No. 07-1513

In The
UNITED STATES COURT OF APPEALS
For The First Circuit

CHERRY HILL VINEYARD, LLC; PHILIP BROOKS,

Plaintiffs/Appellants

v.

JOHN E. BALDACCI, Governor of Maine; G. STEVEN ROWE, Attorney General of Maine; JEFFREY R. AUSTIN, Supervisor of the Bureau of Liquor Enforcement; PATRICK J. FLEMING, Commander of Special Investigations Unit, Bureau of Liquor Enforcement

Defendants/Appellees

DAN GWADOSKY, Director of the Bureau of Alcoholic Beverages and Lottery Operations

Defendant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE JUDGE GENE CARTER, PRESIDING (DISTRICT OF MAINE CASE NO. 05-CV-153-B-C)

BRIEF OF DEFENDANTS/APPELLEES JOHN E. BALDACCI, G. STEVEN ROWE, JEFFREY R. AUSTIN, and PATRICK J. FLEMING

G. STEVEN ROWE
Attorney General
CHRISTOPHER C. TAUB
Assistant Attorney General
Bar Number 65217
Six State House Station
Augusta, ME 04333-0006
(207) 626-8800
Attorneys for Appellees

PAUL STERN
Deputy Attorney General
MICHELLE ROBERT
Assistant Attorney General

Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL CONSTITUTION AND STATUTES

STATE STATUTES

OTHER

sold to consumers in Maine via the Internet, by mail, over the phone, or through any other "remote" means.[1] So, while Maine allows small wineries (known as "farm wineries") to sell wine directly to consumers, such sales must be conducted in face-to-face transactions.[2]

Despite that Maine allows out-of-state wineries to obtain farm winery status on precisely the same terms as in-state wineries may obtain that status, plaintiffs nevertheless argue that Maine is discriminating against out-of-state wineries and violating the Commerce Clause. According to plaintiffs, the effect of the face-to-face sale requirement is to make it difficult (if not impossible) for small out-of-state wineries to sell directly to consumers in Maine. This is so, claim plaintiffs, because Internet/mail order is the only feasible method by which out-of-state wineries can sell directly to consumers in Maine. What plaintiffs fail to recognize, though, is that there is no discrimination against out-of-state wineries. No winery, whether located in Maine or elsewhere, may engage in Internet/mail order sales. Thus, in-state and out-of-state wineries are equally burdened. In fact, the face-to-

[1] These remote sales methods will be referred to collectively as "Internet/mail order sales."

[2] As will be discussed, Maine normally requires manufacturers of alcohol to sell through a "three tier" system and sell only to wholesalers. The ability to sell wine directly to consumers is a privilege given to farm wineries. Another privilege is that they may sell directly to retailers, including wine stores, restaurants, and hotels. Sales to retailers need not be face-to-face transactions, but a retailer's sale to a consumer must be face-to-face.

face sale requirement likely burdens in-state wineries more than out-of-state wineries. While out-of-state wineries are prevented only from selling wine via the Internet/mail order to consumers in Maine, in-state wineries are prevented from selling wine via that method to consumers across the country and throughout the world. In short, while plaintiffs may be unhappy with the face-to-face sale requirement, it does not discriminate against out-of-state wineries. The Commerce Clause does not require that a state open a sales channel not available to any entity simply to make it easier for out-of-state interests to conduct business in the state.

STATEMENT OF THE CASE

This lawsuit began on September 27, 2005, when Cherry Hill Vineyard, LLC ("Cherry Hill") and Dr. Philip Brooks filed a complaint against Governor John E. Baldacci, Attorney General G. Steven Rowe, and Dan Gwadosky, the Director of Alcoholic Beverages and Lottery Operations. Complaint (Docket Item 1) (Joint Appendix ("App.") 7-14). All three defendants were sued in their official capacities. *Id.*, ¶ 15 (App. 9). Plaintiffs later amended their complaint and replaced Mr. Gwadosky with Jeffrey R. Austin, the Supervisor of the Bureau of Liquor Enforcement and Lieutenant Patrick J. Fleming, the Commander of the Special Investigations Unit of the Bureau of Liquor Enforcement. First Amended

Complaint (Docket Item 11) (App. 15-20).[3] Both of the new defendants were sued in their official capacities. *Id.*, ¶ 11 (App. 17).

The sole count in plaintiffs' amended complaint is that by requiring face-to-face sales, Maine's laws effectively prohibit Internet/mail order sales of wine, discriminate against out-of-state wineries, and violate the Commerce Clause. *Id.*, ¶¶ 18-29. The parties agreed to submit the case to the district court on a stipulated record. Accordingly, the parties filed a 53-paragraph set of stipulations, to which four exhibits were attached and incorporated. Stipulated Record (Docket Item 16) (App. 26-187). Other than the facts set forth in the stipulations and attached exhibits, no other facts are part of the record in this case. As will be discussed below, plaintiffs, in their appellate brief, attempt to introduce new facts on appeal. These facts are not part of the record and should not be considered. After submitting the record, the parties submitted legal briefs. *See* Briefs (Docket Items 19, 22, 24 & 25).[4]

On July 27, 2006, Magistrate Judge Kravchuk issued a decision concluding that Maine's laws do not violate the Commerce Clause and recommending that the court enter judgment in favor of the defendants. Recommended Decision, 19

[3] Lt. Fleming was subsequently promoted to Colonel and now heads the Maine State Police. Lt. David E. Bowler is the current Commander of the Special Investigations Unit of the Bureau of Liquor Enforcement.

(Docket Item 27) (Addendum to Appellants' Brief ("Add.") 41-59). The Magistrate Judge noted that two standards apply when a state law is challenged on Commerce Clause grounds. *Id.*, 13 (Add. 53). If the law "in purpose or effect . . . protects in-state commercial interests from out-of-state competition, then strict scrutiny applies." *Id.*, 13 (Add. 53). Under strict scrutiny, "a statute is invalid unless it furthers a legitimate local objective that cannot be served by reasonable non-discriminatory means." *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 10-11 (1st Cir. 2007). On the other hand, a state law that "treats the relevant in-state and out-of-state interests the same or places only indirect or incidental burdens on interstate commerce" is constitutional "so long as [the burdens] are not 'clearly excessive' in relation to 'putative local benefit[s].'" Recommended Decision, 14 (Add. 54) (quoting *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)).

The Magistrate Judge then found that "plaintiffs fail[ed] to demonstrate the existence of a local market in which local farm wineries are authorized to participate and from which out-of-state wineries are excluded." *Id.*, 15 (Add. 55). The Magistrate Judge noted that while out-of-state wineries are excluded from the Internet/mail order market, so too are in-state wineries. *Id.* The Magistrate Judge

---

[4] The court permitted the Maine Beer and Wine Wholesalers Association to participate as "Amicus Curiae Plus," Docket Item 13, and it too submitted briefs. Docket Items 23 & 26.

thus concluded that because the face-to-face sale requirement was neither discriminatory nor protectionist in purpose or effect, strict scrutiny did not apply. *Id.*, 17 (Add. 57).

The Magistrate Judge found that plaintiffs had waived the issue of whether the face-to-face sale requirement fails the *Pike* balancing test: "Notably, the plaintiffs do not articulate a *Pike* analysis anywhere in their primary brief and expressly disavow the appropriateness of any application of the *Pike* test in their reply brief." *Id.*, 14 (Add. 54). Thus, the Magistrate Judge noted that if she concluded "that the statutory scheme is not protectionist in purpose or effect, then there would be no need to balance any incidental or indirect burdens on interstate commerce against the 'putative local benefits' identified in the stipulated record." *Id.*, 14-15 (Add. 54-55). Despite that the issue was waived, the Magistrate Judge concluded that the face-to-face sale requirement[5] "readily passes a *Pike* analysis." *Id*, 17 (Add. 57). The Magistrate Judge noted that face-to-face sale requirements might be suspect if applied "to an innocuous article of interstate commerce such as clothing, which is not subject to any age restriction or other public health restriction (let alone the Twenty-first Amendment)." *Id.*, 18 (Add. 58). The Magistrate Judge recognized, though, that here, "the patently obvious

[5] Here, the Magistrate Judge referred to the requirement as an "on-premises restriction." *Id.*, 17 (Add. 57). Other times she refers to it as a "face-to-face" sale requirement. *Id.*, 16 & 18 (Add. 56 & 58). The two terms are interchangeable.

circumstances are that the subject matter of the statutory scheme is wine, wine is an alcoholic beverage that is contraband when placed in certain minors' hands, and the State has concluded that mail order transactions cannot reliably be policed in order to protect certain minors from themselves." *Id.*, 18 (Add. 58). The Magistrate Judge concluded that

> because the Commerce Clause does not require Maine to permit mail order purchases of wine simply because it is the most practical means of affording remote, out-of-state wineries with access to Maine consumers, the on-premises restriction on sales simply does not impose any cognizable burden on interstate commerce that could possibly outweigh the putative local benefit of regulating minors' access to alcohol.

