IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

B-21 WINES, INC., JUSTIN HAMMER, BOB KUNKLE KUMKLE, MIKE RASH and LILA RASH,	)	
Plaintiffs,	)	
v.	)	No. 3:20CV99
A.D. GUY, JR., Chair, North Carolina Alcoholic Beverage Control Commission, JOSHUA STEIN, Attorney General of North Carolina,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants A.D. Guy, Jr., the Chair of the North Carolina Alcoholic Beverage Commission, and Joshua Stein, the Attorney General of North Carolina, respectfully submit this Memorandum in Support of their Motion to Dismiss.

STATEMENT OF THE CASE

The Plaintiffs are a Florida wine retailer, its owner, and several North Carolina wine consumers. They filed this lawsuit on February 18, 2020, suing the Defendants in their official capacities. The Plaintiffs contend that North

Carolina "prohibit[s] wine retailers located outside the state from selling, delivering, or shipping wine directly to North Carolina residents, when in-state retailers are allowed to do so." (Compl. at 1) Their sole claim alleges that this violates the dormant Commerce Clause. (Compl. at 4). The Plaintiffs are seeking declaratory and injunctive relief plus attorneys' fees. (Compl. at 7-8) The Defendants now move to dismiss because the Plaintiffs lack standing to sue and have failed to state a viable claim for relief, and because Attorney General Stein is not a proper party to this action.

STATEMENT OF THE FACTS

According to the Complaint, Plaintiff B-21 Wines, Inc. is a wine retailer located in Florida that would like to sell and ship wines to North Carolina consumers. (Compl. ¶ 5) Plaintiff Justin Hammer owns and operates B-21 Wines. (Compl. ¶ 6) The remaining Plaintiffs are Charlotte wine consumers who assert that they would purchase wine from out-of-state retailers if they were allowed to do so. (Compl. ¶¶ 3-4)

Defendant A.D. Guy, Jr., is the Chair of the North Carolina Alcoholic Beverage Commission, while Joshua Stein is the Attorney General of North Carolina. They are sued in their official capacities. (Compl. ¶ 8) The Complaint asserts – inaccurately, as discussed further below – that Attorney General

Stein is "authorized by N.C. Gen. Stat. § 114-2 to initiate enforcement proceedings for violations of all state laws." (Compl. ¶ 10)

The Complaint alleges that retailers licensed in North Carolina may ship wines to consumers. (Compl. ¶ 12) It further asserts that certain statutes, and unspecified "related laws, practices and regulations . . . individually and collectively" have the effect of prohibiting out-of-state retailers from shipping wines to North Carolina consumers. (Compl. at 1; Compl. ¶¶ 12-17) The Complaint does not allege that B-21 Wines or Mr. Hammer have ever applied for or been denied a North Carolina retail permit.

Proceeding under 42 U.S.C. § 1983, the Plaintiffs allege that the challenged statutes violate the dormant Commerce Clause by discriminating against out-of-state economic interests. (Compl. ¶ 27) The Complaint seeks declaratory and injunctive relief, including an injunction requiring the Defendants to "allow Justin Hammer, B-21 Wines, Inc. ands [*sic*] other retailers whose premises are located outside the state, to sell and ship wine to consumers in North Carolina." (Compl. at 7)

ARGUMENT

As detailed below, the Complaint should be dismissed because (1) the Plaintiffs lack standing to sue, (2) the Complaint fails to state a viable claim for relief, and (3) Attorney General Stein is not an appropriate defendant.

I. THE PLAINTIFFS LACK STANDING

A. Legal Standards

Standing to initiate a federal lawsuit is "an integral component of the case or controversy requirement" of Article III of the Constitution. *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). To show standing, a plaintiff must allege:

> (1) an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Beck v. McDonald, 848 F.3d 262, 269 (4th Cir. 2017).

The Plaintiffs bear the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Failure to establish standing requires dismissal of the lawsuit. *Id.* at 560. Dismissal is proper for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *See CGM, LLC v. BellSouth Telcoms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011).

