No. 03-1116

In The Supreme Court Of The United States

JENNIFER M. GRANHOLM, GOVERNOR, et al.,
Petitioners,
v.

ELEANOR HEALD, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 32 OTHER STATES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the Twenty-first Amendment?

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INTEREST OF THE *AMICI* STATES

The ability to regulate the flow of alcohol into their borders is an issue of paramount concern to the States. This is particularly so in light of the growth of the Internet and electronic commerce—tools that have dramatically increased shipments from out-of-state sources directly to consumers' doorsteps. These evolving technologies threaten the States' ability to maintain control over alcohol distribution and to ensure that alcohol does not end up in the hands of children. These same technologies also threaten the States' ability to collect legitimate taxes on these consumer products.

The States file this *amicus* brief to assert the importance of their roles in controlling the importing of liquor into their borders. To be sure, some States distinguish between in-state and out-of-state wineries with regard to the ability to ship directly to consumers. But this distinction falls squarely within the Twenty-first Amendment's grant of power to the States to regulate alcohol imports. Equally important, distinguishing between in-state and out-of-state producers is rationally related to the States' legitimate concerns about enforcing and monitoring their liquor distribution systems.

The regulatory system used by most States, the three-tier system, allows the States to address these concerns by requiring all alcohol shipments to enter and arrive to the consumer through a licensed entity with a localized presence. By prohibiting out-of-state wineries from directly shipping to consumers, States are thus doing nothing more than requiring that all liquor sold for use in the State be purchased from a licensed entity that is subject to the enforcement and tax authority of the State.

The *amici* States have a strong interest in maintaining appropriate control over the distribution of alcohol within their borders. Accordingly, we are an important voice in any conversation regarding the appropriate scope of the Twenty-first Amendment. We raise that voice here to ask the Court to reverse the decision below and hold that States may restrict out-of-state wineries from shipping directly into the State borders, while at the same time allowing in-state wineries to ship directly to that State residents.

SUMMARY OF ARGUMENT

The dormant Commerce Clause is a judicially-created doctrine meant to protect Congress's exclusive right to control interstate commerce. The Twenty-first Amendment, however, expressly grants the States the power to regulate one form of interstate commerce—namely, alcohol imported for in-state use. In exercising this power, the States remain subject to other constitutional provisions, such as the First Amendment. But, for those state regulations that lie directly within the Twenty-first Amendment's express grant of power to the States, the dormant Commerce Clause simply does not apply. The only case to even suggest otherwise is *Bacchus Imports v. Dias,* 468 U.S. 263 (1984), and, to the extent it does so, the *amici* States respectfully urge that it should be overturned. At the very least, *Bacchus* should apply only where, unlike the case here, the state regulation amounts to pure economic protectionism, unconnected to any liquor-control interest at all.

Further confirming the inapplicability of the dormant Commerce Clause, Congress has expressly authorized state regulation of alcohol imports. See 27 U.S.C. § 122 (the "Webb-Kenyon Act"). In light of this congressional allocation of power to the States, however, the key assumption underlying the dormant Commerce Clause—the need to protect Congress's exclusive control over interstate commerce—is not met. To the contrary, Congress has expressly spoken on the side of state regulation, and that express use of Congress's Commerce power surely trumps any implications of the dormant Commerce Clause.

The practical realities of alcohol distribution, and in particular the growth of electronic commerce, demonstrate the importance of giving full breadth to the States' power under the Twenty-first Amendment. While no State bans alcohol imports entirely, nearly all States recognize the need to monitor those imports closely in order to ensure that alcohol flows only to adults. Moreover, the Twenty-first Amendment also recognizes that States have an important interest in maintaining their ability to collect appropriate excise and sales taxes on alcohol imports, an interest that is threatened by direct shipping to in-state consumers.

In short, dormant Commerce Clause principles simply do not apply at all to regulations, such as those here, that lie at the heart of the Twenty-first Amendment. If the Court finds otherwise, however, the *amici* States respectfully urge that the Court should, at the very least, modify the traditional dormant Commerce Clause test. By expressly assigning the States regulatory authority, the Twenty-first Amendment makes alcohol a constitutionally-unique product. The Court should adopt a more deferential dormant Commerce Clause test that recognizes this shared regulatory authority. In particular, even facially discriminatory statutes, at least so long as they do not reflect pure protectionism, should be subject only to rational basis review.

ARGUMENT

I. The dormant Commerce Clause does not bar State regulations designed to restrict the importation of alcohol for use within its borders.

This case does not lie at the intersection of the Commerce Clause and the Twenty-first Amendment. Instead, it involves a straightforward application of the latter, which expressly allocates to States the power to control the importation of alcohol for in-state use. The statutes at issue here fall squarely within this text, and the case should end there. Indeed, as shown below, the Court's precedents have been remarkably consistent in reaffirming that regulations falling within the Amendment's textual grant are immune from dormant Commerce Clause challenges.

The only possible deviation from this principle was *Bacchus*, in which the Court appeared to measure the States' regulatory power by reference to the Twenty-first Amendment's "core concerns," rather than its text. If *Bacchus* did so, however, the *amici* States urge that it was wrongly decided and should be overruled. In the alternative, *Bacchus* should be limited to cases, like *Bacchus* itself, that involve pure economic protectionism. Limits on alcohol shipping like those at issue here, however, are an integral part of any "comprehensive system for the distribution of liquor" that pursues the legitimate aims of "promoting **temperance,** ensuring **orderly market** conditions, and raising revenue." *North Dakota v. United States,* 495 U.S 423, 432 (1990). Distinguishing between in-state and out-of-state wineries does not make these regulations illegitimate, for such distinctions merely reflect the need to have an accountable licensee within the State.

A. The Court's precedents have reaffirmed that States have broad power to regulate alcohol imports for in-state use.

The Court has consistently confirmed the States' power to control alcohol imports destined for in-state use. That pattern is reflected in several stages of the Court's jurisprudence.

With the Eighteenth Amendment, when Prohibition became the law of the land, federal attempts to regulate alcohol reached their pinnacle. The Eighteenth Amendment broadly prohibited manufacture, sale, and use of alcohol on a national level. But, within fourteen years, Congress acknowledged the failure of this "Grand Experiment." The adoption of the Twenty-first Amendment in 1933 both repealed Prohibition and *granted States the power to regulate alcohol*:

> 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.

