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Trading Grapes: The Case for Direct Wine Shipments in Arizona

by Mark Brnovich, Director of the Center for Constitutional Government, Goldwater Institute

EXECUTIVE SUMMARY

Arizona law prohibits out-of-state wineries from shipping wine directly to Arizona consumers, with few exceptions. A vestige of Prohibition, Arizona statutes require out-of-state wineries to sell their products to licensed wholesalers (tier 1), who then sell to retailers (tier 2), who select which beverages will be available to consumers (tier 3). It is illegal for an out-of-state producer to bypass the wholesaler. This antiquated three-tiered distribution system grants undue power to wholesalers, drives up the price of wine by forcing the product through a middleman, and reduces choices available to consumers.

At the same time, Arizona law allows in-state wineries to sell and ship directly to consumers. Thus, in-state wineries can bypass the state's three-tiered distribution system. This protectionism cannot be reconciled with the principles of free trade and violates the Commerce Clause of the U.S. Constitution.

Since 2001, laws protecting similar three-tiered distribution schemes have been found unconstitutional in Michigan, North Carolina, Texas, Virginia, and New York. On October 7, 2003, the Institute for Justice filed a lawsuit in Federal District Court to challenge Arizona's system, charging that the system is unconstitutional because it prohibits out-of-state wineries from shipping directly to consumers while permitting in-state wineries to do so.

The Arizona legislature should quickly repeal the prohibition on direct shipment of out-of-state wine. With the court likely to strike down Arizona's prohibition, the repeal will allow the state to avoid costly and unnecessary litigation. But more important, eliminating the three-tiered distribution system will provide Arizona consumers with the benefits of a free market: more choice, greater convenience and lower prices.

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Introduction: Free Grapes and Free Trade

> *The interest of the dealers, however, in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the public. [T]o narrow the competition, is always in the interest of the dealers . . . but to narrow the competition must always be against [the interest of the public], and can serve only to enable the dealers, by raising their profits above what they naturally would be, to levy, for their own benefit, an absurd tax upon the rest of their fellow-citizens.*[1] –Adam Smith

Arizona is one of two dozen states that prohibit the direct shipment of out-of-state wine to consumers. Although the number of wineries and available wines has grown dramatically in the United States over the past 30 years, wholesalers continue to dictate the availability of out-of-state wines to Arizona consumers.

Arizona's three-tiered distribution system requires that out-of-state producers sell their products to licensed wholesalers (tier 1), who then sell to retailers (tier 2), who determine which beverages will be available to consumers (tier 3). Under Arizona law, it is illegal for an out-of-state producer to bypass the wholesaler.[2] In-state wineries, however, are not prohibited from selling and shipping directly to consumers.[3]

Last year, a legislative proposal to reform Arizona's three-tiered system failed. The original bill would have authorized out-of-state wineries to ship directly to Arizona consumers. But the final version of the bill authorized direct shipment of up to two cases only by consumers physically present at an out-of-state winery.[4] While it was a step in the right direction, the law fell far short of allowing the free movement of interstate commerce.

A 2003 Federal Trade Commission report concluded that such bans on direct interstate shipping represent the single largest barrier to expanded e-commerce in wine.[5] The report also found that consumers would reap significant benefits if they had the option of purchasing wines online from out-of-state sources.[6] The benefits include a much greater variety of wine, lower costs, and the convenience of home delivery.[7]

Although e-commerce sales have risen, traditional brick-and-mortar retailers and wholesalers oppose increased internet transactions.[8] In testimony concerning state impediments to e-commerce before the U.S. House of Representatives, Ted Cruz, director of the Federal Trade Commission Office of

Policy and Planning, stated that existing businesses may be using government authority to impede competition from new entrants.[9] Thus, American consumers are paying a minimum of $15 billion more for goods and services as a result of e-commerce prohibitions.[10]

The irony is that local wineries do not need economic protection to thrive. Arizona wineries have attracted wide interest and have received numerous awards.[11] Since its inception in September 2002, the website www.Arizonawines.com has received 1,000 new visitors per month.[12] However, Arizona's prohibition on direct shipment prevents residents of several states from ordering directly from Arizona wineries. Specifically, California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin are "reciprocity" states.

Reciprocity states prevent the shipment of wines from states that prohibit direct out-of-state shipments. Because Arizona law does not allow direct shipment by out-of-state wineries, reciprocity states will not allow consumers in their jurisdictions to directly purchase Arizona wines.[13] Thus, Arizona wines are suitable for service at a White House dinner,[14] but cannot be ordered via the internet by consumers in California or twelve other states.

Arizona's regulatory scheme not only inhibits free trade, but the U.S. Supreme Court has held that protecting in-state interests at the expense of out-of-state parties violates the Constitution.[15] Proponents of the current structure, however, assert that the Twenty-First Amendment provides protection for the current statutory scheme. Nonetheless, constitutional precedents do not support such a position.

A Brief History of the Twenty-First Amendment

Prior to the adoption of the Eighteenth Amendment, which prohibited the manufacture of liquor until its repeal in 1933, the U.S. Supreme Court held that the Constitution prevented state restrictions on importation of out-of-state alcoholic beverages. While states could prohibit the production and distribution of alcoholic beverages, the Supreme Court held that the Commerce Clause[16] prevented states from regulating the in-state sale of imported liquor that remained in original packaging.[17] That is, an alcoholic beverage shipped from one state to a consumer in another state was an "article of interstate commerce" and beyond the reach of state laws. Thus, the curious situation developed where the Commerce Clause curtailed state restrictions on liquor importation, but states had wide latitude in regulating domestic liquor production and consumption.[18]

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In response, the federal government passed two key pieces of legislation. The first was the Wilson Act of 1890. This

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legislation provided that liquor transported into a state was subject to the same laws and regulations as liquor produced within the state.[19] Second, Congress passed the Webb-Kenyon Act in 1913, which allowed state regulation of in-state liquor sales, including shipments directly to consumers.[20] These federal actions gave rise to a wide variety of state laws and regulations concerning the sale and distribution of alcoholic beverages.

