ratification of that Amendment in 1933. Originally, the Supreme Court read the Twenty-first Amendment as overriding the Commerce Clause and empowering states to enact any kind of regulation, including laws that discriminated against interstate commerce. *State Bd. of Equalization v. Young’s Market Co.*, 299 U.S. 59 (1936); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939). The *Young’s Market* doctrine has since been abandoned by the Court as “absurd” and “patently bizarre.” The Twenty-first Amendment did not ‘repeal’ the Commerce Clause whenever regulation of intoxicating liquors is concerned. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. at 331-332. See *Healy*, 491 U.S. at 342; *Brown-Forman*, 476 U.S. at 584; *Bacchus*, 468 U.S. at 275 (all reiterating this point). See also *Cooper v. McBeath*,

11 F.3d 547, 555 (5th Cir. 1994) (“The assertion that § 2 of the Twenty-first Amendment automatically trumps the rigors of the Commerce Clause cannot stand”).¹⁶

The State ignores all these recent cases, however, and continues to press the repudiated *Young’s Market* doctrine, citing and relying on old cases from the 1930s. State’s Brief at 22-36. It bases the argument that the old unlimited-power cases are somehow still good law on one brief passage of dictum in a plurality opinion in *North Dakota v. United States*, 495 U.S. 423, 431 (1990) that “within the area of its jurisdiction, the State has ‘virtually complete control’ over the importation and sale of liquor.” The passage is merely dictum in a four-Justice plurality opinion in a case that did not involve the Commerce Clause and did not involve a discriminatory law.¹⁷ The plurality did not discuss (or even mention) *Brown-Forman* and *Healy*, did not purport to be announcing a rule for analysis of Commerce Clause violations, and gave no indication that this “broad power” extends to the enactment of discriminatory laws. The “virtually complete control” language is not an authoritative statement of the proper standard for weighing the constitutionality of

¹⁶See also Douglass, *supra* note 2, at 1631-38 (legislative history of 21st Amendment ambiguous, but generally does not support “unlimited power” argument).

¹⁷*North Dakota* was a Supremacy Clause case. The plurality opinion was authored by Justice Stevens who dissented from *Brown-Forman* and *Healy*. Justice Scalia concurred only because the case involved no discriminatory law. 495 U.S. at 444.

state liquor laws that discriminate against interstate commerce. The Supreme Court does not decide questions of law in cursory dictum inserted in unrelated cases. *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968). *See also Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) (dictum is not binding authority); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (brief observations about the scope of a constitutional provision in a case where the particular provision was not directly at issue “though weighty and respectable, are nevertheless dicta” and not controlling).

This Circuit has recently recognized that the scope of state power under the Twenty-first Amendment is limited. *TFWS, Inc. v. Schaefer*, 243 F.3d 198, 212 (4th Cir. 2001) (21st Amendment did not save state liquor law that violated the Sherman Act). This principle should be applied in the present case as well. The State’s authority to regulate alcohol does not override a clear violation of the Plaintiffs’ federal constitutional right to engage in interstate commerce. *See Dennis v. Higgins*, 498 U.S. 439, 448 (1991) (Commerce Clause confers individual right to engage in interstate commerce).

The State offers as an alternative argument that the direct shipment law is immune from the Commerce Clause because it falls within the State’s “core power” under the Twenty-first Amendment to regulate “transportation or importation” of

intoxicating liquors. It offers no citation for this proposition,¹⁸ because no Supreme Court case has ever announced such a rule. The only court to directly consider this argument rejected it:

The core concerns underlying the Twenty-first Amendment are not entitled to greater weight than the principle of nondiscrimination animating the Commerce Clause.

Cooper v. McBeath, 11 F.3d at 555.

The direct shipment law does not in any event appear to advance the core concerns of the Twenty-first Amendment. The State's argument apparently is that because the word "importation" appears in the Amendment, any importation law would be within the core power of the Amendment, so the State has unreviewable discretion to regulate importation of alcoholic beverages. State's Brief at 37. The State confuses means with ends.