At first, the Court held that this Amendment gave the States virtually unrestricted power over all aspects of liquor control. Of particular importance here, the Court said that Section 2 exempted alcohol regulation from normal Commerce Clause protections:

> The amendment which "prohibited" the "transportation or importation" of intoxicating liquors into any state in violation of the laws thereof, abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations that do not comply with the conditions that it prescribes.

State Board of Equalization v. Young's Market Co., 299 U.S. 59, 62 (1936). See also *Indianapolis Brewing Co. v. Liquor Control Comm'n,* 305 U.S. 391, 394 (1939) (State's right to prohibit or regulate liquor importation is not limited by the Commerce Clause); *Ziffrin, Inc. v. Reeves,* 308 U.S. 132 (1939) (Twenty-first Amendment gives the State power to forbid all imports that do not comply with prescribed conditions). Thus, in this early stage, the Court seemed to suggest that the Amendment trumped the Commerce Clause entirely, not just the "dormant" portion.

The Court's turning point, which established the rule that we seek to reaffirm today, was *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). In *Idlewild,* the Court invalidated a New York statute that sought to regulate shipments of alcohol that merely passed through John F. Kennedy Airport, as the alcohol was sold to those headed out of the country. *Id.* at 325. The Customs Service had approved the sales, pursuant to the federal Tariff Act of 1930, but the New York statutes forbade the sales because the dealer was not licensed by the State. *Id.*

The Court held that the Twenty-first Amendment did not save the New York law for at least two reasons. First, the law did not govern importation for "use" in the State, as the alcohol was merely passing through, and thus the law fell outside the Amendment's text. *Id.* at 333. Second, the Court noted that the transactions at issue were "carried on under the aegis of a law passed by Congress" under its express Commerce Clause power. *Id.* at 334.

But even in striking the law, the Court strongly reaffirmed that 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." *Id*. at 330. That is, import restrictions tied to *in-state use* are expressly a matter of State concern, at least as long as Congress has not spoken to the contrary, so the dormant Commerce Clause yields fully there.

The Court in *Idlewild* left open the separate possibility—confirmed in a decision issued that same day, *Dept. of Revenue v. James B. Beam Distilling Co.* 377 U.S. 341 (1964)—that the Twenty-first Amendment did not have the same effect where other constitutional provisions were involved. That is, while the Twenty-first Amendment grants the State power to act, thereby overcoming any dormant Commerce Clause concerns, the States must still act in a manner consistent with other constitutional constraints on the exercise of governmental power, such as the First Amendment.

In the decades since *Idlewild,* the Court has reaffirmed, not undermined, those principles. At first blush, it may seem that those cases somehow "further eroded" the State's strong power over liquor control, as the Court's decisions repeatedly struck down State laws. Indeed, some laws that were initially upheld were later struck down. See *Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35 (1966) (upholding New York price affirmation statute), *overruled by Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573 (1986) (invalidating same law), and *Healy v. The Beer Institute*, 491 U.S. 324 (1989). But in truth, all of those cases—save *Bacchus,* discussed separately below—fit comfortably within, and built upon, *Idlewild's* principles. In those cases, State laws were invalidated either because the challenged regulation fell outside the constitutional text (*e.g.*, because it attempted to regulate alcohol other than that destined for in-state consumption), or because the regulation ran afoul of a constitutional constraint other than the dormant Commerce Clause.

In one category, the Court has continued to follow *Idlewild* in finding a State's power limited when a State seeks to regulate imports that are not intended *for in-state use*. Thus, just as shipments destined abroad were different, see *Idlewild*, so too were shipments sent to a federal enclave, which was not part of the "State." *North Dakota,* 495 U.S at 431. See also *United States v. Mississippi Tax Commission*, 412 U.S. 363 (1973) (holding State may not regulate importation of alcohol into territory over which the United States exercises exclusive jurisdiction); *United States v.*

Mississippi Tax Commission, 421 U.S. 599 (1975) (holding State may not regulate importation of alcohol into territory where State and United States exercise concurrent jurisdiction). Similarly, the Court has invalidated statutes that attempted to regulate alcohol outside State borders. See *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 585 (1986) (Twenty-first Amendment "gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States."); *Healy v. The Beer Institute,* 491 U.S. 324 (1989) (invalidating statute regulating beyond State borders).

In another category, several cases involved State regulations that *conflicted* with Commerce Clause legislation enacted by Congress. See *California Retail Liquor Dealers Ass'n. v. Midcal Aluminium*, 445 U.S. 97 (1980); *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987). As noted above, *Idlewild* was also such a case. And, as in *Idlewild*, such cases do not involve the dormant Commerce Clause. Rather, when Congress speaks, the question is one of pre-emption under the Supremacy Clause. See *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 555-56 (1991) (O'Connor, J. dissenting). Thus, this group is merely part of the larger category of cases involving constitutional constraints other than the dormant Commerce Clause.[1]

In that broader category, the Court has repeatedly reaffirmed that State alcohol regulations, while freed from the dormant Commerce Clause, must still comport with other constitutional limitations. See *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 516 (First Amendment); *Craig v. Boren*, 429 U.S. 190 (1976) (Equal Protection Clause); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971) (procedural

[1] Further, here, not only has Congress *not* spoken on the side of the would-be direct shippers, to the contrary, as discussed in Part II below, Congress has expressly spoken to affirm the State's power.

due process); *Dept. of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341 (1964) (Export-Import Clause).

Notably, all of these cases, even while invalidating State laws that regulated beyond the core areas identified in the constitutional text, continued to affirm that State power remained virtually unchecked where core import-control was concerned, and to affirm that the dormant Commerce Clause gave way in the face of such regulations. "[T]he States have virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal Aluminum, Inc.,* 445 U.S. 97 (1980). See also *Idlewild*, 377 U.S. at 330 ("[T]he scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned."); *Capital Cities Cable v. Crisp*, 467 U.S at 712 ("The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders."). Indeed, as this Court ruled just eight years ago, "the 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." *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 516 (1996).

Thus, the Court need not strike out in new directions to protect the States' power here, which is expressed in the Twenty-first Amendment's text. To the contrary, limiting

State power within that text would violate the principle, reaffirmed in the cases above, that such State power remains "totally unconfined" by the Commerce Clause.

B. *Bacchus* was wrongly decided and should be overruled.

The decision in *Bacchus Imports v. Dias*, 468 U.S. 263 (1984), is the only precedent from this Court addressing the dormant Commerce Clause's impact on the States' power to regulate alcohol that does not fit comfortably within a textual reading of the Twenty-first Amendment. As discussed above, all of this Court's other precedent leading up to *Bacchus* recognized the States' power under the text of the Twenty-first Amendment to determine how liquor will be imported into the State for use therein. *Bacchus* is the sole outlier. But it has not improved with age, and should be overruled.