The temperance movement, however, soon made state laws on the sale and transportation of alcoholic beverages irrelevant. On January 16, 1919, the Eighteenth Amendment to the U.S. Constitution was ratified. It brought about the era of Prohibition and criminalized the sale, manufacture, and transportation of intoxicating liquors. Prohibition's failures quickly became evident, and in 1933 the country ended its unsuccessful experiment by passing the Twenty-First Amendment.[21]

The Twenty-First Amendment explicitly repealed the Eighteenth Amendment. However, Section 2 of the Amendment permitted states to continue regulating liquor within their borders:

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

Although the Twenty-First Amendment ended all federal restrictions on the sale, manufacture and transportation of liquor, individual state laws and regulations were not overturned. Thus, states maintained their power to regulate. With the repeal of the Eighteenth Amendment, states were once again responsible for controlling alcoholic beverage sales within their respective jurisdictions.[22] Arguably, the Twenty-First Amendment was designed to remedy the situation that had developed before Prohibition, whereby residents of "dry" states could have alcohol directly shipped across state lines for personal consumption.[23]

The state laws and regulations enacted in the wake of the Twenty-First Amendment took many forms. In some jurisdictions, the prohibition on alcoholic beverages remained. Thus, there are still "dry" jurisdictions in the United States.[24] Other jurisdictions developed a three-tiered system for the distribution of wine and other intoxicating liquors.[25]

The U.S. Supreme Court initially determined that through the use of its police power, a state has broad discretion in matters related to alcoholic beverages.[26] In one of the first significant cases to reach the U.S. Supreme Court, Kentucky's "comprehensive measure" for the control of production and distribution of alcoholic beverages was upheld.[27] The Supreme Court determined that Kentucky's restrictions were not unreasonable because they achieved the policy goal of limiting trafficking in order to minimize the "well-known evils" of liquor.[28]

In another case, the Supreme Court upheld a California statute that distinguished between domestic beer wholesalers and imported beer wholesalers, and required imported beer wholesalers to pay an additional license fee.[29] The Court also validated a Michigan statute that prohibited dealers from selling beer manufactured in states with laws discriminating against Michigan beer.[30] Thus, the initial jurisprudence concerning the Twenty-First Amendment held that states had wide latitude in regulating alcoholic beverages.

However, the trend toward unfettered state discretion over alcoholic beverages began to change in 1964. That year, the Supreme Court held in *Hostetter v. Idlewild Bon Voyage Liquor Corp.* that the Twenty-First Amendment did not repeal the Commerce Clause of the U.S. Constitution.[31] In striking down New York's restrictions on the sale of liquor to departing international travelers, the Court noted that although the Twenty-First Amendment gave states broad authority over alcoholic beverages, that authority must be considered in light of the Commerce Clause.[32]

The Commerce Clause

The U.S. Constitution grants Congress the power to "regulate commerce with foreign Nations and among the several States and with the Indian Tribes."[33] James Madison explained that such a provision is necessary to ensure that states do not impose levies on imports and exports passing through their jurisdictions.[34] In other words, the Commerce Clause is intended to avoid the tendency toward economic Balkanization.[35] It does this by keeping commercial intercourse among the states free from "invidious and partial restraints."[36]

In addition to conferring affirmative authority upon Congress, the Commerce Clause also provides an implied limitation on state regulation affecting interstate commerce. Early on, the Supreme Court recognized the notion of a "dormant" Commerce Clause.[37] The dormant Commerce Clause prevents differential treatment of in-state and out-of-state interests.[38] Thus, any state law that benefits in-state economic interests at the expense of an out-of-state interest is prohibited.[39] The Supreme Court has held that the fundamental purpose of the dormant Commerce Clause is to eliminate economic protectionism by preventing states from providing advantages to its residents at the expense of non-residents in matters of interstate commerce.[40]

The Supreme Court has developed a two-pronged test to determine whether a state statute violates the dormant Commerce Clause. First, the court will examine the impact a statute has on out-of-state economic interests. Second, the court will scrutinize the statute to determine whether it meets

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constitutional muster. The level of scrutiny the court applies depends on whether the statute "regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce."[41]

Under the first prong of analysis, if the statute in question is shown to either directly affect interstate commerce or discriminate against out-of-state interests, courts will apply a "strict scrutiny" standard.[42] Any law that provides for the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" is presumptively discriminatory.[43] In such situations, courts generally have struck down the statute without further inquiry.[44]

Discriminatory statutes can be "saved" only when a state can meet the almost insurmountable burden of proving the "discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[45] That is, a state must demonstrate that discrimination is the only means available to advance a legitimate and compelling local interest.[46]

Even if the subject statute is non-discriminatory on its face, it may still be invalid. Under the second prong of the analysis, for even-handed statutes that impose only indirect burdens on commerce, the court will apply a balancing test. Through the balancing test, the court will determine "whether the burden on interstate commerce clearly exceeds the local benefits."[47] The analysis will consider the local interest and whether it could be advanced with a lesser impact on interstate commerce.[48]

Application of the Twenty-First Amendment to the Commerce Clause

As equal components of the U.S. Constitution, the Twenty-First Amendment and the Commerce Clause should be read and interpreted in light of each other. As the Court noted in the *Hostetter* case, the Twenty-First Amendment did not "repeal" the Commerce Clause's relevance to state regulation of intoxicating liquors.[49] Clearly, if the commodity at issue were grain or lumber, rather than liquor, there would be no dispute that regulations imposed by states are unconstitutional.[50] For example, state laws limiting the length of trucks on roadways,[51] the importation of waste,[52] and the transportation of fish[53] have all been invalidated as impeding the free flow of commerce between the states.

