Wine and Spirits Wholesalers of America, Inc.

Wine and Spirits Wholesalers of America Detailed Position Paper[1]
Prepared for the Federal Trade Commission Workshop
"Possible Anti-Competitive Efforts to Restrict Competition on the Internet"

Presented by M. Craig Wolf
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November 8, 2002

While Chairman Swindle made an effort to avoid getting into a "legal" discussion about the impact of the 21st Amendment on the inclusion of Internet wine sales as a Workshop topic, he was unsuccessful in that effort. And that is only proper. No discussion about the propriety of state regulation in the field of alcohol beverage control can be undertaken without reference to the constitutional amendment which empowers states – not the federal government - to regulate the importation and transportation of alcohol across their borders. In fact, the discussion should begin - and should end - right there.

The Legal Framework:[2]

Section 2 of the 21st Amendment, ratified in 1933, is unambiguous in its enumeration of broad power to the states to regulate the importation and shipment of alcohol coming across its borders. It reads:

> **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.**

The Supreme Court has confirmed repeatedly, as recently as 1990, that states have "plenary" power over the physical importation of alcoholic beverages. No case - indeed, not a single Justice - has ever questioned state power to require that imported alcoholic beverages be sold through the licensed system. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000)("No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause.").

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[1] This paper supplements the testimony provided by C. Boyden Gray on behalf of WSWA at the Workshop on October 8, 2002.

[2] WSWA has filed amicus briefs in direct shipping litigation appeals across the country. WSWA's brief provides a comprehensive legal and historical study of alcohol regulation in this country. It is attached as Addendum 1.

In *North Dakota v. United States*, 495 U.S. 423 (1990), a majority spoke directly to that issue. Justice Scalia said (without any qualification), "*The Twenty-first Amendment ... empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.*" *North Dakota*, 495 U.S. at 447 (emphasis added). Justice Stevens, writing for four Justices (himself, Chief Justice Rehnquist, and Justices White and O'Connor) used somewhat more words but said the same thing. He noted that "[u]nder the State's regulatory system ... out-of-state ... suppliers may sell to only licensed wholesalers or federal enclaves," *id.* at 428, and he squarely endorsed this as within State power:

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

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

This conclusion of five Justices was the first step in the *holding* of the *North Dakota* case. The ultimate issue before the Court was whether North Dakota could impose special labeling requirements on alcoholic beverages destined for federal enclaves within the state. The Court answered that question "yes," *id.* at 430-33, precisely because the state had the Twenty-first Amendment right (a) to channel all sales for its residents through licensed in-state wholesalers, and (b) to protect that controlled distribution system against diversion of beverage alcohol sold to the enclaves. *See id.* (Stevens, J.); *id.* at 447 (Scalia, J.).

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

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

Id. at 330 (emphasis added).

Still later, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court said unanimously: "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110. "[T]ransportation or importation into" a state, for "use"

by its citizens, is the activity covered by the very words of the Twenty-first Amendment, and the Supreme Court has never upheld *any* restriction on a state's power to regulate that activity.

These cases are simply reflections of the intention of Congress when it passed the 21st Amendment. The central purpose of Section 2 was to create an exception to the dormant commerce clause by giving states plenary power to restrict the importation of alcoholic beverages. It restructured federal and state regulatory authority to allow states to design regulatory schemes and enforce them against out-of-state products

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

In response, Congress exercised *its* power under the Commerce Clause to enable States to block alcoholic-beverage importation. In particular, the Webb-Kenyon Act of 1913 (re-enacted in 1935) prohibited "[t]he shipment or transportation ... of any ... intoxicating liquor of any kind, from one State ... into any other State ... in violation of any law of such State ..." 27 U.S.C. § 122; *see Craig*, 429 U.S. at 205 n.19.[3]

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

> The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.

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

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[3] As a result, the "dormant" Commerce Clause has no relevance in this debate. As noted, Congress *exercised* its Commerce Clause power by adopting Webb-Kenyon ("An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases") and reenacting it in 1935. 49 Stat. 877 (1935). That Act, in force today, gives states essentially the same power of regulation as the Twenty-first Amendment put in the Constitution. See copy attached as Addendum 2.

In sum, the power to restrict how alcoholic beverages may cross state borders is "*the central power* reserved [to States] by § 2 of the Twenty-first Amendment." *Capital Cities Cable*, Inc. v, Crisp, 467 U.S. 691, 715 (1984) (emphasis added). This power enables states to enforce all other restrictions they choose to impose on delivery or use. States, and not the courts,[4] determine "the structure of the liquor distribution system," *North Dakota*, 495 U.S. at 431, to achieve their objectives.

State power over interstate commerce in alcoholic beverages granted by Webb-Kenyon and the Twenty-first Amendment is part of the foundation for achieving all other state regulatory objectives. All states prohibit the sale of alcoholic beverages to minors, but that is by no means the states' only regulatory objective. Virtually all states impose labeling requirements, so people electing to drink can do so knowledgeably and responsibly. Many states allow sale of all, or some kinds of, alcoholic beverages only in some parts of the state. Many states control the alcoholic strength or quantity of beverages sold in the state or in particular locations. Most states impose excise taxes on alcoholic beverages from which they derive important revenues.

States could not as effectively impose *any* alcohol-marketing, alcohol-consumption, or revenue obligations if they were required to allow out-of-state suppliers to sell and ship directly to their residents. Even if regulators could require out-of-state wineries or breweries to obtain licenses before shipping their products, those regulators could not as effectively check backgrounds, insist on inspecting premises where alcoholic beverages are sold, attach in-state property if state taxes were not collected or remitted to the state, or wield the same threat of license revocation, because out-of-state manufacturers would have far less at stake. Add to that the difficulty states have in collecting "use" taxes on sales originating out-of-state, as compared with sales taxes on in-state transactions, *see Bridenbaugh*, 227 F.3d at 853, and you can see exactly why most states insist on in-state licensees as taxpayers.

Some would have the FTC believe that because a number of states have permitted in-state direct shipments, there should be no reason for them to deny that privilege to out-of-state interests. However, allowing in-state manufacturers to make direct sales at their premises and deliveries to customers is different and the distinction for allowing this exception entirely rational. In-state manufacturers are subject to direct state regulation and control. They must be licensed. They may sell only on their licensed premises. The licensed premises are subject to State inspection. The manufacturer necessarily has in-state property subject to attachment if it fails to meet its obligations. And its basic business license is subject to revocation if it violates alcohol laws. Thus the allowance of in-state direct shipping is justified by an abundance of legitimate practical considerations that simply do not apply to out-of-state sellers

A Remarkable Success Story - The Three-Tiered System Works:

While the constitutional framework militates against the FTC inserting itself into the debate over state alcohol importation and regulatory prerogatives, the FTC should also be wary of getting involved for another reason – the general public is more than satisfied with the exisiting system.

[4] And I would add parenthetically – not the FTC.

The three-tiered system is remarkably efficient and consumer oriented. The average retail store is packed with hundreds of quality brands of wine, many imported from overseas. Moreover, the price for beverage alcohol products has remained consistently affordable for the average consumer over the past 69 years -- and in many cases the pre-tax price has declined when adjusted for inflation.

The simple fact is that the majority of the consuming public is quite satisfied -- perhaps overwhelmed -- with the quality and selection of brands available to them just around the corner from their homes. A recent Andres McKenna poll conducted for WSWA confirms this. That poll found that 85% of the consuming public polled was satisfied with the selection and convenience available to locally.

The Inherent Danger of Sales to Minors:

But the FTC should also be aware that the same poll (and prior polls commissioned by WSWA found that the public at large is quite concerned about sales to minors and the affect of opening up an unregulated channel of access to alcohol. An overwhelming majority expressed their concern over sales to minors and three quarters of those polled did not believe that online direct sales could be sufficiently controlled to prevent underage access. And they were right in that belief.

The problem is that because a state is unable to effectively monitor direct sales to consumers, there is no guarantee that the person ordering or receiving the alcohol is of age. Private carriers are unaccountable; they may leave the package at the front door or forget to check the I.D. of the recipient. And online systems that are supposedly "designed" to ensure the sale is not to a minor are not face-to-face, and most teenagers between the ages of 18 and 21 years of age (and many who are younger) possess credit cards allowing them to order online.

Examples:

1. Michigan AAG Irene Mead testified at the Workshop that a recent sting by the Michigan AG's office ensnared 70 different companies who shipped 1,020 bottles of wine, 318 bottles of beer and 20 bottles of spirits, a third of those sales going to underage buyers.[5]

2. South Dakota Governor William Janklow decided to veto a bill that would have allowed for direct shipping in his state after learning that a minor working in his office was able to order wine online using a credit card, and have that wine delivered in an unmarked box to the state capitol mailroom without an I.D. check.[6]

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[5] See copy of the Michigan Sting statistics attached as Addendum 3.

[6] See Copy of Governor Janklow's Veto Message attached as Addendum 4.

3. At a recent debate at a CLE in Las Vegas between Institute for Justice President Clint Bolick[7] and the General Counsel of WSWA, the head of the online company 877-Spirits confirmed that minors consistently attempt to buy online and that – while he tries to prevent such sales - he cannot be sure that some do not occur.

4. In 1999, parents of a 17 year-old Alabama boy brought a lawsuit in federal court against an Illinois interest that sole beer online to their son.

5. In 1977, a minor working with the Missouri AG's office was able to purchase beer from a North Carolina company resulting in an action against them.

6. Dozens of media outlets – at both the state and national level - have conducted online stings using minors who were successful in obtaining alcohol online.