In *Bacchus*, Hawaii had imposed a twenty percent excise tax on sales of liquor at wholesale, but exempted locally-produced alcoholic beverages. 468 U.S. at 265. The exemption's admitted purpose—indeed its sole purpose—was to bolster the domestic industry. *Id.* at 267. An importer challenged the tax on Commerce Clause grounds. *Id*. at 265.

Although Hawaii had "expressly disclaimed any reliance upon the Twenty-first Amendment" in the court below, it raised it in defense of its statute in the Supreme Court. *Id*. at 274 n.12. Although the tax appeared to fit within the Amendment's text, five Justices rejected that defense. They concluded that laws that "constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of unrestricted traffic in liquor." *Id.* at 276. Because Hawaii's law did not fit within any "clear concern of the Twenty-first Amendment," the Amendment did not protect them from normal dormant Commerce Clause scrutiny. *Id*.

The three Justices[2] in dissent, however, noted that this approach was inconsistent with the Court's Twenty-first Amendment jurisprudence. According to the dissent, that precedent had treated direct regulation of the sale or use of liquor within the State as a "core § 2 power." *Id*. at 285, quoting *Capital Cities Cable*, 467 U.S. at 713. With regard to such regulations, the dissent argued, "the inherent limitation imposed by the Commerce Clause on the States [*i.e.*, the dormant Commerce Clause] is removed." *Id*. at 279 n.5. The question, they properly concluded, was not whether the statute fell within the Amendment's "central purposes," but rather whether it reflected an "exercise of the power expressly conferred upon the States by the [Amendment]." *Id*. at 287.

The dissent's reliance on the text of the Twenty-first Amendment, rather than the Amendment's purported "central purposes," is more faithful not only to the constitutional text, but also to this Court's precedent both before and after *Bacchus*. Indeed, all of this Court's precedent in the twenty years since *Bacchus* was decided has likewise adhered to a textual reading of the Amendment. Thus, overruling *Bacchus* will not throw out twenty years of jurisprudence. See *North Dakota v. United States,* 495 U.S 423, 431 (1990) ("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."); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 516 (1996) ("the Twenty-first Amendment limits the effect of the Dormant Commerce Clause on a State's regulatory power over the delivery or use

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[2] Justice Brennan recused himself, and thus only eight Justices heard the matter.

of intoxicating beverages within its borders, ..."). Nor will overruling *Bacchus* toss the States into uncertainty as to how to regulate liquor importation. As *Bacchus* stands alone in this Court's jurisprudence and cannot be reconciled with the cases decided before it or after it, the time has come for the Court to overrule *Bacchus.*

At the very least, *Bacchus* should apply only in cases, such as *Bacchus* itself, where the regulation at issue was admittedly and solely protectionist in its purpose. If courts are faced with State regulations of alcohol that are purely protectionist, *Bacchus* may provide some limited guidance. Absent such circumstances, however, the courts need not examine incidental protectionist effects that a regulation may have.

Either way, whether *Bacchus* is overruled or narrowly read, the statute here is constitutional. It is an exercise of the State's core power under Section 2, and does not reflect the pure economic protectionism at issue in *Bacchus*. Thus, the dormant Commerce Clause simply does not apply.

C. The restrictions here fall within both the express language and the "core purposes" of the Twenty-first Amendment and, therefore, are unquestionably valid.

As explained above, the States should win on a textual reading of the Twenty-first Amendment, as the laws at issue fall within the constitutional text. Within the textual sphere, States are virtually unconfined by the Commerce Clause when they restrict the importation, transportation, or delivery of alcohol into the State for use, consumption or delivery therein. On this reading, that is the end of the analysis.

But even if the Court uses the *Bacchus* "core purposes" approach, rather than looking solely to text, the laws at issue here easily pass the test. Indeed, both the textual and the purpose-driven approaches often yield the same result, because, as the Court has explained, the text acknowledges the States' compelling interest in controlling the flow of alcohol into their borders. Regulatory schemes that "channelize the traffic, minimize the commonly attendant evils; [and] facilitate the collection of revenue," *Idlewild*, 377 U.S. at 331, thus meet the core purposes of the Amendment. State regulations that treat in-state producers differently from out-of-state producers can be an important component of achieving these legitimate legislative purposes.

Many States allow in-state wineries to ship directly to consumers, but do not allow out-of-state wineries this same privilege. Moreover, this restriction against out-of-state suppliers shipping directly to consumers is not limited to wine and wineries. Many States bar out-of-state suppliers from shipping "alcoholic beverages" into the State to anyone other than the State itself or a licensed wholesaler.[3] Were this regulation dealing with any commodity other than alcohol, it would be subject to the Court's traditional dormant Commerce Clause analysis. That analysis requires the State to show a compelling interest and that the interest

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[3] See*, e.g.,* Ala. Admin. Code r. 20-X-8.04 (1); Ariz. Rev. Stat. § 4-250.01; Ark. Code Ann. § 3-7-106(a)(1); Del. Code Ann. tit. 4, § 501; Fla. Stat. Ann. § 561.545; Ga. Code Ann. § 3-3-32; Haw. Rev. Stat. Ann. § 281-3; Ind. Code §§ Ind. Code sec. 7.1-5-11-1.5 (but see Ind. Code Sec. 7.1-5-1-1, prohibiting transport or delivery of alcohol by anyone to anywhere within the state except as authorized by law, which in turn does not authorize in-state direct shipment to consumers in many circumstances, including (under Ind. Code sec. 7.1-3-12-2) from Indiana wineries to Indiana businesses or residences); Kan. Stat. Ann. §§ 41-104, 41-306, 41-306a(a); Ky. Rev. Stat. Ann. § 244.165; Me. Rev. Stat. Ann. tit. 28-A, § 2077-B; Md. Ann. Code art. 2B, § 16-506.1; Mass. Gen. Laws Ann. ch. 138, § 2; Miss. Code Ann. 97-31-47; Mont. Code Ann. § 16-3-402; N.J. Stat. Ann. § 33:1-2; Ohio Rev. Code Ann. §§ 4301.19, 4301.20 and Ohio Admin. Code 4301:1-1-22; Okla. Stat. Ann. tit. 37 § 505; Pa. Stat. Ann. tit. 47, § 4-410; S.C. Code Ann. § 12-21-1610; S.D. Codified Laws §§ 35-4-66, 35-4-67; Tenn. Code Ann. § 57-3-402; Tex. Alco. Bev. Code Ann. § 107.05; Utah Code Ann. §§ 32A-8-201, 32A-8-301; Va. Code Ann. § 4.1-310; Wyo. Stat. Ann. §§ 12-2-203, 12-3-101.

could not be served as well by available nondiscriminatory means. See *Maine v Taylor*, 477 U.S. 131, 138 (1986). While the States' interests are indeed compelling and regulations such as this would satisfy traditional dormant Commerce Clause analysis, even applying this analysis is inappropriate because the Twenty-first Amendment makes alcohol constitutionally unique.