Id., 18-19 (Add. 58-59). So, because strict scrutiny did not apply, and because the face-to-face sale requirement passed the *Pike* balancing test (which, in any event, plaintiffs waived), the Magistrate Judge rejected the Commerce Clause challenge and recommended judgment for the defendants. *Id.*, 19 (Add. 59).[6]

On March 5, 2007, Judge Carter, without further written opinion, adopted and affirmed the Magistrate Judge's recommended decision. Docket Item 33 (Add. 60). Judgment for the defendants entered that same day. Docket Item 34 (Add. 61). On March 28, 2007, plaintiffs timely appealed. Docket Item 35 (App. 188).

---

[6] Plaintiffs continue to disavow application of the *Pike* balancing test, Appellants' Brief, 4, and instead put all of their eggs into the strict scrutiny basket.

STATEMENT OF THE FACTS[7]

Children and Alcohol

Alcohol use by young people is a serious problem, and the Internet is a significant part of the problem. In 2002, Congress asked the National Academy of Sciences[8] to develop strategies for reducing underage drinking. Stipulated Record, ¶ 29 (App. 30). In 2004, after completing their work, the Academy's National Research Council and Institute of Medicine released a report entitled "Reducing Underage Drinking: A Collective Responsibility." Stipulated Record, ¶ 30, and Exhibit A thereto (App. 30 & 36-49). The report began by noting the threats posed by underage drinking:

> Alcohol use by young people is dangerous, not only because of the risks associated with acute impairment, but also because of the threat to their long-term development and well-being. Traffic crashes are perhaps the most visible of these dangers, with alcohol being implicated in nearly one-third of youth traffic fatalities. Underage alcohol use is also associated with violence, suicide, educational

---

[7] All of the facts set forth below come directly from the stipulated facts which the parties jointly submitted to the district court and which the parties agreed would constitute the entire factual record. In their brief, plaintiffs now introduce various new "facts" which are not part of the record. Plaintiffs argue that because the facts come from various Internet web sites, the Court may take judicial notice of them. Appellants' Brief, 6 n.3. Defendants are aware of no support for such a proposition, or for the proposition that everything that one reads on the Internet is true. Accordingly, the defendants respectfully request that the Court disregard any "facts" not set forth in the stipulated record. As necessary, defendants will specifically point out new "facts" that have been improperly introduced.

[8] The National Academy of Science is a federally chartered corporation and investigates and reports on scientific matters at the request of the federal government. Stipulated Record, ¶ 28; 36 U.S.C. §§ 150301-150304 (App. 29).

> failure, and other problem behaviors. All of these problems are magnified by early onset of teen drinking: the younger the drinker, the worse the problem. Moreover, frequent heavy drinking by young adolescents can lead to mild brain damage. The social cost of underage drinking has been estimated at $53 billion including $19 billion from traffic crashes and $29 billion from violent crime.

Id. at 1.[9] The Academy then looked at how minors obtain access to alcohol. The Academy noted that in a study conducted in 2000, ten percent of minors reported obtaining alcohol over the Internet or through home delivery, and that "increasing use of the Internet may increase the percentage." *Id.* at 174 (App. 44). The Academy stated:

> Although an argument can certainly be made for banning Internet and home delivery sales altogether in light of the likelihood that these methods will be used by underage purchasers, the committee recognizes that some states may not be willing to curtail legitimate access to alcohol through these means and so recommends, instead, tightening access.

Id.

In addition to the National Academy of Sciences study, there is other evidence suggesting that it is not uncommon for minors to use the Internet to purchase alcohol. On August 3, 1999, the United States House of Representatives held debate on the 21st Amendment Enforcement Act. 145 Cong. Rec. H. 6856

---

[9] Pages 1 through 12 of the National Academy of Sciences study were inadvertently omitted from the appendix, but can be found at Exhibit A to the Stipulated Record (Docket Item 16).

(1999); Stipulated Record, ¶ 32, and Exhibit C thereto (App. 30-31 & 96-186).[10] During debate, members of Congress referred to the problem posed by Internet sales of alcohol. Representative Moakly noted that the Act "takes us a step closer to stopping the sale of alcohol to minors over the Internet." *Id.* at 6857 (App. 98). Representative Scarbourough stated:

> Bootleggers sell liquors to minors over the Internet, again avoiding State laws given preeminence by the Twenty-First Amendment. Shamed by the countless media stories detailing how young children are buying liquor from these modern-day bootleggers over the Internet, they have shrugged off such media stories, calling them nothing more than stings by their economic enemies. But the only sting here comes from the harsh reality that too many young children can buy alcohol over the Internet.

Id. at 6858 (App. 99). Representative Scarborough went on to note that numerous television stations had featured news stories on the ability of minors to purchase liquor over the Internet. *Id.* at 6863 (App. 115).[11] Representative Barr stated that "there are in fact numerous documented instances of minors purchasing alcoholic

---

[10] This Act, which did pass, provides a civil cause of action to state Attorneys General in federal court to seek injunctive relief barring interstate shipments of liquor if such shipments violate the law of the receiving state. 27 U.S.C. § 122a.

[11] Representative Scarborough referred to stations in Birmingham, AL, Phoenix, AZ, Santa Barbara, CA, Washington, West Palm Beach, FL, Miami, FL, Sarasota, FL, Springfield, IL, Evansville, IN, Baltimore, MD, Boston, MA, Lansing, MI, Greenville, MS, Syracuse, N.Y., Charlotte, N.C., Columbus, OH, Cleveland, OH; Oklahoma City, Philadelphia, PA, Lancaster, PA, Pittsburgh, PA, Providence, RI, Spartanburg, S.C., Amarillo, TX, San Antonio, TX, Salt Lake City, UT, Norfolk, VA, Seattle, WA, Green Bay, WI, as well as CNN Morning News, Hard Copy, and ZDTV cable news. *Id.* at 6863 (App. 115).

beverages over the Internet." *Id.* at 6863 (App. 114). Representative Sensenbrenner noted that "illegal direct shippers are bypassing State excise and sales taxes, operating without required licenses, and most appallingly, illegally selling alcohol to underage persons." *Id.* at 6860 (App. 108).

Many underage drinkers themselves acknowledge that, if they could, they would obtain alcohol over the Internet. In February, 2000, Wirthlin Worldwide conducted a survey of 500 college students. Stipulated Record, ¶ 37 (App. 31). Two percent of all students surveyed stated that they had purchased alcohol over the Internet, and five percent stated that they knew someone who had purchased alcohol over the Internet. *Id.* More importantly, 35% of the students under the age of 21 reported that they personally would likely purchase alcohol over the Internet if age verification were not required, and 80% of the students stated that their peers were likely to purchase alcohol on-line if age verification were not required. *Id.* at ¶ 38 (App. 32). It must be remembered that this survey was conducted seven years ago, and Internet usage has only increased.

There is evidence that minors are able to circumvent restrictions and obtain alcohol via the Internet. In 2004, underage students in Washington conducted an experiment to see whether they could purchase alcohol over the Internet. Stipulated Record, ¶ 39 (App. 32). The Gonzaga students succeeded in obtaining beer, wine and liquor from various companies doing business on the Internet,

including Costco. *Id.* at ¶ 40 (App. 32). Costco's chief executive officer stated that he was concerned to hear that the underage students were able to purchase wine from his company because Costco had paid an extra fee to its delivery company to get an adult signature and check identification. *Id.* at ¶ 41 (App. 32).

Also in 2004, the Massachusetts Attorney General's office enlisted underage college students in an investigation to see whether the students could obtain alcohol through the Internet from online retailers. *Id.* at ¶ 43 (App. 32-33). The students successfully obtained 50 bottles of wine, four six-packs of beer and more than a dozen types of hard liquor. *Id.* The Attorney General's office stated that three delivery companies – Federal Express, UPS, and DHL – delivered alcohol to the underage students, sometimes delivering alcohol without asking for proof of age, and sometimes leaving the alcohol on the minors' doorsteps. *Id.* at ¶ 46 (App. 33). The Massachusetts Attorney General's office stated that FedEx on four occasions failed to follow instructions on the outside of the box that it contained alcohol and required a signature of someone at least 21 years old. *Id.*

Finally, when it comes to minors using the Internet to obtain alcohol, the public understands the scope of the problem. In September 2003, Wirthlin Worldwide conducted a nationwide telephone survey of 918 adults regarding attitudes toward the availability of wine, beer and spirits over the Internet and by mail. Stipulated Record, ¶ 33 (App. 31). When participants in the survey were

asked whether they "favor or oppose allowing beer, wine or liquor to be sold directly to consumers over the Internet or through the mail," 77 percent of the participants stated that they were opposed. *Id.* at ¶ 34 (App. 31). Eight-three percent of the participants "indicate[d] that sales over the Internet should not be allowed because it would give minors easier access to alcohol products." *Id.* at ¶ 35 (App. 31).

