UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

B-21 WINES, INC., JUSTIN HAMMER, BOB KUNKLE, MIKE RASH, and LILA RASH, *Plaintiffs,* vs. A.D. GUY, Jr., Chair, North Carolina Alcoholic Beverage Control Commission, JOSHUA STEIN, Attorney General of North Carolina, *Defendants.*	)	Case No. 3:20-cv-99-FDW-DCK

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Plaintiffs are challenging the constitutionality of a North Carolina law that prohibits out-of-state retailers from shipping wine to consumers but allows in-state retailers to do so. The difference in treatment discriminates against interstate commerce in violation of the Commerce Clause. The defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) for lack of standing and 12(b)(6) for failure to state a claim upon which relief can be granted, and to dismiss Attorney General Stein as a defendant on grounds that he is not a proper party. Plaintiffs oppose the motion for the following reasons:

1. Plaintiffs have standing because the law is preventing them from engaging in interstate commerce and the court can redress that injury by declaring the law unconstitutional and enjoining the defendants from enforcing it. *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992).

2. The Complaint states a valid claim that the law violates the Commerce Clause by treating in-state and out-of-state wine shippers differently. The Supreme Court holds that discrimination is not permitted by the Twenty-first Amendment. If a state allows direct shipping, it must do so on evenhanded terms. *Granholm v. Heald,* 544 U.S. 460, 466, 493 (2005).

3. The Attorney General is a proper party because he has statutory authority to initiate proceedings against the plaintiffs for violating the ban on wine shipping. 27 U.S.C. § 122a; N.C. Gen. Stat. § 114-2(a).

I. Standard of review

The standard for evaluating a motion to dismiss is well settled. The court accepts all well-pleaded facts as true and construes these facts in the light most favorable to the plaintiff. A court should grant a motion to dismiss only if, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *McCaffrey v. Chapman,* 921 F.3d 159, 163-64 (4th Cir. 2019). No specific level of detail is required as long as the complaint alleges a claim that is plausible on its face. *Id.* at 163.

II. Plaintiffs have standing

The elements of standing are: (1) the plaintiff must have suffered an injury-in-fact, which (2) must be causally connected to the conduct complained of, and that (3) will likely be redressed if the plaintiff prevails. *Baehr v. Creig Northrop Team, PC,* 953 F.3d 244, 252 (4th Cir. 2020). In cases challenging the constitutionality of a law, the essence of the standing inquiry is whether the plaintiff "has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely

depends for illumination of difficult constitutional questions." *Clatterbruck c. City of Charlottesville*, 703 F.3d 549, 553 (4th Cir. 2013).

Defendants assert that the plaintiffs lack standing for two reasons: (A) neither B-21 Wines nor its owner, Justin Hammer, suffered an actual injury because they never applied for and were denied a liquor permit, and (B) the injuries are not redressable. Neither has merit.

A. The fact that B-21 Wines and Justin Hammer did not apply for a permit is irrelevant to standing

1. It does not matter whether B-21 Wines and Justin Hammer have standing because the other plaintiffs do

Standing is jurisdictional. Therefore, only one plaintiff needs standing for the court to have jurisdiction under Article III. *Bowsher v. Synar,* 478 U.S. 714, 721 (1986). It is well established that there is a personal right to engage in interstate commerce, *Dennis v. Higgins*, 498 U.S. 439, 449-50 (1991), and the consumer plaintiffs, Bob Kunkle, Mike Rash and Lila Rash, have alleged a concrete injury to that right: they tried to order wine over the internet to be shipped to them and were refused because North Carolina law makes interstate shipping illegal. Complaint ¶¶ 19-23. The ABC Law prohibits a retailer from shipping to them, N.C. Gen Stat. § 18B-102(a), and separately prohibits them from having any alcoholic beverage shipped from outside the state. N.C. Gen. Stat. § 18B-109. The defendants do not dispute this. Therefore, even if B-21 Wines and Justin Hammer somehow lacked standing because Hammer did not apply for a permit, it would be irrelevant.