Despite this overwhelming evidence of the dangers of direct shipping, proponents of direct shipping persist in denigrating state and wholesaler warnings that direct sales will lead to increased illegal purchases by minors. But noted public health researcher Henry Wechsler, principal investigator for the Harvard School of Public Health College Alcohol Study, felt compelled to provide expert testimony for the first time in the New York direct shipping case because he recognized the increased threat to minors posed by direct sales.[8] Dr. Wechsler reported to the court that allowing direct sales of alcohol through the Internet, telephone or mail was dangerous, bad public policy, and would invariably weaken controls over underage drinking – noting particularly the risk inherent in losing the ability to conduct face-to-face I.D. checks by trained personnel. Among the many studies he reviewed which supported his conclusions, he highlighted a recent one addressing home delivery of alcohol which found that minors, especially those who were binge or problem drinkers, used home delivery to avoid I.D. checks they would normally experience in face-to-face transactions.[9]

A Public-Private Partnership - Benefiting Consumers While Protecting the Public:

The three-tiered system functions as a partner with state regulatory and monitoring systems that are designed to promote the core concerns of the state -- ensuring orderly market conditions, promoting temperance, including keeping alcohol out of the hands of minors -- and collecting tax revenue.

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[7] Mr. Bolick and the Institute for Justice are leading the litigation efforts in Virginia and New York to strike down state laws prohibiting direct out-of-state shipments to consumers.

[8] See copy of Dr. Wechsler's Affidavit attached at Addendum 5.

[9] I might add here that the FTC has taken great pains to warn the public about the ability of minors to gain access to online gambling sites, emphasizing the obvious point that gambling is illegal for kids (See copy of FTC Consumer Alert attached as Addendum 6). I would suggest that the threat to minors through online alcohol sales – also clearly illegal - should be no less of a concern to the FTC than that posed by online gambling.

In order to understand how the three-tiered system operates as a partner with the state and federal regulatory communities and serves the interests of consumer protection, it is important to understand how it actually operates:

1. A supplier must obtain approval for the label from the BATF and state authorities to ensure that it contains truthful and non-misleading information and mandatory health warnings.

2. That bottle must then be sold to a state and federally licensed wholesaler who is responsible for maintaining records and filing detailed reports tracking each bottle brought into the state, paying the excise taxes due on the alcohol, and delivering the alcohol to a state licensed retail establishment.

3. The retailer is responsible for paying over to the state the sales taxes generated by each sale, and is directly responsible for ensuring that alcohol does not fall into the hands of minors or other prohibited individuals.

4. Since both the wholesaler and the retailer must be licensed by the state, they are fully accountable for any dereliction of their duties. They are subject to on-site inspections, auditing and compliance checks, and any violation can result in the loss of license, fines and other potentially more several penalties.

In sum, the three-tiered system both protects important state interests in regulation and taxation and has created an economically efficient system of alcohol distribution. By channeling the physical distribution of beverage alcohol through licensed in-state wholesalers and retailers, the state can effectively enforce its sales and tax policies (including barring sales to minors, protecting dry areas, limiting strength, controlling labels and advertising and the like) because it can license, inspect, and hold responsible these local firms. At the same time, the in-state wholesalers required by the three-tier system enhance competition at both the supplier and retailer levels, making distribution more efficient and keeping the price to the consumer low.

The same cannot be said of a regime that permits direct interstate shipments.

The FTC Serves the Average Consumer's Interest – Not the Minority Elitist's Interest:

The FTC is ostensibly looking into the issue of direct shipments of wine through the Internet because the public at large would allegedly be better served by allowing such sales and that there is a great demand for such sales. But the evidence for that allegation is simply lacking.

First off – as discussed above – the danger of illegal sales to minors is clearly not in the public interest.

Second – as discussed above – the consuming public is overwhelmingly satisfied with the selection and convenience available to them locally. In fact, when Mr. Sloane, President of the AVA testifying at the Workshop tried to get the New Hampshire Administrator John Byrne to back him up on the alleged demand and need for direct shipments, Mr. Byrne had to inform the

Workshop that 95% of the wines shipped direct into his state were in fact available to consumers locally!

Third, the "demand" for direct sales is not broad based, but – as conceded by Nobel winning economist Dan McFadden at the Workshop – is an "elite" issue relating to only a tiny percentage of the overall market.

Fourth, arguments that wholesalers are somehow improperly restricting access to the market were effectively countered at the Workshop – again by Mr. McFadden – who noted that every winery he spoke to in preparation for the Workshop did in fact have wholesaler representation. All he could allege was that the wholesalers made business decisions not to carry those wines which lacked consumer demand – hardly a sweeping indictment of wholesaler practices. Moreover, it became clear that wholesaler consolidation did not serve to restrict access as shelf space in retail establishments did not increase or diminish due to that consolidation – the same amount and variety of wine would be on the shelf if there were 10,000 wholesalers.

Finally, it was conceded at the Workshop that cost savings inuring to the benefit of the consumer from direct shipments were non-existent -- and in fact the price is often cheaper for the same bottle purchased locally. Why? Because online suppliers often list their product at the retail price. Thus, while the supplier captures an additional profit that would have accrued to the state through taxation, the consumer -- whom the FTC is ostensibly looking out for -- sees no differential in the price.

Erecting Barriers to State Enforcement – Discrimination Against Licensed Interests:

Prior to prohibition, states had difficulty regulating traffic in alcohol originating in other states. Although states were permitted considerable leeway in licensing and regulating suppliers within their borders, courts consistently ruled that the dormant commerce clause prevented them from regulating imports from unlicensed out-of-state suppliers as unlawful interference with interstate commerce.

The Webb-Kenyon Act and the 21st Amendment were designed to reverse discrimination that favored out-of-state suppliers -- as Judge Easterbrook noted in his opinion in the Bridenbaugh case. Prior to those enactments, it was in-state concerns which bore the burden of discriminatory regulation. Only they had to be licensed; only they had to pay taxes; only they were accountable to the state. It was only upon passage of the 21st Amendment that the states were free to require that all suppliers, in-state and out-of-state, were subject to their regulatory frameworks.

The proponents of direct shipping have applauded the decisions of trial courts in North Carolina, Virginia and Texas which have struck down as "discriminatory" certain state laws prohibiting interstate direct shipping. But the reasoning of these cases would nullify the 21st Amendment and recreate the conditions that existed in the Nineteenth Century when unlicensed, untaxed and unaccountable out-of-state suppliers competed on an uneven playing field with licensed, taxed and accountable in-state suppliers.

Opening Pandora's Box:

The argument that is being made by proponents of direct interstate shipping seems to be that because there is an small but vocal elitist demand for direct shipments of wine, and a glut of suppliers who want to ship direct, the FTC should weigh in on the side of direct shippers. However, since the constitution speaks only to alcohol - it makes no distinction between wine, beer and spirits - the FTC should consider whether a decision to weigh in on this matter in favor of the direct shipment of wine will inexorably lead to pressure in the future to ensure consistent state action with respect to all alcohol, by removing state barriers to the sale of spirits and beer on the Internet as well. I believe the FTC would be well advised to refrain from opening the Pandora's box that has been presented to them by the proponents of direct shipping.

Respecting State Rights and Decisions – The Ultimate Federalism:

The legislature of each state speaks to the concerns and choices of its citizenry regarding the distribution of alcohol, and the laws of the state are simply the reflection of the will of the consumers in each state. Some states are control states and alcohol must be shipped through a state wholesaler; some states are license states and alcohol is shipped through licensed private companies; some states have dry areas or prohibit Sunday sales. But whatever system of distribution is employed, they all have one thing in common. They were created pursuant to the power granted to the states under the 21st Amendment, in keeping with the country's post-Prohibition view that these matters were best left in the hands of the states, not the federal government.

It was with the foregoing in mind that Congress passed the 21st Amendment Enforcement Act in October, 2000,[10] an Act backed by 35 state Attorney's General, which gave states the right to go into federal court to stop illegal shipments of alcohol.

Until the 21st Amendment is repealed, the FTC should respect that unambiguous, constitutionally enumerated state power, and the decisions made by the states pursuant to that power.

[10] Signed by the President in October, 2000, the law went into effect in January, 2001. See copy of the Act attached as Addendum 7.

Addendum List

1. WSWA's 4th Circuit Brief (Virginia – redacted to remove Virginia statute addendum).
2. The Webb-Kenyon Act.
3. Michigan Sting Statistics.
4. Governor Janklow's Veto Message.
5. Dr. Wechsler's Affidavit in the New York Litigation.
6. FTC Consumer Alert entitled "Online Gambling and Kids."
7. The "Twenty-first Amendment Enforcement Act."

ADDENDUM 1

Nos. 02-1367, 02-1368

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CLINT BOLICK, *et al.*,

Plaintiff-Appellees,

v.

CLARENCE ROBERTS, *et al.*,

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

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

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MISCELLANEOUS

Amici Wine and Spirits Wholesalers of America *et al.* file this brief supporting appellants with the consent of the parties. Amici have filed a similar brief in *Beskind v. Easley*, Dkt. No. 02-1432. The following pages differ significantly from that brief, because of differences between the North Carolina and Virginia statutes and between the opinions below: 9 n.2, 12, 13 n.7, 14, 16, 19-21, 22, 24, 26, 28-31.

STATEMENT OF INTEREST OF AMICI CURIAE

Wine and Spirits Wholesalers of America, Inc. (WSWA) is a national trade organization and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents more than 480 wine and spirits wholesaler companies in 44 States, the District of Columbia, and Puerto Rico that hold State licenses to act as wine and/or spirits wholesalers.

In Virginia and most other States, State-licensed wholesalers play a central role in State regulation of importation and distribution of beverage alcohol. The requirement that all imported alcoholic beverages be sold by the State or State-licensed wholesalers enables Virginia and other States to enforce their rules against unauthorized retail sales (including sales to minors), content restrictions, labeling requirements, and excise tax laws.

The district court struck down Virginia's laws barring unlicensed persons from importing alcoholic beverages into the Commonwealth. But Section 2 of the Twenty-first Amendment to the U.S. Constitution plainly allows States not only to prohibit entirely the importation of alcoholic beverages but also to permit their importation only if they are shipped to State-licensees. Applied nationwide, the district court's order would cripple State control of distribution of alcoholic beverages to residents.

The additional amici are national associations of suppliers, importers, wholesalers, and retailers of alcoholic beverages. These amici are described in Appendix A.