The States have a compelling reason for treating out-of-state producers differently from their in-state counterparts. In particular, locality matters for enforcement purposes. In-state wineries are plainly subject to a State's regulations and enforcement powers. They are subject to all inspections, subpoenas, taxes, record retention requirements, and license sanctions that the State may impose. If an in-state winery violates State law, its license to sell or manufacture wine can be suspended or revoked. The winery may be fined. And no matter what the discipline issued, the State can be sure the discipline is enforced.

With out-of-state wineries, none of the regulatory safeguards exist. If an out-of-state winery is ordered to suspend sales, States cannot enforce this suspension, nor can they enforce a revocation or fine. States are unable to inspect out-of-state wineries for possible health violations or adulterated liquor. And States are unable to enforce collection of alcohol taxes against out-of-state wineries that ship directly to consumers. Thus, States have only two choices: restrict direct shipments by out-of-state wineries or leave this potentially dangerous product virtually unregulated as long as it is shipped directly to a consumer from out of state.

As this Court has noted, "[a]s long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation' [citation omitted] it retains broad regulatory authority to protect the health and safety of its citizens . . . ." *Maine v. Taylor,* 477 U.S. at 151.

It is health and safety concerns, not economic isolationism, that drive regulations like those here. State legislatures examined the potential harm to their residents when they decided to regulate direct shipment of alcohol to consumers. Enforcement powers against wineries located within their borders help the States to ensure that the health, welfare, and safety of the citizens, as well as the other core Twenty-first Amendment concerns, are achieved.

Requiring accountability in liquor distribution is a valid interest recognized by this Court and others. In *Heublein, Inc. v. South Carolina*, 409 U.S. 275, 277 (1972), South Carolina required all alcohol producers shipping alcohol into the State to have a resident representative in the State. Such a requirement did not violate the Commerce Clause, because "by requiring manufacturers to localize their [alcohol] sales, South Carolina establishes a check on the accuracy of these records." *Id.* at 282. "The requirement that sales be localized is, unquestionably, reasonably related to the State's purposes . . . ." *Id.* at 283. Similarly, requiring out-of-state wineries to "localize" their sales is unquestionably reasonably related to the States' control of their liquor distribution systems. See also *Kronheim v. District of Columbia*, 91 F.3d 193 (D.C. Cir. 1996) (upholding local warehousing regulation designed to advance a core enforcement purpose of the Twenty-First Amendment and combat the perceived evils of unrestricted traffic in liquor upheld). As the Second Circuit recently noted, "presence ensures accountability." *Swedenburg v. Kelly*, 358 F.3d 223, 237 (2nd Cir. 2004). The State restrictions at issue here, by limiting the ability of out-of-state wineries to ship directly to consumers, likewise attempt to achieve accountability by requiring a localized presence.

Requiring an out-of-state winery to ship its product through a locally-licensed entity such as a wholesaler, gives the State a needed avenue of enforcement. But requiring an in-state winery to also sell through a local wholesaler would impose an unnecessary and artificial restriction on the market. The in-state winery is already accountable. The Second Circuit correctly recognized this distinction in *Swedenburg*: "New York has chosen to relax its regulatory grip for wineries to sell directly to consumers. It has not barred out-of-state wineries from the opportunity; it has correlated its relaxation of regulatory scrutiny with a safety net ensuring accountability-presence." 358 F.3d 223, 238; See also *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000) ("laws forbidding purchases from sellers that lack Indiana permits are devilishly difficult to enforce"); *Kronheim & Co., Inc. v. District of Columbia*, 91 F.3d 193, 203-04 (D.C. Cir. 1996) (legitimate state interests would be supported by requiring geographic proximity of the warehouses). In short, allowing in-state wineries to ship directly, but not out-of-state wineries, is a valid distinction based on the enforcement interest that is supported by having a localized presence.

The States should be left to properly determine how best to protect their consumers. "The State may protect her people against evil incident to intoxicants and may exercise large discretion as to means employed." *Ziffrin*, 308 U.S. at 138-39. Discriminatory legislation is permissible if that "discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Healy,* 491 U.S. at 340-41. Here, any discrimination regarding direct shipment of alcohol is justified by a valid factor. These valid interests are unrelated to economic protection: the preservation of the State's duty to protect the health, safety, and well being of its residents. The State regulations concerning direct shipment of alcohol permit out-of-state wineries to participate in the State market, while still preserving the State's strong interest in regulating alcohol distribution.

II. The Webb-Kenyon Act also authorizes States to regulate the flow of alcohol for use within their territories, so the dormant Commerce Clause does not bar these State regulations.

The State regulations here withstand a dormant Commerce Clause challenge for another reason as well—Congress has expressly authorized State regulation. The Commerce Clause grants to Congress the power to regulate commerce among the several States. Where Congress has not acted, of course, the dormant Commerce Clause limits a State's ability to economically isolate itself or impede the free flow of interstate commerce. But, where Congress has acted, the starting point for analyzing State regulations must be the language of the relevant federal act. The relevant federal statute here is the Webb-Kenyon Act, 27 U.S.C. § 122. And under that statute, the State regulations at issue here are valid.

The Webb-Kenyon Act, 27 U.S.C. § 122, expressly confirms the States' authority over liquor importation. That act, originally adopted in 1913 and re-enacted in 1935, states: "The shipment or transportation . . . of any . . . vinous . . . intoxicating liquor . . . into any state . . . to be . . . sold . . . in violation of any law of such state . . . is prohibited." The Commerce Clause is not dormant in the area of alcohol shipping among the States; rather, Congress has expressly authorized the States to regulate alcohol shipping. Thus, not only does the text of the Twenty-first Amendment authorize the States to determine how alcohol will be imported across their borders for use therein, but also Congress has taken the additional step of enacting legislation that complements (and reinforces) the Twenty-first Amendment.