Bringing in new "facts" not in the stipulated record, plaintiffs claim that "[m]inors rarely drink the kind of premium wine that is hand-sold directly by wineries to its customers,[12] rarely are willing to wait several days for a shipment to arrive, and rarely have a safe address for it to be shipped to where their parents will not find out." Appellants' Brief, 11-12.[13] Plaintiffs underestimate the ingenuity

---

[12] It may well be that minors do not purchase pricey award-winning wines like those produced by Cherry Hill. But, Maine requires that all wine be purchased face-to-face, whether the wine costs $40 or $2 per bottle. Plaintiffs' suggestion that perhaps Maine should require that only cheap wine be purchased face-to-face is plainly unworkable and impractical.

[13] In support of these "facts," plaintiffs cite to an FTC report attached to the Stipulated Record. App. 50-95. In the portions cited, though, the FTC is simply discussing claims made by various persons, some of whom are in favor of direct shipping. The FTC does not indicate whether it agrees with such claims. If the FTC's mere repetition of statements made by others is considered, defendants note that elsewhere in the report, the FTC refers to 1) a statement by the former president of the National Conference of State Liquor Administrators that every state that used a minor to attempt to obtain alcohol over the Internet has been able to buy; and 2) a finding by Michigan that one in three websites contacted agreed to sell alcohol to a minor with "no more age verification than a mouse click, and that UPS delivery people did not properly verify the recipients' ages." App. 88-89.

and resourcefulness of teenagers. In any event, and as is discussed above, there is evidence (which is in the record) that minors do use the Internet to obtain alcohol. Nevertheless, defendants certainly recognize that if one were not confined to the record below, one could find conflicting evidence regarding the extent to which minors obtain alcohol over the Internet. But, in the presence of conflicting evidence, and in the absence of any discrimination against out-of-state interests, Maine's legislature was certainly justified in taking a cautious approach and requiring that all alcohol be purchased face-to-face.

The Plaintiffs

Cherry Hill is a winery in Oregon, and it would like to sell and ship wine directly to consumers in Maine. Amended Complaint (Docket Item 11), ¶¶ 8-9 (App. 16-17). Cherry Hill produces approximately 12,000 gallons of wine each year, and, as will be discussed, is eligible for a Maine "farm winery" license. Stipulated Record, ¶¶ 3 & 22 (App. 26 &29). Cherry Hill has never applied for such a license. *Id.*, ¶ 25 (App. 29). Dr. Brooks is a regular purchaser and consumer of "fine and rare wines," and he would like to purchase and have shipped to his home wine from out-of-state wineries. *Id.*, ¶¶ 9-11 (App. 27).[14] Plaintiffs

[14] The record does not reflect whether Cherry Hill produces the "fine" or "rare" wines of which Dr. Brooks is fond, or whether Dr. Brooks would like to purchase wine from Cherry Hill. In any event, defendants do not challenge either plaintiff's standing.

claim that their intended transactions are prohibited (or at least made more difficult) because Maine law, as will be discussed, requires that Maine consumers purchase wine only in face-to-face transactions. Plaintiffs allege that this face-to-face sale requirement violates the Commerce Clause.

Legal Framework

The Twenty-first Amendment prohibits the transportation or importation of alcohol into any state in violation of that state's laws. U.S. Const. amend. XXI, § 2. This provision "confers upon the several states wide-ranging control over the structure of local liquor distribution systems." *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 10 (1st Cir. 2007); *see also California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980) ("The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."). Acting pursuant to its Twenty-first Amendment powers, Maine has, for the most part, imposed a so-called "three-tiered" system on the distribution of beer and wine in the State. Producers of beer and wine may sell only to licensed wholesalers, and wholesalers may sell only to licensed retailers. *See, generally*, 28-A M.R.S.A. §§ 1-2230. Only the retailer may sell to consumers. *Id.* By law, retailers may not sell alcohol to any person under the age of 27 without verifying that "the person is not a minor by means of reliable photographic identification containing that person's

date of birth." 28-A M.R.S.A. § 706(2). Many states mandate three-tiered distribution systems, and the Supreme Court has held such systems are authorized by the Twenty-first Amendment and are "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 489 (2005); *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

It is one of the alternatives to the three-tier system that is relevant here. Under Maine law, any winery, wherever located, that ferments, ages, and bottles its own wine, not exceeding 50,000 gallons per year, may obtain a "farm winery" license. 28-A M.R.S.A. § 1355(3)(A); 28-A M.R.S.A. § 2(11-A). This license allows the holder to do several things that other producers ordinarily cannot do. In particular, a farm winery may "sell, during regular business hours, wines produced at the winery by the bottle, by the case or in bulk on the premises of the winery to persons who are not minors." 28-A M.R.S.A. § 1355(3)(B) (emphasis added). A farm winery may also open one or two retail outlets at which it may sell its wine. 28-A M.R.S.A. § 1355(3)(C). The "on premises" requirement means that, as with all other sales of alcohol to consumers, sales of wine by wineries must be conducted in face-to-face transactions. Finally, a farm winery may "sell or deliver" its wine to licensed retailers, including restaurants and clubs. 28-A M.R.S.A. § 1355(3)(D). The fee for a farm winery license is fifty dollars per year. Stipulated Record, ¶ 23 (App. 29).

While many states allow small wineries to obtain special licenses that allow them to by-pass the three-tier system, Maine is one of few that allows in-state and out-of-state wineries to obtain farm winery licenses on equal terms. Quite simply, any winery, wherever it may be located, that produces not more than 50,000 gallons of wine each year may obtain a farm winery license. 28-A M.R.S.A. § 2(11-A); *see also* 28-A M.R.S.A. § 1355(3)(A).[15] Indeed, the parties have stipulated that out-of-state wineries and in-state wineries are equally eligible to obtain Maine farm winery licenses. Stipulated Record, ¶ 21 (App. 29). So, and again as the parties have stipulated, Cherry Hill, if it obtained a Maine farm winery license, would be allowed to sell and deliver its wine to licensed wholesalers and retailers (including wine stores and restaurants) in Maine. Stipulated Record, ¶ 22

[15] Many years ago, only farm wineries located in Maine could obtain farm winery licenses. 28-A M.R.S.A. § 2(17), repealed by P.L. 1993, ch. 730, § 11. In 1991, Canada asked the World Trade Organization to decide whether the laws of some states regulating the import of beer and wine violated the General Agreement on Tariffs and Trade ("GATT"). *United States Measures Affecting Alcoholic and Malt Beverages*, DS23/R, June 19, 1992, GATT B.I.S.D. (Supp. No. 39) (1993). Among the states that Canada singled out was Maine, and Canada specifically complained that Maine allowed only in-state farm wineries to sell directly to retailers. *Id.* The WTO ultimately determined that the laws of Maine and other states that granted certain privileges to in-state wineries violated GATT. *Id.* In response, Maine promptly amended its laws and repealed the requirement that a winery be located in Maine in order to obtain a farm winery license. P.L. 1993, ch. 730. So, since the enactment of Chapter 730, all farm wineries – in-state and out-of-state – may obtain farm winery licenses.

(App. 29).[16] Because of the face-to-face sale requirement, though, Cherry Hill would not be able to sell wine directly to consumers in Maine unless it established a retail location within the state. *Id.*

Before moving on, it is necessary to address erroneous statements that plaintiffs made below and continue to make here. Below, plaintiffs insisted that out-of-state farm wineries can sell in Maine only by going through a wholesaler (sometimes referred to as a distributor), and the Magistrate Judge properly noted that such a contention "is entirely at odds with the stipulated record" and is contradicted by the plain language of 28-A M.R.S.A. § 1355(3)(D), which explicitly authorizes farm wineries to sell directly to retailers. Recommended Decision, 15 (Add. 55). Despite being corrected by the Magistrate Judge, plaintiffs continue to repeat their erroneous statement. For example, plaintiffs claim that without a physical presence, out-of-state wineries must use two middlemen to sell wine – a wholesaler and a retailer – and that if they cannot find a wholesaler, they are "excluded from the entire Maine wine market." Appellants' Brief, 24-25.

