Nos. [redacted] 08-10146, 08-10148, 08-10160

In The United States Court of Appeals For The Fifth Circuit

SIESTA VILLAGE MARKET LLC, doing business as SIESTA MARKET; KEN TRAVIS; KEN GALLINGER; MAUREEN GALLINGER; DR ROBERT BROCKIE,

Plaintiffs-Appellants—Cross-Appellees,

v.

JOHN T STEEN, JR, Commissioner of the Texas Alcoholic Beverage Commission; GAIL MADDEN, Commissioner of the Texas Alcoholic Beverage Commission; JOSE CUEVAS, JR, Commissioner of the Texas Alcoholic Beverage Commission,

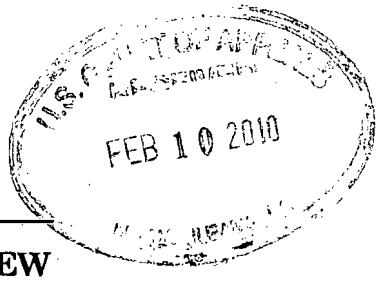
Defendants-Appellees,

GLAZERS WHOLESALE DRUG COMPANY INC; REPUBLIC BEVERAGE COMPANY,

Intervenor Defendants-Appellees—Cross-Appellants.

(caption continued on inside cover)

On Appeal From The United States District Court For The Northern District Of Texas



APPELLANTS' PETITION FOR *EN BANC* REVIEW

Elizabeth M. Locke
Stephen S. Schwartz*
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

James F. Basile
Tracy K. Genesen
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
(415) 439-1400

Sterling W. Steves
STERLING W. STEVES, P.C.
1406 Thomas Place
Fort Worth, Texas 76107
(817) 989-8100

Kenneth W. Starr
KIRKLAND & ELLIS LLP
333 South Hope Street
Los Angeles, CA 90071
(213) 680-8400

Attorneys for Appellants Wine Country Gift Baskets.com, K&L Wine Merchants, Beverages & More, Inc., David L. Tapp, Ronald L. Parrish, Jeffrey R. Davis

February 9, 2010

*Admitted only in Virginia and practice is supervised by principals of the firm.

No. 08-10145, Siesta Village Market, et al. v. Steen, et al.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. PARTIES:

Plaintiffs-Appellants–Cross-Appellees:

Siesta Village Market, LLC, doing business as Siesta Market

Ken Travis

Ken Gallinger

Maureen Gallinger

Dr. Robert Brockie

Wine Country Gift Baskets.com

K& L Wine Merchants

Beverages & More, Inc.

David L. Tapp

Ronald L. Parrish

Jeffrey R. Davis

Defendants-Appellees–Cross-Appellants:

John T. Steen, Jr., Commissioner of the Texas Alcoholic Beverage Commission

Gail Madden, Commissioner of the Texas Alcoholic Beverage Commission

Jose Cuevas, Jr., Commissioner of the Texas Alcoholic Beverage Commission

Alan Steen, in his official capacity as administrator of the Texas Alcoholic Beverage Commission

Intervenors-Appellees–Cross-Appellants:

Glazer's Wholesale Drug Company, Inc.

Republic Beverage Co., now known as Republic National Distributing Company

2. ATTORNEYS:

For Plaintiffs-Appellants–Cross-Appellees:

Kenneth W. Starr
Kirkland & Ellis LLP
333 South Hope Street
Los Angeles, CA 90071

James F. Basile
Tracy Genesen
Kirkland & Ellis LLP
555 California St.
San Francisco, California 94104

Elizabeth M. Locke
Stephen S. Schwartz*
Kirkland & Ellis LLP
655 15th Street, NW
Washington, DC 20005

*Admitted only in Virginia and practice is supervised by principals of the firm.

Robert D. Epstein
Epstein Cohen Donahoe & Mendes
50 S. Meridian St, Suite 505
Indianapolis, IN 46204

Professor J. Alexander Tanford
Indiana University School Of Law
211 South Indiana Avenue
Bloomington, IN 47405-7001

For Defendants-Appellees–Cross-Appellants:

Gregg Abbott
James Carlton Todd
Office of the Texas Attorney General
PO Box 12548, Capitol Station
Austin, TX 78711-2548

Lou Bright
General Counsel
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, TX 78711

James C. Ho
Rance Lamar Craft
Philip A. Lionberger
Office of the Solicitor General for the State of Texas
209 W. 14th Street, 7th Floor
Austin, TX 78701

No. 08-10145, Siesta Village Market, et al. v. Steen, et al.

For Intervenors-Cross-Appellants–Cross-Appellees:

Dee J. Kelly, Sr.
Marshall M. Searcy
William N. Warren
Kelly Hart & Hallman -- Fort Worth
201 Main St., Suite 2500
Fort Worth, TX 76102-3194

Attorney of Record for Appellants

RULE 35 STATEMENT BY COUNSEL

The undersigned attorneys for Appellants express their belief, based upon reasoned and studied professional judgment, that the panel opinion attached as Appendix 1 is contrary to the following opinions of the Fifth Circuit and the United States Supreme Court, and that consideration by the full court is necessary to secure and maintain the uniformity of the court's decisions:

1. *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994).
2. *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003).
3. *Granholm v. Heald*, 544 U.S. 460 (2005).

The panel opinion errs in two areas of exceptional importance. First, the panel opinion contradicts substantive holdings of the Fifth Circuit and the Supreme Court by permitting the State of Texas to discriminate between in-state and out-of-state participants in interstate commerce. In so doing, the panel chose to follow erroneous Second Circuit case law rather than binding local and Supreme Court precedent. Second, the panel opinion applies an analytical method contrary to the method mandated by Fifth Circuit precedent in Commerce Clause cases such as this one. The panel's novel methodology

threatens this court's ability to adjudicate future cases consistently and correctly.

Tracy K. Genesen

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 879-5000

Counsel for Appellants

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STATEMENT OF ISSUES

Whether, without *en banc* review, a panel of this court may uphold the constitutionality of a manifestly discriminatory state statute while disregarding established precedent and employing a novel analytical approach that was argued by none of the parties.