In one of the most important cases decided after *Hostetter,* the Supreme Court was confronted with the issue of a Hawaii tax exemption for locally produced alcoholic beverages.[54] In striking down that statute, the Supreme Court determined that Hawaii's tax exemption expressly reflected a discriminatory intent and was thus incapable of withstanding strict scrutiny review.[55] The Supreme Court also expressed that whatever the scope of the Twenty-First Amendment, its purpose was not to allow states to favor local liquor industries by erecting competitive barriers.[56]

The Supreme Court has also recognized that temperance or other core concerns may be used to justify a state statute that interferes with interstate commerce.[57] This test, normally referred to as the "core concerns" analysis, examines state liquor statutes in light of recognized concerns such as temperance, prevention of monopolies[58] and the collection of state taxes.[59] The existence of core concerns, however, does not eliminate the burden a state has in establishing that its discriminatory laws are the only means available to advance or protect those core concerns.

A state may assert that its statutory mechanism is permissible because "the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-First Amendment that the regulation may prevail."[60] Such a burden is difficult to overcome. In the past two years, laws protecting three-tiered distribution systems and statutes prohibiting direct shipments from out-of-state wineries while allowing it for in-state wineries have been found unconstitutional in Michigan, North Carolina, Texas, Virginia, and New York.[61]

Arizona Liquor Statutes and the Commerce Clause

Arizona statutes governing the distribution of wine are similar to statutes that other jurisdictions have recently invalidated. For example, A.R.S. § 4-203.04 prohibits the direct shipment of out-of-state wine to an Arizona resident.[62] However, Arizona does not prohibit Arizona residents from having wine shipped directly from an in-state winery to their residences.[63]

In another clear example of discrimination, out-of-state wineries and breweries are not authorized to bypass the three-tiered system and sell directly to Arizona consumers.[64] On the other hand, Arizona domestic wineries and microbreweries may obtain a license for the direct retail sale of their products.[65] This includes on-premise sales, as well as direct retail sales at "wine festivals."[66]

In short, under Arizona's statutory scheme, in-state wineries may act as "retailers" exempt from the three-tiered system, while out-of-state producers may not.[67] The scheme further discriminates by allowing "domestic" wineries to sell their products directly to consumers up to 75 days per calendar year.[68] Once again, this ability to avoid the three-tiered system is not available to out-of-state wineries.

Because Arizona's distribution

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system is discriminatory on its face, courts should apply a strict scrutiny standard when determining whether those statutes offend the Commerce Clause. Only narrowly tailored statutes that directly address legitimate state core concerns will be upheld.[69] Arizona's statutes do not address the core concerns of temperance, prevention of consumption by minors, orderly market conditions and tax collection.

Because Arizona's distribution system is discriminatory on its face, courts should apply a strict scrutiny standard when determining whether those statutes offend the Commerce Clause.

There are no records to suggest that temperance is even a concern or issue in Arizona.[70] Current Arizona statutes don't include safeguards to prevent minors from placing internet orders from Arizona wineries.

Reasonable measures can be added to Arizona statutes to address core concerns and ensure alcoholic beverages are not delivered to minors. For example, other jurisdictions have implemented safeguards requiring the purchaser to provide a driver's license number and credit card at the time of purchase. Some require the shipping agent to obtain proof upon delivery that the recipient is at least 21 years of age.[71] Additionally, a recent Federal Trade Commission report concluded that states with direct shipping have experienced few or no problems with shipments to minors.[72]

Another recognized core concern that would potentially justify discrimination is the pursuit of "orderly market conditions." After the repeal of Prohibition, there was concern that organized crime would continue to control the distribution of alcoholic beverages.[73] Thus, many states adopted a three-tiered system to ensure "orderly market conditions."

Such concerns are of little relevance today and the phrase is now a euphemism for "wholesaler protection." The three-tiered system has created an environment where fewer and fewer wholesalers control more and more product.[74] For instance, one Arizona wholesaler, Southern Wine & Spirits, has benefited from the continuing consolidation. Its eight-state operation brings in over $2 billion in annual revenue and Southern controls approximately 11 percent of all domestic wine and liquor consumption.[75] Not surprisingly, wholesalers have been the leading opponents of any change to the three-tiered distribution system.[76]

The last core concern a state may invoke to justify curtailing direct shipment of wine by out-of-state producers is that shipment across state lines may impair revenue or tax collection. But revenue generation alone is not a local interest that can justify discrimination against interstate commerce.[77] The basis for such a concern is mostly speculative. For instance, if Arizona can collect taxes on shipments from in-state wineries, there is no reason why it cannot collect taxes on shipments from out-of-state wineries. For tax purposes, alcoholic beverages can be treated the same way as any other catalog, telephone, or internet purchase. If the state can collect taxes on shipments of clothes or furniture from out-of-state, there is no reason why it cannot do the same with wine.[78]

Proposed Change

Unlike many other consumer goods, wines are distinguished by color, region, the soil used to grow the grapes, and the barrels in which they are stored and aged. Accordingly, each bottle of wine is truly distinct. Given the wide variety available, as well as recent studies suggesting the health benefits of wine,[79] it should not be surprising that Americans are drinking more wine than ever before.[80]

Recently, advocates for the free flow of commerce between states have achieved significant victories.[81] A challenge to the Arizona distribution system on grounds that it violates the U.S. Constitution is already in motion.[82] Given the state's ongoing budget difficulties, it is clear that defending a law of suspect constitutionality is a waste of resources. Also, judicial decisions frequently leave matters unresolved. For example, in declaring a North Carolina shipping statute unconstitutional, the Fourth Circuit remedied the situation by prohibiting all direct shipments, including those by in-state wineries.[83] Although such a result leveled the commercial playing field, in-state wineries suffered from the elimination of their ability to ship directly to consumers.