Moreover, Congress has the authority to empower States in this manner. As the Court has explained, "It is equally clear that Congress may 'redefine the distribution of power over interstate commerce' by '[permitting] the states to regulate the commerce in a manner which would otherwise not be permissible.'" *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 88-89 (1984). In the area of insurance, for example, Congress has transferred *exclusive* authority to regulate to the States, notwithstanding the fact that insurance is an item of interstate commerce. See *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652-55 (discussing McCarran-Ferguson Act).

Similarly, Congress, by enacting Webb-Kenyon, removed any doubt as to the States' power to determine how intoxicating liquor would be permissibly shipped into the States. The Webb-Kenyon Act does not pre-empt State regulation of alcohol shipments. Nor does it so completely "occupy the field" of liquor regulation so as to leave no room for State regulation. Instead, by prohibiting alcohol shipments into a State that are contrary to State law, Congress exercised its Commerce Clause power to expressly empower the States to regulate. The Commerce Clause is not dormant here; it is expressly on the States' side.

Consequently, State restrictions on alcohol imports are valid exercises of the power bestowed upon the States by both the Twenty-first Amendment and the Webb-Kenyon Act. As the regulations do not conflict with a federal exercise of Commerce Clause authority, they survive a dormant Commerce Clause analysis.

III. The regulations here fall well within the States' police power, as they impose only minor limitations on imports that are entirely justified by the dangers that unrestricted alcohol shipments present.

After Prohibition ended, States aggressively regulated alcohol sales and shipments along with the time and place of consumption. While States have adopted varying approaches to alcohol regulation, most use some form of a three-tier distribution, as Michigan does. In specifically analyzing one such three-tier distribution system, the court noted, "the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990). In short, the States have extensive power to regulate, as they see fit, their internal commerce in liquor.

The Twenty-first Amendment, Webb-Kenyon, and the States' inherent police power all authorize State regulation of how alcohol flows into the State. "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972). See also *Rice v. Rehner*, 463 U.S. 713, 724 (1983) (noting the State's unquestionable interest in the liquor traffic that occurs within its borders, independent of the authority conferred on the States by the Twenty-first Amendment). Under these settled principles, the significant dangers presented by the unregulated shipment of alcohol into a State more than justify the import restrictions embodied in the regulations here.

A. The regulations here do not prevent access to State markets or State consumers, and wineries have no right to demand specific methods of access, such as internet sales and direct shipment.

This case is not about whether out-of-state wineries are cut off from in-state consumers, as out-of-state wineries may, and do, sell wine in foreign States. The dispute centers on whether the out-of-state wineries will sell and ship wine to foreign States using the specific methods the wineries demand, or whether the sale and shipment will occur under the laws, regulations, and distribution systems the States establish. State regulation that allows in-state, but not out-of-state, wineries to directly ship to consumers comports with the States' authority to require that all alcohol in the intrastate market be purchased from entities over which the State has significant regulatory control. See *North Dakota*, 495 U.S. at 447 (Scalia, J. concurring). This system advances the States' legitimate interests under the Twenty-first Amendment and is well within the States' police powers.

Out-of-state wineries may sell their wine in many different States and have several methods of participation from which to select. Out-of-state wineries may participate in the traditional three-tier system by selling to in-state wholesalers. They may establish a presence in certain States and obtain State retail permits. Also some States allow direct shipment if the product is unavailable within the State and the product is shipped either to a licensed retailer (Pennsylvania) or directly to the consumer (Ohio). Several States provide for an "on-site" visit or other exception to the restriction on direct shipment. Under these exceptions, State residents are permitted to have certain amounts of alcohol shipped directly or personally transported to their homes, if State requirements are met. Almost all of the States that restrict the shipment of wine from out-of-state wineries also place limits on the amount consumers are allowed to receive during a given period.[4] As these shipments are for personal use only, and are not for resale purposes, these volume limitations are again an example of the States' strong interest in controlling the flow of alcohol into the State. Unrestricted direct shipments from out-of-state wineries would severely impact the States' abilities to enforce the volume limitations that are already in place.

The out-of-state wineries seek to sell their wine through a particular method of operation in a retail market—internet sales and direct shipment to consumers. But the Commerce Clause does not give the wineries a right to sell through any method they like. "Not all intentional barriers to interstate trade are protectionist, however, and the Commerce Clause 'is not a guaranty of the right to import into a state whatever

[4] Connecticut: Conn. Gen. Stat. § 12-436 (2003) allows for up to 4 gallons; Delaware: Del. Code Ann. It. 4, § 716 (2004) allows up to 1 liter; Florida: Fla. Stat. § 562.15 (2004) allows up to 1 gallon; Georgia: Ga. Code Ann. § 3-6-32 (2002) allows 5 cases; Hawaii: Haw. Rev. Stat. Ann. § 281-33.1 (2003) allows 5 gallons; Indiana: Ind. Code Ann. § 7.1-5-11-15 (2004) allows up to 1 quart; Maine: Me. Rev. Stat. Ann. Tit. 28, § 2077 (2003) allows up to 1 gallon; Massachusetts: Mass. Gen. Laws ch. 138, § 22 (2004) allows up to 3 gallons; Michigan: Mich. Comp. Laws Ann. § 436.1203.7 312 oz. personal transport; Montana: Mont. Code Ann. § 16-6-301 (2003) allows up to 3 gallons on your person (this would be different from amounts allowed to a consumer who has a connoisseur's permit see, Mont. Code Ann. § 16-4-901 (2003)); New Jersey: N.J. Stat. Ann. § 33:1-2 (2004) allows up to 1 gallon; North Carolina: N.C. Gen. Stat. § 18B-109 (2004) and 4 N.C. Admin. Code tit. 2, R.1801 (2004) up to 5 liters; Ohio: Ohio Admin. Code § 4301:1-1-23 allows 15 gallons per household per quarter; Oklahoma: Okla. Stat. tit. 37, § 537 (2004) allows up to 1 liter; South Carolina: S.C. Code Ann. § 61-4-745 (2003) allows up to 2 cases per month; South Dakota: S.D. Codified Laws § 35-12A-3 (2003) allows up to 12 cases of wine per year; Tennessee: Tenn. Code Ann. § 57-3-401 (2004) allows up to 1 gallon; Texas: Tex. Alco. Bev. Code Ann. § 107.07 (2004) allows up to 3 gallons personal transport; Vermont: Vt. Stat. Ann. Tit 7, § 63 (2003) allows up to 6 gallons personal transport, no limit on direct ship; Virginia: Va. Code Ann. § 4.1-112.1 (2004) allows up to 2 cases per month.

one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community.'" *Maine v. Taylor,* 477 U.S. 131, 149 n.19 (1986). See also *Exxon v. Maryland,* 437 U.S. 117, 127 (1978) ("We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market.") The decision to allow in-state wineries to directly ship is a legislative decision made on a State-by-State basis, best left to the state legislatures as consistent with the text of the Twenty-first Amendment.