INTRODUCTION

Appellants challenged Texas state wine regulations as discriminatory under the Commerce Clause of the federal Constitution. In rejecting that challenge, a panel of this court endorsed the State of Texas's effort to ban certain out-of-state businesses from shipping to Texas residents while allowing in-state businesses to do so. The panel held that the Commerce Clause protects wine *producers* from discriminatory state regulation, but not wine *retailers* or the Texas consumers wishing to purchase from them.

The panel's decision contradicts, without distinguishing or even citing, Fifth Circuit precedent holding that such discrimination is virtually *per se* unconstitutional.[1] Not only does the panel's decision create an intra-circuit conflict, it ignores the Supreme Court's analytical framework. The panel reached its destabilizing decision by adopting recent Second Circuit precedent that conflicts with the weight of federal authority—including this circuit's.

The resulting intra-circuit split threatens to confuse litigants in future Commerce Clause cases. To preserve the uniformity of this

[1] *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003) (Wiener, J.); *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994) (Jones, J.).

court's jurisprudence, and to avoid conflict between this court's decisions and those of other courts, *en banc* review is necessary.[2]

BACKGROUND AND PROCEEDINGS TO DATE

"[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."[3] Under § 2 of the Twenty-First Amendment, Texas, like most other states, regulates alcohol imports through the framework of a "three-tier system" that distinguishes and separates producers, wholesalers, and retailers of alcoholic beverages. However, Texas's right to regulate importation of alcohol across its borders is not unlimited. When construing the Commerce Clause and the Twenty-First Amendment together, courts distinguish between the authority to use that regulatory tool—which

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[2] *See, e.g., Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 786-87 (5th Cir. 2009) (en banc) ("We granted en banc consideration [to resolve] the conflict among our cases."); *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 360 n.5 (5th Cir. 2008) (Garza, J., dissenting from denial of rehearing *en banc*) (arguing that a panel overruled a prior panel); *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 283 (5th Cir. 2007) (en banc) (evaluating whether a panel interpreted Supreme Court precedent according to the Fifth Circuit interpretation shared by most circuits or the Ninth Circuit's minority opposition); *United States v. Garcia-Espinoza*, 325 F. App'x 380, 382 (5th Cir. 2009) (per curiam) (unpublished) (Owen and Dennis, JJ., concurring) (urging en banc review to resolve a circuit split).

[3] *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994)) (quotation marks omitted). *See also Dickerson*, 336 F.3d at 395 (referring to the "dormant Commerce Clause").

Texas has—and the authority to discriminate against out-of-state participants in the alcoholic beverage market—which Texas does *not* have.

For more than fifteen years, this court has invalidated numerous discriminatory provisions of the Texas three-tier system as violative of the Commerce Clause.[4] This case is part of that unfolding history, and the discrimination here is manifest: In-state retailers may ship wine via common carriers to Texas locations; out-of-state wine retailers may not.[5] The district court (Fitzwater, C.J.) recognized the flagrant unconstitutionality of the challenged statutes, granted summary judgment on the merits to the out-of-state wine retailers, but then fashioned an inappropriate remedy.[6] The wine retailers and the State appealed. Overturning Chief Judge Fitzwater's determination of unconstitutionality, the panel vacated the district court's decision and entered judgment for the State.

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[4] *See Dickerson*, 336 F.3d 388; *Cooper*, 11 F.3d 547. Those Fifth Circuit cases, in turn, compose one part of a larger, national story of vigorous federal and Supreme Court litigation over state wine-shipping regulation. Until this panel's opinion, the Fifth Circuit had been a leader in defending Commerce Clause protections of free trade between the states.

[5] TEX. ALCO. BEV. CODE §§ 22.03, 24.03. Moreover, in-state retailers can bypass wholesalers in some cases and purchase wine directly from in-state wineries. TEX. ALCO. BEV. CODE § 110.053.

[6] *Siesta Village Market, LLC v. Perry*, 530 F. Supp. 2d 848 (N.D. Tex. 2008).

ARGUMENT

I. THE PANEL OPINION DISREGARDS AND CONTRADICTS TWO DECISIONS OF THIS COURT.

This Court has twice held that the Twenty-First Amendment does not authorize Texas to violate the Commerce Clause's rule prohibiting discrimination against out-of-state parties. Ignoring one of those precedents altogether and fashioning an illusory distinction of the other, the panel crafted a novel rule that endorsed Texas's discriminatory regime. The panel's break with binding precedent requires *en banc* review and reversal.

A. The panel opinion contradicts the holdings of *Cooper* and *Dickerson*.

This court's seminal case interpreting the Commerce Clause in light of the Twenty-First Amendment is *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994). Despite emphasis by both wine retailers and the State, the panel did not even cite *Cooper*. The omission is telling. In *Cooper*, this court, speaking through now-Chief Judge Jones, invalidated Texas's state citizenship requirements for a type of alcohol retailing permit, after determining that the Texas statutes were discriminatory and unconstitutional.

> The statutory barrier Texas has erected against non-residents who wish to obtain mixed beverage permits results in shielding the State's operators from the rigors of outside competition. This rule subjects such laws to the Commerce Clause's insistence on nondiscrimination. . . . The discriminatory three-year residency requirement inherent in the challenged statutory provisions cannot stand.

Id. at 555-56. And yet the panel reasoned that "we know that Texas may authorize its in-state, permit-holding retailers to make sales and prohibit out-of-state retailers from doing the same," Panel Op. at 17, and started from the "beginning premise [that] retailers may be required to be within the state." Panel Op. at 18.[7] The Texas statutes that the panel upheld undeniably "shield[] . . . in-state operators" from competition against out-of-state retailers in shipping wine. The panel, in short, directly contradicted precedent applying the Commerce Clause's nondiscrimination rule to alcohol retailers.