In addition, Arizona's parochial liquor distribution statutes do not advance the best interests of Arizona consumers, who desire to purchase a wider variety of beverages at lower prices.[84] Finally, eliminating the prohibition on the direct shipment of wine will provide Arizona wineries with greater opportunities to sell and ship their wines out-of-state.[85]

In 2003, the Arizona Legislature amended the liquor statutes contained in Title 4 of the Arizona Revised Statues. However, no meaningful changes were achieved. Instead, the legislature authorized the shipment of up to two cases of wine, per person, per year.[86] The change did nothing to facilitate the direct shipment of wine from out-of-state producers. The law still requires a purchaser to be physically present at an out-of-state winery in order to ship wines and does not eliminate the unfair advantage enjoyed by locally produced wines. Moreover, the 2003 amendment has given individual consumers little relief. Because of the uncertainty of state statutes, major shippers such as UPS and Federal Express will not ship out-of-state wines to Arizona.[87]

Several jurisdictions, however, have recently enacted legislation that could serve as a model for Arizona. In Virginia, South Carolina, and New Hampshire, legislatures have passed laws consistent with the Commerce Clause.[88] Such legislation allows direct shipment of wine to adult consumers. Examples of these statutes are included in Appendixes A and B.

Given the state's ongoing budget difficulties, it is clear that defending a law of suspect constitutionality is a waste of resources.

Conclusion

Arizona's prohibition on direct shipment of out-of-state wines leaves consumers with fewer choices. The system also hurts local wineries by limiting their ability to ship to numerous jurisdictions. Large wholesalers, who benefit most from the three-tiered distribution system, continue to oppose any changes.

Enacting direct shipment legislation will benefit consumers by providing a wider selection of wines at lower prices. It will also serve as a good starting point to address other anticompetitive state statutes.

Because Arizona's liquor laws unnecessarily discriminate against out-of-state producers, they are likely to be struck down in federal court. Even so, the Arizona Legislature has an obligation to change state wine shipping laws, saving state resources that otherwise would be squandered defending a frivolous position, and demonstrating the Legislature's willingness to benefit Arizona consumers.

Arizona consumers and wineries will continue to suffer if the current three-tiered distribution system is not changed. As a recent Federal Trade Commission report indicates, enacting direct shipment legislation will benefit consumers by providing a wider selection of wines at lower prices. It will also serve as a good starting point to address other anticompetitive state statutes and put Arizona on the road to being a national leader in e-commerce trade.

APPENDIX A – Virginia Direct Shipping Statute

§ 4.1-112.1. Direct shipments of beer and wine authorized; regulations of the Board

A. Holders of wine shippers' licenses and beer shippers' licenses issued pursuant to this section may sell and ship not more than two cases of wine per month nor more than two cases of beer per month to any person in Virginia to whom alcoholic beverages may be lawfully sold. All such sales and shipments must be for personal consumption only and not for resale. A case of wine shall mean any combination of packages containing not more than nine liters of wine. A case of beer shall mean any combination of packages containing not more than 288 ounces of beer. Any winery or farm winery located within or outside the Commonwealth may apply to the Board for issuance of a wine shipper's license that shall authorize the shipment of brands of wine and farm wine identified in such application. Any brewery located within or outside the Commonwealth may apply to the Board for issuance of a beer shipper's license that shall authorize the shipment of brands of beer identified in such application. Any person located within or outside the Commonwealth who is authorized to sell wine or beer at retail in their state of domicile and who is not a winery, farm winery, or brewery may nevertheless apply for a wine or beer shipper's license, or both, if such person satisfies the requirements of subsection B. Any brewery, winery or farm winery that applies for a shipper's license or authorizes any other person, other than a retail off-premises licensee, to apply for a license to ship such brewery's, winery's or farm winery's brands of wine or beer shall notify any wholesale licensees that have been authorized to distribute such brands that an application has been filed for a shipper's license. The notice shall be in writing and in a form prescribed by the Board. The Board may adopt such regulations as it reasonably deems necessary to implement the provisions of this section, including regulations that permit the holder of a shipper's license to amend the same by, among other things, adding or deleting any brands of wine, farm wine, or beer identified in such shipper's license.

B. Any applicant for a wine or beer shipper's license that does not own or have the right to control the distribution of the brands of wine, farm wine, or beer identified in such person's application may be issued a shipper's license for wine or beer or both, if the applicant has obtained and filed with its application for a shipper's license, and with any subsequent application for renewal thereof, the written consent of the winery, farm winery, or brewery whose brands of wine, farm wine, or beer are identified therein. Any retail off-premises licensee that purchases wine or beer from anyone authorized to sell wine or beer at wholesale for resale in Virginia shall be presumed to have the authorization of such winery, farm winery, or brewery to ship its brands. Any winery, farm winery, or brewery that has provided written authorization to a shipper licensed pursuant to this section to sell and ship its brand or brands of wine, farm wine, or beer shall not be restricted by any provision of this section from withdrawing such authorization at any time. If such authorization is withdrawn, the winery, farm winery, or brewery shall promptly notify such shipper licensee and the Board in writing of its decision to withdraw from such shipper licensee the authority to sell and ship any of its brands, whereupon such shipper licensee shall promptly file with the Board an amendment to its license eliminating any such withdrawn brand or brands from the shipper's license.