In 1933, the Twenty-first Amendment gave states the power to retain *local* prohibition after *national* prohibition was repealed. Prohibition, temperance, and the decision whether to restrict the sale of alcohol are the core concerns of the Amendment. *Bacchus*, 468 U.S. at 276 (suggesting only core purpose of Twenty-first amendment is to "combat the perceived evils of an unrestricted traffic in

¹⁸ The State cites *Capital Cities Cable v. Crisp*, 467 U.S. 691, 715 (1984), but that case does not say that state laws governing importation are immune from the Commerce Clause. It merely says that state laws that *do not* directly engage the central powers of the Twenty-first Amendment are not entitled to much weight when balanced against other federal interests.

liquor”); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984) (controlling sales to promote temperance); *Wine Indus. v. Miller*, 609 F.2d 1167, 1170 (5th Cir. 1980) (only significant purpose of the Twenty-first Amendment was to permit “dry” states to enforce local prohibition). *See also* Douglass, *supra* note 2, at 1631-36 (review of legislative history of 21st Amendment shows that it was meant to refer only to state dry laws); Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 375-76 (1999) (temperance only core concern).

Thus, if North Carolina decided to impose some form of local prohibition, the Twenty-first Amendment would give them the ability to regulate the importation of alcohol from non-prohibition states as a *means* to advance its important interest in temperance and prevent its citizens from circumventing the prohibition law.¹⁹ Even then, however, the means chosen to advance that core concern would be fully subject to Commerce Clause scrutiny. The State could not select a means that discriminated against interstate commerce.

We have often examined a “presumably legitimate goal,” only to find that the State attempted to achieve it by “the illegitimate means of isolating the State from the national economy.”

Wyoming v. Oklahoma, 502 U.S. at 456-57; quoting *Philadelphia v. New Jersey*,

¹⁹The 21st Amendment does not prohibit “importation,” but “importation ... in violation of the laws.”

437 U.S. at 623-24. *See also Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. at 581-82, and *New Energy Co. of Ind. v. Limbach*, 486 U.S. at 278 (discriminatory tax laws struck down despite state's important interest in raising revenue); *Oregon Waste Sys., Inc. v. Dept. of Envirtl. Quality*, 511 U.S. at 101 (state's important interest in regulating waste did not authorize rules discriminating against out-of-state waste).

Laws advancing the State power over alcohol are not exempt from this scrutiny. In *Bacchus*, 468 U.S. at 268, the Supreme Court held that although Hawaii had an important state interest in taxing wine, it could not employ a procedure that treated out-of-state wine differently than local wine. The Court held:

A cardinal rule of Commerce Clause jurisprudence is that "[n]o State, consistent with the Commerce Clause, may 'impose a [liquor] tax which discriminates against interstate commerce .'"

The Court repeated the point in *Healy*:

In its previous decisions, this Court has followed a consistent practice of striking down state [liquor] statutes that clearly discriminate against interstate commerce, unless that discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

491 U.S. at 340-41 (citation omitted). *See also id.* at 344 (Scalia, J., concurring) (a liquor law's "invalidity is fully established by its facial discrimination against interstate commerce."). Even the Seventh Circuit's decision in *Bridenbaugh v.*

Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000), *cert. den. sub nom. Bridenbaugh v. Carter*, 121 S.Ct. 1672 (2001), relied on heavily by the State because it upheld Indiana’s direct shipment law, agrees on this point:

What the [Supreme] Court has held, however, is that the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms.... [T]he state [may not use] its power to impose a discriminatory condition on importation, one that favors Indiana sources of alcoholic beverages over sources in other states.

G. The Webb-Kenyon Act adds nothing to the constitutional analysis of North Carolina’s direct shipment law

In a footnote, the State suggests (without citation)²⁰ that even if the Twenty-first Amendment does not exempt the direct shipment law from Commerce Clause scrutiny, an obscure 1913 law called the Webb-Kenyon Act²¹ does. The State suggests that the Act granted *exclusive* authority to the states to regulate alcohol and rendered the dormant Commerce Clause inapplicable. State’s Brief at 33, n. 7. The argument is unavailing, because the Supreme Court has said exactly the opposite. By its plain terms, the Webb-Kenyon Act divests intoxicating liquors of their

²⁰ Normally, failure to cite pertinent legal authority in the opening brief constitutes waiver of the issue on appeal. *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n. 6 (4th Cir. 1999); *Linc Finance Corp. v. Onwuteaka*, 129 F.3d 917, 921-22 (7th Cir. 1997).