B. The Plaintiffs Lack Standing Because B-21 Wines and Mr. Hammer Have Never Sought a Retail Permit, Rendering any Injury Speculative

Standing exists only when a plaintiff has suffered an "actual or threatened injury" because of the defendant's conduct. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979). A plaintiff must allege an injury that is "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Beck*, 848 F.3d at 270-71 (quoting *Spokeo, Inc. v. Robins*, __ U.S. __, __, 136 S. Ct. 1540, 1548 (2016)). Allegations of a possible future injury do not create standing. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

In this case, the Plaintiffs have not alleged that they have suffered any actual or threatened injury, as they do not allege that B-21 Wines or Mr. Hammer have ever applied for, much less been denied, a North Carolina retail permit. Without such a fundamental step, the Plaintiffs' concerns that they may be denied a permit are purely speculative and do not constitute an injury. *See, e.g., S. Blasting Servs. v. Wilkes County*, 288 F.3d 584 (4th Cir. 2002) (holding that explosives companies lacked standing to challenge county explosives ordinances that gave the local fire marshal significant discretion regarding permitting because "plaintiffs have never even applied for a permit,

much less been denied one" and therefore "cannot demonstrate an actual injury").

The Complaint attempts to suggest that applying for a permit would be fruitless, alleging that pursuant to N.C. Gen Stat. § 18B-900(a)(2), Mr. Hammer cannot obtain a North Carolina permit because he manages B-21 Wines and is not a North Carolina resident. (Compl. ¶ 13) However, N.C. Gen Stat. § 18B-900 contains additional provisions that call this projected outcome into question. N.C. Gen Stat. § 18B-900(a)(2) provides that a non-resident may receive a retail permit if they execute a power of attorney to a qualified resident for purposes of receiving service and managing the business for which the permit is sought. Further, N.C. Gen Stat. § 18B-900(d) provides that the manager of an establishment operated by a corporation and holding off-premises permits for wine need not meet the residency requirement at all.

In any event, whether or not the Plaintiffs would succeed in obtaining a permit, they have no concrete injury until they have tried. In *Miller v. City of Wickliffe*, 852 F.3d 497 (6th Cir. 2017), the Sixth Circuit rejected, for lack of standing, a challenge to a city ordinance regulating nightclubs. The plaintiffs wanted to operate nightclubs but had not sought permission to do so. The court ruled that "they lack an injury in fact because the Ordinance has not yet been applied to them. Their injury is conjectural and hypothetical, rather than

concrete and particularized." *Id.* at 503. The plaintiffs claimed that, for various reasons, seeking permission would be futile, but the court ruled that "[t]he doctrine of futility does not save plaintiffs' claims because they have failed to demonstrate that the City's decision was sufficiently final to constitute an injury in fact." *Id* at 504.

Like the plaintiffs in *Miller*, the Plaintiffs here have engaged in self-limiting conduct. They have not alleged even a threat of injury to their interests. *See, e.g., Oriental Health Spa v. Ft. Wayne*, 864 F.2d 486, 489 (7th Cir. 1988) (holding that when a plaintiff business has not been threatened with the denial of a license under a local licensing scheme, a federal claim seeking relief from the licensing scheme is not ripe for review).

The United States Supreme Court has explained that justiciability issues, like those here, can often be described as either standing or ripeness while addressing the same fundamental question. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007). The "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). Whether conceptualized as a ripeness problem or a standing one, until the Plaintiffs seek a permit, they lack a sufficient injury and the Complaint should be dismissed.

C. The Plaintiffs' Purported Injuries Are Not Redressable

The Plaintiffs fail to establish standing for another reason: they cannot show that their purported injuries would be redressable in this litigation. North Carolina's alcoholic beverage control statutes provide that if a court finds a constitutional violation, any remedial construction must "further limit rather than expand commerce in alcoholic beverages." N.C. Gen. Stat. § 18B-100. Therefore, even if the Plaintiffs were to prevail on their claim that North Carolina's wine shipment laws unconstitutionally discriminate against out-of-state wine retailers, the required remedy would be prohibiting in-state retailers from shipping wine to consumers, not allowing out-of-state retailers to do so. This remedy would not alleviate Mr. Hammer's and B-21 Wine's supposed lack of access to the North Carolina market and the consumer Plaintiffs' asserted lack of access to out-of-state retailers.