B. The growth of the internet and e-commerce threatens the States' ability to enforce their liquor laws and preserve a safe and orderly market in alcohol.

Enforcement of State liquor laws against out-of-state entities is a very real problem, as is the sale and shipment to minors by these out-of-state entities. Internet access to alcohol is not a phantom problem. On the internet, alcohol websites are offering a "cyber playground" for underage youths. A study by the Center on Alcohol Marketing and Youth at Georgetown University revealed that alcohol websites received 700,000 visits by underage people from July through December 2003. See *Clicking with Kids: Alcohol Marketing and Youth on the Internet,* Center on Alcohol Marketing and Youth http://www.camy.org/research/ (visited July 21, 2004). The study revealed that 13% of all visitors to 55 alcohol company websites were under the age of 21. Even though the sites generally require age verification, that "verification" consists simply of asking the user if she is 21. But of course, there is no way to verify the user's truthfulness. *Id.*

Allowing internet sales of a highly dangerous and highly regulated product, such as alcohol or tobacco, is a genuine concern for State regulators. Thus, the Court may fairly consider whether invalidation of State liquor laws will leave States unable to adequately enforce their laws for the protection of their residents. Internet sales and direct shipment from out-of-state wineries significantly undermine the States' ability to prevent underage access to alcohol and significantly impair the collection of sales and excise tax.

1. Unrestricted out-of-state shipment directly to consumers would impede States' efforts to prevent minors from obtaining alcohol.

The Massachusetts Attorney General recently completed an undercover investigation of out-of-state online alcohol retailers, and not surprisingly, it got results. The Attorney General is now suing four online retailers for selling to underage buyers in Massachusetts. Three other online alcohol retailers face administrative actions. See http:// www.ago.state.ma.us/sp.cfm?pageid=986&id=1241 (visited July 19, 2004). In each case, underage college students were able to order beer, wine, and hard liquor—without having to verify their age—and the underage buyers had it shipped to them. *Id.* A previous Massachusetts sting conducted by the Massachusetts Alcohol Beverages Control Commission in 2002 yielded similar results. *Id.* See also *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet*, A Report of the President's Working Group on Unlawful Conduct on the Internet (March 2000) Appx. G (noting that the primary issue concerning the on-line alcohol sales is the difficulty sellers have in determining whether a purchaser is underage.) These examples show why many States are reluctant to allow out-of-state wineries to ship directly to consumers.

Similar concerns recently led the Second Circuit to uphold a New York statute that bans direct shipment of cigarettes to consumers. *Brown & Williamson v. Pataki*, 320 F.3d 200 (2nd Cir. 2003). The court held that the legislature rightly determined that cigarettes sold over the internet or by telephone or mail order pose a serious threat to public health, safety, and welfare. *Id.* at 204. "Sales accomplished through direct shipment made the verification of the purchaser's age difficult and that existing penalties for cigarette bootlegging were inadequate." *Id.* Because of these concerns, the court rejected the dormant Commerce Clause challenge and held that the regulation of importation of cigarettes was a legitimate exercise of the State power in the public interest. *Id.* at 217. As with restrictions on cigarette sales, the States' restrictions on direct shipments by out-of-state wineries likewise protect the public interest and are likewise a legitimate exercise of State power. Such restrictions do not violate the dormant Commerce Clause.

2. Direct shipment interferes with the States' ability to collect legitimate sales and excise taxes, which are significant sources of State revenue.

Along with the States' interests in preventing sales to minors and maintaining an orderly market, States also share an interest in regulating liquor markets to ensure proper tax collection. States have made the legislative decision that limiting, restricting, or completely banning out-of-state wineries from shipping directly to consumers serves these tax collection interests. As the GAO study noted, non-reporting of internet sales by internet vendors can significantly affect State sales tax receipts. Staff of the GAO, *Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement* GAO-02-743 (August 2002) at 11.

The States' experience with internet cigarette vendors illustrates the difficulty of collecting sales and excise taxes on direct shipments that bypass the State system. Internet cigarette vendors do not comply with the tax reporting requirements of the Jenkins Act. General Accounting Office, GAO-02-743, Internet Cigarette Sales (2002). The GAO reviewed 147 website addresses for internet cigarette vendors in the United States and not one site posted information that indicated the vendors complied with the Jenkins Act. GAO-02-743 at pp. 3, 4. "Conversely, information posted on 78 percent of the websites indicated the vendors do not comply with the Act. " *Id.* at 4.

Nor can States rely on cigarette buyers, rather than sellers, to remit taxes. To be sure, consumers who buy cigarettes over the internet from out-of-state vendors are liable for their own State's sales tax. *Id.* But, despite a detailed federal regulation requiring reporting of information, officials from the nine states noted in the GAO study all expressed concern over the Internet cigarette vendors' noncompliance with the Jenkins Act and the resulting loss of State sales tax revenue. *Id.* at 11. California estimated a loss of approximately $13 million in tax revenue during a 30-month period. *Id.*

The States have little reason to expect that we will have better luck taxing online alcohol sales than we have had with cigarette sales. Indeed, in a direct-shipping world, the State may have no way to collect a sales tax from the winery at all. See *Quill Corp. v. North Dakota,* 504 U.S. 298, 315-18 (1992) (holding that Commerce Clause bars imposition of sales tax where only contact between out-of-state entity and in-state consumer is internet ordering and direct shipment). Conversely, by requiring out-of-state wineries and other alcohol providers to participate in the three-tier distribution system, States are able to collect legitimate sales and excise taxes.

Moreover, taxes on liquor are a vital source of revenue. The table attached as Appendix B lists the State wine excise tax rates for each State. The table in Appendix C provides the amounts of sales and excise taxes that each State collected in fiscal year 2001. These amounts range from a high of $545.48 million in Florida to $1.34 million in Wyoming. States rely on these revenues, so underreporting of sales and use taxes by individuals costs the States. Thus, many States rely on the three-tier system for the efficient collection of taxes due the State.