---

[16] Plaintiffs argue that the ability of out-of-state farm wineries to sell directly to retailers is of no benefit because no retailer can "afford the cost and shelf space to carry products from 4,200 wineries." Appellants' Brief, 9. This is plainly ridiculous. A retailer will obviously not stock every wine from every winery, but it will stock those that its customers might buy. And, if someone like Dr. Brooks desires a particular wine, he can simply ask his local wine store to order it. So, the ability to sell directly to retailers gives small out-of-state wineries significant access to the Maine market.

Elsewhere, plaintiffs complain about the "fact" (which is not in the record) that some states are served by "as few as five or six distributors of American wine," and imply that this poses an obstacle for farm wineries who want to sell wine in Maine. *Id.*, 10 & 28. By now, it should be perfectly clear to plaintiffs – farm wineries may sell directly to retailers and any obstacles posed by wholesalers are wholly irrelevant. Stipulated Record, ¶ 22 (App. 29); 28-A M.R.S.A. § 1355(3)(D).

Also at issue in this case is 28-A M.R.S.A. § 2077, which applies to the importation of alcohol by individuals. With respect to wine, a person is absolutely entitled to bring into the state up to four quarts. 28-A M.R.S.A. § 2077 (1-A). If a person wants to bring in more than four quarts of wine, he or she need simply obtain permission from the Department of Public Safety (the "Department"). 28-A M.R.S.A. § 2073(3)(A); Stipulated Record, ¶ 26 (App. 29). To obtain such permission, the person may send a letter (by regular mail, facsimile, or e-mail) providing details regarding the type, quantity, and intended use of the wine that the person proposes to bring into the state. Stipulated Record, ¶ 27 (App. 29).[17] There

[17] Plaintiffs claim that obtaining permission would be time consuming and impractical. Appellants' Brief, 8 n.9. They also imply that the Department delays giving permission or may not give permission at all. Appellants' Brief, 20-21 (noting that consumer must wait until the Department "get[s] around to acting on the application" and that the request "may or may not be granted"). There is nothing in the record to support such claims. What is in the record is the stipulation of the parties that obtaining permission is as simple as sending an e-

is no fee for obtaining permission to bring wine into the state, and permission is generally granted so long as the Department is satisfied that the wine is for personal consumption and will not be re-sold. *Id.*[18]

SUMMARY OF THE ARGUMENT

Two standards are applied when state statutes are challenged under the Commerce Clause. If the statute discriminates against interstate commerce, whether in purpose or effect, the statute is subject to a strict scrutiny standard. Under that standard, the state must establish that the statute serves a legitimate local purpose, and that the purpose could not be served as well by available

---

mail, no fee is charged, and "permission is generally granted so long as the Department of Public Safety is satisfied that the wine is for personal consumption and will not be resold." Stipulated Record, ¶ 27 (App. 29). Dr. Brooks has apparently never asked for permission to bring in wine and has no basis for complaining about the process.

[18] Plaintiffs claim that 28-A M.R.S.A. § 2077 is "discriminatory on its face," but they explicitly state that they are not challenging the constitutionality of the import restriction. Appellants' Brief, 15 n.18. Any challenge would fail. Briefly stated, the Twenty-first Amendment authorizes Maine to impose limits on the importation of alcohol. In fact, the Fourth Circuit recently upheld against a Commerce Clause challenge a similar import restriction imposed by Virginia. *Brooks v. Vassar*, 462 F.3d 341, 349-54 (4th Cir. 2006), *cert. denied*, 2007 U.S. Lexis 5184. And, Congress has specifically endorsed such limits. 27 U.S.C. § 124 (authorizing winery visitors to ship home wine purchased at the winery so long as the visitors' home states would have allowed the wine to be carried into the state); *see also Maine v. Taylor*, 477 U.S. 131, 138 (1986) ("It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid."). Finally, to bring in more than four quarts, persons simply must obtain permission from the Department of Public Safety, and permission is liberally granted. Stipulated Record, ¶ 27 (App. 29).

nondiscriminatory means. If, on the other hand, the state statute regulates even-handedly to effectuate a legitimate local public interest and has only "incidental" effects on interstate commerce, the so-called *Pike* balancing test applies. Under that test, the statute will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Here, plaintiffs are arguing only that the face-to-face sale requirement discriminates against interstate commerce and that the strict scrutiny standard applies. They have waived any challenge based on the *Pike* balancing test.

Maine's face-to-face sale requirement does not discriminate against interstate commerce and thus does not trigger strict scrutiny. Courts in other jurisdictions, including the Second Circuit, have almost uniformly rejected arguments that face-to-face sale requirements are subject to strict scrutiny, and have upheld such requirements against Commerce Clause challenges. As these courts recognized, as long as face-to-face sale requirements are applied equally to in-state and out-of-state interests, they are not discriminatory.

Maine's face-to-face sale requirement is evenhanded and applies equally to in-state and out-of-state wineries. No winery, wherever located, may ship wine directly to consumers. Plaintiffs' claim that the face-to-face sale requirement benefits in-state wineries is not supported by any evidence. Indeed, common sense dictates that the face-to-face sale requirement imposes greater burdens on in-state

wineries. Maine law prevents them from shipping wine to consumers anywhere in the world, but only prevents out-of-state wineries from shipping wine to consumers in Maine. Further, even if there is some market in Maine for walk-in purchases of wine at wineries, such a market is distinct from the market that plaintiffs want opened. They want Maine to open a direct shipment market, which is a market that is closed to all wineries. The Commerce Clause does not require states to open markets that the state has not opened to any entity, nor does it require states to make it easier for distant companies to do business in the state.

Plaintiffs' reliance on *Granholm v. Heald* is misplaced. There, the Court held that strict scrutiny applied because New York and Michigan allowed in-state wineries to ship directly to consumers, but did not allow out-of-state wineries to do so. The Court found that this was obvious and purposeful discrimination. Maine, however, treats in-state and out-of-state wineries exactly the same, and does not allow any winery to ship directly to consumers. In short, there is no discrimination in purpose or effect, and strict scrutiny does not apply.

Even if strict scrutiny did apply, the face-to-face sale requirement would pass. The requirement serves Maine's important interest in restricting the ability of minors to obtain alcohol. The anonymity of the Internet makes age verification difficult, and there is simply no substitute for an in-person sale where the seller can confirm the buyer's age. Requiring carriers to verify the recipients' age upon

delivery is problematic for two reasons. First, Maine may be preempted from imposing such requirements on carriers. Second, there is evidence in the record that carriers do not perform age verification even when the shipper has requested that they do so. Other alternatives proposed by plaintiffs are similarly unworkable.

In sum, the face-to-face sale requirement does not trigger strict scrutiny, and, even if does, it passes that test.

STANDARD OF REVIEW

"This Court reviews orders for summary judgment *de novo*, construing the record in the light most favorable to the nonmovant and resolving all reasonable inferences in that party's favor." *Clemente v. Executive Airlines, Inc.,* 213 F.3d 25, 29 (1st Cir. 2000). The review of an order for summary judgment does not limit this Court to the district court's rationale; rather, the Court may affirm the entry of summary judgment on any ground revealed by the record. *See, e.g., Sands v. Ridefilm Corp.*, 212 F.3d 657, 662 (1st Cir. 2000).

ARGUMENT

I. Maine's Face-to-Face Sale Requirement for Wine Does Not Violate the Commerce Clause.

A. The Dormant Commerce Clause and the Two-Tiered Approach.

The Commerce Clause declares that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. Art. I, § 8. On its face, the Commerce Clause is an

affirmative grant of power to Congress, and does not restrict the ability of the states to regulate commerce. Nevertheless, the Supreme Court has interpreted the Commerce Clause as "a substantive 'restriction on permissible state regulation' of interstate commerce." *Dennis v. Higgins*, 498 U.S. 439, 447 (1991). This implicit restriction on state regulation has become known as the "dormant Commerce Clause." *See, e.g., Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 179 (1995). "The dormant Commerce Clause prohibits protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors." *Grant's Dairy--Maine, LLC v. Commissioner of Maine Dep't of Agric., Food & Rural Resources*, 232 F.3d 8, 18 (1st Cir. 2000); *see also Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999) ("The core purpose of the dormant Commerce Clause is to prevent states and their political subdivisions from promulgating protectionist policies."). [19] The dormant Commerce Clause is not an absolute prohibition on state regulations that affect interstate commerce, and "States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Lewis v. BT Investment Managers*, 447 U.S. 27, 36 (1980).

---

[19] The Commerce Clause also may prohibit a state from regulating commerce that takes place wholly outside its borders. *See, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). Plaintiffs do not claim that this prohibition applies here.

