

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 E. 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
Western District of North Carolina

**PLAINTIFFS-APPELLEES' PETITION FOR REHEARING
AND REHEARING *EN BANC***

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With the stroke of a pen, this Court has taken the unprecedented step of creating a state criminal offense by judicial fiat. After affirming the district court's decision that North Carolina discriminated against interstate commerce by prohibiting out-of-state (but not in-state) wineries from shipping wine directly to consumers, the panel decided to redress the discrimination by striking the law permitting in-state shipments. The panel overlooked the fact that these are *criminal laws*, not merely liquor regulations, so that the effect of its decision is to make in-state shipping a crime.¹ No principle of federalism is more basic than that the federal courts should defer to state legislatures when it comes to defining what kinds of conduct constitute criminal offenses. The panel also overlooked the fact that it was supposed to review the district court's decision as to remedy for abuse of discretion, not fashion its own remedy *de novo*. If allowed to stand, the panel opinion will represent an unprecedented intrusion by a federal court into the legislative prerogatives of a state. Therefore, Plaintiffs-Appellees petition this Court for rehearing or rehearing *en banc* pursuant to FED. R. APP. P. 35 and 40, to reconsider its decision as to remedy for two reasons:

1. The Court overlooked the material fact that these are state criminal laws so that its decision criminalizes in-state shipping. The holding conflicts with

¹N.C. Gen. Stat. § 18B-102 (violation of shipping provision a misdemeanor); § 18B-102.1 (violation by out-of-state shipper is a felony).

opinions of the United State Supreme Court that “the discretion to delimit the categories of crimes [and] define criminal offenses and prescribe punishments, resides wholly with the state legislatures.” *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984).²

2. The panel’s *de novo* review of the terms of the district court’s injunction conflicts with prior decisions in this circuit that the district court’s decision as to remedy is to be reviewed for abuse of discretion. E.g. *Tuttle v. Arlington Co. Sch. Bd.*, 195 F.3d 698, 703 (4th Cir. 1999).³

BRIEF STATEMENT OF THE CASE⁴

Plaintiffs are a California winery (Oakstone) and seven North Carolina wine consumers who want to engage in interstate commerce in wine. The winery wants to sell and ship its wine directly to consumers, but cannot. The state of North Carolina prohibits Oakstone from making direct shipments and requires instead that it distribute its wine only through a separate wholesaler and retailer. If one of Oakstone’s employees violates this direct shipment law, he commits a felony.

N.C. GEN. STAT. §§ 18B-102.1.

²If rehearing is denied, consideration by the full court will be necessary to secure and maintain uniformity of the courts’ decisions.

³If rehearing is denied, consideration by the full court will be necessary to secure and maintain uniformity of the court’s decisions.

⁴Plaintiffs incorporate by reference their statement of facts in their brief.

However, the state does not make all wine go through this expensive and cumbersome three-tier distribution system. For twenty years, in-state wineries have been allowed to do what Oakstone cannot -- sell and ship their wine directly to consumers without the added cost of having to sell through two middlemen. N.C. GEN. STAT. §§ 18B-1001(4), 18B-1101(3). This statutory scheme gives in-state wineries an economic advantage and better access to the market. For this reason, the plaintiffs sued state officials for a declaratory judgment that the discriminatory ban on interstate direct wine shipments violated the Commerce Clause. The State defended the direct shipment law as a proper exercise of the 21st Amendment, arguing that the 21st Amendment trumps the Commerce Clause and gives the state virtually unreviewable authority to regulate alcoholic beverages any way it sees fit. See Def. Brief at 19-36.

The district court, in a thorough opinion,⁵ sided with Plaintiffs. It ruled that the statutory scheme discriminated against interstate commerce and provided economic protection to in-state interests. Relying on *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and other Supreme Court cases, the district court declared the direct shipment law unconstitutional because it violated the “dormant” Commerce Clause and exceeded the scope of legitimate state authority

⁵197 F. Supp. 2d 464 (W.D. N.C. 2002).

under the 21st Amendment. The district court then enjoined state officials from enforcing the law against interstate shipments.