2. No application for a non-existent permit is required to establish standing.

The defendants' argument that B-21 Wines and Justin Hammer were required to apply for a North Carolina liquor permit in order to have standing is without merit in any event. They are not complaining that North Carolina officials would not issue them a permit, but that there is no

permit they could have applied for. Complaint ¶ 17. State law flatly prohibits them from shipping wine to consumers through interstate commerce from their business premises in Florida, N.C. Gen. Stat. § 18B-102.1(a), and no permit exists that would allow them to do so. Complaint. ¶¶ 13-17, 23. The cases cited by the defendants as requiring a plaintiff to apply for a license before suing involved licenses that existed and for which the plaintiffs might have qualified. *E.g., So. Blasting Servs., Inc. v. Wilkes Co.,* 288 F.3d 584, 595 (4th Cir. 2002) (plaintiff complained that fire marshal had too much discretion and could arbitrarily deny a blasting license).

The defendants have not identified any actual permit that B-21 Wines or Justin Hammer could have applied for that would authorize them to ship wine directly to consumers from their Florida premises. It would be absurd to require plaintiffs to apply for a permit that does not exist in order to have standing,[1] and the law does not require them to undertake a futile act. If no permit exists, "[t]heir failure to submit an application ... does not deprive them of standing." *Sporhase v. Nebraska*, 458 U.S. 941, 944 n.2 (1982). Plaintiffs do not have to go through the futile act of applying. *Townes v. Jarvis,* 577 F.3d 543, 547 n.1 (4th Cir. 2009). *Accord Hamilton v. Pallozzo*, 848 F.3d 614, 620 (4th Cir. 2017); *Payne v. Chapel Hill North Prop., Inc*., 947 F.Supp. 2d 567, 575 (M.D. N.C. 2013); *Harris v. McDonnell*, 988 F. Supp. 2d 603, 612 (W.D. Va. 2013).

[1] To obtain any ABC permit, either the owner or manager must be a "resident of North Carolina," N.C. Gen. Stat. § 18B-900(a) (2), and plaintiffs have alleged that Mr. Hammer is the owner and manager of B-21 Wines and is not a resident, so he does not qualify. Complaint ¶ 13. The Defendants point to 18B-900(d) which contains conflicting language that says the manager of an establishment with an off-premises wine permit does not have to be a resident. That section is probably referring to an establishment located in the state, which B-21 is not. The court need not resolve this ambiguity, however, because N.C. Gen. Stat. § 18B-102.1(a) says "It is unlawful for any person who is an out-of-state retail or wholesale dealer in the business of selling alcoholic beverages to ship or cause to be shipped any alcoholic beverage directly to any North Carolina resident," so the off premises wine permit would not do them any good.

B. The injury is redressable

Redressability means that the district court has the ability to issue a meaningful order that will provide a remedy to the plaintiffs because the persons responsible for causing the injury are parties to the action. *Roe v. Dept. of Defense*, 947 F.3d 207, 231 (4th Cir. 2020). The burden is not onerous. *Deal v. Mercer Co. Bd. of Ed.*, 911 F.3d 183, 189 (4th Cir. 2018). The district court has considerable discretion in crafting the terms of an injunction to provide appropriate relief. *Roe v. Dept. of Defense*, 947 F.3d at 231. When the plaintiffs are objects of a statute or other state action, "there is ordinarily little question that ... a judgment preventing or requiring ... action [by officials] will redress it." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992).

Redressability problems arise when the injury to the plaintiffs are the result of the actions of a third party "not before the courts and whose [behavior] the courts cannot presume either to control or to predict." *Lujan v. Defenders of Wildlife,* 504 U.S. at 562. The third party would not be bound by the court's order and would be free to continue the unlawful conduct. *Id.* at 569. This includes situations where an independent law would prohibit the defendant from providing relief even if the court granted it, and the official responsible for enforcing that other law is not a party. 13A CHARLES A. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 3531.5 (3d ed. 2019). *See, e.g.*, *Lujan v. Defenders of Wildlife,* 504 U.S. at 568-69. That is not the situation here. The officials responsible for enforcing the ban against direct shipping by out-of-state wine retailers are the defendants and the court can declare the ban unconstitutional and enjoin them from enforcing it.