It should also be noted that this case involves the application of Maine's police powers to regulating the distribution and sale of alcohol. This Court has described such regulation as "unique" because while it still "is subject to the nondiscrimination principles of the dormant commerce clause," the Twenty-first Amendment gives the states "wide-ranging control" over the distribution of liquor. *Wine & Spirits Retailers*, 481 F.3d at 10. As will be discussed, while face-to-face sale requirements might violate the Commerce Clause when applied to the Magistrate Judge's example of "an innocuous article of interstate commerce such as clothing," Recommended Decision, 18 (Add. 58), such requirements are perfectly valid when applied to alcohol, a product that not only poses health hazards to minors, but is also given special treatment in the Constitution with respect to state regulation. *Wine & Spirits Retailers*, 481 F.3d at 10 (referring to the "constitutionally sanctioned zone of control" for alcohol).[20]

As the Magistrate Judge recognized, the Supreme Court "has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp. v. New York State Liquor*

---

[20] The plaintiffs are plainly wrong in claiming that the "fact that the product in this case is wine rather than books is irrelevant." Appellants' Brief, 15. First, the Constitution gives states no special regulatory power over books. Second, books pose no health hazard to minors, and a requirement that books be purchased only in face-to-face transactions would plainly be ridiculous and possibly would violate not only the Commerce Clause but also the Equal Protection and Due Process Clauses.

Auth., 476 U.S. 573, 578-79 (1986). If the state statute discriminates against interstate commerce, whether in purpose or effect, the statute is subject to stricter scrutiny. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *see also Wine & Spirits Retailers*, 481 F.3d at 10 ("A statute that discriminates on its face against interstate commerce, whether in purpose or effect, demands heightened scrutiny."). "Discrimination" is defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994). "The proponent of a dormant Commerce Clause claim bears the burden of proof as to discrimination." *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 40 (1st Cir. 2005); *see also Hughes*, 441 U.S. at 336 ("The burden to show discrimination rests on the party challenging the validity of the statute. . . .").

Of importance here is "the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978). So, the "strict scrutiny" test applies when there is discrimination against interstate commerce generally, and does not apply simply because, as is the case here, particular out-of-state companies are burdened by a state law. *See Wine & Spirits Retailers*, 481 F.3d at 15 ("the fact that the mosaic of state laws . . . may

have had a negative impact on [one company's] business model is, in itself, insufficient to show discriminatory effect.").

If the proponent establishes discrimination, the state then bears the burden of proving that the statute serves a legitimate local purpose, and that the "purpose could not be served as well by available nondiscriminatory means." *Taylor*, 477 U.S. at 138; *see also Hughes*, 441 U.S. at 337; *Wine & Spirits Retailers*, 481 F.3d at 10-11 (under strict scrutiny, "a statute is invalid unless it furthers a legitimate local objective that cannot be served by reasonable non-discriminatory means").

Under the second tier of a Commerce Clause analysis, state law that "regulates even-handedly to effectuate a legitimate local public interest" and has only "incidental" effects on interstate commerce will be upheld unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also Fireside Nissan v. Fanning*, 30 F.3d 206, 214 (1st Cir. 1994). The *Pike* balancing test involves three steps:

> First, we are to evaluate the nature of the putative local benefits advanced by the statute. Second, we must examine the burden the statute places on interstate commerce. Finally, we are to consider whether the burden is "clearly excessive" as compared to the putative local benefits.

Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 312 (1st Cir. 2005).

Here, plaintiffs argue that the face-to-face sale requirement is discriminatory and fails the strict scrutiny test. Appellants' Brief, 4. "Plaintiffs do not argue that the regulation also fails the lesser [*Pike*] balancing test." *Id.* So, if the Court finds that the face-to-face sale requirement does not trigger strict scrutiny, the Court need go no further and should affirm the district court's order granting summary judgment to the defendants. If, however, the Court finds that strict scrutiny does apply, the Court would then need to determine whether the face-to-face sale requirement serves a legitimate local purpose that could not be served as well by available nondiscriminatory means.

B. The Face-to-Face Sale Requirement Is Not Discriminatory and Does Not Trigger Strict Scrutiny.

Plaintiffs do not argue that the purpose of the face-to-face sale requirement is to discriminate against interstate commerce.[21] Rather, they argue that the effect of the requirement is discriminatory. It is plaintiffs who bear the burden of establishing discriminatory effect, *Wine & Spirits Retailers*, 481 F.3d at 14, and they failed to do so here. They produced no evidence that the face-to-face sale requirement favors in-state wineries and disadvantages out-of-state ones, and "[t]he absence of any such evidence is telling." *Id.* at 14.

---

[21] If they did make such a claim, they would need to "show that the statute was prompted by a discriminatory purpose." *Wine & Spirits Retailers*, 481 F.3d at 12. Such a showing is not possible here, and plaintiffs have not attempted to make such a showing.

Before addressing specifically Maine's face-to-face sale requirement, it should be pointed out that courts have consistently upheld against Commerce Clause challenges state laws requiring that certain commodities, including wine, be purchased in face-to-face transactions. The case most directly on point is *Jelovsek v. Bresden*, 2007 U.S. Dist. LEXIS 23814 (D. Tenn. 2007). There, Tennessee enacted a statute generally prohibiting wineries (both in-state and out-of-state) from selling wine directly to consumers. *Id.* at *10. A limited exception was that any winery using at least 75 percent Tennessee-grown agricultural products could sell wine directly to consumers provided that the sale took place on the winery's premises and did not exceed five cases to a single consumer in a single day. *Id.* at *10-11. The court rejected a Commerce Clause challenge brought by an out-of-state winery. The court concluded that "there is a significant difference in kind, magnitude, and market, between permitting direct shipment of wine into or within the State and permitting wineries to sell a limited quantity of their wine on-site." *Id.* at *20. The court continued:

> But it seems the market for on-site wine purchases, requiring the effort (or pleasure) of a trip to the winery, is different in kind and reach from the convenience-oriented market that would be created and facilitated by a law allowing direct-shipping. Plaintiffs are trying to compare separate markets that need not be compared in a Commerce Clause analysis.

Id. at *23. The court also noted, quoting with approval one of the litigants' statements, that "'[s]tates do not have a general obligation under the dormant

Commerce Clause to ensure that all potential market participants, no matter how geographically remote, have the same economic opportunities as in-state producers.'" *Id.* at *26. The court concluded that the Tennessee statute did not discriminate in purpose or effect, and thus did not trigger strict scrutiny. *Id.* at *26.[22] The court noted that the statute would likely pass the *Pike* balancing test, but that the plaintiffs had waived application of that test. *Id.* at *26-28.[23]

Face-to-face sale requirements have been upheld for other commodities. In *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2nd Cir. 2003), New York's legislature determined that the sale of cigarettes via the Internet, telephone, and mail order posed a public health threat and made it easier for minors to obtain access to cigarettes. *Id.* at 204. Accordingly, New York passed a law prohibiting cigarette sellers from shipping cigarettes directly to New York residents and

---

[22] A federal court found that Kentucky's requirement that wine be sold face-to-face did trigger strict scrutiny and violated the Commerce Clause, but, as the court noted in distinguishing the magistrate judge's recommended decision in the present case, "[t]he statutory scheme in Maine differs in significant respects from the Kentucky scheme." *Cherry Hill Vineyards, LLC v. Hudgins*, 2006 U.S. Dist. LEXIS 93266, *53 (W.D. Ky. 2006).

[23] In *Hurley v. Minner*, 2006 U.S. Dist. LEXIS 69090, *18-21 (D. Del. 2006), the court initially held that Delaware's law allowing farm wineries to sell wine to consumers only on their premises did not, on its face, violate the Commerce Clause. The court later vacated the decision after plaintiffs clarified that they were making an as applied challenge, and not a facial challenge. *See* Order dated April 24, 2007 in *Hurley v. Minner*, No. 05-826-SLR (D. Del.). The court has not yet addressed the as applied challenge. Presumably, though, the court still stands by it analysis of the facial challenge to the face-to-face sale requirement, which is the type of challenge the plaintiffs appear to making here.

effectively prohibiting "all sales of cigarettes to New York consumers that do not involve face-to-face sales." *Id.* at 203-04, 213.[24] Out-of-state sellers argued that the face-to-face sale requirement put them at competitive disadvantage vis-a-vis in-state sellers, and they alleged that the statute violated the dormant Commerce Clause. The Court of Appeals rejected this argument.