The other critical Fifth Circuit case is *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003). There, this court condemned as unconstitutional discrimination against out-of-state wineries' shipping rights. The *Dickerson* court invalidated exceptions to the Texas three-tier system allowing in-state wineries to ship wine directly to Texas

[7] There is no constitutional distinction between state *citizenship* and in-state *presence* requirements. *Granholm*, 544 U.S. at 474-75.

consumers but banning out-of-state wineries from doing the same. *Id.* at 399-400. Speaking through Judge Wiener, this court was explicit: "Texas may not use the Twenty-First Amendment as a veil to hide from constitutional scrutiny its parochial economic discrimination against out-of-state wineries." *Id.* at 407. Yet, in the face of *Dickerson's* teaching, the panel here blithely described the wine-shipping rights that Texas grants in-state, but not out-of-state, retailers, as a "constitutionally benign incident of" Texas's three-tier system. Panel Op. at 18.[8]

"[C]onstitutionally benign" discrimination against out-of-state commerce in wine does not exist. In the wake of two binding Fifth Circuit decisions, one holding that Texas may not discriminate based on state residency in granting *alcohol retail permits*, and the other holding that Texas may not discriminate based on state residency in permitting *alcohol shipments to Texas citizens*, the panel finds no legal refuge for

[8] The Supreme Court has foreclosed any reliance on the "limited" nature of Texas's discrimination. There is no *de minimis* exception for Commerce Clause violations. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 581 n. 15 (1997). Nor is "incident[al]" discrimination inevitable. Panel Op. at 19. The Model Direct Shipment Bill adopted by the National Conference of State Legislatures in 1997, which both Appellants and the State discuss in their panel briefs, provides for a nondiscriminatory alternative to state systems such as Texas's. *See* http://www.wineinstitute.org/files/ModelDirectShipmentBill.pdf (last visited Feb. 2, 2010).

its conclusion that Texas *may* discriminate based on residency when *alcohol retailers try to ship alcohol to Texas citizens.*

B. *Cooper* and *Dickerson* are binding.

Not only do *Cooper* and *Dickerson* remain good Fifth Circuit law, they served as harbingers for the Supreme Court's seminal decision in *Granholm v. Heald*, 544 U.S. 460 (2005). In *Granholm*, the Court held that because "the Twenty-[F]irst Amendment does not supersede other provisions of the Constitution," states may regulate alcohol but may not violate the nondiscrimination principle of the Commerce Clause. *Id.* at 486-87.[9] Like *Dickerson* and the case at hand, *Granholm* addressed interstate wine shipments. The Court explained that "[s]tates may not enact laws that burden out-of-state producers *or shippers*," regardless of whether the states happen to employ a three-tier system. *Id.* at 472 (emphasis added).[10]

Relying on *Granholm dicta*, the panel distinguished *Dickerson* and *Granholm* as involving shipment of wine by *producers* rather than

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[9] *See also Healy v. Beer Institute, Inc.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring) ("[A state law's discriminatory character eliminates the immunity afforded by the Twenty-[F]irst Amendment.").

[10] *See Granholm*, 544 U.S. at 487-88 (stating that precedent "forecloses any argument that section 2 of the Twenty-[F]irst Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny.").

retailers. Panel Op. at 9.[11] The would-be distinction is illusory, ignoring the pivotal fact that both cases involved *shippers* that, like Appellants, sought access to state markets to furnish wine at retail to consumers through interstate commerce.

It is also an unnatural reading. To be sure, because the *Granholm* Court was faced with state discrimination against out-of-state wine producers, its opinion referred often to "producers." But nothing in either case differentiates producers and retailers or suggests a reasoned basis for treating wine retailers differently. More fundamentally, the panel provides no apparent rationale for departing from the Commerce Clause's nondiscrimination rule. In any event, the panel's gossamer distinction offers no answer to *Cooper*, which invalidated Texas discrimination against alcohol retailers. The panel's failure to apply or distinguish *Cooper* remains a fatal—and inexplicable—omission.

In short, the Supreme Court has *joined* the Fifth Circuit's earlier rulings in holding that neither the Twenty-First Amendment nor Texas's use of a three-tier system creates a carve-out to the Commerce

[11] The Commerce Clause distinction between manufacture and trade has long been discredited. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (overruling *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)). The panel has no justification for resurrecting it.

Clause that justifies Texas's discrimination against wine retailers. All binding precedent required the panel to invalidate, as Judge Fitzwater did, the Texas statutes at issue. To resolve this intra-circuit conflict, this court should grant *en banc* review and reverse the panel's opinion.

II. THE PANEL FAILS TO APPLY THE ANALYTICAL METHOD MANDATED BY THIS COURT AND THE SUPREME COURT.

This circuit applies a simple (and mandatory) analytical method in adjudicating Commerce Clause challenges that implicate the Twenty-First Amendment. "Under controlling precedent in this circuit and in the Supreme Court, [the panel was] required to assess first whether these statutes violate the Commerce Clause, and, if [it] so determine[d], . . . whether they are saved by § 2 of the Twenty-First Amendment." *Dickerson*, 336 F.3d at 394-395. The panel failed to do so. That failure not only contributed to the panel's erroneous outcome but threatens this court's ability consistently to adjudicate future Commerce Clause cases.

The required Commerce Clause analysis first inquires whether a challenged statute discriminates against interstate commerce. Facially discriminatory statutes must be invalidated unless they advance a "legitimate local purpose that cannot be adequately served by

reasonable nondiscriminatory alternatives."[12] If a state articulates a Twenty-First Amendment defense, this court next applies the "core concerns test" to determine whether the central purposes of the Amendment (promotion of temperance, prevention of monopolies and organized crime, collection of taxes) excuse that discrimination. *Id.* at 404.[13]

If the panel had employed that analysis, it would have concluded that the Texas statutes at issue are, as Judge Fitzwater rightly discerned, deeply discriminatory. Texas has, after all, adopted what amounts to a state residency requirement for wine retailers wishing to participate fully in the Texas wine market. The issue before the panel was whether that discrimination *matters*. The Fifth Circuit has explained how to answer that fundamental question. The panel was required to determine whether the Texas statutes advance the "core concerns" of the Twenty-First Amendment or serve legitimate local purposes that cannot be adequately achieved by reasonable nondiscriminatory alternatives.

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[12] *Cooper*, 11 F.3d at 553 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988)).

[13] The "core concerns" test derives from the Supreme Court's decisions in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). *Cooper*, 11 F.3d at 555.