When a state violates the dormant Commerce Clause by discriminating unfairly between in-state and out-of-state economic interests, the remedy may involve leveling up (providing the out-of-state interests with the more favorable treatment previously reserved for in-state actors) or leveling down (applying to the in-state actors the less advantageous treatment previously accorded only to out-of-state interests). *See generally Comptroller of the Treasury v. Wynne*, 575 U.S. 542, __, 135 S. Ct. 1787, 1806 (2015) ("Whenever

government impermissibly treats like cases differently, it can cure the violation by either 'leveling up' or 'leveling down.'"). In the case at bar, however, leveling down is the only possible remedy. North Carolina law requires any relief to restrict, not expand, commerce in alcoholic beverages:

> If any provision of this Chapter, or its application to any person or circumstance, is determined by a court . . . to be . . . unconstitutional, such provision shall be stricken and the remaining provisions shall be construed in accordance with the intent of the General Assembly to further limit rather than expand commerce in alcoholic beverages, and . . . the remaining provisions shall be construed to enhance strict regulatory control over taxation, distribution, and sale of alcoholic beverages.

N.C. Gen. Stat. § 18B-100.

When crafting remedies for constitutional violations, courts are required to act in keeping with legislative intent. *United States v. Booker*, 543 U.S. 220, 226 (2005) ("We answer the remedial question by looking to legislative intent."). Here, the statutory "level down" provision is the clearest possible evidence of legislative intent. *See Sessions v. Morales-Santana,* __ U.S. __, __, 198 L. Ed. 2d 150, 173 (2017) ("The choice [of remedy] is governed by the legislature's intent, as revealed by the statute at hand.") Therefore, if the Plaintiffs were to prevail on their dormant Commerce Clause claim, the mandatory remedy would be to restrict commerce in alcoholic beverages by

prohibiting in-state retailers from shipping wine to consumers, as many states do.[1]

Courts regularly dismiss cases where the available remedies would provide no redress for the plaintiffs. For example, in *Ansley v. Warren*, 861 F.3d 512 (4th Cir. 2017), North Carolina residents brought an Establishment Clause challenge against a state statute that (1) allowed magistrates to recuse themselves from performing same-sex marriages and (2) provided for an out-of-county magistrate to come to a county to perform marriages when all the local magistrates had recused themselves. The district court dismissed the case for lack of standing and the Fourth Circuit affirmed, in part because of a lack of redressability. Because the plaintiffs claimed taxpayer standing, the court reasoned that it "could not enjoin the judicial recusal program," so "[t]he best remedy plaintiffs can hope for is an injunction against the ongoing travel expenditures [for the replacement magistrates], which if anything would have the unfortunate result of making marriages less accessible." In other words, the only legally permissible remedy would not achieve the plaintiffs' goals,

[1] *See, e.g.,* Ark. ABC Rules and Regulations § 3E.3.19(6), available at: https://www.dfa.arkansas.gov/alcoholic-beverage-control/abc-rules-and-regulations/title-3-subtitle-e-prohibited-conduct-and-activities (retail permittees generally cannot deliver); Ks. Stat. 41-308(b) (retail permit allows sale "only on the licensed premises"); Okla. Stat. 37A-2-109 (retail licensees may sell wine "on the licensed premises"; no provision for shipping). A UPS document summarizing state laws shows 20 states that prohibit wine shipment even from those states' retailers. UPS, *Wine Shipping Agreement Addendum A*, available at: https://www.ups.com/assets/resources/media/en_US/wine_addendum.pdf.

rendering their injuries not redressable. In the case at bar, the only legally permissible remedy would be to prohibit wine shipments by in-state retailers. This would not benefit Plaintiffs Hammer and B-21 Wines, and from the consumer Plaintiffs' point of view, would actually "have the unfortunate result of making [wine] less accessible."

Because this litigation cannot redress the Plaintiffs' claimed injuries, the Plaintiffs lack standing and the Complaint should be dismissed.