C. The direct shipment of beer and wine by holders of licenses issued pursuant to this section shall be by approved common carrier only. The Board shall develop regulations pursuant to which common carriers may apply for approval to provide common carriage of wine or beer, or both, shipped by holders of licenses issued pursuant to this section. Such regulations shall include provisions that require (i) the recipient to demonstrate, upon delivery, that he is at least 21 years of age; (ii) the recipient to sign an electronic or paper form or other acknowledgement of receipt as approved by the Board; and (iii) the Board-approved common carrier to submit to the Board such information as the Board may prescribe. The Board-approved common carrier shall refuse delivery when the proposed recipient appears to be under the age of 21 years and refuses to present valid identification. All licensees shipping wine or beer pursuant to this section shall affix a conspicuous notice in 16-point type or larger to the outside of each package of wine or beer shipped within or into the Commonwealth, in a conspicuous location stating: "CONTAINS ALCOHOLIC BEVERAGES; SIGNATURE OF PERSON AGED 21 YEARS OR OLDER REQUIRED FOR DELIVERY." Any delivery of alcoholic beverages to a minor by a common carrier shall constitute a violation by the common carrier. The common carrier and the shipper licensee shall be liable only for their independent acts.

APPENDIX B – New Hampshire Direct Shipping Statute

§ 178:14-a Direct Shippers.

I. Notwithstanding any law, rule or regulation to the contrary, any person currently licensed in its state of domicile as an alcohol beverage manufacturer, importer, wholesaler or retailer shall apply for a registration permit from the liquor commission as a direct shipper for a fee of $228 per year.

II. A direct shipper may ship directly to New Hampshire consumers over 21 years of age or licensees in packages clearly marked “Alcoholic Beverages, adult signature (over 21 years of age) required.” All shipments from direct shippers into the state shall be made by a licensed carrier and such carriers are required to obtain an adult signature. Direct shippers or carriers shall not ship into areas of the state where alcohol beverages may not be lawfully sold. Liquor and wine that has been registered for sale to the commission with the commission during the previous 2 months may be direct shipped only if the shipper offers to sell a matching amount to the commission at wholesale. Shipments of any other products shall be considered unlicensed shipments under the provisions of RSA 178:1, I.

III. No direct shipper shall ship more than 60 individual containers of not more than one liter each of liquor and wine to any one licensee in New Hampshire or to any consumer or consumer’s address in New Hampshire in any calendar year. Furthermore, in the event any manufacturer or wholesaler direct shipper wishes to ship more than a total of 1,200 individual containers of not more than one liter each of any particular liquor or wine directly to any combination of licensees and/or consumers in New Hampshire, the shipper shall offer to sell a matching amount to the commission or beer distributor at wholesale prices.

IV. No direct shipper shall ship more than 27 gallons of beer or beverage in individual containers of not more than one liter to any consumer’s address in New Hampshire in any calendar year. No direct shipper shall ship beer or beverage to a New Hampshire licensee.

V. Direct shippers shall file invoices for each shipment with the liquor commission showing the retail price of the product, and shall pay a fee of 8 percent of the retail price for shipments of liquor, wine, beer, or beverage to the commission. Such filings shall be monthly, and arrive at the commission no later than the tenth of the month following shipment. Direct shippers shall maintain records for at least 3 years which will permit the commission to ascertain the truthfulness of the information filed and permit the commission to perform an audit of the direct shippers’ filings upon reasonable request. Wholesale shipments of any liquor or wine shall be permitted only in accordance with RSA 175:6.

VI. The liquor commission shall adopt rules, pursuant to RSA 541-A, relative to:
(a) The application procedures and form for the direct shipper registration permit authorized under paragraph I.
(b) The signature form or other identification procedures to be used by direct shippers to ensure that consumers to which liquor and beverage are being shipped are over 21 years of age.
(c) Filings of direct shippers under paragraph V.

VII. Notwithstanding the provisions of RSA 179:58, any person holding a direct shippers permit under this section who ships liquor, wine, or beer to a person under 21 years of age, shall be guilty of a class B felony and shall have such permit permanently revoked.

VIII. Upon notification by authorities in another state which imposes a reciprocal enforcement policy, a New Hampshire licensee proved to be making illegal direct shipments to consumers and licensees in said state shall be subject to action by the liquor commission. Such actions may include fines and suspension and revocation of New Hampshire liquor licenses presumed to have the authorization of such winery, farm winery, or brewery to ship its brands. Any winery, farm winery, or brewery that has provided written authorization to a shipper licensed pursuant to this section to sell and ship its brand or brands of wine, farm wine, or beer shall not be restricted by any provision of this section from withdrawing such authorization at any time. If such authorization is withdrawn, the winery, farm winery, or brewery shall promptly notify such shipper licensee and the Board in writing of its decision to withdraw from such shipper licensee the authority to sell and ship any of its brands, whereupon such shipper licensee shall promptly file with the Board an amendment to its license eliminating any such withdrawn brand or brands from the shipper's license.

NOTES

1. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations,* ed. C. J. Bullock, vol. 10, *The Harvard Classics* (New York, P.F. Collier & Son, 1909-14), www.bartleby .com/10/.

2. *Ariz. Rev. Stat.* § 4-243.01. See also *Ariz. Rev. Stat.* § 4-244; and 19 *Ariz. Admin. Code* (A.C.C.) R1-202 - 1-204.

3. *Ariz. Rev. Stat.* § 4-205.04; *Ariz. Rev. Stat.* § 4-203.04.

4. *Ariz. Rev. Stat.* § 4-203.04. The original proposal was SB 1316, 46th Legislature, 1st Reg. Sess.