STATEMENT OF THE ISSUES

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

Is this authority nullified because Virginia allows licensed in-state wineries and breweries to sell their products at their in-state premises and deliver them to retail purchasers in the State?

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 2 of the Twenty-first Amendment states, "The transportation or importation into any State ... of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Appellees persuaded the district court to allow *exactly* what the Amendment forbids: importation of alcoholic beverages into Virginia, to and for use by Virginia residents, in violation of State statutes requiring out-of-state suppliers to sell only to licensed in-state wholesalers.[11/]

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

Under consistent and *current* Supreme Court interpretation of the Twenty-first Amendment, States "unquestionably" may bar out-of-state alcohol suppliers from sending their products into the State to anyone other than a licensed in-state

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11/ Many States have similar statutes barring out-of-state suppliers from sending alcoholic beverages into the State to anyone other than the State itself or a licensed wholesaler. *See, e.g.*, ALA. ADMIN. CODE r. 20-X-8.04(1); 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 §§ 7.1-5-1-9.5, 7.1-5-11-1.5; 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; N.Y. ALCO. BEV. CONT. § 102(1)(c); OHIO REV. CODE ANN. §§ 4301.19, 4301.20; 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; VT. STAT. ANN. tit. 7, § 305; WYO. STAT. ANN. §§ 12-2-203, 12-3-101.

wholesaler. The Court said in 1936 and has since stated repeatedly that States have "virtually complete control" over *physical importation* of alcoholic beverages.

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

The Supreme Court has never suggested that the dormant Commerce Clause limits State power under the Twenty-first Amendment to control importation of alcoholic beverages. Cases acknowledging that the *federal* government may *also* regulate sales of alcohol under the Commerce Clause, and that States must observe other provisions of the Constitution, do not create an exception allowing imports the State has barred.

Virginia's choice to allow *licensed* in-state manufacturers to sell wine and beer at their premises and deliver it to customers does not invalidate its power to require that imported beverages be sold to licensed in-state wholesalers. Virginia requires that *all* wines and beers sold in the State be sold by the State itself or State-licensed firms that have a substantial and enduring presence there, and, as the

district court admitted, *Bolick v. Roberts*, 199 F. Supp. 2d 397, 410 (E.D.Va. 2002), Virginia's statute is indistinguishable in this respect from the Indiana statute upheld in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849, 851 (7th Cir. 2000), *cert. denied*, 532 U.S. 1002 (2001). Virginia draws an entirely rational distinction: Licensed in-state manufacturers are subject to thorough background checks, inspection of their premises, attachment of their property if they fail to collect and remit taxes or otherwise fail to comply with State law, and a threat of license revocation—and they bear the costs of State licensing and compliance procedures. None of the district court's handful of "discrimination" cases deals with physical importation or control of physical distribution within the State, and none remotely suggests that a State cannot require alcohol to be sold through licensed firms with a substantial physical presence in the State, which in-state manufacturers have and California manufacturers lack.

Virginia need not "narrowly tailor" its laws to maximize out-of-state manufacturers' ability to sell alcohol to Virginians. The "narrow tailoring" doctrine arose in cases involving personal constitutional rights, particularly freedom of speech and freedom from racial and other invidious discrimination, which both Federal and State governments must interfere with as little as possible when they may interfere at all. There is no comparable right to be "as free as possible" to sell alcoholic beverages in interstate commerce, or to have a court

redraw regulatory lines in accordance with its view of fairness: on the contrary, even apart from the Twenty-first Amendment, that activity is subject, like other economic activity, to wide-ranging economic regulation, and the lines drawn by legislatures need only be rational. Both Congress (under the Commerce Clause) and the States (under the Twenty-first Amendment) have broad power to design regulatory schemes they deem appropriate.

In any event, if, as the district court believed, the exception for in-state manufacturers created a constitutional problem, the proper remedy would be to strike down the exemption – not Virginia's control of imports.

ARGUMENT

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

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

In *North Dakota v. United States*, 495 U.S. 423 (1990), a majority spoke directly to the point here at issue. Justice Scalia said (without any qualification), "*The Twenty-first Amendment ... empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.*" *North Dakota*, 495 U.S. at 447 (emphasis added). Justice Stevens, writing for four Justices (himself, Chief Justice Rehnquist, and Justices White and O'Connor) used somewhat more words but said the same thing. He noted that "[u]nder the State's regulatory system ... out-of-state ... suppliers may sell to only licensed wholesalers or federal enclaves," *id.* at 428, and he squarely endorsed this as within State power:

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

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

This conclusion of five Justices was the first step in the *holding* of the *North Dakota* case. The ultimate issue before the Court was whether North Dakota could impose special labeling requirements on alcoholic beverages destined for federal enclaves within the State. The Court answered that question "yes," *id.* at 430-33, precisely because the State had the Twenty-first Amendment right (a) to channel all sales for its residents through licensed in-state wholesalers, and (b) to protect that controlled distribution system against diversion of beverage alcohol sold to the enclaves. *See id.* (Stevens, J.); *id.* at 447 (Scalia, J.). If appellees' position in this case were correct, and they had a constitutional right to ship alcoholic beverages directly to retail customers, the Court could not have ruled as it did in *North Dakota*.[12/]

12/ The district court essentially ignored *North Dakota*. The magistrate said only "the Supreme Court was not confronted ... with a Dormant Commerce Clause question." *Bolick*, 199 F. Supp. 2d at 434-36 (magistrate report). But the Supreme Court's decision in *North Dakota* squarely depended on the power of the State to channel all imports through licensed in-state wholesalers, and the Court said this provision was "unquestionably legitimate." The four dissenters made no objection on this point, although they disagreed on an issue irrelevant to the present case. The Court obviously did not unanimously overlook a Commerce Clause problem that would have required a different result if the case had involved any other product.

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

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

Id. at 330 (emphasis added).[13/]

Still later, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court said unanimously: "The Twenty-first Amendment grants the States virtually complete control over whether to permit

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13/ The *Idlewild* Court rejected as "an absurd oversimplification" and "bizarre" the suggestion, made in that case, that Section 2 had eliminated all *federal* power over the distribution of alcoholic beverages. *Idlewild*, 377 U.S. at 331-32. It was in that context that the Court said the Twenty-first Amendment and the Commerce Clause are "parts of the same Constitution." *Id.* at 332. That is, both Congress and the States have the power to regulate commerce in alcoholic beverages, and conflicts between these exercises of power must sometimes be resolved. There is no such conflict with respect to physical importation for two reasons. First, the Twenty-first Amendment was designed to eliminate the Commerce Clause restriction. *See* pp. 12-14, *infra*. Second, Congress has *exercised* its positive Commerce Clause power by adopting and in 1935 reenacting the Webb-Kenyon Act, 27 U.S.C. § 122, confirming State power to regulate importation. *See* pp. 13 n.7, *infra*. (The decisive point in *Idlewild* itself was that the relevant beverages were *not* destined for "delivery or use" within New York (but rather for export) and the Twenty-first Amendment was therefore inapplicable. *See* 377 U.S. at 325, 332-33.)

importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110.[14/] "[T]ransportation or importation into" a State, for "use" by its citizens, is the activity covered by the very words of the Twenty-first Amendment, and the Supreme Court has never upheld *any* restriction on a State's power to regulate that activity.[15/]

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

Section 2 of the Twenty-first Amendment restructured federal and State regulatory authority to allow States to design regulatory schemes and enforce them against out-of-state products. It is a broad grant of "plenary" power over "importation" of alcoholic beverages, so the State can control "delivery or use" within its borders. U.S. Const. amend. XXI, § 2. Its express purpose was to override the dormant Commerce Clause. *See North Dakota*, 495 U.S. at 431.

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

15/ On the contrary, when, for example, the Court ruled that federal regulation of broadcast advertising of alcoholic beverages preempted State regulation, it carefully noted that federal authority could prevail only because the State regulations were *not* a State "attempt[] directly to regulate the sale or use of liquor within its borders." *Capital Cities Cable*, 467 U.S. at 713.

The Court explained the history and purpose of the Twenty-first Amendment in *Craig v. Boren*, 429 U.S. 190, 204-07 (1976), and the Seventh Circuit recently offered a similar review in *Bridenbaugh*, 227 F.3d at 851-53.[16/] In summary:

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

In response, Congress exercised *its* power under the Commerce Clause to enable States to block alcoholic-beverage importation. In particular, the Webb-Kenyon Act of 1913 (re-enacted in 1935) prohibited "[t]he shipment or transportation ... of any ... intoxicating liquor of any kind, from one State ... into

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

any other State ... in violation of any law of such State ..." 27 U.S.C. § 122; *see Craig*, 429 U.S. at 205 n.19.[17/]

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

> The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.

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

In sum, the power to restrict how alcoholic beverages may cross State borders is "*the central power* reserved [to States] by § 2 of the Twenty-first Amendment." *Capital Cities Cable*, 467 U.S. at 715 (1984) (emphasis added). This power enables States to enforce all other restrictions they choose to impose on delivery or use. States, not appellees and not the courts, determine "the structure of the liquor distribution system," *North Dakota*, 495 U.S. at 431, to achieve their objectives.

17/ As a result, the "dormant" Commerce Clause has no application in this case. As noted, Congress *exercised* its Commerce Clause power by adopting Webb-Kenyon ("An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases") and reenacting it in 1935. 49 Stat. 877 (1935). That Act, in force today, gives States essentially the same power of regulation as the Twenty-first Amendment put in the Constitution. Congress may, of course, exercise authority under the Commerce Clause to give the States power the dormant Commerce Clause would otherwise deny. *Cf. Sporhase v. Nebraska*, 458 U.S. 941, 960 & n.21 (1982).