²¹27 U.S.C. §122.

interstate character only in *certain* cases, not all cases.²² *Adams Express Co. v. Kentucky*, 238 U.S. 190, 198-99 (1915) (“act did not assume to deal with all interstate commerce shipments of intoxicating liquors”). Those “certain cases” are only those related to state prohibition laws. *James Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 322 (1917) (Act’s “only purpose was to give effect to state prohibition” laws); *Seaboard Air Line Ry. v. North Carolina*, 245 U.S. 298, 303 (1917) (Act permits states to regulate interstate commerce in aid of prohibition, and does not give states power to regulate interstate commerce in liquor into counties where possession of alcohol was lawful); *McCormick & Co. v. Brown*, 286 U.S. 131, 143 (1932) (Act “referred to the prohibitory laws of the States, the enforcement of which it was intended to aid”); *Bridenbaugh*, 227 F.2d at 853 (Act applies only to state prohibition laws). State laws like the direct shipment rules at issue here which are unrelated to prohibition are not immune from scrutiny. *See Dept. of Revenue v. James Beam Dist. Co.*, 377 U.S. 341, 346 n.7 (1964) (Webb-Kenyon did not remove state tax laws from constitutional scrutiny).

H. The Seventh Circuit’s opinion in *Bridenbaugh* adds nothing to the constitutional analysis of the direct shipment law

The State relies heavily on *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. den. sub nom. Bridenbaugh v. Carter*, 121 S.Ct. 1672 (2001).

²²The Webb-Kenyon Act is entitled “An Act divesting intoxicating liquors of their interstate character in *certain* cases.” (emphasis added).

State’s Brief at 33-36. In that case, several Indiana wine consumers challenged a direct shipment law similar to the one at issue here. None of the plaintiffs in *Bridenbaugh* was an out-of-state wine seller; 227 F.3d at 849; so the issue of discrimination between out-of-state and in-state sellers was not before the Seventh Circuit.²³ *Bridenbaugh* therefore has little to say about our case.

The State also relies heavily on *Bridenbaugh* as a correct summary of the controlling law on balancing the Commerce Clause and the Twenty-first Amendment. Their reliance is misplaced. To the extent that *Bridenbaugh* is consistent with the Supreme Court’s Commerce Clause/Twenty-first Amendment cases it is redundant, and to the extent that it diverges from the Supreme Court’s cases it must be disregarded.²⁴

Bridenbaugh does not in any event stand for the proposition that a state may discriminate against interstate commerce and favor its local wine sellers. It holds only that the Twenty-first Amendment gives states general power to regulate alcohol evenhandedly and require out-of-state wine sellers to abide by the same rules as in-

²³ *Bridenbaugh*, 227 F.3d at 854 (“So far as these plaintiffs are concerned,” the law treats all wines alike).

²⁴For example, the opinion takes the unusual view that the “‘dormant commerce clause’ ... does not” appear in the constitution and is therefore not entitled to much weight. 227 F.3d at 849. This cannot be considered good law because the Supreme Court has recognized the constitutional force of the dormant Commerce Clause since 1824. *See Camps Newfound/ Owatonna*, 520 U.S. at 572-75.

state businesses. 227 F.3d at 853. Out-of-state sellers cannot use the Commerce Clause to argue that they have a right to be exempt from licensing and tax rules, e.g., to be treated more favorably than in-state sellers.²⁵ *Bridenbaugh* did not hold, or even suggest, that a state could use its power to regulate alcohol as an excuse to create discriminatory laws that favor in-state businesses.