First, the court found that the statute did not discriminate against interstate commerce either facially or in effect. *Id.* at 209-216. As the court noted, the statute "prohibits all direct shipments of cigarettes to New York consumers, whether the direct shippers be located within or without the state. . . ." *Id.* at 211. The court acknowledged that the face-to-face sale requirement meant that out-of-state sellers might have to set up "brick and mortar" stores in New York to sell directly to New York consumers, but found that the same was true for in-state sellers who might otherwise have preferred to conduct transactions via the Internet. Thus, this "consequence applies evenhandedly to both out-of-state and in-state direct shippers and therefore does not discriminate against those located outside of

[24] The statute had a provision that, as interpreted by the court, permitted sellers to ship up to four cartons of cigarettes to consumers so long as the sellers used their own trucks (as opposed to common carriers). *Id.* at 214-15. So, for example, a grocery store that provided delivery services with its own trucks could deliver cigarettes to its customers. *Id.* at 216. The court held that such a "de minimis advantage to in-state brick-and-mortar retail sellers" was "insufficient to establish a discriminatory effect." *Id.* at 216. Here, on the other hand, in-state wineries do not have even a de minimis advantage.

New York State." *Id.* at 212. The court stated that the statute "merely requires that cigarette sales to New York consumers be conducted in such a way that age can be verified and tax collected, a requirement that applies to all direct shippers of cigarettes wherever they may be located. *Id.* at 214. Because the statute applied "evenhandedly to both in-state and out of state businesses," and had "only incidental effects on interstate commerce," the *Pike* balancing test applied. *Id.* at 216. The court held that the statute passed this test and upheld the statute against the Commerce Clause challenge.[25]

In *Arkansas Tobacco Control Board v. Santa Fe Natural Tobacco Co.*, No. 04-273, 2004 Ark. LEXIS 765 (Ark., Dec. 9, 2004), the Arkansas Supreme Court held that a statute that required cigarette retailers to conduct sales from a physical location within the state did not violate the Commerce Clause. The court noted that the statute applied equally to in-state and out-of-state retailers, did not discriminate on its face or in effect, and that the *Pike* test applied. *Id.* at *10-13. As in *Brown & Williamson*, the court found that statute passed that test. *Id.* at *25.

Finally, in *Consigned Sales Co. v. Sanders*, 543 F. Supp. 230 (W.D. Okla. 1982), Oklahoma passed a statute prohibiting the sale of fireworks through the mail, and instead requiring that all sales be made in face-to-face transactions. The

[25] Because plaintiffs are not arguing that Maine's face-to-face sale requirement fails the *Pike* balancing test, the *Brown & Williamson* court's application of that test is irrelevant and does not warrant further discussion.

court noted that at least one purpose of the mail order restriction was to prevent fireworks from being sold to persons under the age of twelve and intoxicated or "irresponsible" persons. *Id.* at 232. The court applied the *Pike* test and thus implicitly recognized that the statute did not trigger strict scrutiny. And, as in *Brown & Williamson* and *Santa Fe Natural Tobacco*, the court held that the statute passed the Pike test. *Id.* at 232-233.[26]

Maine's face-to-face sale requirement for wine no more triggers strict scrutiny than did the statutes at issue in the cases discussed above. Strict scrutiny is called for only when there is discrimination against out-of-state interests. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). And, as plaintiffs concede, discrimination exists when a state either benefits in-state interests at the expense of out-of-state interests or "places an out-of-state product or producer at a 'substantial commercial disadvantage' compared to in-state products and producers." Appellants' Brief, 22 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 275 (1988)) (emphasis added).

There is no discrimination here. All wineries, whether located in Maine or elsewhere, are prohibited from selling wine to consumers without a face-to-face sale where the seller can verify the buyer's age. It may well be that Internet/mail

[26] Despite that defendants relied extensively below on four of these cases, plaintiffs do not so much as cite them in their brief, much less make any effort to distinguish them or argue that they were wrongly decided.

order sales are the most effective and efficient methods by which small wineries can sell wine to consumers. Under Maine law, though, no winery, in-state or out-of-state, may use such methods. So, while a farm winery in Maine might wish, as Cherry Hill does, that it could sell wine to consumers without forcing them to journey to the winery, it cannot do so. As this Court has recognized, the Commerce Clause does not "protect[] particular business structures or methods of operation in retail markets." *Wine & Spirits Retailers*, 481 F.3d at 15-16. Plaintiffs essentially want Maine to open up a sales channel that currently no business may use to sell wine, and the Commerce Clause does not require such action. Quite simply, the Commerce Clause does not require a state to make it easier for distant businesses to conduct sales in the state. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) ("A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry.").

In fact, Maine's face-to-face sale requirement might have greater impact on in-state wineries. The requirement prohibits in-state farm wineries from selling wine via the Internet/mail order to consumers everywhere in the world. Out-of-state wineries, on the other hand, are prohibited only from selling wine via the Internet/mail order in Maine, and Maine law does not limit their ability to make

such sales to consumers located anywhere else. In short, all farm wineries, both in-state and out-of-state, are adversely affected by Maine's face-to-face sale requirement, and there is thus no discrimination.

In an effort to show discrimination, plaintiffs claim that the face-to-face sale requirement makes it "easy" for in-state wineries to make direct sales to consumers. Appellants' Brief, 21. While it may be true that it is easy for wineries to sell wine to consumers who happen to pay them a visit, there is no evidence in the record that this is a significant market. Plaintiffs bear the burden of establishing that the face-to-face sale requirement discriminates against out-of-state wineries in favor of in-state ones, *see Alliance of Auto. Mfrs.*, 430 F.3d at 40, and claims unsupported by any record evidence do not satisfy that burden. Presumably, if plaintiffs had evidence that in-state wineries do much walk-in business, they would have presented such evidence. The Court should presume, then, that in-state wineries are just as much burdened by the face-to-face sale requirement as are out-of-state wineries.[27]

---

[27] As noted previously, defendants object to the numerous "facts" that plaintiffs argue should be judicially noticed. If the Court does judicially notice any of these facts, the Court should also consider taking judicial notice of the newspaper article dated December 4, 2004 from the *Bangor Daily News* entitled "Court Decision Could Benefit Maine Vintners," a copy of which is included in the addendum to this brief. The article notes that local wineries were following the *Granholm* case and were hoping that the Supreme Court would rule against state laws prohibiting direct shipment of wine to consumers. One local winery owner noted that his "sales would definitely increase" if he could ship wine to consumers, and that he

It should also be noted that any obstacles that Cherry Hill is facing in selling directly to Maine consumers is due to the winery's physical distance from those consumers, and is not necessarily a result of the fact that a state border separates it from those consumers. Geographical distances could pose exactly the same problem for in-state wineries. For example, wineries located in parts of the state that are far from population centers will likely find that the face-to-face sale requirement significantly reduces the potential customers to whom it can directly sell its wines. On the other hand, out-of-state wineries located close to Maine's population centers (as in, for example, Portsmouth, N.H.) will likely be affected far less by the face-to-face sale requirement. Simply because some wineries located far from Maine experience disadvantages as a result of the face-to-face sale requirement does not mean that the requirement violates the Commerce Clause. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978) ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.").

---

does not "even advertise in other states" because "[i]t's too frustrating." Id. at 1. The article further notes that "[f]or years, Maine's wineries have petitioned the state Legislature to change the distribution laws" to allow them to ship wine directly to consumers. *Id.* at 2. Defendants suspect that if local winery owners were contacted, the vast majority would welcome the ability to ship directly to consumers, and do not view the ability to make on premises sales as any advantage over out-of-state wineries. Defendants did not develop this evidence below because it is plaintiffs that bear the burden of proving discrimination.

Plaintiffs' reliance on *Granholm* in support of their argument that strict scrutiny applies (Appellants' Brief, 22-25) is misplaced because, in *Granholm*, there was obvious (and, probably, intentional) discrimination against out-of-state wineries. At issue in *Granholm* were Michigan and New York laws that allowed in-state wineries to sell wine to consumers over the Internet, but did not allow out-of-state wineries to do so.[28] The states in *Granholm* did not have adequate explanations for this distinction, and the Court found that it was discriminatory. *Granholm*, 544 U.S. at 467 ("The differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce."). Here, on the other hand, Maine treats all wineries the same – no winery, in-state or out-of-state – can sell wine to consumers over the Internet.[29] So, there is no discrimination, and strict scrutiny does not apply.

---

[28] Oddly, plaintiffs claim that in *Granholm*, the Court struck down "a wine distribution law from New York that was even-handed on its face but had the practical effect of 'mak[ing] direct sales impractical from an economic standpoint.'" Appellant's Brief, 27 (quoting *Granholm*, 544 U.S. at 466). In fact, the Court found that New York's wine distribution law was patently discriminatory. *Granholm*, 544 U.S. at 474-76.