II. THE COMPLAINT FAILS TO STATE A VIABLE CLAIM FOR RELIEF AS THE FEDERAL COURTS HAVE REPEATEDLY HELD THAT STATES MAY PROHIBIT THE IMPORTATION OF ALCOHOL THAT WOULD UNDERMINE STATES' REGULATORY SYSTEMS

The Complaint asserts that North Carolina prohibits out-of-state retailers from shipping wine to North Carolina consumers. The federal courts have held repeatedly that states are free to do just that, in order to prevent their systems of alcohol regulation from being undermined by retailers located in jurisdictions with fewer regulations. The Complaint should be dismissed for failure to state a claim on which relief may be granted.

A. Legal Standards

To survive a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), a complaint must satisfy the court that the claim is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550

U.S. 544, 555, 570 (2007). Although all well-pled allegations are presumed to be true and must be viewed in the light most favorable to the plaintiff, *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008), "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). Furthermore, a court need not accept as true a plaintiff's legal conclusions and "unwarranted inferences, unreasonable conclusions, or arguments." *Giarratano*, 521 F.3d at 302 (citation omitted) (internal quotation marks omitted).

B. States are entitled to adopt, and have adopted, different approaches to the regulation of alcohol

The Twenty-First Amendment repealed national prohibition and replaced it with a system of state control of alcohol. The amendment provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. Am. XXI § 2. This gives the states "broad powers" to regulate alcohol. *Granholm v. Heald*, 544 U.S. 460, 485 (2005). North Carolina, like many other states, has exercised those powers by implementing a three-tier system. "[T]he State issues different types of licenses to producers, wholesalers, and retailers of alcoholic beverages. . . . Producers may sell only

to licensed wholesalers; wholesalers may sell only to licensed retailers or other wholesalers; and only licensed retailers may sell to consumers." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas,* __ U.S. __, __, 139 S. Ct. 2449, 2457 (2019). The Supreme Court has described the three-tier system as "unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

Each tier of the system is regulated. These regulations serve important state purposes such as promoting an orderly market for alcoholic beverages, preventing overconsumption of alcohol, preventing the consumption of alcohol by minors, and raising revenue for the state. *See, e.g.,* N.C. Gen. Stat. § 18B-303 (limiting the quantity of alcoholic beverages that may be purchased in a single retail transaction); 18B-904(e)(1) (providing that a permit may be revoked if the business becomes "detrimental to the neighborhood"); 18B-1107 (stating that a wine wholesaler may receive products only from certain sources, including primary sources recognized by the ABC Commission).

Each state's system of alcohol regulation is different, whether it features three tiers or not, addressing state-specific concerns and striking different balances between competing interests. For example, North Carolina strictly limits retailers' participation in certain consumer promotions such as coupons and sweepstakes, presumably to reduce the risk of stimulated

overconsumption. *See* 14B NCAC 15B .1004 (limiting retailers' use of coupons); 14B NCAC 15C .0714 (limiting retailers' involvement in sweepstakes and promotions). But Florida, where B-21 Wines is located, has a more permissive approach. *See* Fl. Stat. 561-42(13) (providing limitations on coupons only regarding malt beverages). Similarly, North Carolina prohibits wholesalers from offering volume discounts in order to protect the viability of smaller retailers. *See* 14B NCAC 15C .0704. Florida does not. *See* Fl. Stat. 561-42(6) (trade discounts allowed "in the usual course of business"); Fl. Stat. 561.01(10) (discounts in the usual course must be equal only among retailers buying "similar quantities").

C. Allowing out-of-state retailers to ship wine to North Carolina consumers would undermine North Carolina's three-tier system

Allowing out-of-state retailers to ship wine and other alcoholic beverages to North Carolina consumers would undermine North Carolina's carefully calibrated system of regulations, because alcohol sent from other states has not passed through North Carolina's regulatory funnel. A race to the bottom would inevitably ensue, with retailers in states with the fewest restrictions on alcohol offering the lowest prices to consumers.

