

No. 22-285

In the
Supreme Court of the United States

B-21 WINES, INC., ET AL.,

Petitioners,

v.

HANK BAUER,
CHAIR OF THE N.C. ALCOHOLIC BEVERAGE
COMM'N,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the
Fourth Circuit

**BRIEF OF 41 WINE CONSUMERS AS *AMICI*
CURIAE IN SUPPORT OF PETITIONERS**

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INTERESTS OF *AMICI CURIAE*¹

Wine consumers nationwide² desire to have access to wines produced beyond the borders of their own localities. Some consumers, however, are stymied in their attempts to acquire rare, collectible, and remote wines because of discriminatory state laws that prevent out-of-state retailers from selling and supplying wine directly to them. Compounding this problem, states like North Carolina prohibit out-of-state retailers from obtaining the necessary retail package sales license required to serve North Carolina customers unless they establish a physical presence.

A retail package license is something readily available to North Carolina-based retailers. Such license allows in-state retailers to make direct shipments of wine to North Carolina consumers. North Carolina's licensing regime, however, effectively prevents out-of-state retailers from participating in the North Carolina marketplace because it requires a physical presence—something this Court has specifically prohibited. On the other hand, wine retailers based in North Carolina may

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for any party authored this brief in whole or in part or made any monetary contribution. Pursuant to Supreme Court Rule 37.2, written consent to file was obtained from counsel for all parties more than 10 days in advance of the filing deadline.

² The names of all *Amici* are listed in the Appendix.

sell and ship wine directly to North Carolina residents, through an online portal, even if the consumer has never physically visited the retailer or producer. This regime is facially protectionist in favor of in-state retailers.

Amici, as wine enthusiasts, have an interest in ensuring a fair and level marketplace for fellow wine enthusiast residing in North Carolina. They have an interest in ensuring that protectionist laws like those at issue here are struck down. The challenged protectionist laws violate the Dormant Commerce Clause by preventing North Carolina wine consumers, and all others similarly situated, from purchasing certain varieties of wine not available in North Carolina from out-of-state retailers.

In North Carolina, a retailer must establish a physical presence in the state as a condition of obtaining a retail package license which affords the benefit of shipping wine directly to the state's consumers, including internet or app-based sales. This heavy burden effectively prevents out-of-state retailers from participating in the North Carolina marketplace without a corresponding legitimate benefit aside from impermissibly protecting in-state retailers.

The *amici curiae* respectfully request this Court grant Petitioners' Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Dormant Commerce Clause prohibits discrimination by any state in favor of intrastate commerce over interstate commerce. Such prohibition encompasses both direct discrimination and discrimination in practical effect. The Twenty-First Amendment provides states with the authority to regulate the “transportation or importation” of alcohol. This Court’s precedent, however, holds this authority is not absolute.

The sale of wine, like many other consumer goods, has shifted toward online retail sales. The North Carolina residency and in-state presence requirements fly in the face of this economic evolution. Online retail portals have brought about a radical paradigm shift by providing consumers almost unlimited choices in a wide array of goods. Such a massive and conveniently accessible marketplace was something beyond comprehension in 1933 when the Twenty-First Amendment was ratified.

The challenged North Carolina licensing regime is a vestige of post-Prohibition state laws enacted to regulate alcoholic beverages. Yet, the economy has radically evolved from what existed in the early 1930s. The state of technology in the era immediately preceding Prohibition dictated that a regulatory regime which required an in-state presence was non-discriminatory because the width of the gap between retailer and consumer made it impractical for out-of-state wine retailers

to effectively reach in-state consumers. The narrowing of such gap resulting from new technologies available to out-of-state retailers (internet and app-based portals) has changed the paradigm such that requiring an in-state presence as a condition of doing business is now discriminatory.

North Carolina's licensing regime is one of those post-Prohibition economic impediments which discriminates against out-of-state commerce by preventing out-of-state retailers from shipping wine directly to consumers by requiring in-state residency. This requirement effectively bars out-of-state retailers from the North Carolina marketplace. The Court's Commerce Clause jurisprudence forbids this sort of protectionist interference with interstate commerce.