Instead of following binding precedent, however, the panel fashioned its own novel inquiry. The panel seized again upon *Granholm dicta*—concerning the uncontroverted right of states to adopt three-tier systems—and asked whether the Texas discrimination is "inherent in the three-tier system itself." Panel Op. at 15. The panel ultimately asked not whether Texas's indisputably discriminatory laws are justified by the Twenty-First Amendment, but whether the Texas three-tier system regulations provide a good example of "retailing."[14]

That newly-minted approach is unknown in Fifth Circuit and Supreme Court case law. *Granholm*, the panel's would-be authority, calls for nothing of the kind. *Granholm* justifies neither the panel's break with precedent nor its elevation of the three-tier system to the status of a new constitutional standard.[15] On the contrary, the *Granholm* Court employed the same Commerce Clause analysis

[14] *See* Panel Op. at 15-16. ("[T]he foundation on which we build is that Texas may have a three-tier system. . . . [W]e resolve whether what Texas has allowed here is so substantially different from what retailing must include as not to be third-tier retailing at all.") The panel's method appeared out of thin air. Even the State of Texas did not urge the panel to reason in that manner. *See* Panel Op. at 16.

[15] The three-tier system is not created or required by the Twenty-First Amendment or federal statutory law. Moreover, the Model Direct Shipment Bill provides an equally viable regulatory framework that does *not* discriminate against out-of-state wine market participants and demonstrates that *no* discrimination is "inherent" in state alcohol regulation.

required by *Cooper* and *Dickerson*, *see Granholm*, 544 U.S. at 472-76, and a Twenty-First Amendment analysis closely resembling the Fifth Circuit "core concerns" test. *See id.* at 485-86, 487-88.

The panel's resulting analysis lacks either a constitutional or precedential foundation. States unquestionably enjoy broad discretion in how they structure their alcohol markets. The term "three-tier system" describes one permissible regulatory strategy. By looking to a regulatory framework rather than the constitutional text and binding case law, the panel was left to rely on little more than its own views on the nature of "retailing."[16] The panel's failure to follow Fifth Circuit precedent not only casts the correctness of its analysis into doubt, but disrupts this court's orderly jurisprudence with a new decision that fundamentally distorts the relationship between the Twenty-First Amendment and the Commerce Clause.

[16] *See* Panel Op. at 17 ("[S]ales are being made to proximate customers, not those distant to the store. Retailers are acting as retailers and making what conceptually are local deliveries."); *id.* at 18 ("[I]t seems to us that implementing consumer-friendly practices [such as common carrier deliveries of alcohol] for in-state retailing . . . has more to do with changing economic realities than with the Constitution.").

III. THE PANEL'S DECISION IS IN CONFLICT WITH THE WEIGHT OF FEDERAL AUTHORITY.

By choosing to follow the Second Circuit's minority position rather its own precedent, the panel rejects the weight of federal authority from other circuits. That fact independently warrants *en banc* review.

A. The panel disregards the weight of federal authority.

The panel's decision represents this court's most recent contribution to a long history of federal court litigation arising under the Twenty-First Amendment. Given the manifest defects in the panel's methodology, that contribution is seriously inadequate. Furthermore, it is inconsistent with the decisions of most courts to address the issue.

This is not the first time a federal court has reviewed state laws that discriminate against alcohol shipping by out-of-state retailers. In two post-*Granholm* cases that the panel cites, federal district courts struck down laws legally indistinguishable from the Texas laws challenged here.[17] By upholding the State of Texas's similar provisions, the panel's decision is the true outlier.

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[17] *See Siesta Village Market, LLC v. Granholm*, 596 F. Supp. 2d 1035, 1038 (E.D. Mich. 2008) (out-of-state wine retailers required to establish an in-state physical presence before shipping); *Brooks v. Vassar*, 462 F.3d 341, 346 (4th Cir. 2006) (out-of-state retailers required to obtain written permission from beverage producers

B. The panel follows Second Circuit precedent instead of *Cooper* and *Dickerson*.

The only case offering significant support to the panel is *Arnold's Wines, Inc. v. Boyle*.[18] In that case, the Second Circuit rejected a constitutional challenge to New York retailer shipping statutes resembling the Texas ones under scrutiny here.

The Second Circuit's decision is doubtful on various grounds. Like the panel's own decision, *Arnold's Wines* embraces a dramatic over-reading of the Twenty-First Amendment that overrules the Commerce Clause's protection of wine retailers. But *Granholm* and its progeny surely affirm the Commerce Clause's insistence on *evenhanded* regulation of wine shippers. Where a state permits a market for the

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before shipping). *See also Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200, 220 (D. Mass. 2006) (state residency required for liquor retail licenses).

One judge on the *Brooks* panel wrote that out-of-state retailers may be subject to constitutional discrimination. 462 F.3d at 352 (Niemeyer, J.). The other two judges, however, disagreed with that view, and it is therefore not the law in the Fourth Circuit. *See id.* at 361 (Traxler, J., concurring in the judgment); *id.* at 361-62 (Goodwin, D.J., concurring in part and dissenting in part). Judge Niemeyer also wrote that the provisions at issue in *Brooks* discriminated against *in-state* retailers, and so were not subject to Commerce Clause objections. *Id.* at 352, 353-54. Lastly, the statutes at issue in *Brooks* were not direct shipment statutes at all, but statutes regulating face-to-face transactions. Such statutes have only an incidental effect on interstate commerce and do not offend the Commerce Clause. *See Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 35 (1st Cir. 2007).

[18] 571 F.3d 185 (2d Cir. 2009) (Wesley, J.).

direct shipment of wine, it must open that market to similarly-situated out-of-state competitors.[19]

Regardless of the merits, the Second Circuit had no *Cooper* and *Dickerson* precedent to follow. *Granholm*, in fact, reversed a Second Circuit decision permitting discrimination against wine shipment by out-of-state producers.[20] The *Arnold's Wines* court therefore wrote its Twenty-First Amendment jurisprudence on a virtually blank slate. Although the Second Circuit may have been entitled to an original interpretation of *Granholm*, a Fifth Circuit three-judge panel is not. This circuit simply cannot permit its panels to choose other courts' precedents over its own.