State power over interstate commerce in alcoholic beverages granted by Webb-Kenyon and the Twenty-first Amendment is part of the foundation for achieving all other State regulatory objectives. All States, including Virginia, prohibit the sale of alcoholic beverages to minors, *see* VA. CODE ANN. §§ 4.1 -304(i), -305, but that is by no means the States' only regulatory objective. Virtually all States, including Virginia, impose labeling requirements, so people electing to drink can do so knowledgeably and responsibly. *See id.* §§ 4.1-103(9), -119(E), -325(8-9). Many States allow sale of all, or some kinds of, alcoholic beverages only in some parts of the State. *See, e.g., id.* § 4.1-121, *et seq.* Many States control the alcoholic strength or quantity of beverages sold in the State or in particular locations. *See, e.g., id.* §§ 4.1-100, -119. Most States, including Virginia, impose excise taxes on alcoholic beverages from which they derive important revenues. *See id.* §§ 4.1-236, *et seq.*

Import restrictions are essential to all these important requirements. In Virginia and many other States, such requirements are enforced by requiring out-of-state suppliers to sell alcoholic beverages only to the State itself or to State-licensed firms with a substantial permanent physical presence in the State. Such a firm can be effectively held responsible for assuring compliance with all other regulatory requirements. That may not be the only way to make State regulation effective, but it is the Twenty-first Amendment's way.

States could not as effectively impose *any* alcohol-marketing, alcohol-consumption, or revenue obligations if they were required to allow out-of-state suppliers to sell and ship directly to their residents. Even if Virginia regulators could require California wineries or breweries to obtain Virginia licenses before shipping their products to Virginians, Virginia regulators could not as effectively check backgrounds, insist on inspecting premises where alcoholic beverages are sold, attach in-state property if State taxes were not collected or remitted to the State, or wield the same threat of license revocation, because California manufacturers would have far less at stake. The district court acknowledged that Virginia could not effectively levy any tax on out-of-state sellers if their products did not pass into State-licensed hands. *Bolick*, 199 F. Supp. 2d at 403, 444 (magistrate report). The proverbial difficulty States have in collecting "use" taxes on sales originating out-of-state, as compared with sales taxes on in-state transactions, *see Bridenbaugh*, 227 F.3d at 853, shows exactly why Virginia and other States have insisted on in-state licensees as taxpayers.

III. THE SUPREME COURT HAS NEVER SUGGESTED THAT THE DORMANT COMMERCE CLAUSE LIMITS STATE POWER UNDER THE TWENTY-FIRST AMENDMENT TO LIMIT IMPORTS; CASES CONCERNING *FEDERAL* REGULATORY POWER OR OTHER PROVISIONS OF THE CONSTITUTION ARE IRRELEVANT TO THE PRESENT ISSUE.

The district court believed, *Bolick*, 199 F. Supp. 2d at 412, that the dormant Commerce Clause restricts States' Twenty-first Amendment rights, allowing them to "control the importation and distribution of liquor within [their] borders" only if

those controls do not distinguish in any way between in-state and out-of-state suppliers. But this misstates the relationship between the Twenty-first Amendment and the dormant Commerce Clause. As noted, the former creates an exception to the latter.

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

This Court's decision in *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001), cited by the district court as "establish[ing the Fourth Circuit's] constitutional analysis when it has been presented with Twenty-first Amendment issues" *Bolick*, 199 F. Supp. 2d at 433, actually concerned a question irrelevant to this case: whether State price regulation was immune from challenge under the

Sherman Act because of the Twenty-first Amendment. Carefully applying the Supreme Court's decision in *Midcal Aluminum*, *supra*, the Court first found the pricing scheme a *per se* antitrust violation; the Court then ruled that the scheme could nevertheless survive if, on remand, the State could show "interests ... of sufficient weight to prevail against the federal interest in enforcement of the antitrust laws."[18/] But as the Supreme Court itself explained in *Midcal*, *no* balancing is required where (as here) the State law controls imports, not prices, or where (again, as here) there is no conflicting federal regulation. See *Midcal*, 445 U.S. at 106-10. Indeed, in *Midcal*, the Court reiterated without qualification that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110. Its discussion of balancing explicitly concerned only "*other* [State] liquor regulations." *Id.* (emphasis added).

The Court has also explained that States exercising Twenty-first Amendment power are subject to other constitutional provisions. *See Craig v. Boren,* 429 U.S. 190 (1976) (gender discrimination); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996) (freedom of speech); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122

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

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

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

The district court treated Section 2 of the Twenty-first Amendment as having no force in this case because Virginia regulates out-of-state and licensed-in-state suppliers differently. *Bolick*, 199 F. Supp. 2d at 408. But *all* State laws that come within the very words of the Twenty-first Amendment—that is, all laws that restrict "transportation or importation into [the] State"—apply to interstate commerce in ways that have no parallel in purely intra-state activities. The Twenty-first Amendment expressly permits the States to regulate hard-core interstate commerce—physical carriage of goods across State borders. As the Seventh Circuit said in *Bridenbaugh* in response to a nearly identical challenge to a nearly identical statute, "*Every* use of § 2 could be called 'discriminatory' in the sense that

plaintiffs use that term .... If that were the sort of discrimination that lies outside State power, then § 2 would be a dead letter." 227 F.3d at 853.[19/]

The magistrate implicitly recognized that Virginia's requirement that all imported alcoholic beverages be sold to the State or to licensed in-state wholesalers, standing alone, would be valid. *See Bolick*, 199 F. Supp. 2d at 444-45 (magistrate report). The court ruled, however, that the whole regulatory structure fails because Virginia allows licensed in-state manufacturers to sell and deliver wine and beer at retail. *Id.* But the regulatory structure, although it necessarily treats imports differently from in-state sales, is entirely rational: every drop of wine and beer sold in the State must be sold by a licensed seller with a substantial in-state physical presence.

The prohibition of direct shipment by out-of-state manufacturers follows directly from the need for a licensee with a permanent physical in-state presence.[20/] All other State objectives relating to sales, labeling, beverage content, and tax

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

20/ Even if the prohibition were constitutionally problematic, the proper remedy would be, as the magistrate recognized, *Bolick*, 199 F. Supp. 2d at 449-451 (magistrate report), to strike down the narrow and clearly severable exception for in-state manufacturers. Plaintiffs cannot invalidate otherwise-valid import regulations merely because that is the remedy they have demanded. See pp. 28-31, *infra*.

collection are served by channeling sales through firms that can be inspected, whose licenses can be denied or rescinded, and whose property can be attached.

Allowing in-state manufacturers to make direct sales at their premises and deliveries to customers is also entirely rational.[21/] In-state manufacturers are subject to direct State regulation and control. Wine and beer makers must have Virginia licenses. *See* VA. CODE ANN. § 4.1-206, *et seq.* They may sell only on their licensed premises. *See id.* § 4.1-207(4). The licensed premises are subject to State inspection. *See id.* § 4.1-204(D). The manufacturer necessarily has in-state property subject to attachment if it fails to meet obligations to the Commonwealth. And its basic business license is subject to revocation if it violates Commonwealth alcohol laws. *See, e.g., id.* §§ 4.1-225, -226. In-state manufacturers bear the burden of the licensing and compliance process.[22/] Virginia rationally decided that no further regulation is necessary—and it had no obligation to impose unneeded restrictions on in-state manufacturers merely because it was important to impose restrictions on out-of-state manufacturers. On the contrary, allowing unregulated

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21/ The special provisions relate *only* to licensed in-state wineries and breweries. An ordinary resident of Virginia may not manufacture intoxicating beverages for sale, *see* VA. CODE ANN. § 4.1-200(6) (permitting an individual to make wines and beers for "domestic consumption"); *id.* § 4.1-300(a) (forbidding non-authorized manufacturing), and a licensed manufacturer must ordinarily sell to a licensed wholesaler who must sell to a licensed retailer. *Id.* § 206, *et seq.*

22/ The district court declined, *Bolick*, 199 F. Supp. 2d at 404, 408, 409, 411, even to consider whether the burdens on these entities exceed any burden on out-of-state sellers from having to sell to licensed in-state wholesalers.

direct sales by out-of-state wineries and breweries would distinctly favor them over the in-state concerns that are subject to licensing, regulation, and effective taxation.

The district court concluded that the rationality and effectiveness of the Commonwealth's control scheme are irrelevant, *see, e.g., Bolick*, 199 F. Supp. 2d at 404, and that the difference in regulation, however rational, suffices to invalidate the bar on direct shipment from out-of-state. But no case has come close to suggesting that State alcoholic-beverage importation laws that meet ordinary tests for rationality are unconstitutional merely because they treat out-of-state suppliers *differently*.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), did not concern control over importation *or* in-state distribution. The Court struck down, 5-3, a tax that contained an exemption whose *sole* purpose was to promote local industry. *See id.* at 276. The Court noted that Hawaii did not seriously attempt to defend the exemption on Twenty-first Amendment grounds, *id.* at 274 & n.12, and the Court struck it down as "*mere economic protectionism.*" *Id.* at 276 (emphasis added). In the present case, the district court asserted that Virginia's exceptions for licensed in-state manufacturers were mere protectionism, *Bolick*, 199 F. Supp. 2d at 443-444, but the legitimate purpose of the exceptions is clear and real: to avoid imposing unnecessary burdens on strictly limited sales by licensed firms with a substantial in-state presence, who already bear substantial regulatory burdens.

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

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

Heublein, Inc. v. ABC, 376 S.E.2d 77 (Va. 1989), involved a Virginia contract-uniformity statute that significantly affected contracts that had nothing to do with Virginia: contracts between out-of-state wineries and out-of-state distributors. *Heublein*, 376 S.E.2d at 78 n.4 (citing VA. CODE ANN. § 4-118.27(b)). The court followed *Brown-Forman*, striking down the law as an attempt to regulate transactions wholly outside the regulating State. *Id.* at 80. The statute had the further defect of exempting small in-state wineries from its contracting requirements, *see id.* at 78 n.3, an exemption the court viewed as pure protectionism with no other justification. *Id.* at 80. Nothing in *Heublein* supports any challenge to Virginia's rational scheme for regulating physical distribution of beverage alcohol.