Again, States' revenue concerns are not alleviated by any suggestion that we may rely on individual consumers to remit sales and excise taxes, as we have already seen how tax revenues escape when online sales grow. The Government Accounting Office Report on sales taxes and electronic commerce reported, "use tax compliance by individual purchasers (for all purchases, not just those over the internet) was extremely low—on the order of 0 to 5 percent." General Accounting Office, GAO/GGD/OCE-00-165, *Sales Taxes: Electronic Commerce Growth Presents Challenges; Revenue Losses Are Uncertain* (June 2000) at 17. A Congressional Budget Office paper also noted this threat: "[T]he administrative costs of use taxes paid by purchasers are relatively high and the rate of collections is quite low." Economic Issues in Taxing Internet and Mail-Order Sales, Congressional Budget Office paper (Oct. 2003) at 3, *available at* www.cbo.gov/showdoc.cfm?index+=4638. One estimate is that the State of Florida alone may lose between $321 million and $1.28 billion in taxes on remote sales in 2003. See GAO Sales Taxes Report at App. V. "[S]tates have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes. Noncompliance is almost impossible to detect, and rampant civil disobedience ensures that a handful of prosecutions would not be effective. Private gains from violating the laws vastly exceed the anticipated legal penalties." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000). Requiring out-of-state wineries to sell through wholesalers that are present in the State is a legitimate response to these concerns.

IV. If this Court determines that, notwithstanding the

express text of the Twenty-first Amendment, the dormant Commerce Clause applies to State regulations governing importation of alcohol into the State, then the Court should use a rational basis test for its Commerce Clause analysis.

The States freely admit that regulations such as those at issue here treat out-of-state wineries differently from in-state wineries with regard to the ability to directly ship to in-state consumers. Under traditional dormant Commerce Clause principles (*i.e.*, those applicable to non-alcohol products), then, these statutes would constitute virtually *per se* violations, which this Court has subjected to the strictest scrutiny. But for all the reasons above, those traditional dormant Commerce Clause principles simply do not apply, because this discrimination in regulating alcohol rests squarely on both the text of the Twenty-first Amendment and the congressional authorization for state regulation reflected in the Webb-Kenyon Act. However, if the Court rejects these arguments, and finds that the dormant Commerce Clause does apply, then the *amici* States argue in the alternative that such Commerce Clause analysis should be adjusted to reflect the unique protection for state alcohol regulations embodied in the Twenty-first Amendment. Specifically, we propose two changes to dormant Commerce Clause analysis of such regulations. First, the standard Commerce Clause rule—that statutes that discriminate on their face against out-of-state entities are virtually *per se* violations of the dormant Commerce Clause—should not apply. Second, the Court should apply a rational basis test, not the traditional *Pike* balancing test used for other articles of commerce. *Pike v. Bruce Church Inc.,* 397 U.S. 137 (1970).

First, the Court should not apply traditional Commerce Clause analysis without any alcohol-specific adjustment, because if the Court were to simply treat alcohol like any other product, then the Twenty-first Amendment would be reduced to a nullity. Respondents urge the Court to treat alcohol just like butter or any other item that moves in commerce. This approach, however, ignores both the Twenty-first Amendment and the Court's precedent, as both acknowledge that alcohol is, in fact, constitutionally different. Given the express language of the Twenty-first Amendment, the Court should, at the very least, acknowledge the interests recognized there. A virtually *per se* prohibition on facially discriminatory regulations, or any approach that would require State laws to pass strict scrutiny to survive, would not adequately reflect the States' interests in liquor control.

Similarly, the traditional *Pike* balancing test also fails to give due deference to the State authority granted by the Twenty-first Amendment. The *Pike* test balances the burden a regulation imposes on commerce against the putative local benefits. That test should not be applied to alcohol import regulations either, as simply applying the *Pike* balancing test would essentially treat alcohol like every other article of commerce. Nor would it be enough to recognize the States' interest within the *Pike* framework by granting greater weight to the State-interest side of the scale where alcohol is involved. That thumb-on-the-scale approach has already been adopted for dangerous products such as cigarettes. See *Brown & Williamson v. Pataki,* 320 F.3d 200, 217. So alcohol would undoubtedly warrant such treatment even without the Twenty-first Amendment. Consequently, adopting such an approach would not fully honor alcohol's constitutionally unique status.

Because none of the other Commerce Clause tests are appropriate, the States submit that—if the Commerce Clause is to apply here at all—the Court should adopt a standard that recognizes the constitutionally-unique nature of alcohol regulation. In particular, the Court should defer to the States' compelling interest in regulating alcohol imports for use in the State and uphold such import regulations as long as there is "any reasonably conceivable set of facts" that shows a rational basis for treating out-of-state wineries differently from those in-state. See *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993). Such a rational-basis standard would acknowledge the constitutionally-unique character of alcohol, the States' compelling interest in controlling the flow of alcohol into their borders for use or consumption, and Congress's power to regulate the free flow of commerce.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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July 29, 2004

SUPPLEMENTAL MATERIALS

APPENDIX A

1. Reciprocity States - Allow direct shipments only from States that afford the reciprocal privilege.

California
Colorado
Hawaii
Idaho
Illinois
Iowa
Minnesota
Missouri
New Mexico
Oregon
Washington
West Virginia
Wisconsin

2. Limited Personal Import States - Allow direct shipment of alcohol in limited amounts if certain State requirements are met.

Alabama
Alaska
Arizona
Connecticut
Delaware
Florida
Georgia
Louisiana
Michigan
Nebraska
Nevada
New Hampshire
New Jersey

North Carolina
Ohio
Oklahoma
Pennsylvania
Rhode Island
South Carolina
Vermont
Virginia
Wyoming

3. Express Prohibition States - Simply ban all direct shipments of alcohol.

Arkansas
Indiana
Kansas
Kentucky
Maine
Massachusetts
Maryland
Mississippi
Montana
New York
North Dakota
South Dakota
Tennessee
Texas
Utah

Source: See, Vijay Shankar, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-first Amendment,* 85 Va.L.Rev. 353, 356-57, n.20, 22, 24 (1999) (States have been re-classified from what appears in the note due to statutory changes since 1999; these classifications represent legislative restrictions and may not reflect how laws are currently being enforced due to pending litigation).