This would frustrate the plain meaning of the Twenty-First Amendment. Under these circumstances, prohibiting the shipment of alcohol by out-of-state

retailers is not discrimination against out-of-state economic interests, which the dormant Commerce Clause forbids. Rather, it is the protection of a legitimate and carefully considered regulatory scheme that "serve[s] a State's legitimate . . . [nonprotectionist] interests," which the dormant Commerce Clause allows. *Tennessee Wine*, 139 S.Ct. at 2469.

For all of these reasons, federal courts have repeatedly rejected claims like the Plaintiffs'. Just last week, the Sixth Circuit rejected identical claims, brought by the same plaintiffs' lawyers, challenging Michigan's prohibition on out-of-state retailers shipping alcohol to Michigan consumers. *Lebamoff Enters. v. Whitmer*, __ F.3d __, 2020 U.S. App. LEXIS 12745 at *15 (6th Cir. April 21, 2020) (emphasizing that "[o]nce out-of-state delivery opens, the least regulated (and thus the cheapest) alcohol will win," undermining the regulatory controls built into Michigan's three-tier system). Other federal appellate courts have reached similar results. *See Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009) (ruling that "the challenged regime is permissible under the Twenty-first Amendment insofar as it requires that all liquor sold within the State of New York pass through New York's three-tier regulatory system"); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (finding no improper discrimination where "Indiana insists that every drop of liquor pass through its three-tiered system and be subjected to taxation"); *Wine*

Country Gift Baskets.com v. Steen, 612 F.3d 809 (5th Cir. 2010) (upholding a system allowing local wine delivery by Texas retailers but prohibiting out-of-state shipment against a dormant Commerce Clause challenge).

The Fourth Circuit rejected a very similar argument in *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006):

> Because only *retailers* in Virginia may now sell directly to consumers, this argument must be that in-state *retailers* are favored over out-of-state retailers. But an argument that compares the status of an in-state retailer with an out-of-state retailer -- or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart -- is nothing different than an argument challenging the three-tier system itself. As already noted, this argument is foreclosed by the Twenty-first Amendment and the Supreme Court's decision in *Granholm*, which upheld the three-tier system as "unquestionably legitimate."

Id. at 352.

In sum, federal courts have consistently ruled that the Plaintiffs' legal theory is not viable. The Complaint fails to state a claim on which relief may be granted, and should be dismissed.

III. ATTORNEY GENERAL STEIN LACKS ANY SUBSTANTIAL CONNECTION TO NORTH CAROLINA'S ABC LAWS AND SO IS NOT A PROPER PARTY

Attorney General Stein lacks any substantial connection to the ABC laws. This requires dismissal of the claims against him because he is immune from suit under the Eleventh Amendment; he is not a proper person to sue

under 42 U.S.C. § 1983; and the Plaintiffs cannot allege an injury traceable to him, so they lack standing to bring claims against him.

A. Attorney General Stein is Protected by Eleventh Amendment Immunity

The Eleventh Amendment prevents suits by private citizens against states in federal court. Immunity extends to state officials where they are "merely the nominal defendants and the state is the real, substantial party in interest." *Booth v. Maryland*, 112 F.3d 139, 142 (4th Cir. 1997). A narrow exception to this rule was created by *Ex parte Young,* which allows state officials to be sued for ongoing constitutional violations where equitable relief is sought – but only where a connection exists between the officer and the act. 209 U.S. 123, 157 (1908). "This 'special relation' requirement ensures that the appropriate party is before the federal court, so as not to interfere with the lawful discretion of state officials. . . . [G]eneral authority to enforce the laws of the state is an insufficient ground for abrogating Eleventh Amendment immunity." *McBurney v. Cuccinelli*, 616 F.3d 393, 400 (4th Cir. 2010).

The Plaintiffs allege no special relationship between Attorney General Stein and North Carolina's ABC laws, nor could they. Chapter 18B of North Carolina's General Statutes governs the regulation of alcoholic beverages. It makes no reference to the Attorney General and mentions the Department of

Justice only once — as a last resort for turning in property seized due to a violation of ABC law. N.C. Gen. Stat. § 18B-504(f)(3).