Healy v. Beer Institute, 491 U.S. 324 (1989), also involved a price regulation statute that "ha[d] the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Id.* at 337. The statute substantially affected prices in transactions having no relationship to the regulating State (Connecticut); it was struck down because of these extraterritorial effects. *See id.* at 337-40. That ruling, which has nothing to do with discrimination, has no bearing on the present case. The Court also objected, briefly and secondarily, to the fact that the pricing statute applied only to interstate sellers and not to similar sellers with operations confined to Connecticut. *Id.* at 340-41. But the Court made clear

that its objection was that there was no reason for applying the price regulation only to interstate sellers, and that even "discrimination" may be acceptable if it is "*demonstrably justified by a valid factor unrelated to economic protectionism.*" *Id.* at 340-41 (emphasis added).

In *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994), the Fifth Circuit assumed the *legitimacy* of Texas's requirement that only licensed persons may import beverage alcohol; it ruled only that three years' residency was an unreasonable license requirement. *See* 11 F.3d at 554 (noting that State has power to revoke permits and impose other civil and criminal penalties on licensees that violate State law); *id.* at 555 (citing labeling and reporting requirements in *North Dakota*, 495 U.S. 423, as serving core concerns of the Twenty-first Amendment).

The district court gave short shrift, *see Bolick,* 199 F. Supp. 2d at 408, to the Seventh Circuit's decision in *Bridenbaugh*, a case directly on point. The Indiana statute under consideration in *Bridenbaugh* allowed "local wineries, but not wineries 'in the business of selling ... in another state or country' to ship directly to Indiana consumers." *Bridenbaugh*, 227 F.3d at 851; *see* Ind. Code § 7.1-5-11-1.5(a). The Seventh Circuit upheld this regulation, noting that "the main effect of Indiana's system is to subject [the plaintiffs' out-of-state wine purchases] to taxation, by requiring the beverages to pass through the hands of permit holders

whose business is closely monitored to ensure tax collection .... [T]his is precisely what § 2 [of the Twenty-first Amendment] is for." *Bridenbaugh*, 227 F.3d at 854.

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

The district court demanded that the Commonwealth "produce evidence tending to show that there are no other nondiscriminatory means of enforcing their legitimate interests." *Bolick*, 199 F. Supp. 2d at 409.[23/] But the Supreme Court has never suggested that the States' "plenary power" and "virtually complete control" over importation of alcoholic beverages, *see* pp. 8-11, *supra*, must be exercised in a "narrowly tailored" manner to allow suppliers of such beverages maximum commercial freedom, or that rational regulatory distinctions may, merely because they treat different classes of sellers differently, be redrawn to fit a court's view of fairness.

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

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

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

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

with interstate commerce, but a State regulation does not *become* unconstitutional merely because a court thinks it could design an equally effective, narrower regulation. As the Seventh Circuit has explained, "the dormant commerce clause does not replace the rational-basis inquiry with a 'broader, all-weather, be-reasonable vision of the Constitution.'" *National Paint & Coating Ass'n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995). The dormant Commerce Clause does not "authorize a comprehensive review of the law's benefits, free of any obligation to accept the legislature's judgment" as to those benefits, and then, upon "disparag[ing] the law's benefits[, a finding] that unconstitutionality under the dormant commerce clause follow[s]." *Id.* The structure Virginia and other States have chosen is both protected by the Twenty-first Amendment and abundantly justified by practical considerations; appellees have no right to have this Court order the States to "do better."

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

After finding the exceptions allowing direct sales by in-state concerns unconstitutional, the magistrate's report stated, "[T]he Virginia General Assembly did ... pass the offending provisions separately after passing the comprehensive Act regulating alcohol without direct shipment preferences." *Bolick*, 199 F. Supp. 2d at 450 (magistrate report) (citing *Heublein*, 376 S.E.2d at 81). Because of that, and

because the Virginia Supreme Court had found other, organic sections of the law severable, the report concluded that "the unconstitutional [exceptions] can be segregated from the Act as a whole," preserving the "comprehensive Act." *Id.* The district court, however, rejected that view: it somehow concluded that allowing out-of-state manufacturers to ship into Virginia *without* regulatory oversight "effects the intent of the legislature ... and preserves the police powers of the Commonwealth to further its legitimate interests under the ABC regime." *Bolick*, 199 F. Supp. 2d at 416.

The question is one of severability, a matter of State law. *See Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). In Virginia, the test for severability is whether "the General Assembly would have passed the Act without" the offending sections. *Heublein*, 376 S.E.2d at 81. The General Assembly has made its view with regard to severability plain: "The provisions of all statutes are severable unless (i) the statute specifically provides that its provisions are not severable; or (ii) it is apparent that two or more statutes or provisions must operate in accord with one another." VA. CODE ANN. § 1-17.1. The Alcohol Beverage Control Act does not contain a "non-severability" clause, and the three-tiered system manifestly does not depend upon the provisions for direct in-state shipment. Those provisions are therefore severable.

The district court thought that *Heublein* supported its non-severability conclusion, but *Heublein* itself states the critical fact here: the General Assembly *did* pass the Act without the challenged "exceptions," adding them only in the 1980s. 376 S.E.2d at 80. There is not the slightest evidence that the Assembly would have preferred to have the Commonwealth forgo the protections of the public and the fisc embodied in the Act, rather than give up later-adopted exceptions.[24/] And the district court failed even to mention the Code's general severability provision.

Moreover, the remedy for perceived discrimination should not be discrimination *against* in-state concerns. The district court's remedy would free out-of-state wineries and breweries from regulatory burdens and from effective tax enforcement, giving them distinct advantages over in-state firms that can be and are effectively regulated and taxed. The result would resemble the States' pre-Prohibition dilemma (when they could effectively regulate and tax only in-state firms, *see* p. 13, *supra*)—which is precisely what the Webb-Kenyon Act and Section 2 of the Twenty-first Amendment were designed to eliminate.

24/ *Heublein* itself concerned an entirely different statute, regulating franchising contracts, which the court determined, in view of that statute's own history, could not be severed without doing violence to the legislature's fundamental intentions. 376 S.E.2d at 81.

CONCLUSION

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

Respectfully submitted,

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July 15, 2002

Appendix A

DESCRIPTION OF AMICI CURIAE

The National Association of Beverage Importers (NABI) is a national trade association that represents the interests of beer, wine, and spirit importers. The NABI is dedicated to enhancing the import industry and assisting importers in complying with domestic and international regulations.

The American Beverage Licensees (ABL) is a nonprofit corporation that represents the interests of more than 20,000 on-premise and off-premise alcoholic beverage licensees who sell and serve alcoholic beverages. ABL is dedicated to preserving States' rights to ensure legal sales of alcohol to persons of legal age and to maintaining high standards for the retail sale of alcohol, and plays a crucial role in controlling sales of alcoholic beverages and collecting taxes.

The National Beer Wholesalers Association (NBWA) is a nonprofit trade association located in Virginia. NBWA, the national association representing beer wholesalers, is dedicated to enhancing the independent beer wholesale industry and to encouraging the responsible consumption of beer.

The Coalition of Licensed Beverage Associations (COLBA) is a national association representing the interests of private-sector licensed beverage retailers who sell and serve alcohol beverages. COLBA represents both on-premise and off-premise alcohol beverage licensees. It is dedicated to preserving States' rights to

ensure legal sales of alcohol to persons of legal age and to maintaining high standards for the retail sale of alcohol.

The Presidents' Forum of the Beverage Alcohol Industry is a coalition of chief executive officers in the United States that produce or import beer, wine, or distilled spirits for sale to independent wholesalers. The Forum provides an opportunity for these executives to apply their collective experience and expertise to respond to issues affecting the alcoholic beverage industry.

ADDENDUM 2

THE "WEBB-KENYON ACT," 27 U.S.C. § 122:

> The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited. [25]

[25] This paragraph contains the original Webb-Kenyon Act ("An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases") which was adopted on March 1, 1913 and re-enacted in 1935.

ADDENDUM
3

Actions Taken Against Shippers
As of 05/02/02

Criminal Action - guilty plea [1]:

Randall's, [Internetwines] (Illinois) {sale to minor; sting}	wine

Civil Assurances of Discontinuance completed, w/penalties and fines paid [51 total]:

Randall's [Internetwines] (2nd shipment) (Illinois) {sale to minor; sting}	wine
Shermers, [Primewines, Connoisseur Enc.] (Illinois) {sale to minor; sting}	gin
Sam's Wine & Liquors (Illinois) {sale to minor; sting}	wine
Schatz [Extra Value Beverage Shop] (Illinois) {sting}	beer
Case Liquors, Inc. (California) {sting}	scotch
P.E.L. (Illinois)	wine
Convito Italiano (Illinois)	wine
Merchant Direct [Beer Across America, IWC] (Illinois)	wine
Cuvaison Winery (California)	wine
Clos Pegase Winery (California)	wine
The Wine & Cheese Place [R. H. II, Inc.] (Missouri)	tequila
Leonetti Cellar (Washington State)	wine
Page Mill Winery (California)	wine
Renaissance Vineyards (California)	wine
Best Regards (California)	wine
International Markets [PRP] (Illinois)	wine

2.

Civil Assurances completed, cont'd:

Secret Cellars (California)	wine
Mumm Club Cuvee (California)	wine
Sterling Vineyards (Delaware Corp., operating in California)	wine
World Beer Direct/SSBC (Mass./NC)	beer
Mosby Winery (California)	wine
Hallcrest Vineyards [Organic Wine Works] (California)	wine
Wine of the Month Club (California)	wine
Honeywood Winery (Oregon)	wine
Pop's Wine & Spirits (New York)	wine
The Wine Club (California)	wine
Wine House (California)	wine
Connoisseur Imports (California)	wine
American Cellars Wine Club [Central Coast](California)	wine
Wine Exchange (California)	wine
Schaeffers Tri Wine (Illinois)	wine
Best Buy Wine Club [BBCK Enterprises] (California)	wine
Granite Springs (California)	wine
Chicago Wine Company (Illinois)	wine
Elk Cove (Oregon)	wine
Beaumont (Oregon)	wine
California Wine Club (California)	wine
Mountain Valley (Tennessee)	wine

3.