North Carolina defends the physical presence and residency requirements embodied in its licensing scheme by claiming an interest in promoting and protecting the public health and welfare of citizens. Such reliance is a pretext that clearly divides access to the North Carolina marketplace between intrastate and interstate commerce and favors intrastate actors. North Carolina should, at minimum, be required to make an evidentiary showing that its discriminatory practice is necessary to serve the core purposes of the Twenty-First

Amendment, as opposed to a pretext for discrimination.³ North Carolina should thus be required to demonstrate evidence that the purpose of its discriminatory practice cannot be achieved by nondiscriminatory means.

Finally, the Covid pandemic brought about paradigm shifting changes in the manner of retailers selling and delivering alcoholic beverages to consumers. These changes accentuate the discrimination against out-of-state retailers which occurs when a state licensing regime, like that at issue here, permits in-state retailers to sell and deliver wine directly to its consumers but denies the same privilege to out-of-state retailers on terms which this Court has already banned.

North Carolina embraced the expansion of effecting the retail sale of alcoholic beverages to its residents as the pandemic persisted. The fact North Carolina embraced policies which expanded the availability of alcoholic beverages to its residents must negate any claim that promoting the Twenty-First Amendment's core principles justifies its discriminatory requirements with respect to out-of-state retailers. A state should not be permitted to justify a discriminatory practice upon its

³ The core principles underlying the Twenty-First Amendment are promoting temperance, ensuring orderly market conditions and raising revenue. See *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990) (plurality opinion).

Twenty-First Amendment authority when it embraces new technologies which benefit in-state interests while denying the parallel benefit of such technologies by out-of-state retailers.

ARGUMENT

This case requires the Court to again consider the direction which traffic must flow at the intersection of the Constitution's Commerce Clause⁴ and its Twenty-First Amendment.⁵ How traffic flows through this intersection has an ironic consequence because:

“there are two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under color of no law, can violate the United States Constitution. One is to enslave somebody, a suitably hellish act. The other is to bring a bottle of beer, wine, or bourbon into a state in violation of its beverage control laws.”

Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217 (1995).

The *Amici* concur with the Petitioners' suggestion that the Court should grant certiorari to determine whether the Fourth Circuit's opinion is

⁴ U.S. CONST., art. I, § 8, cl. 3.

⁵ U.S. CONST., amend. XXI.

consistent with prevailing jurisprudence. This Court settled in *Granholm v. Heald*, 540 U.S. 460 (2005) the question which direction traffic must flow through the intersection. This Court reiterated its settlement beyond any reasonable doubt in *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. ____, 139 S.Ct. 2449 (2019) when it upheld and followed *Granholm*. The Fourth Circuit's opinion is incongruent with the proposition that it must give credence to the constitutional analysis articulated in *Granholm* and *Thomas*.

The principle of *stare decisis* is intended to bring certainty and stability in the law. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008). The principle of *stare decisis* mandates that lower courts follow this Court's decisions. *Hutto v. Davis*, 460 U.S. 533, 535 (1983). The Fourth Circuit's opinion demonstrates the constitutional significance of this case. The Court should accept certiorari to put to rest once and for all any question about which direction traffic must flow when a state alcoholic beverage law rooted in its Twenty-First Amendment authority faces a Commerce Clause challenge.

I. The Twenty-First Amendment does not immunize state laws which discriminate against out-of-state commerce.

This Court has made it clear the authority of states to regulate alcoholic beverages granted by the Twenty-First Amendment is limited by the

guardrails of the Commerce Clause's nondiscrimination principles. The application of these coordinate principles means that a state may thus not compel an out-of-state entity to establish an in-state presence as a condition of gaining access to the marketplace that is already open to in-state entities. *Granholm*, 540 U.S. at 475. Thus, the Twenty-First Amendment grants states broad authority to choose the tone and tenor of their alcoholic beverage control policies, the Commerce Clause restrains such authority by requiring that such policies provide a level playing field for both in-state and out-of-state interests.

The interplay between the Twenty-First Amendment and the Dormant Commerce Clause seeks to avoid discrimination which results in market inefficiencies that require out-of-state retailers who wish to do business in North Carolina to allocate resources necessary to establish a physical presence in the state although they already have the infrastructure necessary to sell wine online and deliver it directly to North Carolina consumers. This Court views with suspicion state statutes requiring businesses to establish or move operations to a state in order to conduct business when the same operations already exist and operate more efficiently elsewhere. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970).⁶

⁶ *Amici* acknowledge the continued viability of *Pike* is presently at issue before the Court in *Nat'l Pork Producers v. Ross*, No. 21-468.