[29] In the Tennessee wine case, *Jelovsek v. Bresden*, the district court similarly recognized that trying to apply *Granholm* to state laws that flatly prohibit direct shipment of wine to consumers is "comparing apples and oranges." 2007 U.S. Dist. LEXIS 23814, *25. As the court noted, the states in *Granholm* had created special markets to benefit in-state wineries and excluded out-of-state wineries from those markets. *Id.* at *25-26. That is far different than the inevitable effect that geography has on certain markets.

If anything, *Granholm* supports the view that Maine's face-to-face sale requirement comports with the Commerce Clause. In the penultimate paragraph, the Court summarized its holding:

> 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. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.

Granholm, 544 U.S. at 493 (emphasis added). The phrase "if a State chooses to allow direct shipment of wine" suggests that states do, in fact, have the power to decide whether or not to allow the direct shipment of wine. *See also Granholm*, 544 U.S. at 489 ("State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."). So, *Granholm* supports the proposition that states can regulate the manner in which alcohol is sold so long as they treat in-state and out-of-state sellers the same, as Maine's laws do.

Plaintiffs argue that a face-to-face sale requirement violates *Granholm* because it essentially "requires nonresident wineries to establish a physical presence in the state in order to have access to the direct sale market." Appellants' Brief, 24-25. Again, *Granholm* is easily distinguishable. There, New York tried to

insulate its discriminatory statute from a Commerce Clause challenge by making it theoretically possible for an out-of-state winery to sell to consumers over the Internet – such transactions would be permitted if the out-of-state winery established a physical presence in the state by opening a branch office and warehouse. *Granholm*, 544 U.S. at 474-75. In the Court's view, this requirement was artificial and discriminatory because there was no legitimate reason to require a winery to establish a physical presence in the state in order to sell wine over the Internet. *Granholm*, 544 U.S. at 475 ("We have 'viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere.'") (quoting *Pike*, 397 U.S. at 145). Here, though, the fact that a winery must establish a retail outlet in Maine to sell wine directly to consumers is not artificial – it is simply the natural consequence of geography and the requirement that wine be sold in face-to-face transactions. And, the requirement is not limited to out-of-state wineries – in-state wineries that want to sell directly to consumers also must establish a retail operation within the state.

Further, the *Granholm* Court noted that even out-of-state wineries that established an in-state presence were given less favorable treatment than in-state wineries: 1) they were not eligible for farm winery licenses and instead had to obtain commercial winery licenses, which required that they obtain a separate certificate from the state liquor authority authorizing the direct sale to consumers;

2) they were not allowed to distribute their wines through other wineries; and 3) they were required to maintain distribution operations within New York. *Granholm*, 544 U.S. at 475-76. In Maine, on the other hand, any small winery, wherever located, may obtain a farm winery license, and out-of-state farm winery licensees have exactly the same privileges as in-state licensees. And, while out-of-state farm wineries cannot sell over the Internet, neither can in-state farm wineries.

In sum, it is plaintiffs who bear the burden of showing that the face-face sale requirement is discriminatory, *Hughes*, 441 U.S. at 336, and they fail to meet this burden. All wineries, whether in-state or out-of-state, are treated exactly the same, and there is no evidence that in-state wineries are advantaged by the face-to-face sale requirement at the expense of out-of-state wineries. Therefore, strict scrutiny does not apply and, because plaintiffs have waived application of the *Pike* balancing test, the Court should affirm the order granting summary judgment for the defendants.

C. Even If the Face-to-Face Sale Requirement Did Trigger Strict Scrutiny, It Would Pass That Test.

In the event that the Court determines that Maine's laws do discriminate against interstate commerce, the Court would then need to apply the strict scrutiny test and determine whether the laws serve a legitimate local purpose that "could not be served as well by available nondiscriminatory means." *Taylor*, 477 U.S. at 138. Even under this test, Maine's laws are valid. First, as discussed above,

restricting minors' access to alcohol is undoubtedly a legitimate and important interest, and the plaintiffs apparently concede this. Appellants' Brief, 31-32. Plaintiffs' contention is not that Maine has no legitimate interest, but that Maine has not demonstrated there is no reasonable non-discriminatory alternative to advance this interest. *Id.* at 32.

The face-to-face sale requirement, which enables the seller to visually assess the buyer and, if necessary, check his identification, is obviously the most effective means of ensuring that alcohol is not sold to minors. The Internet is famously anonymous and its transactions involve no personal contact. And, as is reflected in the record, minors can and do exploit these weaknesses to obtain alcohol.

The alternatives proposed by plaintiffs are simply not as effective as the broad requirement that all alcohol be purchased face-to-face. Plaintiffs argue that Maine could allow Internet/mail order sales and still effectively control youth access by requiring carriers to verify the ages of recipients before making deliveries. Appellants' Brief, 30. As is discussed above, though, the experiences of the Gonzaga students and the Massachusetts Attorney General demonstrate that carriers, in their rush to make deliveries quickly and efficiently, cannot be counted

on to verify the age of recipients, even when shippers have specifically requested that they do so (and presumably paid a premium for this service).[30]

More fundamentally, it is not clear whether Maine could enact a law requiring carriers to perform age verification. Recently, this Court held that provisions of a Maine law that imposed requirements (including age verification) on carriers delivering cigarettes were preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). *New Hampshire Motor Transport Ass'n v. Rowe*, 448 F.3d 66 (1st Cir. 2006). According to the Court, Maine is preempted from enacting any law that "requires (or has the effect of requiring) carriers to implement state-mandated procedures in the processing and delivery of packages." *Id.* at 82. Maine filed a petition for a writ of certiorari, and the United State Solicitor General filed a brief recommending that the Supreme Court not review the case. *See* Brief for the United States as Amicus Curiae in No. 06-457, at 1 (available at http://www.usdoj.gov/osg/briefs/2006/2pet/6invit/2006-0457.pet.ami.inv.pdf).[31] According to the Solicitor General, the FAAA preempts

---

[30] Plaintiffs claim that the "current in-person ID system" "leaks like a sieve." Appellants' Brief, 35. There is no evidence regarding whether that is the case in Maine. But, if it is true that persons who handle alcohol cannot be counted on to verify a person's age, plaintiffs' suggestion that harried delivery people check identification before delivering alcohol is obviously flawed.

[31] Despite the Solicitor General's recommendation, the Supreme Court granted certiorari on June 25, 2007. *Rowe v. New Hampshire Motor Transport Ass'n*, 2007 U.S. LEXIS 8324 (2007).

Maine from imposing age-verification and other requirements on carriers. *Id.* at 13-19.

Significantly, though, the Solicitor General noted that one tool states may use to prevent minors from obtaining tobacco products over the Internet is to "ban[] outright the direct shipment of cigarettes to individual consumers." *Id.* at 18. Further, the Solicitor General cited with approval *Brown & Williamson* and *Santa Fe Natural Tobacco*, *id.*, two cases discussed above in which courts upheld face-to-face sale requirements against Commerce Clause challenges. Presumably, then, the Solicitor General sees no Commerce Clause problems in imposing face-to-face sale requirements on cigarettes. It is difficult to imagine that the Solicitor General would make any distinction when it comes to alcohol, another product that poses health hazards when used by minors.

As a variation on their argument that Maine could directly require carriers to perform age verification, plaintiffs argue that "Maine can require a nonresident winery to . . . use only those common carriers that have put special wine shipping procedures into place, such as FedEx, UPS and DHL." Appellants' Brief, 34.[32] First, there is nothing in the record regarding what "wine shipping procedures"

---

[32] Plaintiffs also suggest that perhaps Maine could require wineries to use some sort of on-line age verification service known as "ChoicePoint." Appellants' Brief, 12-13 & n.17, 16, 34. This is another new "fact," and nowhere in the record is there any information regarding ChoicePoint, including how it works and whether it is effective.

these carriers have. More fundamentally, though, in *New Hampshire Motor Transport*, this Court explicitly rejected Maine's argument that it is not preempted from requiring tobacco retailers to use only those carriers that offer certain services:

> A state may use its coercive power to cause carriers to conform to state-imposed rules in at least two ways: it may directly regulate carriers or it may limit retailers to hiring only those carriers that comply with the state-imposed mandates. Either way the state is employing its coercive power to police the method by which carriers provide services in the state. In short, the Attorney General's argument would lead to the untenable result of permitting states to regulate carrier services indirectly by regulating shippers.

New Hampshire Motor Transport, 448 F.3d at 79. And, again, there is evidence in the record that carriers do not reliably perform age-verification services.

