

**PUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 21-1906**

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B-21 WINES, INC.; JUSTIN HAMMER; BOB KUNKLE; MIKE RASH; LILA RASH,

Plaintiffs – Appellants,

v.

HANK BAUER, Chair, North Carolina Alcoholic Beverage Control Commission,

Defendant – Appellee,

and

JOSHUA STEIN, Attorney General of North Carolina,

Defendant.

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CENTER FOR ALCOHOL POLICY; NORTH CAROLINA ASSOCIATION OF  
ABC BOARDS; AMERICAN BEVERAGE LICENSEES; NC BEER & WINE  
WHOLESALE ASSOCIATION; WINE & SPIRITS WHOLESALE OF  
AMERICA, INCORPORATED,

Amici Supporting Appellee.

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Appeal from the United States District Court for the Western District of North Carolina, at  
Charlotte. Frank D. Whitney, District Judge. (3:20-cv-00099-FDW-DCK)

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Argued: March 9, 2022

Decided: June 1, 2022

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Before WILKINSON, KING, and QUATTLEBAUM, Circuit Judges.

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Affirmed by published opinion. Judge King wrote the majority opinion, in which Judge Quattlebaum joined. Judge Wilkinson wrote a dissenting opinion.

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**ARGUED:** James A. Tanford, EPSTEIN COHEN SEIF AND PORTER, LLP, Bloomington, Indiana, for Appellants. Ryan Y. Park, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Robert D. Epstein, James E. Porter, EPSTEIN COHEN SEIF AND PORTER, LLP, Indianapolis, Indiana; William C. Trosch, CONRAD TROSCH & KEMMY, P.A., Charlotte, North Carolina, for Appellants. Joshua H. Stein, Attorney General, Zachary W. Ezor, Solicitor General Fellow, Jeffrey B. Welty, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. Jon Carr, JORDAN PRICE, Raleigh, North Carolina, for Amicus North Carolina Association of ABC Boards. John C. Neiman, Jr., Brandt P. Hill, MAYNARD COOPER & GALE P.C., Birmingham, Alabama, for Amici The Center for Alcohol Policy and the North Carolina Association of ABC Boards. Jo Moak, Jacob Hegeman, WINE & SPIRITS WHOLESALERS OF AMERICA, INC., Washington, D.C.; Kris Gardner, THARRINGTON SMITH LLP, Raleigh, North Carolina; Frederick R. Yarger, Teresa G. Akkara, WHEELER TRIGG O'DONNELL LLP, Denver, Colorado, for Amici Wine & Spirits Wholesalers of America, Inc., American Beverage Licensees, and North Carolina Beer & Wine Wholesalers Association.

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KING, Circuit Judge:

Plaintiffs B-21 Wines, Inc., a Florida-based wine retailer, plus its owner and three North Carolina residents, initiated this 42 U.S.C. § 1983 action in the Western District of North Carolina, challenging a North Carolina alcoholic beverage control regime as unconstitutional. More specifically, the Plaintiffs allege that North Carolina’s regime, which prohibits out-of-state retailers — but not in-state retailers — from shipping wine directly to consumers in North Carolina (the “Retail Wine Importation Bar”), contravenes the Constitution’s dormant Commerce Clause. The Plaintiffs sought declaratory and injunctive relief and named the Chair of the North Carolina Alcoholic Beverage Control Commission as a defendant, in his official capacity only (hereinafter, the “N.C. Commission”).<sup>1</sup>

After entertaining competing cross-motions for summary judgment, the district court awarded summary judgment to the N.C. Commission, ruling that the Twenty-first Amendment authorizes the Retail Wine Importation Bar. *See B-21 Wines, Inc. v. Guy*, No. 3:20-cv-00099 (W.D.N.C. July 9, 2021), ECF No. 43 (the “Opinion”).<sup>2</sup> The Plaintiffs challenge that ruling by way of this appeal. As explained herein, we are satisfied that —

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<sup>1</sup> When the Plaintiffs initiated this litigation, A.D. Guy, Jr., was Chair of the N.C. Commission and was named as a defendant. During the appeal, Hank Bauer replaced Guy as Chair. We have substituted Bauer for Guy, pursuant to Federal Rule of Appellate Procedure 43(c)(2). The Plaintiffs also named the Attorney General of North Carolina as a defendant, in his official capacity. The Attorney General asserted sovereign immunity and was dismissed. That ruling is not challenged.

<sup>2</sup> The Opinion is published in the Federal Supplement and can be found at 548 F. Supp. 3d 555 (W.D.N.C. 2021).

even though the Retail Wine Importation Bar discriminates against interstate commerce — it is authorized by Section 2 of the Twenty-first Amendment. In the circumstances, we affirm the district court.

I.

A.

Plaintiff B-21 Wines is a wine retailer from Florida that sells wine by way of online transactions. B-21 Wines and its Florida resident owner, plaintiff Justin Hammer, seek to sell and ship wine to North Carolina consumers. Plaintiffs Bob Kunkle, Mike Rash, and Lila Rash are North Carolina residents who desire to purchase wine from out-of-state retailers such as B-21 Wines, and seek to have the wine shipped directly to them. North Carolina, however, has made it unlawful “for any person who is an out-of-state retail[er]” to ship any “alcoholic beverage” — a term that includes wine — directly to North Carolina consumers. *See* N.C. Gen. Stat. § 18B-102.1(a). Additionally, North Carolina prohibits its residents from “hav[ing] any alcoholic beverage mailed or shipped to [them] from outside this State.” *Id.* § 18B-109(a).

By contrast, North Carolina’s in-state retailers may ship wine directly to consumers in the State. In that regard, North Carolina generally allows those wine retailers to ship their product “in closed containers to individual purchasers inside and outside the State.” *See* N.C. Gen. Stat. § 18B-1001(4). To ship wine directly to consumers, retailers are required to obtain permits, *id.* § 18B-304, and such permits may be issued only to retail locations owned or managed by a North Carolina resident and having in-state physical

premises that are made available for inspection, *id.* §§ 18B-900(a)(2), -502. Additionally, qualifying retailers must purchase their wine from an in-state wholesaler. *Id.* § 18B-1006(h).

North Carolina thus prohibits out-of-state retailers — by way of the Retail Wine Importation Bar — from shipping wine directly to the State’s consumers. On the other hand, North Carolina allows its in-state retailers to do so. The constitutionality of that statutory distinction is at issue in this appeal.

## B.

The differential treatment that North Carolina applies to in-state and out-of-state retailers with respect to wine shipping is part of the Old North State’s larger regime of alcoholic beverage control. Like many other states, North Carolina has decided to regulate alcoholic beverages by routing them through a system of three distinct “tiers.” A typical “three-tier system” separates the producers, the wholesalers, and the retailers, consistent with the public interest aim of promoting responsible consumption of alcoholic beverages. An important feature of a typical three-tier system is “to prohibit a member of one tier from having a financial interest in a member of a higher or lower tier.” *See Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1176 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 335 (2021). In North Carolina, the first tier of the three-tier system relates to the alcoholic beverage producers — such as wineries, breweries, and distilleries. *See* N.C. Gen. Stat. §§ 18B-1101, -1104, -1105. The system’s second tier relates to the alcoholic beverage wholesalers, who purchase such beverages from producers and sell them to retailers. *Id.* §§ 18B-1107,

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