The defendants assert a novel theory that the ban against direct shipping is not redressable because a provision in the ABC Law's severance clause expresses a preference for "limit[ing] rather than expand[ing] commerce in alcoholic beverages." N.C. Gen. Stat. § 18B-100. The

defendants contend this means the "only possible remedy" this court could impose if it found the ban unconstitutional would be to strike the shipping rights of in-state retailers, which result would not benefit the plaintiffs. Def. Mem. at 8-10. They cite no authority for the argument that a state statute can dictate the remedy a federal court must impose. The cases hold to the contrary, that a "[s]tate law cannot define the remedies which a federal court must give." *SSMC, Inc. v. Steffen*, 102 F.3d 704 (4th Cir. 1996). The only two cases cited by the defendants held that courts must consider Congressional intent when fashioning a remedy for an unconstitutional federal law. *Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1699 (2017) (gender discrimination in federal immigration law); *U.S. v. Booker*, 543 U.S. 220, 246 (2005) (denial of right to jury under federal sentencing guidelines). Those cases had nothing to say about the appropriate remedy when a court finds a *state* law unconstitutional.

The defendants' argument cannot possibly be correct.[2] If a state law could prevent a federal court from issuing a remedy, no plaintiff could ever establish standing. A state could completely insulate an unconstitutional law from constitutional scrutiny. It could create a tax deduction for contributions only to Christian churches and provide that if anyone challenged the law, the deduction would have to be eliminated rather than extended to other religions. It could establish a science high school only for girls and say that if anyone challenged the law, the school would have to be closed rather than admit boys. It could ban nonresident from fishing in state park lakes

[2] The argument also misstates the severance clause. The clause does not say that the preference for limiting commerce in alcohol requires a court to strike the provision favoring in-state interests if it determines that the provision injuring out-of-state interests is unconstitutional. It sets up a two-step process. First, "[i]f any provision of this Chapter ... is determined by a court ... to be invalid or unconstitutional, such provision shall be stricken." That would be the sections prohibiting interstate commerce, because a court must tailor its remedy to address the nature of the constitutional violation. *Ostergree v. Cuccinelli*, 615 F.3d 263, 288-89 (4th Cir. 2010). Only the "remaining" provisions need to be construed to limit rather than expand sales of alcohol. N.C. Gen. Stat. § 18B-100.

and provide that if anyone challenged the law, all fishing would be prohibited. If poison pill provisions such as these tied the hands of federal judges and made the laws non-redressable, then no plaintiff could ever have standing. The result would not be the closing of the discriminatory programs, but the continuation of the discrimination because no one could challenge it. This contradicts one of the most basic principles of constitutional law that a "statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution." *Younger v. Harris,* 401 U.S. 37, 52 (1971); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803).

Even if the poison pill provision reduces the likelihood that plaintiffs will ultimately receive an entirely favorable remedy, it does not deprive them of standing. Plaintiffs often receive less than what they asked for. Plaintiffs do not need to show that a favorable decision will relieve every aspect of their injuries. *Deal v. Mercer Co. Bd. of Ed.*, 911 F.3d at 189. The removal of even one obstacle to the exercise of one's rights is sufficient. *Sierra Club v. U.S. Dept. of Interior*, 899 F.3d 260, 285 (4th Cir. 2018).

Finally, the Supreme Court has said that "a litigant to whom Congress has accorded a procedural right to protect his concrete interests ... can assert that right without meeting all the normal standards for redressability." *Massachusetts v. EPA,* 549 U.S. 497, 518 (2007). That is the situation in our case. Congress has given private litigants the right to use 42 U.S.C. § 1983 to sue state officials to protect constitutional rights, including the right to engage in interstate commerce. *Dennis v. Higgins*, 498 U.S. at 448-50. The plaintiffs have shown "that the action injures [them] in a concrete and personal way ... assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented ... will be resolved ... in a concrete factual context conducive to a realistic appreciation

of the consequences of judicial action." *Massachusetts v. EPA*, 549 U.S. at 517-18.

It is completely within the discretionary authority of the district court to redress the discrimination by enjoining the provisions that offend the Commerce Clause, §§ 18B-102.1(a) and 18B-109. That is all that is required for standing.