Civil Assurances completed, cont'd:

Tobin James (California)	wine
Red Carpet (California)	wine
Witch Creek (California)	wine
Adelaida Cellars, Inc. (California)	wine
Marotta/Curly Flat (Australia)	wine
Astor Wines (NY)	wine
Bender Foods (Iowa)	wine
C & H (California)	beer
Bargetto Wine Club (California)/ **Associated Resources** (Connecticut)	wine
Honeyrun Winery (California)	wine
Binneys (Illinois)	wine
Anasazi Fields (New Mexico)	wine
Prima Trattoria e Negozio di Vini (California)	wine

Notices of Intended Action Issued [1]

Tasting deVine (Illinois)	wine

Complaints Issued [2]

California Wine Guild [CWG, Inc] (California)	wine
Out of Africa [SA Wine Co., Inc.] (California)	wine

4.

Pending Complaints [1]:

Micro Beer Club (WA)	beer

Preliminary Letters [16]

Excelsior Marketing (Illinois)	wine
Carolina Wine Co (North Carolina)	wine
FRC (New York)	wine
Bulgarian Master Vintners (California0	wine
Clinton/Devens (Massachusetts)	beer
Hogue Cellars (Washington)	wine
Ste Chapelle Winery (Idaho)	wine
Fortino Winery (California)	wine
World Wine Trade (South Africa)	wine
Creston Delivery (New York)	wine
Hess (Washington)	wine
A.L.A., Inc. (Missouri)	spirits (var.)
Altamont Wine Shop (NY)	wine
Orfila Vineyards & Winery (CA)	wine
Willowcroft Farm Vineyards (VA)	wine
Willamette Valley Vineyards (OR)	wine

5.

Administrative Closures (indiv's, special circumstances)[10]

Cappuccino by the Sea (California)	beer
Hanley/Smith (New Hampshire)	wine
Coopers (Alabama)	whiskey
Des Jardins (Texas)	tequila
Mail Boxes/Kremin (Illinois)	wine
Business Services (California)	wine
Ciudadano (Harbick) (California)	wine
Shipping Logistics (Illinois)	beer
Wonderlich (New York)	wine
Secret Cellars - Post-Assurance shipment (California)	wine

Total fines, penalties and costs collected as of May 2, 2002: $ 57,007.24

Contraband Alcohol Seizures

The rate of contraband alcohol seizures continues to decline, due directly to the enforcement efforts of the Attorney General's Office against out-of-state shippers.

As of May 2, 2002:

164 separate shipments have been seized:

74 of these shipments were from California (37 different shippers)

34 from Illinois (14 different shippers)

21 from North Carolina (all but one shipment from World Beer Direct)

10 from New York (8 shippers)

7 from Washington State (4 shippers)

5 from Oregon (4 shippers)

2 from Texas (1 shipper)

2 from Missouri (2 shippers)

1 each from Massachusetts, Alabama, New Mexico, Iowa, Idaho, Tennessee, Virginia, Australia, and South Africa.

A total of 1358 bottles of alcoholic beverages have been seized:

1020 bottles of wine (541 - CA; 260 - IL; 85 - NY; 42 - WA; 22 - OR; 6 - TN, 12 - NM; 6 - IA; 12 - NC; 11 - ID; 8-VA; 12 - So. Africa; 3 - Australia)

318 bottles of beer (234 - NC; 12 - WA; 24 - CA; 24 - IL; 24 - MA)

20 bottles of spirits (17- MO; 2 - TX; 1 - AL)

51 Assurances of Discontinuance have been reached with shippers and filed in Ingham County Circuit Court, resulting in $57,007.24 in fines and costs.

ADDENDUM 4

March 8, 2001

The Honorable Scott Eccarius

Speaker of the House

State Capitol

Pierre, SD 57501-5070

Dear Mr. Speaker and Members of the House:

I herewith return House Bill 1295 and VETO the same. It is, "An Act to allow certain interstate shipments of wine."

1. **House Bill 1295 will encourage more underage drinking in South Dakota.**

   Because this bill will legalize direct shipment of wine for the first time in South Dakota's history, it will allow much easier access to wine without face-to-face proof of age. Therefore, it will encourage more underage drinking in South Dakota. I know this is true because a minor who works in my office made a supervised purchase of wine on the Internet with another employee's credit card just to see if it could be done. The wine was delivered a few days later in an unmarked package to the state capitol mailroom and picked up by an inmate who brings the mail to my office every morning. At the time of delivery, no one asked anyone in the mailroom if the recipient was old enough to purchase alcohol. Nobody but the shipper, the minor, and the minor's supervisor knew what was in the package.

   If House Bill 1295 becomes law, more and more minors will learn about this very, very easy way to secure wine without having to show any proof of age. This new "virtually" no-risk method of securing alcohol will explode in usage by minors.

2. **House Bill 1295 will be costly to taxpayers and eliminate protections against offensive wine labels.**

   Under current law, wine brands must register with the state for two reasons. First, the brand label fees account for approximately $110,000 in taxes that will not have to be raised by taxes on the state's citizens. Second, the brand registering requirement enables the state to keep offensive labels out of South Dakota. Under House Bill 1295, South Dakota will lose tax revenues and the opportunity to refuse offensive labels.

3. **The twelve case limit in House Bill 1295 is confusing.**

   The bill states that "No person may receive more than twelve cases of wine ... in any calendar year for personal use from another state under this Act." Can a person receive more than twelve cases if the wine is not for personal use?

4. House Bill 1295 violates the three-tier system that has served South Dakota well for many years.

In the three-tier system, consumers buy from retailers. Retailers buy from wholesalers, and wholesalers buy from the alcohol beverage producers. This system allows for the orderly collection of taxes and effective enforcement of liquor laws. House Bill 1295 violates the current three-tier system by allowing the direct delivery of wine to an address. There is no way for the state to enforce the state's liquor laws, such as our underage drinking laws.

I respectfully request that you concur with my action.

Respectfully submitted,

William J. Janklow

WJJ:js

cc: The Honorable Carole Hillard

The Honorable Joyce Hazeltine

ADDENDUM
5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JUANITA SWEDENBURG, in her own capacity and as proprietor of SWEDENBURG WINERY, a Virginia partnership; DAVID LUCAS, in his own capacity and as proprietor of THE LUCAS WINERY, a California sole proprietorship; PATRICK FITZGERALD; CORTES DeRUSSY; and ROBIN BROOKS,

Plaintiffs,

-against-

EDWARD F. KELLY, Chairman, and LAWRENCE J. GEDDA and JOSEPH ZARRIELLO, Commissioners, of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in their official capacities,

Defendants,

-and-

CHARMER INDUSTRIES, INC., PEERLESS IMPORTERS INC., EBER BROTHERS WINE & LIQUOR CORP., PREMIER BEVERAGE COMPANY LLC, METROPOLITAN PACKAGE STORE ASSOCIATION, INC., LOCAL 2D OF THE ALLIED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, and DR. CALVIN BUTTS,

Intervenor-Defendants.

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Case No. 00 CV 778 (RMB)

AFFIDAVIT OF HENRY WECHSLER IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF MASSACHUSETTS)
) ss.:
COUNTY OF NORFOLK)

HENRY WECHSLER, being duly sworn, deposes and says:

1. I, Henry Wechsler of Quincy, Massachusetts, have been asked to provide expert testimony on behalf of the Attorney General of New York State in this case. I am testifying in opposition to changing the current system of alcohol distribution and sales in New York so as to allow direct sales from out-of-state suppliers to New York residents through mail, telephone, and Internet orders. I oppose this change because in my expert opinion it would increase the access of underage youth to alcohol, weaken the current system of controls over underage drinking, and increase underage drinking and the resulting harms. This is the first time I am providing expert testimony despite numerous requests to do so over the years. I am doing so because this is such an important issue.

2. I am a public health researcher specializing in studies of alcohol use and problems among young people. My experience and scholarly work in this field are reflected in my current curriculum vitae, which I have enclosed as exhibit A.

3. I received my Ph.D. degree in social psychology from Harvard University and have been on the faculty of the Harvard School of Public Health since 1966. I have regularly taught courses there on "Alcohol Abuse and Alcoholism from a Public Health Perspective" and "An Introduction to High Risk Behaviors: Epidemiology and Prevention and Public Policy." I have also held appointments as Adjunct Professor at the Boston University School of Public Health and the Simmons College School of Social Work. I was Research Director and Associate Executive Director of the Medical Foundation Inc. in Boston.

4. I have published 17 books and monographs and more than 150 articles in professional journals including the Journal of the American Medical Association, the New England Journal of Medicine, the Journal of Studies on Alcohol, the American Journal of

Preventive Medicine, the American Journal of Public Health, and the Journal of the American College Association. I am a member of the National Institute on Alcoholism and Alcohol Abuse Special Task Force on College Drinking, and I have consulted with a number of colleges and state agencies about student alcohol issues. In Massachusetts I was a consultant to the Governor's Alliance Against Drugs. I have been a keynote speaker at a number of national and state organizations including the American Society of Addictive Medicine, the New York State College Consortium in Alcohol and Other Drugs, the National Conference of State Liquor Administrators New Jersey Summit, the Mother's Against Drunk Driving College Commission, the Association for Medical Education and Research in Substance Abuse, the American Society of Addiction Medicine, the National Association of Student Personnel Administrators, the National Alcohol Beverage Control Association National Alcohol Education Symposium, and the Association of American Colleges and University Program for Health and Higher Education. I also lecture nationally to college administrators, college health personnel and students about binge drinking and other forms of high risk behavior. I am the recipient of the American College Health Association's Clifford B. Reifler Award for my research contributions.

5. I published my first study on the topic of alcohol use in 1969, and since then have published over 50 research articles in professional journals on alcohol and substance abuse. In the 1970s, when most attention was placed on marijuana and other illicit drug use, my research pointed to the greater prevalence and harms resulting from alcohol abuse.