5. U.S. Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine,* July 3, 2003.

6. Ibid.

7. Ibid.

8. U.S. Department of Commerce News, 2nd Quarter 2002 release, Aug. 22, 2002. E-commerce sales increased almost ten times greater than retail sales over a comparable quarter.

9. Ted Cruz, director, Office of Policy Planning of the Federal Trade Commission, Testimony before the Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce, 107th Cong., September 22, 2002.

10. Robert D. Atkinson, "Revenge of the Disintermediated: How the Middleman is Fighting E-Commerce and Hurting Consumers," Progressive Policy Institute, January 26, 2001. See also Brian Sullivan, "FTC says states' e-commerce laws hurt consumers," *ComputerWorld,* July 18, 2002.

11. See http://www.Arizonawines.com for an extensive list of awards received by Arizona wines.

12. Ibid.

13. See Wine Institute website, http://www.wineinstitute.org.

14. On February 24, 2002, Dos Cabezas' Pinot Gris was served at a formal White House dinner. See http://www.agriculture.state.az.us for further details.

15. *Oregon Waste Systems v. Department of Environmental Quality,* 511 U.S. 93, 99 (1994).

16. U.S. Const. art. 1, § 8.

17. *Leisy v. Hardin,* 135 U.S. 100 (1890). See also *Bowman v. Chicago & N.W. Ry. Co.,* 125 U.S. 465 (1888), where the Supreme Court held that requiring license of anyone seeking to import alcohol impermissibly regulated commerce and was unconstitutional.

18. *Mugler v. Kansas,* 123 U.S. 623 (1887).

19. 26 Stat. 313 (1890), currently

codified at 27 U.S.C. § 121 (1994). The constitutionality of the Wilson Act was upheld in *Scott v. Donald,* 165 U.S. 58, (1897).

20. 37 Stat. 699 (1913), currently codified at 27 U.S.C. § 122 (1994). The Supreme Court upheld the constitutionality of the Webb-Kenyon Act in *James Clark Distilling Co. v. Western Maryland Ry. Co.,* 242 U.S. 311 (1917).

21. Mark Thorton, *The Economics of Prohibition,* (University of Utah Press, 1991).

22. For analysis of the history of the Twenty-First Amendment, see Duncan Baird Douglass, "Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages," 49 *Duke Law Journal* 1619 (April 2000).

23. SJR 211, 72nd Cong., 2d sess., *Cong. Rec. 76*, 4143 (1933). Senator Blaine, the Senate sponsor of the amendment resolution, stated that the amendment was designed to ensure that "dry" states would remain so and that the federal government could not force states to permit the sale of liquor.

24. For example, counties in Tennessee and several other states prohibit the sale of alcoholic beverages.

25. U.S. Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine,* July 3, 2003, p. 5. *Ariz. Rev. Stat.* § 4-201, et seq. provide for such a system in Arizona.

26. *State Board of Equalization of California v. Young's Market,* 299 U.S. 59, 63 (1936).

27. *Ziffren, Inc. v. Reeves,* 308 U.S. 132 (1939).

28. Ibid., 139.

29. *Young's Market,* 299 U.S., 59. Here the Court held that the Twenty-First Amendment is not limited by the Commerce Clause and a state may regulate the importation of intoxicating liquor.

30. *Indianapolis Brewing Co. v. Liquor Control Commission of Michigan,* 305 U.S. 391 (1939).

31. *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964).

32. Ibid., 331-32.

33. U.S. Const., art. 1 § 8.

34. James Madison, *The Federalist Papers,* No. 42.

35. *Hughes v. Oklahoma,* 441 U.S. 322, 325 (1975).

36. See *Gibbons v. Ogden,* 22 U.S. 1, 231 (1824), where Chief Justice Marshall wrote, "[if] there was any one object riding over every other in the adoption of the constitution, it was to

keep the commercial intercourse among the States free from all invidious and partial restraints."

37. In *Wilson v. Black Bird Creek Marsh,* 27 U.S. 245 (1829), the Court upheld a state statute authorizing the construction of a dam across a navigable waterway. The Court nonetheless recognized that a state law may be invalid if it is "repugnant to the power to regulate commerce in its dormant state." See also *Gibbons,* which the Supreme Court decided five years earlier. In *Gibbons,* the Court implied that states were precluded from regulating activities that the Constitution granted power to Congress to regulate.

38. *Dennis v. Higgins,* 498 U.S. 439, 447 (1991). See also *Wyoming v. Oklahoma,* 502 U.S. 437, 454 (1992), where Justice White wrote in the majority opinion, "the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce."

39. *Oregon Waste Systems v. Department of Enviromental Quality,* 511 U.S. 93, 99 (1994). See also, *South-Central Timber Dev. v. Wunnicke,* 467 U.S. 82, 87 (1984), where the Court held, "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."

40. *General Motors v. Tracy,* 519 U.S. 278, 299 (1997).

41. *Oregon Waste Systems,* 511 U.S., 93.

42. The state has the burden to justify the statute both in terms of benefits to the state and the unavailability of nondiscriminatory alternatives. *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 353 (1977). See also, *Waste Mgmt. Holdings v. Gilmore,* 252 F.3d 316, 333 (4th Cir. 2001). In order for a law to survive such scrutiny, the state must prove that the discriminatory law is demonstrably justified by a valid factor unrelated to economic protectionism, and that there are no nondiscriminatory alternatives adequate to preserve the local interests at stake.

43. *Oregon Waste Systems,* 511 U.S., 99.

44. *Brown-Forman Distillers v. N.Y. State Liquor Authority,* 476 U.S. 573, 579 (1986). In *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970), the Supreme Court held that a discriminatory restriction on commerce is "virtually per se invalid."

45. *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 274 (1988).