III. The complaint states a valid claim that North Carolina's wine shipping laws discriminate against interstate commerce in violation of the Commerce Clause

North Carolina's ABC Law prohibits a retailer located outside the state from shipping wine through interstate commerce to consumers in the state, N.C. Gen. Stat. §§ 18B-102.1(a); 18B-109, but allows retailers located within the state to do so. N.C. Gen. Stat. § 1001(4). This violates the nondiscrimination principle of the Commerce Clause.[3]

> [S]tate laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter [and] give[s] a competitive advantage to in-state businesses.

Granholm v. Heald, 544 U.S. 460, 472 (2005) (citations omitted). The State has broad authority under § 2 of the Twenty-first Amendment[4] to regulate alcohol even-handedly, but discrimination "is neither authorized nor permitted." *Granholm*, 544 U.S. at 466. *Accord Tenn. Wine,* 139 S.Ct. at 2470. The Amendment "does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference" to in-state businesses. *Granholm*, 544 U.S. at 486. A discriminatory state liquor law may be upheld only if the State proves that the law advances a legitimate state interest that cannot adequately be served by reasonable nondiscriminatory alternatives. *Tenn. Wine,* 139 S.Ct at 2474; *Granholm,*

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[3] "The Congress shall have the power [to] regulate commerce ...among the several states." U.S. CONST., ART. I, § 8, cl. 3.

[4] "The 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., AMEND. XXI, § 2.

544 U.S. at 489. This cannot be determined on a motion to dismiss the complaint, because the State is required to prove with "concrete evidence" that the law is justified. *Tenn. Wine*, 139 S.Ct. at 2474; *Granholm*, 544 U.S. at 490.

The defendants argue that the complaint should be dismissed because the Twenty-first Amendment gives states broad power to regulate the distribution of alcohol within its borders. The argument is without merit. The Supreme Court has said clearly that although the Twenty-first Amendment gives states broad power to regulate alcohol even-handedly, it does not give them the authority to discriminate against out-of-state interests.

> States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.

Granholm v. Heald, 544 U.S. at 493.[5] It affirmed this principle last year:

> § 2 grants States latitude with respect to the regulation of alcohol, but the Court has repeatedly declined to read § 2 as allowing the States to violate the "nondiscrimination principle that was a central feature of the regulatory regime that the provision was meant to constitutionalize

Tenn. Wine & Spirits Retailers Assoc. v. Thomas 139 S. Ct 2449 (2019). *Accord Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (the "purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition"); *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring) (a law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment").

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[5] The Court's holding cannot possibly be misunderstood. In the course of its opinion, it said: "The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, 544 U.S. at 484-85, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," 544 U.S. at 487, "discrimination is neither authorized nor permitted by the Twenty-first Amendment," 544 U.S at 466, and "discrimination is contrary to the Commerce Clause and is not saved by the 21st Amendment." 544 U.S at 489.

The Defendants neither discuss these controlling Supreme Court precedents nor explain why the nondiscrimination rule does not apply to this particular state liquor law. They cite *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990) for its vague statement that the three-tier system is unquestionably legitimate,[6] but that case (which involved neither the Commerce Clause nor discrimination) has long since been superseded by *Granholm* and *Tenn.Wine*, which held that the "legitimacy" of the three-tier system is limited by the nondiscrimination principle of the Commerce Clause. They cite *Arnold's Wine v. Boyle, 571* F.3d 185 (2d Cir. 2009); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), and *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010) for having supposedly rejected claims "just like the Plaintiffs." Even if that were true (which it is not),[7] those cases are no longer good law. They assumed that the Commerce Clause applied differently to the retailer tier than the producer tier, so the holding in *Granholm v. Heald,* 544 U.S. at 475, that states cannot require a wine shipper to be physically present did not apply. The Supreme Court rejected that view in *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct at 2471, saying "There is no sound basis for this distinction" and applying the principles of *Granholm* to retailer-tier laws.[8]

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[6] Defendants also cite a passage from *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) for the same vague statement, but the section they cite is not actually an opinion of the Fourth Circuit. The statute in that case (which concerned personal importation of wine, not retail shipping) had been rendered moot by legislative changes so two judges did not concur in the section of the opinion quoted by the State. See 462 F.3d at 361.