The Plaintiffs assert that Attorney General Stein is generally empowered to enforce state laws under N.C. Gen. Stat. §114-2. (Compl. ¶ 10) However, the statute contains no such enforcement power. Indeed, the plain language of the statute indicates the relationship between the Attorney General and the ABC Commission is that of attorney and client. The duty to enforce the ABC laws is allocated to the ABC Commission and the Alcohol Law Enforcement Division of the Department of Public Safety. *See* N.C. Gen. Stat. § 18B-203(a)(2).

Ex parte Young expressly rejects the notion that this attenuated association can serve as a basis for federal jurisdiction as it would subject attorneys general to suit "for the purpose of testing the constitutionality of every act passed by the legislature" because the attorney general "might represent the State in litigation involving the enforcement of its statutes." 209 U.S. at 157. The Fourth Circuit has reaffirmed this principle. *See McBurney v. Cuccinelli*, 616 F.3d 393, 400-01 (4th Cir. 2010) (holding that the Eleventh Amendment barred suit against a state Attorney General in an action

challenging the state's Freedom of Information Act; the court found that the Attorney General had only a general authority to enforce the law).

Because Attorney General Stein bears no special responsibility for the enforcement of North Carolina's ABC laws, he is immune from suit and must be dismissed as a defendant.

B. Attorney General Stein is Not a Proper Defendant Under 42 U.S.C. § 1983 Because He Has Not Taken, or Threatened to Take, Any Action Against the Plaintiffs

42 U.S.C. § 1983 creates liability only against persons acting under color of State law to deprive others of their federally-guaranteed rights. The Plaintiffs have not alleged that Attorney General Stein has taken, or even threatened to take, any action against the Plaintiffs. Therefore, all claims against him must be dismissed.

To bring such a claim against a state official, a plaintiff must show that the official has engaged in an ongoing violation of the Constitution or federal law. *Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998) (stating that plaintiff must show "the violation for which relief is sought is an ongoing one"). "The requirement that the violation of federal law be ongoing is satisfied when a state officer's enforcement of an allegedly unconstitutional state law is threatened, even if the threat is not yet imminent." *Waste Mgmt. Holdings,*

Inc. v. Gilmore, 252 F.3d 316, 330 (4th Cir. 2001). However, "[a] litigant must show more than the fact that state officials stand ready to perform their general duty to enforce laws." *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986). The threat of enforcement must be real. *Id.*; *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 440-41 (7th Cir. 1992) (holding that the Attorney General was not a proper defendant in a section 1983 action when he "has never threatened the [plaintiffs] with prosecution and . . . has no authority to do so"). Thus, to prevail, the Plaintiffs must show the Attorney General acted or threatened to act.

Here, the Plaintiffs have only alleged that the Attorney General has a general duty to enforce the laws of the state and do not allege that he has taken or threatened to take any actions against the Plaintiffs. He is not a proper party to this lawsuit and the Plaintiffs' claims against him should be dismissed pursuant to Fed. R. Civ. P 12(b)(1), (2) and (6).

C. The Plaintiffs Lack Standing to Bring a Claim Against Attorney General Stein

Finally, the Plaintiffs' claims against the Attorney General also fail due to lack of standing. To have standing, a plaintiff must show the injury complained of is "fairly traceable" to an action by the defendant. *Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs. Inc.*, 528 U.S. 167, 180 (2000).

Here, the Plaintiffs lack standing because they fail to demonstrate that the conduct they challenge is "fairly traceable" to Attorney General Stein. He is not responsible for enforcing the state's ABC laws, and the Plaintiffs have not alleged that he has taken any action or threatened to take any action against them. Accordingly, the Plaintiffs' claims are not traceable to the conduct of Attorney General Stein and all claims against him must be dismissed.

CONCLUSION

For the reasons stated above, the Complaint should be dismissed.

Respectfully submitted, this the 27th day of April, 2020.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that this document complies with the 4,500 word limit imposed by this Court's Initial Scheduling Order.

I hereby certify that on April 27, 2020, I electronically filed the foregoing *Memorandum in Support of Defendant's Motion to Dismiss* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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Respectfully submitted,

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