CONCLUSION

For the foregoing reasons, this court should rehear this case *en banc*, affirm the district court's judgment on the merits, and remand for application of the proper remedy: an injunction against state enforcement of the discriminatory statutes.

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[19] *See Baldacci*, 505 F.3d at 35-37. *See also General Motors Corp. v. Tracy*, 519 U.S. 278, 298-300 (1997) (Commerce Clause protects similarly-situated entities able to compete in a single market).

[20] *See Granholm*, 544 U.S. at 470-71, 492 (discussing and reversing *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004) (Wesley, J.)).

February 9, 2010

Respectfully submitted,

Tracy K. Genesen

Elizabeth M. Locke
Stephen S. Schwartz*
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

James F. Basile
Tracy K. Genesen
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
(415) 439-1400

*Admitted only in Virginia and practice is supervised by principals of the firm.

Sterling W. Steves
STERLING W. STEVES, P.C.
1406 Thomas Place
Fort Worth, Texas 76107
(817) 989-8100

Kenneth W. Starr
KIRKLAND & ELLIS LLP
333 South Hope Street
Los Angeles, CA 90071
(213) 680-8400

Attorneys for Appellants Wine Country Gift Baskets.com, K&L Wine Merchants, Beverages & More, Inc., David L. Tapp, Ronald L. Parrish, Jeffrey R. Davis

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2010, two true and correct copies of the foregoing **Appellants' Petition for *En Banc* Review** were served by Federal Express, upon the parties listed below:

Greg Abbott, Esq.
Attorney General of Texas
James Carlton Todd, Esq.
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL OF TEXAS
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548
Telephone: (512) 463-2120
Facsimile: (512) 320-0667

Attorneys for
JOHN T. STEEN, JR., GAIL MADDEN, and JOSE CUEVAS, JR.

James C. Ho, Esq.
Rance Lamar Craft, Esq.
Philip A. Lionberger, Esq.
OFFICE OF THE SOLICITOR GENERAL FOR THE STATE OF TEXAS
209 W. 14th Street, 7th Floor
Austin, TX 78701
Telephone: (512) 936-2872
Facsimile: (512) 474-2697

Attorneys for
JOHN T. STEEN, JR., GAIL MADDEN, and JOSE CUEVAS, JR.

Dee J. Kelly, Esq.
David E. Keltner, Esq.
Marshall M. Searcy, Jr., Esq.
William N. Warren, Esq.
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, TX 76102-3194
Telephone: (817) 332-2500
Facsimile: (817) 878-9229

Attorneys for
GLAZERS WHOLESALE DRUG COMPANY, INC., and
REPUBLIC BEVERAGE COMPANY

Professor J. Alexander Tanford
INDIANA UNIVERSITY
SCHOOL OF LAW
211 South Indiana Avenue
Bloomington, IN 47405-7001
Telephone: (812) 855-4846
Facsimile: (812) 855-0555

Attorneys for
SIESTA VILLAGE MARKET LLC d/b/a SIESTA MARKET, KEN TRAVIS, KEN GALLINGER, MAUREEN GALLINGER, and ROBERT BROCKIE

Robert D. Epstein, Esq.
EPSTEIN COHEN DONAHOE & MENDES
50 S. Meridian St, Suite 505
Indianapolis, IN 46204
Telephone: (317) 638-1326
Facsimile: (317) 638-9891

Attorneys for
SIESTA VILLAGE MARKET LLC d/b/a SIESTA MARKET, KEN TRAVIS, KEN GALLINGER, MAUREEN GALLINGER, and ROBERT BROCKIE

Tracy K. Genesen

Tracy K. Genesen

CERTIFICATE OF SERVICE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
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Charles R. Fulbruge III
Clerk

No. 08-10146

SIESTA VILLAGE MARKET LLC, doing business as SIESTA MARKET; KEN TRAVIS; KEN GALLINGER; MAUREEN GALLINGER; DR ROBERT BROCKIE

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v.

JOHN T STEEN, JR, Commissioner of the Texas Alcoholic Beverage Commission; GAIL MADDEN, Commissioner of the Texas Alcoholic Beverage Commission; JOSE CUEVAS, JR, Commissioner of the Texas Alcoholic Beverage Commission

Defendants – Cross-Appellants

WINE COUNTRY GIFT BASKETS.COM; K&L WINE MERCHANTS; BEVERAGES & MORE INC; DAVID L TAPP; RONALD L PARRISH; JEFFREY R DAVIS

Plaintiffs – Appellants-Cross-Appellees

v.

ALLEN STEEN, in his official capacity as administrator of the Texas Alcoholic Beverage Commission

Defendant – Appellee-Cross-Appellant

GLAZERS WHOLESALE DRUG COMPANY, INC; REPUBLIC BEVERAGE COMPANY

No. 08-10146

Intervenor Defendants – Appellees-
Cross-Appellants

Appeal from the United States District Court
for the Northern District of Texas

Before JOLLY, PRADO, and SOUTHWICK, Circuit Judges.

Leslie H. Southwick, Circuit Judge:

This case primarily concerns a Texas law that allows alcohol retailers to ship to the door of their local consumers. Out-of-Texas wine retailers claim that the dormant Commerce Clause requires they be given a supposedly reciprocal right to make direct shipments to any Texas consumer. The district court partly accepted their argument. We hold that the statutes do not run afoul of the dormant Commerce Clause. We VACATE and REMAND for entry of judgment.

FACTUAL AND LEGAL BACKGROUND

There were several parties to this case, but they can be grouped easily. One plaintiff, Siesta Village Market LLC, who is a Florida wine retailer, has dismissed its appeal. Another, Wine Country Gift Baskets.com, is a California wine retailer. Wine Country's appellate brief describes the plaintiffs, present and past, as "a group of out-of-state wine retailers and Texas wine consumers." We refer to the plaintiffs collectively as "Wine Country."

Suit was filed by Siesta Village and a few Texas wine consumers on March 31, 2006, in the Dallas Division of the U.S. District Court for the Northern District of Texas. A nearly identical suit was filed by Wine Country, two other California retailers, and a few named Texas consumers in the Fort Worth Division. The suits were consolidated in the Dallas Division. The wine retailers located outside of Texas wish to ship wine directly to Texas consumers.