[7] In *Arnold's Wines,* in-state retailers were not allowed to ship directly to consumers, 571 F.3d at 188, and in *Wine Country,* in-state retailers were only allowed to deliver within their local areas, 612 F.3d at 812, so there was no actual discrimination against out-of-state retailers in either case, who were asking for the right to ship statewide by common carrier. The *Bridenbaugh* case did not involve retail shipping at all and was decided before *Granholm* and *Tenn. Wine*.

[8] Defendants also cite *Lebamoff Enterp. v. Whitmer*, ___ F.3d ___, 2020 WL 1921939 (6th Cir. 2020) as having rejected a similar case "brought by the same lawyers." It is unclear why the identity of the lawyers matter. It's like urging a jury to convict the accused because the same defense lawyer lost a similar case last week. The outcome of each case is determined by the evidence.

Ultimately, the Defendants might be able to prove that North Carolina has to ban out-of-state retailer shipping because it has no other realistic way to protect the public from some specific threat. Controlling precedent gives them the opportunity to try to justify discrimination. *Tenn. Wine,* 139 S.Ct at 2474; *Granholm,* 544 U.S. at 489. However, that is not a question that can be answered on a motion to dismiss.

IV. Attorney General Stein is a proper party because he has statutory authority to initiate proceedings to enforce the ban on interstate shipping

Finally, the Defendants move to dismiss Attorney General Stein on the grounds that he is not a proper party, citing *McBurney v. Cuccinelli*, 616 F.3d 393, 400 (4th Cir. 2010). This case is not similar to *McBurney*, which involved the Virginia Freedom of Information Act, over which the Attorney General apparently had no enforcement authority. This case involves a law the Attorney General has specific authority to enforce. The Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a provides:

> (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.

The Attorney General is also authorized under state law to initiate proceedings to enforce the law. N.C. Gen. Stat. § 114-2(a) provides that he may "institute court proceedings in all matters affecting the public interest," and the sale of alcoholic beverages is surely a matter of public interest. In *McBurney*, the Fourth Circuit took judicial notice that the Attorney General's authority includes "enforcing state laws that protect businesses and consumers," 616 F.3d at 399, and the alcoholic beverage laws affect businesses and consumers.

These provisions make clear that the Attorney General can in fact initiate enforcement actions in either state or federal court against the plaintiffs for violating the laws against interstate wine shipping. N.C. Gen. Stat. §§ 18-B 102.1, 18B-109. This satisfies the principle a state official must have "a specific duty to enforce the challenged statutes" in order to be a proper party. *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001). On a pragmatic level, it is reasonable to include him as a defendant so that his enforcement authority is subject to the same injunction as would apply to the chair of the ABC Commission.

V. Conclusion

For the foregoing reasons, the motion to dismiss should be denied.

Respectfully submitted, this the 11th day of May 2020.

s/ James A. Tanford
James A. Tanford (Indiana Attorney No. 16982-53)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 812-332-4966
Fax: 317-638-9891
tanfordlegal@gmail.com

William C. Trosch (NC Attorney No. 20163)
CONRAD TROSCH & KEMMY, P.A.
301 S. McDowell Street, Suite 1001
Charlotte, NC 28204
Tel: 704-553-8221
Fax: 704-331-0595
troschbill@ctklawyers.com

Robert D. Epstein (Indiana Attorney No. 6726-49)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 317-639-1326
Fax: 317-638-9891
Rdepstein@aol.com

James Porter (Indiana Attorney No. 28011-49)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 317-639-1326
Fax: 317-638-9891
james@jeporterlaw.com

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that this document contains 3950 words and therefore complies with the 4500-word limit imposed by this Court's Initial Scheduling Order.

I hereby certify that on May 11, 2020, I electronically filed the foregoing Plaintiffs' Memorandum in Opposition to Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Jeffrey B. Welty
jwelty@ncdoj.gov

Respectfully submitted,
Attorneys for Plaintiffs,

s/ James A. Tanford
James A. Tanford (Indiana Attorney No. 16982-53)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 812-332-4966
Fax: 317-638-9891
tanfordlegal@gmail.com