46. *C & A Carbone, Inc. v. Town of Clarkstone, New York,* 511 U.S. 383, 392 (1994).

47. *Brown-Foreman Distillers,* 476

U.S., 579.

48. *Pike,* 397 U.S., 142.

49. In *Hostetter,* 377 U.S., 331-32, the court held that such a result "would be patently bizarre and is demonstrably incorrect."

50. *Hostetter,* 377 U.S., 329.

51. *Raymond Motor Transp. v. Rice,* 434 U.S. 429 (1978).

52. *Philadelphia v. New Jersey,* 437 U.S. 617, 620 (1978).

53. *Hughes v. Oklahoma,* 441 U.S. 322 (1979).

54. See *Brown-Forman Distillers,* 476 U.S., 584, citing *Bacchus Imports v. Diaz,* 468 U.S. 263 (1984), for the proposition that state regulation of alcohol is reviewable under the Commerce Clause.

55. *Bacchus Imports,* 468 U.S., 273.

56. Ibid., 276.

57. Ibid.

58. *Healy v. Beer Institute,* 491 U.S. 324, 342-43 (1989).

59. In *North Dakota v. United States,* 495 U.S. 423, 432 (1990), the Court found the core concerns of the Twenty-First Amendment are "promoting temperance, ensuring orderly market conditions, and raising revenue."

60. *Capital Cities Cable v. Crisp,* 467 U.S. 691, 714 (1984).

61. See *Heald v. Engler,* 342 F.3d 517 (6th Cir. 2003). The Sixth Circuit held that Michigan's three-tiered statutory and regulatory scheme governing the distribution of alcohol violated the dormant Commerce Clause and there was no showing that the scheme's discrimination furthered a legitimate state interest under the Twenty-First Amendment that could not adequately be served by reasonable nondiscriminatory alternatives. In *Beskind v. Easley,* 325 F.3d 506 (4th Cir. 2003), the Fourth Circuit affirmed a lower court ruling that North Carolina's statutory scheme discriminated between in-state and out-of-state wineries, violated the Commerce Clause, and was not "saved" by the Twenty-First Amendment. Additionally, in *Bainbridge v. Turner,* 311 F.3d 1104, 1115 (11th Cir. 2002), the Eleventh Circuit found that Florida's alcohol distribution statutes' differentiation between in-state and out-of-state wineries facially discriminated against interstate commerce and remanded for further fact-finding on whether Florida's statutory scheme is "necessary to effectuate the . . . core concern [of revenue raising] in a way that justifies treating out-of-state firms differently from in-state firms." Further, in *Dickerson v. Bailey,* 212 F.Supp.2d 673, 695 (S.D.Tex. 2002), the District Court found that Texas's ban on direct shipment by out-of-state wineries violated the dormant Commerce Clause and that the state had "fail[ed] to demonstrate how a statutory exception

for local wineries from Texas' three-tier regulatory system . . . was justified by any of the traditional core concerns of the twenty-first amendment" or to show "that the core interests of taxation and orderly market conditions . . . could not be effected by alternative, nondiscriminatory options for these out-of-state wineries," affirmed by the Circuit Court of Appeals in *Dickerson v. Bailey,* 336 F.3d 388 (5th Cir. 2003). The District Court in *Bolick v. Roberts,* 199 F.Supp.2d 397, 409 (E.D.Va. 2002), adopted the magistrate judge's findings that Virginia's ABC laws violated the dormant Commerce Clause and that the state had failed to produce "any meaningful evidence" showing that the state cannot "accomplish its legitimate interests without discriminating against out-of-state direct shippers of wine," vacated by *Bolick v. Danielson,* 330 F.3d 274 (4th Cir. 2003), remanding for reconsideration in light of intervening change in applicable statutes. In *Mt. Hood Beverage Co. v. Constellation Brands,* 63 P.3d 779 (Wash. 2003), the Washington State Supreme Court determined that state's three-tiered system was facially discriminatory and was in violation of the Commerce Clause. In *Swedenburg v. Kelly,* 232 F.Supp.2d 135 (S.D.N.Y. 2002), the Court found that New York's ban on direct shipment of out-of-state wine was unconstitutional.

62. *Ariz. Rev. Stat.* § 4-203.04 sets forth a process through which a resident of Arizona may place an order in person, by telephone, mail or catalog or on the internet for spirituous liquor for the person's own personal use; the resident must order from a person who holds a direct shipment license. The statute, however, requires the spirituous liquor be sent to a wholesaler before it can be received by the purchaser. See also *Ariz. Rev. Stat.* § 4-203.04 (H), which provides: "The licensed retailer shall deliver the spirituous liquor or shall arrange for the delivery of the spirituous liquor to the person who placed the order and shall collect and pay to the department of revenue all transaction privilege taxes imposed pursuant to title 42, chapter 5."

63. *Ariz. Rev. Stat.* § 4-205.04 (C). Additionally, in a letter to Clint Bolick of the Institute for Justice, Director Leesa Berens Morrison confirmed that Arizona statutes prohibit the direct shipping of wine purchases via catalog, telephone or internet from out-of-state wineries. Such purchases and shipments, however, are not prohibited for in-state wineries.

64. *Ariz. Rev. Stat.* § 4-205.04.

65. *Ariz. Rev. Stat.* § 4-205.04 (D) defines, in part, a domestic winery as producing not less than two hundred gallons and not more than seventy-five thousand gallons of wine annually from *grapes or other suitable agricultural products of which at least seventy-five per cent are grown in this state* (emphasis added).