Defendants are Allen Steen, the Administrator of the Texas Alcoholic Beverage Commission, and three Commission members sued in their official capacities. They enforce the Texas Alcoholic Beverage Code ("TABC"). We will refer to the various Defendants as "the State" or "Texas."

Two Texas alcoholic beverage wholesalers intervened. These companies are Glazer Wholesale Drug Company, Inc., and Republic Beverage Co.

As do many other States, Texas has a three-tier system for regulating sales of alcoholic beverages. The first tier is the producer, who must sell its product to the second-tier, which is a State-licensed wholesaler. The wholesaler distributes the product to the third tier, consisting of State-licensed retailers. Consumers purchase from the retailers. "[S]trict separation between the manufacturing, wholesaling, and retailing levels" of the alcoholic beverage industry must be maintained. TEX. ALCO. BEV. CODE § 6.03(i).

The challenged Texas laws fall into three principal categories. Almost all the relevant provisions apply to alcohol generally, though the complaint is from companies whose commercial interest is solely in wine.

First, some laws allow individuals to bring alcoholic beverages into Texas for their own use, known as a "personal import exception," but limit the quantity. The district court held that this direct-purchase restriction was unconstitutional in part. "Texas cannot prohibit consumers from purchasing wine from out-of-state retailers who comply with the Code and TABC regulations," the district court held. *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 868 (N.D. Tex. 2008). It ordered Texas to allow out-of-state retailers to receive Texas-issued retailer permits. Therefore, any consumer who bought wine from an out-of-state holder of a Texas permit would not be subject to the quantity limit when entering the State with the beverages, though the limit for importing would apply to the same person's excessive purchases from out-of-state retailers that did not have Texas permits.

Second, and at the heart of this case, some of the laws allow in-state retailers to deliver alcoholic beverages to their customers within designated local areas, but forbid out-of-state retailers from delivering or shipping alcoholic beverages to customers anywhere in Texas.[1] Retailers may use common carriers licensed under the TABC, which include such companies as Federal Express. Just before summary judgment motions were filed in the consolidated suits, the Texas legislature amended the prior law which had allowed holders of package store permits or wine-only package store permits to ship their beverages statewide. TEX. ALCO. BEV. CODE § 22.03 (Vernon 2006) (amended Sept. 1, 2007). The amendment drew in the boundaries of the area of permissible shipment from the entire State to basically the county in which the retailer has a store. *Id.* §§ 22.03 & 24.03 (Vernon 2009). The district court held that the statutes discriminated against Wine Country and granted relief.

Third, the suit challenged requirements that the holders of TABC retailer permits have been Texas citizens for one year. The decision in an earlier case declared those provisions unconstitutional insofar as they applied to wholesalers. *S. Wine & Spirits of Tex. v. Steen*, 486 F.Supp. 2d 626, 633 (W.D. Tex. 2007). The district court in the present case declared the requirements unconstitutional as applied to retailers. The State does not appeal the voiding of the requirement and advised the district court that it will not enforce the citizenship rule.

The parties agreed on a preliminary injunction blocking enforcement of certain provisions for the duration of the lawsuit. On summary judgment, the district court declared twenty-three TABC provisions to be unconstitutional. *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 873.

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[1] Although the statutes create some special permits for retailers selling only wine, the statutes allowing local delivery apply to retailers selling only wine and also to full-service package store permit holders. TEX. ALCO. BEV. CODE §§ 22.03(a); 24.03.

The district court did not, however, provide the remedy Wine Country wanted. The court decided that other provisions of the TABC, though clearly regulating only in-state retailers, should be applied to out-of-state retailers. Thus, Wine Country had a right to make direct shipments to Texas consumers, but it was required to obtain a Texas retailer permit and purchase all wine shipped to Texas consumers from Texas-licensed wholesalers. Such a "victory" was, if not pyrrhic, apparently of no benefit.[2]

Wine Country's dissatisfaction is evident from the fact it was the first to appeal, thereby becoming the Appellant despite the general success of its arguments. It claimed error in the remedy. The State cross-appealed to argue that its statutes do not violate the dormant Commerce Clause. Siesta Village, the named plaintiff in one of the two consolidated cases, initially was an Appellant but has since dismissed its appeal.

DISCUSSION

The grant of a motion for summary judgment is reviewed *de novo*. *Pasant v. Jackson Nat'l Life Ins. Co.*, 52 F.3d 94, 96 (5th Cir. 1995). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2).

This appeal almost exclusively concerns questions of law.

Wine County convinced the district court that numerous TABC provisions violated the dormant Commerce Clause. Wine Country's arguments as the Appellant center on the remedy imposed by the district court. Because we set aside the invalidation of the statutory provisions, issues about the remedial

[2] The Second Circuit found it operationally absurd for out-of-state retailers to purchase inventory from in-state wholesalers, have it delivered to the retailers in some fashion, then shipped back to in-state consumers. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 n.3 (2d Cir. 2009). Wine Country also found the requirement to be dispiriting.

relief implementing the invalidation become moot. We thus do not discuss Wine Country's arguments on the remedy.

The State of Texas as Cross-Appellant does not contest the district court's invalidation of the requirement that retailers establish Texas residency. That part of the judgment was not included in any notice of appeal and therefore has not been brought to us for reversal or affirmance.

Texas vigorously does contest the holding that the dormant Commerce Clause interfered with what Texas considers to be a right granted by the Twenty-first Amendment to favor in-state retailers in some respects.

Texas also argues that the direct shipping laws are justified by legitimate state interests. It alleges valid local public interests exist and the law has only incidental effects on interstate commerce. Its policy justifications include the State's need to access retail sites for inspection and enforcement, which can uncover illegal activities – specifically regarding alcohol or more generally such as for money laundering – and the State's goals of promoting temperance, insuring tax collections, and assuring the separation between the three tiers. We do not reach the policy justifications, as our reversal is for other reasons.

The last section in the Texas brief explains its embrace of the remedy that Wine Country rejects. There is no need to review those arguments.