On appeal, a panel of this Court affirmed the district court on the constitutional merits. It agreed that the state's statutory scheme discriminated against interstate commerce, exceeded its authority under the 21st Amendment, and was unconstitutional. However, this Court did not affirm the district court's choice of remedy. Because the underlying violation was a Commerce Clause violation, the district court had struck the part of the law that burdened interstate commerce, namely the law prohibiting interstate direct shipments. This Court reversed, holding that principles of federalism required it to find a remedy that caused the least intrusion into the state's legislative prerogatives. It then decided that it would be less intrusive to strike the law permitting in-state shipments than to strike the one prohibiting interstate shipments. This decision had the perverse effect of ruling that although plaintiffs had suffered an injury by being denied the right to participate in interstate commerce, no remedy was available to them. Instead, they are still denied the right to engage in direct commercial wine transactions.

Plaintiffs seek rehearing only on the remedy issue. When this Court decided that striking the in-state benefit was less intrusive into state legislative prerogatives than striking the prohibition against interstate shipment, it failed to

realize that its decision would create a state criminal offense of “illegal in-state shipping.” This Court’s decision was actually far more intrusive into state legislative prerogatives than it would have been to affirm the district court.

**THIS COURT DID NOT APPLY THE CORRECT STANDARD
OF REVIEW: ABUSE OF DISCRETION**

In fact, this Court should never even have tried to resolve the remedy issue, because the district court’s decision as to remedy is supposed to be reviewed for abuse of discretion, even in constitutional cases. *See Virginia Soc. for Human Life, Inc. v. Fed. Elec. Comm’n*, 263 F.3d 379, 392 (4th Cir. 2001) (injunction in 1st Amendment case reviewed for abuse of discretion); *Belk v. Charlotte-Mecklinburg Bd. of Ed.*, 269 F.3d 305, 346-47 (4th Cir. 2001) (*en banc*) (remedy in school desegregation case reviewed for abuse of discretion); *Tuttle v. Arlington Co. Sch. Bd.*, 195 F.3d 698, 703 (4th Cir. 1999) (scope of injunction in Equal Protection case reviewed for abuse of discretion). The Court of Appeals is not supposed to take over the district court’s role to fashion an appropriate remedy. It should affirm the district court’s choice of remedy if it is within legal bounds, or remand if the wrong legal analysis was used, but should not reverse just because it prefers a different remedy.⁶ The district court, which sits in the state and is closer

⁶The panel opinion did not mention the abuse-of-discretion standard, nor give any explanation why the district court’s choice of remedy was an abuse of discretion. Indeed, the Court admits that both remedies are permissible, and that

to the facts, is in a better position to determine which of several remedies is least intrusive of state public policy while still being fair to plaintiffs. The district court also would not have to rely on presumptions about state policy, as this Court did,⁷ but could hold hearings and build a record on which to base a decision. *See St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 783 (4th Cir. 1995) (state policy must be shown by “clear and dominant” evidence).

**BY NOT RECOGNIZING THAT THESE ARE CRIMINAL LAWS,
THIS COURT HAS CHOSEN A REMEDY WHICH IS IMPERMISSIBLY
INTRUSIVE INTO STATE LEGISLATIVE PREROGATIVE**

It is a fundamental principle of federalism that when a federal court reviews state legislation, it may not substitute its own preferences for those of the general assembly. Federal courts are not “superlegislatures.” *See Alden v. Maine*, 527 U.S. 706, 714 (1999) (the federal system established by our Constitution preserves the sovereign status of the States); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969) (federal courts should not decide for states what policy they should or should not embrace; courts “do not sit as a super-legislative body”); *Baltimore Teachers’ Union v. Baltimore*, 6 F.3d 1012, 1021-22 (4th Cir. 1993)

“we are given at least the choice to affirm the district court’s conclusion ... or to agree with the State that only the provision affording the preference for local wineries should be stricken.” Slip op. at 18.

⁷Slip op. at 19.

(federal courts not superlegislatures). When deciding between two remedies that will both result in a state being enjoined from enforcing its own laws, a federal court should choose the alternative that is more consistent with legislative intent and does least harm to state sovereignty.