Plaintiffs argue that the law limiting the import of wine to four quarts does nothing to further Maine's goal of limiting youth access to alcohol. Appellants' Brief, 30. First, plaintiffs have explicitly stated that they are not challenging the import restriction. Appellants' Brief, 15 n.18. Second, the purpose of the import law is obvious – it prevents unlicensed entities from importing wine into Maine outside of the regulated channels and then reselling it to retailers and consumers in violation of state law and without regulatory oversight. It is because this is the purpose of the law that the Department generally waives the import limit as long as it is satisfied that the wine is for personal consumption and will not be resold. Stipulated Record, ¶ 27 (App. 29).

Plaintiffs argue that once a person has shown up at a winery and proven he is of legal age, there is no reason for Maine to nevertheless require that all subsequent purchases still be face-to-face. Appellants' Brief, 30. But, a statutory scheme in which a winery may ship wine directly to consumers who have previously visited the winery would depend on the diligence of wineries keeping records of all of their visitors from Maine, documenting their ages, and then referring back to their records whenever a Maine consumer ordered wine over the Internet. And, it would be difficult for Maine to enforce such a law because it presumably would need to prove that a particular consumer had not visited a particular winery. Finally, in the absence of a face-to-face transaction, it is hard to see how a winery could be sure that the person at the other end of an anonymous Internet connection is, in fact, the person who once visited the winery.

Plaintiffs argue that there is no rationale for the supposed requirement that Maine residents who purchase wine at out-of-state wineries must "personally carry the wine home rather than ship it." Appellants' Brief, 30-31. Defendants are aware of no statute or regulation imposing such requirement, and it is their position that once a Maine resident has purchased wine out-of-state, he may ship the wine home to himself, as long as it is less than four quarts or he has received permission to bring in additional quantities. Further, under certain circumstances, federal law

specifically authorizes consumers to ship home wine they purchased while out-of-state. 27 U.S.C. § 124.

In sum, there is simply no reasonable alternative to Maine's requirement that all alcohol be purchased face-to-face where the seller can confirm the buyer's age. So, even if that requirement triggers strict scrutiny, it survives the test.

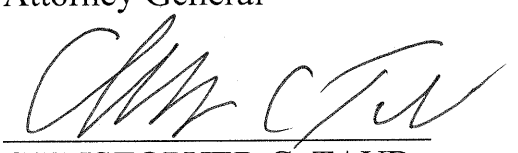
CONCLUSION

For the reasons set forth above, the defendants respectfully request that the Court affirm the district court's order granting summary judgment in their favor.

Dated: June 27, 2007
Augusta, Maine

Respectfully submitted,

G. STEVEN ROWE
Attorney General



CHRISTOPHER C. TAUB
Assistant Attorney General
Bar Number 65217
Six State House Station
Augusta, ME 04333-0006
(207) 626-8800

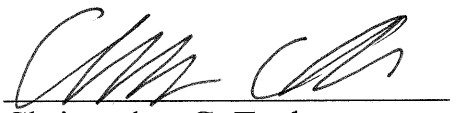
PAUL STERN
Deputy Attorney General
MICHELLE ROBERT
Assistant Attorney General

Of Counsel

Augusta, ME 04333-0006
(207) 626-8800
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

The within Appellees' Brief is submitted under Federal Rule of Appellate Procedure 32(a)(7)(B). I hereby certify that the brief complies with the type-volume limitation prescribed by Rule 32(a)(7)(B)(i). For this Certification, I relied on the word count function of the word-processing software used to prepare this brief (Microsoft Word 2000), which has counted 11,874 words in this brief. I further certify that all text in this brief is in proportionally spaced Times New Roman Font and is 14 points in size.



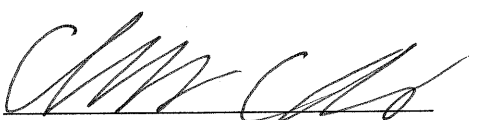
Christopher C. Taub
Assistant Attorney General
Bar No. 65217
Six State House Station
Augusta, Maine 04333-0006
(207) 626-8800

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I, Christopher C. Taub, Assistant Attorney General for the State of Maine, hereby certify that on this, 27th day of June, 2007, I filed the above brief by causing to be dispatched nine copies of same, along with a computer readable disk containing the same, by First Class Mail, postage prepaid, to the Clerk of the United States Court of Appeals for the First Circuit. I further certify that on this, the 27th day of June, 2007, I served the above brief on the Appellant and Amicus by causing to be dispatched two copies of the same, by First Class Mail, postage prepaid, to the following persons:

James A. Tanford, Esq.
School of Law
Indiana University
211 S. Indiana Avenue
Bloomington, IN 47505

George T. Dilworth, Esq.
McCloskey Mina Cunniff & Dilworth
12 City Center
Portland, ME 04101



Christopher C. Taub
Bar No. 65217

ADDENDUM

7 of 17 DOCUMENTS

Bangor Daily News (Maine)

December 6, 2004 Monday
All Editions

SECTION: Pg. A7

LENGTH: 769 words

HEADLINE: Court decision could benefit Maine vintners

BYLINE: SHARON KILEY MACK OF THE NEWS STAFF

DATELINE: BROOKSVILLE

BODY:

Maine's vintners are closely watching the U.S. Supreme Court this week as justices hear arguments that would allow wineries to ship wine directly to consumers, a move that could see Maine's wine industry explode.

Though Maine's wine industry is tiny - just seven vintners annually producing 37,980 gallons of wine valued at $460,000 - changing the distribution law will give Maine's vintners the edge they say they need to thrive.

Underlying the case is a battle between 3,000 small, family-owned wineries in all 50 states that cannot get national distribution and large wholesalers who oppose direct-to-consumer wine shipments because they are not involved in the transaction and therefore do not profit from such sales.

Maine is one of 25 states that ban interstate sales of wine except through a licensed distributor. The power of the distributors' lobby is large. In five states, to ship a resident a bottle of wine from another state is a felony. In some states, the penalty for shipping a bottle of Chardonnay to an adult over 21 years old is the same as for a burglary conviction.

Tom Hoey of The Sow's Ear, an organic, fruit winery in Brooksville, said Sunday, "It was always illegal to ship across the state lines. But everyone would mail a few bottles or ship UPS and it was a don't ask, don't tell situation. And then the Internet came along and it became a flourishing business.

"My sales would definitely increase if I could ship," said Hoey. "Right now, I don't even advertise in other states. It's too frustrating."

At issue is the clash between the 21st Amendment, which gives states the right to regulate alcohol distribution, and the commerce clause, which prohibits states from discriminating against out-of-state competitors.

Maine's vintners are currently not allowed to ship their wine across state lines, and most vintners can't afford to deal with Maine's alcohol distributors.

"I would lose 30 percent of my profit by going with a distributor," said Dave Ulrich, who has operated Blacksmiths Winery in Casco since 1999 and produces grape and fruit wines.

Ulrich said a bottle of wine that would sell for $10 must be sold to the retailer for $7.69 so the retailer can make its 26-27 percent profit. "If I sell to a distributor, I have to back it down to $4 a bottle," said Ulrich. "The cost of packaging the wine is approaching $2."

Ulrich said that the triple-tier approach to liquor distribution - producer, distributor and retailer - was established when Prohibition ended to keep organized crime out of the booze business. Each tier is required to be licensed and report sales.

"In Maine, the distributors have quite a monopoly," said Ulrich, "and they don't want to give it up."

For years, Maine's wineries have petitioned the state Legislature to change the distribution laws, but the distributors' lobby has undermined their efforts. "Their argument is that minors can get their hands on alcohol," he said. The argument says that Little Johnny, at age 11, sitting at a computer in Idaho, could use a credit card to order wine from Maine, and "It's worked every time," said Ulrich.

The vintner estimates he could increase his business 20 percent or more by adding out-of-state sales and Internet business. "I get calls from all over the country seeking to buy my wine every day," said Ulrich.

Major wine states California and New York and 24 others have brought the case before the Supreme Court.

In a prepared statement, Wine Institute President and CEO Robert P. Koch said, "A favorable decision to end discrimination promoted by wholesalers would be good for wine consumers, regulators and tax collectors in states that pass legalized direct shipping, and a win for America's small family wineries."

Koch said that 99 percent of all wine is sold through the three-tier system, but that direct shipping would augment that system by allowing small wineries with limited distribution options to do increased business.

"The case has nothing to do with the serious issue of underage drinking," Koch said. "This is a false argument that the wholesalers are using to protect their monopoly."

The Federal Trade Commission released a study in July 2003 that concluded that direct shipping of wine gives consumers more choices and has little or no effect on underage drinking.

In a statement on the Wine & Spirits Wholesalers of America Inc. Web site, President and CEO Juanita D. Duggan said, "We believe the Supreme Court will use this opportunity to let states know that they have the right to protect their communities, safeguard their children and track sales and distribution of alcohol within their borders."

LOAD-DATE: December 6, 2004