[T]he greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms.... See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267... (1984) ("The central purpose of [§ 2] was not to empower States to favor local liquor industries by erecting barriers to competition."). Cases such as *Brown-Forman* and *Bacchus* ... treat § 2 as eliminating economic discrimination against in-state commerce of the sort caused by *Leisy*, *Bowman*, and the original package doctrine, without authorizing discrimination against out-of- state sellers. [Section] 2 enables a state to do to importation of liquor -- including direct deliveries to consumers in original packages -- what it chooses to do to internal sales of liquor, but nothing more.

227 F.3d at 853.

The Seventh Circuit upheld the Indiana law not because direct shipment laws are exempt from the Commerce Clause, but because it found that the Indiana plaintiffs had not demonstrated that the Indiana law discriminated against them personally or infringed their ability as consumers to engage in interstate commerce. 227 F.3d at 853. In this case, we have proved that North Carolina's direct shipment law

²⁵ The Seventh Circuit limited its opinion to deciding whether the state could prohibit consumers from obtaining wine from out-of-state sellers who "lack and do not want Indiana permits." 227 F.3d at 854.

discriminates against out-of-state sellers, and the State concedes the point; State's Brief at 8, 15; so *Bridenbaugh* is not applicable.

II. BECAUSE THE DIRECT SHIPMENT LAW DISCRIMINATES AGAINST INTERSTATE COMMERCE, THE APPROPRIATE REMEDY IS TO ENJOIN THE ENFORCEMENT OF THE OFFENDING LAWS, RATHER THAN STRIKE OTHER STATUTORY PROVISIONS THAT ALLOW IN-STATE WINE SELLERS TO MAKE DIRECT SHIPMENTS

A. The standard of review of the scope and content of an injunction is “abuse of discretion.”

In its brief, the State did not address the standard of review of the district court's injunction. This Court has previously stated that although it reviews an award of summary judgment de novo, it reviews a district court's choice of equitable remedy for abuse of discretion. When a district court grants an injunction, the scope of such relief rests within its sound discretion. *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002). This Court applies the abuse of discretion standard to injunctions designed to remedy constitutional violations. *Virginia Soc. for Human Life, Inc. v. Fed. Elec. Comm'n*, 263 F.3d 379, 392 (4th Cir. 2001) (injunction to prevent state from interfering with First Amendment rights); *Belk v. Charlotte-Mecklenburg Bd. of Ed.*, 269 F.3d 305, 346-47 (4th Cir. 2001) (Equal Protection case).

B. The State did not raise the remedy issue in the District Court

After the district court declared the direct shipment law unconstitutional, it granted the relief requested by plaintiffs and enjoined the enforcement of the

offending statutory provisions. This was the remedy explicitly requested in the Complaint (Second Amended Complaint ¶¶ E-F, Apx. p. 29). The State argues for the first time on appeal that the district court should have granted a different remedy no one had asked for -- striking the statutory provisions that permit in-state wine sellers to make direct shipments.²⁶ The State did not propose this remedy in the district court. Generally, issues not presented to the district court cannot be raised for the first time on appeal. *Skipper v. French*, 130 F.3d 603, 610 (4th Cir. 1997). *See also Usery v. Turner Elkhorn Min. Co.*, 428 U.S. 1, 37 (1976) (inappropriate to consider constitutionality of statutory provision other than the one challenged).

C. Enjoining the enforcement of the unconstitutional direct shipment law was the most appropriate remedy

The district court found the direct shipment law unconstitutional under the Commerce Clause because it treated out-of-state and in-state wine sellers unequally and discriminated against the out-of-state sellers. In cases in which unequal treatment of two groups is found to be unconstitutional, the court must decide how to remedy the problem so that everyone is treated alike. In this case, there are two ways to achieve equality -- extend the benefits of direct shipment to out-of-state sellers, or withdraw it from in-state sellers.

²⁶ The State only mentions striking N.C. Gen. Stat. § 18B-1101(3), which applies to wineries. Presumably they meant to include N.C. Gen. Stat. § 18B-1001(4), which applies to retailers.

The State argues that the district court erred by extending the shipment privilege to out-of-state sellers, and should instead have withdrawn it from in-state sellers. The State proposes *less* interstate commerce rather than more. Such a remedy in this case would be perverse, because it would leave the plaintiffs in a worse position than they would be in if they had lost the case.