Although the panel intended to “take the course that least destroys” state sovereignty,⁸ it actually accomplished the exact opposite. The laws at issue are criminal laws, not mere ABC regulations.⁹ When the panel struck down the provision making in-state shipments lawful, it made in-state direct shipping a criminal offense by judicial fiat. Because of this decision, wineries in North Carolina that have been selling and shipping wine directly to consumers for twenty years, are now in criminal violation for those shipments despite the fact that the state expressly authorizes their conduct. When a federal court is basing a choice of remedy on the “minimal-damage” approach,¹⁰ it surely should avoid a remedy that criminalizes conduct against the will of the state legislature. See *United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (judgments about defining criminal offenses and punishments belong to the legislature); *Bousely v. United States*, 523

⁸Slip op. at 19.

⁹N.C. GEN. STAT. § 18B-102 (violation of chapter a misdemeanor); N.C. GEN. STAT. § 18B-102.1 (violation by out-of-state seller is a felony).

¹⁰Slip op. at 20.

U.S. 614, 621 (1998) (only the legislature, not the courts, can make conduct criminal); *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) (“the discretion to delimit the categories of crimes [and] define criminal offenses and prescribe punishments, resides wholly with the state legislatures”); *Hutto v. Davis* 454 U.S. 370, 371 (1982) (defining what conduct constitutes a crime is a basic line-drawing process within the province of the legislature, not the courts). The appropriate remedy is to achieve equality by extending to outsiders the exemption from criminal liability enjoyed by state residents, rather than to order the state to criminalize the behavior of its own citizens. *Welsh v. United States*, 398 U.S. 333, 361-67 (1970) (Harlan, J., concurring). The panel’s decision has done more damage to state sovereignty than it would have by affirming the district court’s decision to strike down the direct shipment laws.

If the Court allows the panel’s decision to stand, what happens next? If an employee of a North Carolina winery made a direct shipment in violation of the Court’s mandate, it would be a criminal act. What would the indictment say -- that Bill Bennett of Bennett Vineyards is hereby charged with a violation of *Beskind v. Easley*?¹¹ Even if a winery employee were somehow legally indicted, he would undoubtedly assert as a defense that N.C. Gen. Stat. § 18B-1103 says that in-state

¹¹It is unlikely that such a charge would satisfy the due process requirement that citizens have adequate notice as to what constitutes criminal conduct.

shipments are lawful. This Court’s ill-considered “remedy” turns out not to be a remedy at all. The statutory unequal treatment between in-state and out-of-state wineries remains because in-state winery employees have a statutory defense not available to those from out of state.

The panel should have affirmed the district court’s decision that the appropriate way of remedying the constitutional harm was to strike the law which burdened interstate commerce -- the one prohibiting direct shipments. This remedy does less harm to state sovereignty than ordering the state to make in-state shipping a crime against its will. It strikes down only those provisions that are inconsistent with the federal interest in interstate commerce,¹² and it leaves in place provisions that involve state regulation of its own citizens. It is consistent with recent actions by the state legislature that expand the ways wine can be sold.¹³ The district court’s remedy is also more consistent with basic notions of

¹²*Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (strong federal interest in free and open commerce). The panel’s discussion of remedy does not mention the federal interest being vindicated, and treats it as essentially superfluous. The decision has the ironic effect of remedying a violation of the Commerce Clause by ordering even *less* commerce.

¹³Amendments to the ABC laws in the last twenty-five years permit wine sales in tasting rooms, N.C. Gen Stat. § 18B-1103; at festivals, § 18B-1114.1; from hotel mini-bars, § 1001(13); at wine tastings, § 18B-1001(15); and on Sunday, § 18B-1004(c). The state has also raised the amount of wine that can be purchased and transported at any one time from one gallon to 50 liters; § 18B-303(a)(3); and have expanded the hours in which wine may be sold. N.C. Gen Stat. § 18B-

Due Process. The remedy ordered by the panel takes away benefits from in-state wineries who are not parties to the litigation and have not had notice¹⁴ or the opportunity to be heard. *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).

WHEREFORE, Plaintiffs-Appellees request this Court to grant panel rehearing on the issue of remedy and affirm the district court's injunction against the enforcement of the direct shipment laws, and if that petition is denied, to grant rehearing *en banc* for this purpose.

Respectfully submitted

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1004(a). The Court's "presumption" that the state prefers greater regulation to less, Slip Op. at 19, is thus not entirely accurate.

¹⁴The unusual remedy of making in-state shipments unlawful was not suggested by the State until appeal. See Plaintiffs-Appellees' Brief at 36-37.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served this petition by first-class mail upon the attorneys of record addressed as follows:

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This the 21st of April, 2003

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