We discuss only the cross-appeal arguments presented by Texas. First, we will examine closely the United States Supreme Court opinion that spoke strongly and supportively about the three-tier system for distribution of alcohol. We then look at what three subsequent opinions from other courts have said about it. We then briefly review the district court's decision, and finally we apply our analysis to it.

A. The three-tier system and Granholm

Intoxicating liquor is the only consumer product identified in the Constitution. Only its regulation by States is given explicit warrant.

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

U.S. CONST. amend. XXI, § 2. The goals of "promoting temperance, ensuring orderly market conditions, and raising revenue" are met through regulation of the production and distribution of alcoholic beverages. *North Dakota v. United States,* 495 U.S. 423, 432 (1990) (plurality opinion). The understanding of a State's power under the Twenty-first Amendment may have changed since the 1933 ratification, but we need not review seventy-five years of history. Instead, we rely primarily on the latest Supreme Court explanation.

The basic point Texas makes on appeal is that the three-tier system allows certain kinds of distinctions and particularly allows distinctions between in-state and out-of-state retailers. Further, allowing Texas-licensed retailers to make their sales in certain ways, namely, by delivery, and prohibiting out-of-state retailers from doing anything at all, is said to be authorized by controlling interpretations of the Twenty-first Amendment.

We start where Texas urges us to start, and where the district court did, by examining the most recent Supreme Court discussion of the interplay between a State's authority to regulate alcohol and the dormant Commerce Clause. *See Granholm v. Heald*, 544 U.S. 460 (2005). The Court reaffirmed the principle that, despite what might appear to be absolute authority granted to States by the Twenty-first Amendment to regulate alcohol, the anti-discrimination principles of the dormant Commerce Clause nonetheless place some restrictions on the States.

The Court said that "in all but the narrowest circumstances, state 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.'" *Id.* at 472 (quoting *Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994)). "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Id.* at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

The *Granholm* Court invalidated two States' "direct shipping" laws allowing in-state wineries to ship wine they produced directly to consumers, but barring out-of-state wineries from doing the same. It found the "discriminatory character" of Michigan's prohibition "obvious," as that State's laws prohibited any shipment from out-of-state wineries, while allowing in-state wineries to ship after obtaining a permit. *Id.* at 473. New York's scheme was more complicated, allowing out-of-state wineries to ship to in-state consumers if the wineries established a physical presence in the State and became part of New York's three-tier distribution system. The Court nonetheless found New York's rules discriminatory, noting that the rules clearly gave "preferential terms" to in-state wineries, which qualified for a simpler permit, did not have to participate in the three-tier system, and could ship wine directly from the site of its production. *Id.* at 474. Both States' laws, then, dealt with producers.

At least as to producers, the Court held that 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 their own producers." *Id.* at 486.

Once finding the laws discriminatory, the Court examined whether they might be saved by a tenet of the dormant Commerce Clause that exempts laws that "'advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* at 489 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)). Obtaining such an exemption requires the "clearest showing" that the law is the only adequate means of serving the State's legitimate purpose. *Id.* at 490 (quoting *C&A Carbone, Inc.*

v. Clarkstown, 511 U.S. 383, 393 (1994)). The States claimed two purposes – prevention of underage drinking and the need for taxes. *Id.* at 489. The Court found that neither had sufficient evidentiary support to save those States' laws. *Id.* at 490-92. We do not discuss this point because we determine that the Texas provisions are constitutional and do not need to be saved.

A decision by this court foreshadowed *Granholm*. In it, we struck down Texas laws that allowed Texas wineries to ship directly to consumers and thus bypass going first to a wholesaler, but these laws prohibited out-of-state wineries from doing the same. *Dickerson v. Bailey*, 336 F.3d 388, 406-7 (5th Cir. 2003). The Texas legislature responded to *Dickerson* by authorizing wineries wherever located to ship directly to Texas consumers once they were issued the appropriate permit. TEX. ALCO. BEV. CODE §§ 54.01-.12.

We disagree with Wine Country that *Dickerson* answers today's questions. That precedent, as did *Granholm*, concerned wineries, *i.e.*, the producers of the product traveling in commerce. The producers in a three-tier system often are not located in the State in which the sales occur. The traditional three-tier system, seen as one that funnels the product, *Granholm*, 544 U.S. at 489, has an opening at the top available to all. The wholesalers and retailers, though, are often required by a State's law to be within that State. The distinction is seen in Texas law. It allows wineries themselves, located for example in California or Florida as are the retailer plaintiffs, to ship directly to Texas consumers.

Texas argues that the following language in *Granholm* certifies the constitutionality of the three-tier system that most States use, and is the lens through which the concept of discrimination needs to be seen:

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "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." *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." *North Dakota v. United States*, 495 U.S. at 432; *see also id.* at 447 (Scalia, J., concurring in judgment) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler"). State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers.

Id. at 488-89 (citations reformatted). That language may be *dicta*. If so, it is compelling *dicta*. What we make of that language, and its ability to protect these Texas statutes from Wine Country's dormant Commerce Clause arguments, is the next part of our analysis.

B. Other Courts' Granholm *analysis*

Granholm dealt specifically with state laws treating in-state and out-of-state producers of alcohol differently. This present appeal involves retailers. Since *Granholm*, other decisions from outside this Circuit have addressed that precedent's applicability to retailers who wish to ship wine into other States. We will discuss the three that are the most relevant.[3]

In the earliest decision, some Virginia consumers and a few out-of-state wineries challenged a Virginia statute that limited the amount of alcohol that consumers could personally carry into the State for their own use. *Brooks v.*

[3] A fourth decision analyzing *Granholm* was recently released, but we find nothing in it to affect our reasoning. *Family Winemakers of Cal. v. Jenkins,* No. 09-1169, 2010 WL 118387, at *5-15 (1st Cir. Jan. 14, 2010) (state law granting distribution rights to "small" wineries was held to discriminate in favor of in-state wineries, all of whom were "small").

Vassar, 462 F.3d 341, 349 (4th Cir. 2006). The plaintiffs' theory was that the provision was unconstitutional because consumers could purchase an unlimited amount of wine from in-state sources but only limited amounts out-of-state for their personal importation into Virginia.