6. I am perhaps best known for my work as the Principal Investigator of the Harvard School of Public Health College Alcohol Study, an ongoing survey of a nationally representative sample of 14,000 students at 119 four-year colleges in 40 states. The first landmark study, published in 1994, focused national attention on the problem of "binge drinking" on college campuses and on the harmful, "second-hand" effects on other students.[1] The wide dissemination of this study's results has led to the strengthening of efforts on college campuses and home communities to reduce the heavy levels of use among college students.[2]

7. The role that public policy plays in affecting the levels of underage drinking and the harms that are associated with this problem is a central part of the study. My own research has pointed to college students' relatively easy access to large supplies of alcohol, and the relationship of such access to student "binge" or heavy drinking.[3] In that study two of the strongest predictors of binge drinking among underage students were ease of access and low price per drink.

The Minimum Drinking Age

8. Perhaps the most effective countermeasure against youthful drinking and the problems that it engenders is the 21-year minimum drinking age. In 1984 the passage of the national Uniform Drinking Age Act led to the adoption of the minimum legal drinking age (MLDA) of 21 in all states. Since 1975, the National Highway Traffic Safety Administration estimates that the MLDA of 21 has saved over 19,000 lives among persons in accidents involving drivers 18 to 20 years of age-- 900 in 1999 alone, reducing

fatalities by about 13%. The proportion of youth fatalities that were alcohol related dropped from 63.2% in 1982 to 35.1% in 1999.[4]

9. Studies of highway fatalities when the MLDA in most states was lowered in the 1970's revealed a similar increase in deaths during that time period.[5]

Underage Alcohol Use

10. While the effect of the MLDA has been positive, underage alcohol use remains a serious national problem. Enforcement is often lax, and the agencies involved are under-funded in many states.[6] Fake IDs and the provision of alcohol to underage persons continue to present serious enforcement problems. Studies of drinking establishments show that compliance needs to be improved.[7]

11. Today even with the improving situation attributed to the MLDA law, more than half of 8th graders and four of five high school seniors have tried alcohol. One in two high school seniors and two in three underage college students reported consuming alcohol in the past month.[8] Among college students, those who were underage reported drinking on fewer occasions than their of-age classmates. When they drank, however, underage students drank more alcohol per occasion.[3]

12. This is the essence of the problem with underage drinking in the United States. Thirty percent of high school seniors, or more than half of those who drank, reported consuming five or more drinks in a row, an amount associated with alcohol related problems. Two in five underage college students drank five or more drinks in a row, compared to only one in four of-age students. Even among 8th graders, 15% reported

drinking five or more drinks in a row. These levels of heavy drinking characterize the prevalent manner in which underage students drink.[8]

13. As a result, it is not surprising that underage drinking is associated with high levels of morbidity and mortality. In 1999 over 2,000 youth died in alcohol related crashes.[4] While raising the MLDA has contributed to a gradual decrease in alcohol related fatalities under current levels of enforcement, automobile fatalities involving drinking drivers are still the number one cause of death among persons under 21. In addition to traffic fatalities, underage drinking is a major factor in unintentional injuries from burns and falls, violence and crime, and suicide. Fetal alcohol syndrome and alcohol poisonings are among the direct consequences of such drinking.[9] Heavy drinking among young people has also been associated with unsafe sexual practices through lower levels of condom use.[10]

14. In my own research, frequent binge drinkers were found to be ten or more times more likely to get into trouble with the police, be involved in verbal or physical violence, vandalize property, or become hurt or injured.[11]

15. All in all, it is estimated that underage alcohol use costs the nation more than 50 billion dollars per year.[9] Underage drinking also poses a potential to alcohol problems later in life. The earlier the age of the first drink or intoxication, the greater the likelihood of alcohol problems in adult life, and of alcohol related injuries from automobile collisions.

16. As widespread as these consequences of underage drinking are today, research findings suggest that they would increase dramatically if the MLDA was lowered or the current policies and levels of enforcement were decreased.

Enforcement Level

17. Where there are more controls over underage drinking--with more careful and frequent ID checks--drinking by this age group, and heavy drinking in particular, is lower. Community wide efforts to accomplish this have reported some success.[12-15]

Ease of access to alcohol

18. Ease of access to alcohol for underage students is a key factor in their drinking participation and in the number of drinks consumed per occasion. While research has shown that access to alcohol is relatively easy for most college students, underage students at colleges where it is easiest to obtain alcohol are more likely to binge drink and to experience higher rates of alcohol related problems.[3]

19. Studies have shown more drinkers and higher levels of drinking with increased hours of sale, days of sale, and with greater numbers of alcohol establishments in a geographic area or higher outlet density.[16]

State Alcohol Retail Sales Monopolies

20. Several states have made changes in the system of distributing alcohol. Researchers have studied the effects of privatization, the changeover to private sales from a system of state run retail monopolies in seven states as well as several Canadian provinces, and countries. The balance of evidence suggests that sales and consumption increases availability through major increases in the number of outlets, and changes in marketing practices, increasing hours and days of sale.[17-20] A review of the studies indicate that lower prices, and an increase in the volume of alcohol sold usually follow privatization.

Lower prices have been found to be associated with higher consumption, and more binge drinking in other studies.[15]

Extending Alcohol Sales to Other Types of Outlets

21. Expanding the number of outlets by allowing sales of some forms of alcohol in other types of establishments--such as groceries and fast food restaurants-- has been found to be associated with more alcohol consumption and higher levels of outlet related problems.[21-23]

Outlet Density

22. Studies on the number of outlets in a region show a positive relationship to volume purchased, heavy consumption, and higher levels of alcohol related problems.[24-27] Some studies have found that rates of drunk and disorderly behavior, homicides, and automobile collisions are higher in areas where there are more alcohol outlets.[24, 28-30]

Hours and Days of Sale

23. Similarly, some studies have found that increasing the hours and weekend days that alcohol is sold is associated with more automobile collisions, more domestic violence, and more drunkenness.[31-36]

Home Delivery

24. Perhaps no other method of sale decentralizes control policies to the same extent as home deliveries. While such distribution of alcohol is permitted in some states, only one

study was found examining the potential consequences of this system. About one in ten underage students reported utilizing this system of delivery and thus eluding ID checks.[37] These students tended to be the heaviest drinkers and were more likely to experience alcohol related problems. Furthermore, establishments providing home delivery more often sold alcohol in such large volume as kegs than other outlets.[37] This home delivery of alcohol in bulk to heavier drinkers and potential party hosts poses new ways of circumventing the MLDA law.

Direct Sales of Alcohol Via Internet, Telephone, or Mail

25. While no studies have yet been reported regarding the effect of allowing alcohol to be sold directly over the Internet, telephone, or through the mail, what we know about the factors that affect underage drinking allows us to reach certain conclusions. In my expert opinion, changing the system of sales in New York by greatly increasing the number and type of suppliers who can sell alcohol products directly to New York consumers is likely to lead to a breakdown of controls over underage drinking. Even under the current system of controls which needs strengthening, the MLDA of 21 has resulted in a saving of 19,000 lives. Allowing delivery services to check ages of persons obtaining alcohol will increase the number of persons and sites involved in the control system, and consequently increase the chance of unintentional or intentional errors. Removing the possibility of face to face ID checks by trained personnel is at best a risky practice. Allowing direct sales is also likely to lead to more aggressive marketing practices and promotions, increasing the exposure of underage persons to stronger selling pressure. I also understand that those seeking this change argue that it will result in a drop in the

price of alcohol in the long run, which in turn would, in my expert opinion, result in a subsequent increase in underage consumption. We should be strengthening the system of controls over underage drinking, and not weakening it. From a public health perspective, I view allowing the direct sale of alcohol through the Internet, telephone and mail to be a dangerous idea, and a bad public policy for any state such as New York that wants to promote temperance, by increasing abstinence and decreasing heavy drinking among persons under the legal drinking age.

Direct Shipping by Certain New York Suppliers

26. I have been informed that New York State does permit certain in-state licensees to make direct shipments of alcoholic beverages to New York consumers in some cases. I strongly oppose these exceptions. However, I have also been informed that New York State does have the ability to control in-state shipments not present in the case of direct shipments by out-of-state sellers; for example, New York is able to hold in-state suppliers accountable for any violations of law because they are licensed by and present in New York State. I also understand that such violators may be subject to various civil and criminal sanctions, including sanctions under New York's Dram Shop Act. In any event, allowing all out-of-state suppliers to ship their products directly to New York consumers would, in my opinion, greatly increase the type and extent of problems far beyond those that may occur from direct shipments by a limited number of New York suppliers.

Henry Wechsler

Subscribed and sworn to before
me this 10th day of August, 2001

Notary Public

My commission expires 7-2-2004

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CURRICULUM VITAE *06/14/01*

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Current Position:

Harvard School of Public Health
1966- Lecturer, Department of Health and Social Behavior
1992- Director, College Alcohol Studies Program

Employment:

1965-1988	Director of Research and Community Health Programs; Associate Executive Director; The Medical Foundation Inc., Boston, Massachusetts
1980-1984	Simmons College School of Social Work; Adjunct Professor
1979-1980	Boston University School of Public Health; Adjunct Professor
1969-1979	Simmons College School of Social Work; Lecturer in Social Work Research
1970-1973	Harvard Medical School; Lecturer, Laboratory of Community Psychiatry
1967-1971	Boston University; Visiting Lecturer, Department of Psychology
1969-1970	Harvard University; Lecturer in Social Psychology, Department of Social Relations
1963-1966	Harvard School of Public Health; Research Associate in Psychology, Department of Epidemiology
1960-1966	Harvard Medical School; Research Associate in Psychology, Department of Psychiatry
1959-1965	Massachusetts Mental Health Center; Research Social Psychologist
1958-1959	Clark University; Research Associate and Assistant Professor, Department of Psychology
1958-1959	Joint Commission on Mental Illness and Health; Research Associate
1957-1958	Harvard Medical School; Research Fellow in Psychology, Department of Psychiatry
1953-1957	Harvard University; Research Assistant and Teaching Fellow, Department of Social Relations

Education:

A.B. Washington and Jefferson College, 1953
M.A. Harvard University, 1955
Ph.D. Harvard University, 1957 (Social Psychology)

Academic Honors and Fellowships:

Washington and Jefferson College: Summa Cum Laude, Phi Beta Kappa, Honors in Psychology
Harvard Foundation for Advanced Study Fellow (1953-1954)
Harvard University Resident Fellow (1954-1955)
U.S. Public Health Service Post-Doctoral Research Fellow (1957)
Recipient, American College Health Association, Clifford B. Reifler Award for outstanding contributions to the Journal of American College Health (2001)

Consultation:

1987-1993	Governor's Alliance Against Drugs, Commonwealth of Massachusetts
1977-1985	Harvard Joint Orthopaedic Residency Program
1974-1984	American Academy of Orthopaedic Surgeons
1969-1974	Socio-Technical Systems Associates Founding president, human services consulting firm conducting research for: National Institute of Mental Health; National Institute on Alcoholism and Alcohol Abuse; Rehabilitation Services Administration; Law Enforcement Assistance Administration.
1969-1970	New York State Education Department
1968-1969	United Community Services of Metropolitan Boston
1965-1968	Boston State Hospital
1962-1963	The Medfield Foundation
1961-1962	Massachusetts Rehabilitation Commission

Current Research Interests:

Alcohol and drug abuse among college students and youth; prevention of substance abuse and related problem behaviors among college students; public policy towards youthful alcohol abuse.