APPENDIX B

STATE ALCOHOL EXCISE TAX COLLECTIONS BY STATE – FISCAL YEAR 2001
($Thousands)

State	2001
Total	$4,181,160

Alabama	$ 128,848
Alaska	12,003
Arizona	51,406
Arkansas	29,121
California	288,451
Colorado	30,439
Connecticut	47,328
Delaware	11,611
Florida	545,488
Georgia	140,367
Hawaii	37,782
Idaho	6,057
Illinois	140,643
Indiana	33,078
Iowa	12,209
Kansas	77,896
Kentucky	69,876
Louisiana	52,392
Maine	40,900
Maryland	24,522
Massachusetts	64,793
Michigan	136,591
Minnesota	60,610
Mississippi	39,256
Missouri	25,912
Montana	17,541
	17,290

Nebraska	
Nevada	16,468
New Hampshire	11,462

STATE ALCOHOL EXCISE TAX COLLECTIONS BY STATE – FISCAL YEAR 2001 ($Thousands)

State	2001
New Jersey	79,889
New Mexico	34,738
New York	179,157
North Carolina	199,844
North Dakota	4,892
Ohio	81,029
Oklahoma	61,994
Oregon	12,616
Pennsylvania	187,662
Rhode Island	9,450
South Carolina	137,429
South Dakota	11,070
Tennessee	78,471
Texas	541,305
Utah	25,020
Vermont	15,386
Virginia	127,638
Washington	168,777
West Virginia	8,197
Wisconsin	44,907
Wyoming	1,349

Source: Compiled from information found at http://www.taxfoundation.org/statealcoholtaxes (last visited on July 29, 2004).

APPENDIX C

STATE WINE EXCISE TAX RATES

January 1, 2004

STATES	EXCISE TAX RATES ($per gallon)	SALES TAXES APPLIED	OTHER TAXES
Alabama	$1.70	Yes	Over 14% - sold through state store
Alaska	$2.50	n.a.	
Arizona	$0.84	Yes	
Arkansas	$0.75	Yes	under 5% - $0.25/gallon; $0.05/case; and 3% off-and 10% on-premise
California	$0.20	Yes	Sparkling wine - $0.30/gallon
Colorado	$0.32	Yes	
Connecticut	$0.60	Yes	Over 21% and sparking wine - $1.50/gallon
Delaware	$0.97	n.a.	
Florida	$2.25	Yes	Over 17.259% - $3.00/gallon, sparking wine $3.50/gallon 6.67¢/4 ounces on-premise retail tax
Georgia	$1.51	Yes	Over 14% - $2.54/gallon; $0.83/gallon local tax
Hawaii	$1.36	Yes	Sparkling wine - $2.09/gallon and wine coolers - $.084/gallon
Idaho	$0.45	Yes	

Illinois	$0.73	Yes	Over 20% - $4.50/gallon; $0.30/gallon in Chicago and ($0.16-$0.30)/gallon in Cook County
Indiana	$0.47	Yes	Over 21% - $2.68/gallon
Iowa	$1.75	Yes	Under 5% - $0.19/gallon
Kansas	$0.30	No	Over 14%-$0.75/gallon; 8% off- and 10% on-premise
Kentucky	$0.50	Yes*	9% wholesale
Louisiana	$0.11	Yes	14% to 24% - $0.23/gallon, over 24% and sparkling wine- $1.59/gallon
Maine	$0.60	Yes	Over 15.5% - sold through state stores, sparkling wine - $1.25/gallon; additional 5% on-premise sales tax
Maryland	$0.40	Yes	
Massachusetts	$0.55	Yes*	Sparkling wine - $0.70/gallon;
Michigan	$0.51	Yes	Over 16% - $0.76/gallon
Minnesota	$0.30	--	14% to 21% - $0.95/gallon, under 24% and sparkling wine - $1.82/gallon; over 24% - $3.52/gallon; $0.01/bottle (except miniatures) and 9.0% sales tax
Mississippi	$0.35	Yes	Over 14% and sparkling wine – sold through the state
Missouri	$0.36	Yes	

Montana	$1.06	n.a.	Over 16% - sold through state stores
Nebraska	$0.95	Yes	
Nevada	$0.70	Yes	14% to 22% - $1.30/gallon, over 22% - $3.60/gallon
New Hampshire	See footnote (1)	n.a.	
New Jersey	$0.70	Yes	
New Mexico	$1.70	Yes	Over 14% - $6.06/gallon
New York	$0.19	Yes	
North Carolina	$0.79	Yes	Over 17% - $0.91/gallon
North Dakota	$0.50	--	Over 17% - $0.60/gallon, Sparkling wine - $1.00/gallon; 7% state sales tax
Ohio	$0.32	Yes	Over 14% - $1.00/gallon, vermouth - $1.10/gallon and sparkling wine - $1.50/gallon
Oklahoma	$0.72	Yes	Over 14% - $1.144/gallon, sparkling wine - $2.08/gallon; 13.5% on-premise
Oregon	$0.67	n.a.	Over 14% - $0.77/gallon
Pennsylvania	See footnote (1)	Yes	
Rhode Island	$0.60	Yes	Sparkling wine - $0.75/gallon
South Carolina	$0.90	Yes	$0.18/gallon additional tax

South Dakota	$0.93	Yes	14% to 20% - $1.45/gallon, over 21% and sparkling wine – $2.07/gallon; 2% wholesale tax
Tennessee	$1.21	Yes	$0.15/case and 15% on-premise
Texas	$0.20	Yes	Over 14% - $.408/gallon and sparkling wine - $0.516/gallon; 14% on-premise and $0.05/drink on airline sales
Utah	See footnote (1)	Yes	
Vermont	$0.55	Yes	Over 16% - sold through state store, 10% on-premise sales tax
Virginia	$1.51	Yes	Under 4% - $0.2565/gallon and over 14% - sold through state store
Washington	$0.87	Yes	Over 14% - $1.72/gallon
West Virginia	$1.00	Yes	5% local tax
Wisconsin	$0.25	Yes	Over 14% - $0.45/gallon
Wyoming	See Footnote (1)	Yes	
Dist. Of Columbia	$0.30	Yes	8% off – and 10% on-premise sales tax, over 14% - $0.40/gallon and Sparkling - $0.45/gallon

U.S. Median	$0.64		

Source: Compiled by FTA from various sources, See http://www.taxadmin.org/fta/rate/wine.html (visited July 24, 2004)

** Sales tax is applied to on-premise sales only.*

(1) All wine sales are through state stores. Revenue in these states is generated from various taxes, fees and net profits.