The 21st Century economy has evolved to a place completely unimaginable when the several states ratified the Twenty-First Amendment in 1933. Perhaps the greatest evolution has been the market efficiencies brought about by the emergence of new technologies which were a thing of futuristic fiction in 1933. Back then, physical stores usually offered a limited selection of goods. Consumers in those days who wished to access an expanded selection of goods had to order them from catalog companies like *Sears®* and *Montgomery Ward®*, and then wait for their delivery by mail. Instantaneous consumer-driven concepts like *Amazon®* were well beyond comprehension at the time.

The idea of remotely purchasing alcoholic beverages was even more limited after the end of Prohibition. In 1933, it was the standard practice for states to require face-to-face transactions between alcoholic beverages retailers and consumers. The state of technology in 1933 made it impractical, if not impossible, for wine retailers in one state to reach out-of-state consumers. This means any requirement that retailers maintain an in-state presence have a residency would not affect the broader national marketplace for wine given the impracticability of reaching out-of-state consumers.

The emergence of new technologies over the past decade has vastly narrowed the gap between retailers and consumers. States like North Caro-

lina have embraced these new technologies by relaxing their in-person transaction requirements by permitting the remote sale and delivery of wine to its residents—but only for in-state retailers. Out-of-state retailers still must establish a physical presence and maintain a residence to avail themselves of the same remote sales privilege granted to in-state interests. Such barriers to remote sales of wine are anachronistic as states like North Carolina continue to adhere to an economic model that has, in many, respects remained frozen in time as technology evolved around it.

It is undeniable the internet and online retail portals have become a paradigm-shifting technology which has become a pervasive outlet for interstate commerce. Such technology has brought consumers and marketplaces closer than ever before, even when they are physically distant. *S. Dakota v. Wayfair, Inc.*, 585 U.S. ___. 138 S. Ct. 2080, 2095 (2018). These technologies allow consumers to purchase any number and variety of goods without ever physically visiting a retail store. North Carolina has adopted this marketplace with respect to wine shipment to its consumers but restricts the privilege of purveying goods to only in-state retailers when it comes to shipping wine to North Carolina residents.

The Dormant Commerce Clause requires that the marketplace be a level playing field between in-state and out-of-state interests. This concept precludes a state from placing unfair burdens which cut out-of-state interests, either directly or

in practical effect, from the marketplace in favor of in-state interests. The fact the Twenty-First Amendment grants states authority to regulate alcohol sales in a particular manner does not exempt those regulations from scrutiny under the Commerce Clause. *Granholm*, 540 U.S. at 466.

The Twenty-First Amendment, for instance, authorizes a state to limit alcohol sales to in-person transactions. Such a policy could not be viewed as discriminatory because it would apply equally to both in-state retailers and out-of-state retailers. The Twenty-First Amendment conversely authorizes a state to permit online or remote sales of alcoholic beverages. Such a policy would not pose a discriminatory market barrier to retailers, whether in-state or out-of-state, who choose to eschew online sales. That same policy would pose a clear market impediment to out-of-state wine retailers who employ online and remote sales.

The North Carolina licensing regime is unlawfully discriminatory because it forces such out-of-state retailers to establish a brick-and-mortar presence in North Carolina, secure a managing officer who resides in North Carolina, and then sell from that location to participate in the marketplace. This is overburdensome, unrealistic for most out-of-state retailers, and wholly inefficient when out-of-state retailers already have in place the mechanisms necessary to effect the sale and delivery of wine to North Carolina consumers. These are the kinds of efficiencies the Commerce Clause was intended to protect.

Determine whether a discriminatory licensing regime passes muster under the Commerce Clause requires courts to both consider “concrete evidence” that is established on the record, and then only allow discriminatory requirements for which there is no sufficient nondiscriminatory alternative. *Thomas*, 139 S.Ct. at 2474. Under this standard, this Court held that Tennessee’s two-year residency requirement for retail alcohol licenses was unconstitutional, in part because the state failed to provide any evidence that such requirement, which was facially discriminatory as to out-of-state retailers, both sufficiently correlated to the protection of public health and safety and that nondiscriminatory alternatives would sufficiently protect those interests. *Id.* This evidentiary showing is more difficult for states today given that the same technologies which brought retailers closer to consumers have also brought state regulators closer to those parties they regulate.