The State's proposed remedy is also inconsistent with Supreme Court precedent which holds that ordinarily "extension, rather than nullification, is the proper course" when a state law disseminates benefits unequally. *Califano v. Westcott*, 443 U.S. 76, 89 (1979). *See also Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (federal courts should not normally nullify a valid portion of a state law because a different portion is invalid). One reason for this presumption is that the group from whom the benefits would be taken away are not parties to the litigation, have not had the opportunity to be heard before being deprived of a benefit on which they rely, and may have a substantial financial stake. *See Heckler v. Mathews*, 465 U.S. 728, 733, 738-40 (1984); *Nguyen v. I.N.S.*, 533 U.S. 53, 95-96 (2001) (Scalia, J., concurring).

The district court's decision to enjoin the State from maintaining a trade barrier is clearly the appropriate remedy for a Commerce Clause violation, because it advances the federal interest in competition and free trade. *See Bacchus Imports v. Dias*, 468 U.S. at 276; *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). The State's

proposal would leave the trade barrier in place and do nothing to further interstate commerce. When selecting a remedy for a violation of the United States Constitution, a federal court should consider which remedy will better advance the important federal policies embodied in the Constitution. *See, e.g., Police Department v. City of Mosely*, 408 U.S. 92, 96 (1972) (remedy for unconstitutional ordinance that permitted labor picketing but not political picketing was to extend the benefit to all rather than eliminate the favorable treatment to labor, because First Amendment policy favors more speech rather than less). In this case, the federal constitutional right at stake is the ability to engage in interstate commerce free from restrictive trade barriers. The State's proposal would leave North Carolina's trade barrier intact and frustrate the federal interest in robust interstate commerce. *See e.g. Bacchus Imports v. Dias*, 468 U.S. at 276; *Hughes v. Oklahoma*, 441 U.S. at 325. The District Court correctly selected the remedy that extends the benefit of direct shipment to out-of-state sellers, thereby promoting rather than inhibiting interstate commerce.

The State's proposed remedy would not in any event cure the unconstitutionality problems. It would not redress the fact that the law has unconstitutional extraterritorial effect, nor resolve different treatment of in-state and out-of-state sellers with respect to their ability to remit excise taxes or acquire the necessary permits to do business in North Carolina.

D. The district court’s choice of appropriate remedy has nothing to do with “severance”

The State incorrectly casts their argument about remedy as an issue of severability. The question of whether to strike down an entire statute or just sever one specific unconstitutional provision would be controlled by state law and the intent of the legislature; *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996); so the court would not have to select a remedy that advanced the federal interest in interstate commerce.

The remedy issue has nothing to do with severability. Severability refers to whether the remainder of a statute “can still be valid even if one part of it is struck down as invalid by a court.” Black’s Law Dictionary 1373 (6th ed. 1990). The State proposes “severing” the provisions concerning in-state shipments by wineries and retailers, but those are not the parts of the alcoholic beverage laws that were challenged and found to be unconstitutional by the District Court.²⁷ There is no issue of whether they can be severed from the rest of the statutes. The State’s argument about state legislative intent is therefore irrelevant.²⁸

²⁷ The District Court declared N.C. Gen. Stat. §§ 18B-102.1, 18B-109, and 18B-1114 unconstitutional on their face, and §§ 18B-102 and 105-113.83 unconstitutional as applied. (Slip op. at 20; Apx. p. 143).

²⁸ Part of the argument is wrong in any event. The State asserts incorrectly (and without citation) that subsection (3) of 18B-1101 was an amendment to the original statute, and therefore easily severed consistent with legislative intent. State’s Brief at 50. In point of fact, Chapter 18B was created in its entirety by Public Acts 1981, chapter 412, which rewrote and recodified North Carolina’s entire Alcoholic Beverage Code. Section 1101 was created by that Act, and its original form

CONCLUSION

North Carolina's direct shipment law discriminates against interstate commerce and gives a competitive advantage to in-state wine sellers. It has the practical effect of regulating wine sales that take place in other states. These are Commerce Clause violations. The U.S. Supreme Court has acknowledged that the Twenty-first Amendment gives states authority to regulate alcohol sales within their borders, but not to ignore the Commerce Clause. State liquor laws like this one that discriminate against interstate commerce and have extraterritorial effect, are "virtually per se invalid." This Court should affirm the district court's grant of summary judgment in favor of the Plaintiffs that the direct shipment laws are unconstitutional, and its order enjoining the State from enforcing them.