66. *Ariz. Rev. Stat.* § 4-203.03 (A) provides in relevant part, "The director . . . may issue up to twenty-five

wine festival licenses for each calendar year for each licensed domestic farm winery, for up to a total of seventy-five calendar days per winery, authorizing sampling of domestic farm winery products on the wine festival premises, the sale of such products for consumption on the wine festival premises and the sale of such products in original containers for consumption off the wine festival premises."

67. *Ariz. Rev. Stat.* § 4-205.04 (C).

68. *Ariz. Rev. Stat.* § 4-203.03.

69. See generally, *Capital Cities Cable v. Crisp;* and *Bacchus Imports v. Diaz.* See also *West Lynn Creamery v. Healy,* 512 U.S. 186 (1994), stating that "Preservation of local industry by protecting it from rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits."

70. On September 19, 2003, the Arizona Department of Liquor responded to a Goldwater Institute public records request by stating that "The Department of Liquor Licenses and Control does not maintain records of citations or prosecutions concerning the importation of liquor into the state by minors. We have no historical record available on this subject matter."

71. *Va. Code Ann.* § 4.1-112.1. Virginia law is similar to laws in other jurisdictions (e.g., *Ga. Code Ann.* § 3-6-31, *La. Rev. Stat. Ann.* § 26:359), and demonstrates that reasonable methods exist to address the potential for minors to receive shipped wine.

72. U.S. Federal Trade Commission, *Possible Anticompetitive Barriers,* p. 5. According to the report, states allowing the direct sale and shipment of wine have not experienced any significant problems with underage consumption.

73. *Dickerson v. Bailey,* 212 F.Supp.2d 673, 679-80 (S.D.Tex. 2002).

74. The number of "wholesalers" of alcoholic beverages has decreased by over 75 percent over the past 30 years. At the same time, the number of wineries has increased over 500 percent. Thus, less than 17 percent of wineries are represented by distributors in all 50 states. http://www.freethegrapes.org.

75. See "Vintage System: Big Liquor Wholesaler Finds Change Stalking its Very Private World," *Wall Street Journal,* April 4, 1999.

76. See, "A Vintage Ruling," *Wall Street Journal,* Apr. 5, 2002, p. A8,. See also "A Bill to Allow Direct Shipment of Out-of-State Wines Received Heavy Opposition from Lobbyists for Wine Distributors and Retailers," *East Valley Tribune,* Sept. 17, 2003.

77. *C&A Carbone v. Town of Clarkstown,* 511 U.S. 383 (1984).

78. Arizona could condition a direct shipping permit upon the collection of taxes. Several states have enacted similar legislation to ensure out-of-state

wineries pay taxes on shipments to in-state consumers; *La. Rev. Stat. Ann.* §26:359(B); *N.H. Rev. Stat. Ann.* § 178:14a (V); *Nev. Rev. Stat. Ann.* § 369.462.

79. Peter Jaret, medically reviewed by Gary D. Vogin, MD, "Bottoms Up: To Your Health," WebMD Feature Archive 2001, cites numerous studies that report the health benefits of wine, including: *Annals of Internal Medicine,* September 2000, reporting that light drinkers of wine cut risks of dying prematurely by one year; the *European Heart Journal,* January 2000, found that drinking wine appears to dilate arteries and increase blood flow, reducing the risk of heart problems; scientists published in the journal *Pharmacology, Biochemistry, and Behavior,* May 2000, found that men and women around the age of 32 who had a glass or two of wine each day had significantly higher levels of "good" cholesterol because they remove the "bad" artery-clogging cholesterol before they can choke blood vessels; the *Journal of Nutrition and Biochemistry,* November 2000, reported similar findings, and found that the reduction of artery-clogging cholesterol reduced the likelihood of cardiovascular disease, such as heart disease and stroke; the *Journal of Cellular Biochemistry,* June 2000, reported that drinking wine in moderation may slow the growth of breast and prostate cancer cells; *Oncology Reports,* July-August 2000, similarly found that wine consumption can slow down the growth of liver cancer cells; additionally, the *Journal of the American Dental Association,* June 2000, found that wine consumption may inhibit the growth of oral cancer cells; a report in the *American Journal of Epidemiology,* April 2000, showed that women who drank one to three glasses of wine had greater bone mineral density; similarly, *Osteoporosis International,* November 2000, found that men, age 54-63, who drank a glass or two of wine a day also showed signs of greater bone mineral density.

80. Wine Institute, http://www.wineinstitute.org. *Industry Background and Statistics,* Sept. 29, 2003.

81. *Heald v. Engler,* 342 F.3d 517 (6th Cir. 2003).

82. On October 7, 2003, the Institute for Justice Arizona Chapter filed a lawsuit in Federal Court, District of Arizona, challenging Arizona's prohibition on direct interstate shipment of wine. The case is entitled *Parker v. Morrison.*

83. *Beskind v. Easley,* 325 F.3d 506 (4th Cir. 2003).

84. U.S. Federal Trade Commission, *Possible Anticompetitive Barriers.* According to the report, consumers could save as much as 21 percent on more expensive wines. See also, *Boston Herald,* July 4, 2003, Finance Section, 25. The FTC report concludes that consumers could get lower prices and more choices on wine, and states could expand e-commerce, and perhaps tax revenue, by permitting direct interstate wine shipments to consumers."

85. Ibid., 12.

86. *Ariz. Rev. Stat.* § 4-203.04.

87. Erica Sagon, "Wine Lovers Want Lawmakers' Stamp on Bottles by Mail," *The Arizona Republic,* August 11, 2003.

88. *Va. Stat. Ann.* §4.1-112.1; *S.C. Rev. Stat.* §61-4-747; *N.H. Rev. Stat.* §178:27.

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500 East Coronado Rd., Phoenix, AZ 85004 | *Phone* (602) 462-5000 | *Fax* (602) 256-7045 | *email* info@goldwaterinstitute.org