It is unclear as to how the Fourth Circuit concluded that North Carolina’s residency licensure requirement is either adequately connected to the advancement of public health or that a nondiscriminatory alternative would adequately protect that interest, as there was no concrete evidence in the district court record. The Fourth Circuit asserted, without supporting evidence, that North Carolina’s ability to regulate in-state retailers was sufficient to meet the “exacting standard” required to allow a discriminatory practice to stand under Commerce Clause jurisprudence. *Heald*, 540 U.S. at 493.

At the very least, North Carolina should be required to demonstrate how its discriminatory law which requires retailers to establish an in-state presence in order to ship wine to consumers benefits the public health and that a nondiscriminatory alternative would serve a similar purpose. In sum, North Carolina should be required to demonstrate evidence which demonstrates that no reasonable alternative means would allow it to effectively regulate out-of-state wine retailers such that its discriminatory practices are warranted and constitutional.

II. The market changes resulting from the Covid pandemic highlight the discriminatory effect of the challenged North Carolina licensing regime.

Few things exist today as they did before the Covid pandemic. The changes resulting from the pandemic have amplified the market disparity represented by licensing regimes like those employed by North Carolina. The pandemic brought about a seismic economic shift in the manner of selling and delivering alcoholic beverages at a retail level. This occurred because states were willing to marry a liberalized attitude regarding alcoholic beverage

retail regulations with the aforementioned technological advances.^{7/8} North Carolina embraced such liberalization.⁹

It was practically unheard of before the pandemic for states to allow by-the-drink beverage retailers, such as restaurants and bars, to either deliver alcoholic beverages with food or allow the sale of alcoholic beverages on a to-go basis. The in-person sale policies were, as discussed *supra.*, vestiges of the end of Prohibition. The Twenty-First Amendment clearly authorized states to adopt relaxed policies for the retail sale of alcoholic beverages as a matter of economic expediency.

The genie, however, is now out of the proverbial bottle with respect to remote sale of alcoholic beverages. States can no longer hide behind the core values of the Twenty-First Amendment by embracing new technologies which benefit in-state interests but then deny the parallel benefit of such technologies as to out-of-state retailers.

⁷ BBC News, *Coronavirus: How the pandemic is relaxing US drinking laws*. (May 15, 2020).

⁸ Fortune, *How the On-Demand Liquor Delivery Business Changed Overnight During the Coronavirus Pandemic*. (April 11, 2020).

⁹ Office of the Governor of North Carolina, *Governor Cooper Signs Executive Order to Extend Delivery and To-Go Mixed Beverage*. (Apr. 29, 2021).

CONCLUSION

For the foregoing reasons, this Court should grant the Petitioners' Petition for Writ of Certiorari in this matter.

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APPENDIX
NAMES OF INDIVIDUAL *AMICI*

Frank David Baxter, Los Angeles CA
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Dr. Larry Buckel, Carmel IN
Kitty Buckel, Carmel IN
Cornelius P. Corbett, Saint Helena CA
Neal Cutler, Wayne PA
Louis Danzis, San Antonio TX
Brian Epstein, Carmel IN
Jessyca Frederick, La Quinta CA
Mark Galewski, Richfield MN
Myra Gassman, Charlotte, NC
Joel Goldberg, Brighton MI
Dr. Pinkus Goldberg, Indianapolis IN
Alex Goldstein, Scottsdale AZ
Mark Golodetz, Manor NY
Larry Gralla, Reno NV
Noel Kaplan, San Rafael CA
Fredric Koepfel, Memphis TN
Andrew Klug, White GA
Rob Kowalski, Napa CA
Bob Kunkle, Charlotte NC
Dan Lewis, Phoenix AZ
Kathleen Maher, Ashland OR
Gary Millman, Santa Rosa CA
Grant Opperman, Brentwood TN
Anthony Phelps, Spring Lake MI

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Gary Redish, Hackensack NJ
Fred Reno, Charlottesville, VA
Mitchell Rubenstein, Boca Raton FL
Jeanne Savelle, Smyrna GA
Daniel Schmelzinger, Dawsonville GA
Elizabeth Schneider, Raleigh NC
Laurie Silvers, Boca Raton FL
Jack Schultz, Detroit MI
Jack Stride, Detroit MI
James Troutman, Louisville, KY
Bobbie Troutman, Louisville, KY
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