Respectfully submitted,

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contains subsection (3) which gives in-state wineries the power to ship its wine to individual purchasers.

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ADDENDUM

U.S. Const., Art. I, § 8.

The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const., Amend. XXI.

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

N.C. Gen. Stat. § 18B-102.

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

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

N.C. Gen. Stat. § 18B-102.1.

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

* * *

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

N.C. Gen. Stat. § 18B-109.

(a) General Prohibition. -- No person shall have any alcoholic beverage mailed or shipped to him from outside this State unless he has the appropriate ABC permit.

N.C. Gen. Stat. § 18B-1001.

When the issuance of the permit is lawful in the jurisdiction in which the premises is located, the Commission may issue the following kinds of permits:

* * *

(4) *Off-Premises Unfortified Wine Permit.* -- An off-premises unfortified wine permit authorizes the retail sale of unfortified wine in the manufacturer's original container for consumption off the premises and it authorizes the holder of the permit to ship unfortified wine in closed containers to individual purchasers inside and outside the State. The permit may be issued for retail businesses. The permit may also be issued for a winery for sale of its own unfortified wine.

N.C. Gen. Stat. § 18B-1101.

The holder of an unfortified winery permit may:

- (1) Manufacture unfortified wine;
- (2) Sell, deliver and ship unfortified wine in closed containers to wholesalers licensed under this Chapter as authorized by the ABC laws, except that wine may be sold to exporters and nonresident wholesalers only when the purchase is not for resale in this State;
- (3) Ship its wine in closed containers to individual purchasers inside and outside this State;
- (4) Furnish or sell "short-filled" packages, on which State taxes have been or will be paid, to its employees for the use of the employees or their families and guests in this State;
- (5) Regardless of the results of any local wine election, sell the winery's wine for on- or off-premise consumption upon obtaining the appropriate permit under G.S. 18B-1001.

A sale under subdivision (4) shall not be considered a retail or wholesale sale under the ABC laws.

N.C. Gen. Stat. § 18B-1114.

The holder of a nonresident wine vendor permit may sell, deliver, and ship unfortified and fortified wine in this State only to wholesalers, importers, and bottlers licensed under this Chapter, as authorized by the ABC laws. The unfortified and fortified wine must come to rest at the licensed premises of a wine wholesaler in this State before being resold to a retailer. A nonresident wine vendor permit may

be issued to a winery, a wholesaler, an importer, or a bottler outside North Carolina who desires to sell, deliver, and ship unfortified and fortified wine into this State.

N.C. Gen. Stat. § 105-113.83.

* * *

(b) Beer and Wine. -- The excise taxes on malt beverages and wine levied under G.S. 105-113.80(a) and (b), respectively, are payable to the Secretary by the resident wholesaler or importer who first handles the beverages in this State. The taxes on malt beverages and wine shall be paid only once on the same beverages. The tax shall be paid on or before the 15th day of the month following the month in which the beverage is first sold or otherwise disposed of in this State by the wholesaler or importer. When excise taxes are paid on wine or malt beverages, the wholesaler or importer shall submit to the Secretary verified reports on forms provided by the Secretary detailing sales records for the month for which the taxes are paid. The report shall indicate the amount of excise tax due, contain the information required by the Secretary, and indicate separately any transactions to which the excise tax does not apply.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with Rule 32(a)(7)(b) and contains fewer than 14,000 words. According to the word count program of the word processing system used to prepare it (WordPerfect 9.0), this brief including footnotes contains 10,024 words.

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CERTIFICATE OF SERVICE

I certify under penalties of perjury that on July 17, 2002, I filed the Brief for Plaintiffs-Appellants with the clerk of the 4th Circuit U.S. Court of Appeals by first-class mail, and served copies on the attorney of record by first-class mail addressed as follows:

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