Current Courses Taught:

Alcoholism and Alcohol Abuse from a Public Health Perspective
An Introduction to High Risk Behaviors: Epidemiology, Prevention and Public Policy
Tutorials in Alcohol and High Risk Behaviors Research

Professional Memberships:

American Psychological Association, Fellow (Division 8 & 9)
American Sociological Association, Fellow
American Public Health Association, Fellow
Massachusetts Psychological Association, Fellow, Former Treasurer
Massachusetts Public Health Association (Former Chairman, Division of Community and Environmental Health)

Biographical Listings:

Who's Who in America
Who's Who in the East
Who's Who in Health Care
American Men and Women of Science, Social and Behavioral Sciences
Dictionary of International Biography

Journal Reviews:

Reviewer of articles for: Journal of the American Medical Association, American Journal of Public Health, Drug and Alcohol Dependence, Journal of Studies on Alcohol, Massachusetts Journal of Community Health, Millbank Quarterly, and Social Problems.

Founding editor of the Massachusetts Journal of Community Health (Journal of the Massachusetts Public Health Association)

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ADDENDUM 6

FTC Consumer Alert

Federal Trade Commission □¡ Bureau of Consumer Protection □¡ Office of Consumer and Business Education

Online Gambling and Kids: A Bad Bet

Do kids gamble? The National Research Council (NRC) suggests that not only do most adolescents gamble, but also that they've gambled recently.

The most common types of gambling for kids are reported to be card games and sports betting. But increasingly, parents of teens are concerned that their kids may be gambling on the Internet, where many game operators are operating from servers outside the U.S. — beyond the jurisdiction of state or federal regulations about the hours of operation, the age of the participants, or the type of game offered.

According to the Federal Trade Commission (FTC), it's easy for kids to access online gambling sites, especially if they have access to credit or debit cards. Indeed, some of the most popular nongambling websites carry ads for gambling sites, and many online game-playing sites link to gambling sites.

The FTC wants teens and parents to understand the risks associated with kids gambling online:

• **You can lose your money.** Online gambling operations are in business to make a profit. They take in more money than they pay out.

• **You can ruin a good credit rating.** Online gambling generally requires the use of a credit card. If kids rack up debt online, they could ruin their credit rating — or yours, if they use your credit card. That can prevent you from getting a loan to buy a house or a car, or even from getting a job.

• **Online gambling can be addictive.** Because Internet gambling is a solitary activity, people can gamble uninterrupted and undetected for hours at a time. Gambling in social isolation and using credit to gamble may be risk factors for developing gambling problems. Gamblers Anonymous (www.gamblersanonymous.org) is a self-help group for problem gamblers. Gam-Anon (www.gam-anon.org) is a self-help program for family members.

• **Gambling is illegal for kids.** Every state prohibits gambling by minors. That's why gambling sites don't pay out to kids and why they go to great lengths to verify the identity of any winner.

The FTC works for the consumer to prevent fraudulent, deceptive and unfair business practices in the marketplace and to provide information to help consumers spot, stop and avoid them. To file a complaint or to get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters Internet, telemarketing, identity theft and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

FEDERAL TRADE COMMISSION **For the Consumer**
1-877-FTC-Help **www.ftc.gov**

June 2002

ADDENDUM 7

1. SEC. 2004. TWENTY-FIRST AMENDMENT ENFORCEMENT.

(a) SHIPMENT OF INTOXICATING LIQUOR IN VIOLATION OF STATE LAW- The Act entitled `An Act divesting intoxicating liquors of their interstate character in certain cases', approved March 1, 1913 (commonly known as the `Webb-Kenyon Act') (27 U.S.C. 122) is amended by adding at the end the following:

2. `SEC. 2. INJUNCTIVE RELIEF IN FEDERAL DISTRICT COURT.

`(a) DEFINITIONS- In this section--

`(1) the term `attorney general' means the attorney general or other chief law enforcement officer of a State or the designee thereof;

`(2) the term `intoxicating liquor' means any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind;

`(3) the term `person' means any individual and any partnership, corporation, company, firm, society, association, joint stock company, trust, or other entity capable of holding a legal or beneficial interest in property, but does not include a State or agency thereof; and

`(4) the term `State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

`(b) ACTION BY STATE ATTORNEY GENERAL- If the attorney general has reasonable cause to believe that a person is engaged in, or has engaged in, any act that would constitute a violation of a State law regulating the importation or transportation of any intoxicating liquor, the attorney general may bring a civil action in accordance with this section for injunctive relief (including a preliminary or permanent injunction) against the person, as the attorney general determines to be necessary to--

`(1) restrain the person from engaging, or continuing to engage, in the violation; and

`(2) enforce compliance with the State law.

`(c) FEDERAL JURISDICTION-

`(1) IN GENERAL- The district courts of the United States shall have jurisdiction over any action brought under this section by an attorney general against any person, except one licensed or otherwise authorized to produce, sell, or store intoxicating liquor in such State.

`(2) VENUE- An action under this section may be brought only in accordance with section 1391 of title 28, United States Code, or in the district in which the recipient of the intoxicating liquor resides or is found.

`(3) FORM OF RELIEF- An action under this section is limited to actions seeking injunctive relief (a preliminary and/or permanent injunction).

`(4) NO RIGHT TO JURY TRIAL- An action under this section shall be tried before the court.

`(d) REQUIREMENTS FOR INJUNCTIONS AND ORDERS-

`(1) IN GENERAL- In any action brought under this section, upon a proper showing by the attorney general of the State, the court may issue a preliminary or

permanent injunction to restrain a violation of this section. A proper showing under this paragraph shall require that a State prove by a preponderance of the evidence that a violation of State law as described in subsection (b) has taken place or is taking place.

`(2) ADDITIONAL SHOWING FOR PRELIMINARY INJUNCTION- No preliminary injunction may be granted except upon--

`(A) evidence demonstrating the probability of irreparable injury if injunctive relief is not granted; and

`(B) evidence supporting the probability of success on the merits.

`(3) NOTICE- No preliminary or permanent injunction may be issued under paragraph (1) without notice to the adverse party and an opportunity for a hearing.

`(4) FORM AND SCOPE OF ORDER- Any preliminary or permanent injunction entered in an action brought under this section shall--

`(A) set forth the reasons for the issuance of the order;

`(B) be specific in terms;

`(C) describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and

`(D) be binding upon--

`(i) the parties to the action and the officers, agents, employees, and attorneys of those parties; and

`(ii) persons in active concert or participation with the parties to the action who receive actual notice of the order by personal service or otherwise.

`(5) ADMISSIBILITY OF EVIDENCE- In a hearing on an application for a permanent injunction, any evidence previously received on an application for a preliminary injunction in connection with the same civil action and that would otherwise be admissible, may be made a part of the record of the hearing on the permanent injunction.

`(e) RULES OF CONSTRUCTION- This section shall be construed only to extend the jurisdiction of Federal courts in connection with State law that is a valid exercise of power vested in the States--

`(1) under the twenty-first article of amendment to the Constitution of the United States as such article of amendment is interpreted by the Supreme Court of the United States including interpretations in conjunction with other provisions of the Constitution of the United States; and

`(2) under the first section herein as such section is interpreted by the Supreme Court of the United States; but shall not be construed to grant to States any additional power.

`(f) ADDITIONAL REMEDIES-

`(1) IN GENERAL- A remedy under this section is in addition to any other remedies provided by law.

`(2) STATE COURT PROCEEDINGS- Nothing in this section may be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any State law.

3. `SEC. 3. GENERAL PROVISIONS.

`(a) EFFECT ON INTERNET TAX FREEDOM ACT- Nothing in this section may be construed to modify or supersede the operation of the Internet Tax Freedom Act (47 U.S.C. 151 note).

`(b) INAPPLICABILITY TO SERVICE PROVIDERS- Nothing in this section may be construed to--

`(1) authorize any injunction against an interactive computer service (as defined in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)) used by another person to engage in any activity that is subject to this Act;

`(2) authorize any injunction against an electronic communication service (as defined in section 2510(15) of title 18, United States Code) used by another person to engage in any activity that is subject to this Act; or

`(3) authorize an injunction prohibiting the advertising or marketing of any intoxicating liquor by any person in any case in which such advertising or marketing is lawful in the jurisdiction from which the importation, transportation or other conduct to which this Act applies originates.'.

(b) EFFECTIVE DATE- This section and the amendments made by this section shall become effective 90 days after the date of the enactment of this Act.

(c) STUDY- The Attorney General shall carry out the study to determine the impact of this section and shall submit the results of such study not later than 180 days after the enactment of this Act.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.