The opinion for the court held that plaintiffs' effort to compare in-state retailers to out-of-state retailers and then allege they were treated differently was fundamentally a challenge to the three-tier system itself. *Brooks*, 462 F.3d at 352 (Niemeyer, J.).[4] Because the Supreme Court had described the three-tier system as "unquestionably legitimate," the court held the Virginia statutes to be constitutionally sound. *Id.* (quoting *Granholm*, 511 U.S. at 489).

In another decision, there were challenges to New York statutes that are analogous to those here. New York law permitted an in-state alcoholic beverage retailer to deliver directly to consumers' residences in New York, using the retailer's vehicles or by using vehicles of a transportation company licensed by the State's liquor authority; out-of-state retailers did not have comparable rights. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 188 (2d Cir. 2009).

The Second Circuit started with a recognition that the Twenty-first Amendment does not authorize all alcohol regulation. Any discrimination between in-state and out-of-state alcohol products or producers must reasonably further a legitimate state interest "that cannot adequately be served by reasonable nondiscriminatory alternatives." *Id.* at 189 (citation omitted). The court's focus on "products or producers" is the central debate: how much further, if at all, beyond products and producers do the anti-discrimination principles go?

The Second Circuit held products and producers are the limit. It described plaintiffs' arguments as simplistic analogies to the *Granholm*-identified

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[4] Judge Niemeyer wrote for the court, but a second judge concurred only in the judgment with respect to this part of the opinion, while the third judge on the panel dissented from that part. This reasoning presumably has limited precedential effect in that Circuit.

discrimination. A State's making distinctions among in-state and out-of-state retailers, and even requiring wholesalers and retailers to be present in and licensed by New York, were fundamental components of the three-tier system authorized in *Granholm*. *Id.* at 190.

The court concluded that the New York laws permitting only in-state retailers to ship directly to consumers were in "stark contrast" to the laws struck down in *Granholm*, which "created specific exceptions to the states' three-tier systems favoring in-state producers." *Id.* at 191. It found that the production-related discrimination involved in *Granholm* "was exactly the type of economic protectionist policy the Commerce Clause sought to forestall, and where the *Granholm* Court drew the line." *Id.*

The line drawn by the court was between the broad state powers under the Twenty-first Amendment "to regulate the transportation, sale, and use of alcohol within their borders," and any "attempts to discriminate in favor of local products and producers." *Id.* It held New York's laws were evenhanded in their control of "importation and distribution of liquor within the state," and that made the dormant Commerce Clause all but irrelevant. *Id.* at 192.

In the third case, the court considered a Michigan law authorizing some in-state retailers to ship wine directly to consumers, while out-of-state retailers without a physical presence in Michigan could not. *Siesta Vill. Mkt., LLC v. Granholm*, 596 F. Supp. 2d 1035, 1037-38 (E.D. Mich. 2008). The Michigan court limited the effect of the Supreme Court's *Granholm* decision: "While the [*Granholm v.*] *Heald* court did state that the three-tier system was an appropriate use of state power, it did not approve of a system that discriminates against out-of-state interests." *Id.* at 1039. The court found that "regulations creat[ing] an extra burden on out-of-state wine retailers" were not saved by the Twenty-first Amendment. *Id.* The court also held it to be insufficient that out-of-state retailers could comply with Michigan law by establishing a location in

the State. The "prohibitive" expense of opening physical stores in multiple States gave a clear advantage to in-state retailers. *Id.* at 1040 (citing *Granholm*, 544 U.S. at 474-75). Accordingly, the court struck down the Michigan laws.[5]

C. The District Court's Interpretation

The district court here considered the Texas "Personal Import Exception," which authorizes individuals to import alcohol for their own use. One section prohibits importation unless authorized. TEX. ALCO. BEV. CODE §107.05. That section is then made inapplicable to Texas residents who import for personal use not more than one quart of liquor, one gallon of wine, or twenty-four twelve-ounce bottles of beer. *Id.* §107.07. There is no direct limit on how much can be purchased, only on how much can be imported.

These provisions were held by the district court to discriminate against out-of-state retailers because they "prohibit customers from purchasing wine from out-of-state retailers" in unlimited quantities. *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 868. The remedy was to allow out-of-state retailers to apply for Texas retail permits, even without the retailers' opening a location in the State. Any retailer with a Texas permit and making sales at locations outside of Texas could not be limited in sales volumes when those limits do not apply to Texas permit holders making sales inside Texas.

The district court also held that the Texas local shipping rights to were discriminatory. The court held the relevant question to be whether there was discrimination "with respect to access to *in-state markets*," and there could be no exception for *de minimis* levels of discrimination. *Id.* at 864 (emphasis in original). The disability imposed on out-of-state retailers was not a "mere practical consequence" of location, as it might be if Texas permitted only over-the-counter sales of alcohol. Since Texas allowed in-state retailers to ship

[5] An appeal to the Sixth Circuit was apparently mooted by an intervening change in the Michigan statutes being challenged.

alcohol, there was no practical reason why out-of-state retailers could not also. *Id.* at 865-66. Shipping was the key, because shipping was as easily done from outside the State as from within.

Having found the Texas laws discriminatory, the court turned to the question of whether the State could show legitimate local purposes, not obtainable by nondiscriminatory alternatives, to justify the discrimination. We do not ultimately reach that analysis, so we do not summarize it here.

D. Dormant Commerce Clause Analysis

We first analyze the provisions that allow an in-state retailer to deliver within its county but bars an out-of-state retailer from shipping into Texas. Texas argues that distinguishing between retailers in this way is a fundamental part of the constitutional three-tier system, which is "unquestionably legitimate." *Granholm*, 544 U.S. at 488-89.

To the contrary, Wine Country focuses on the *Granholm* prohibition on a state's liquor laws discriminating against out-of-state interests. Wine Country acknowledges that the Court limited its holding to discrimination benefitting alcohol on the basis of its in-state production status, but Wine Country argues that makes sense as that was the *Granholm* dispute. Texas argues the *Granholm* failure to mention retailers was significant, as distinctions favoring in-state retailers are inherently part of the three-tier system.

We first note what is not in issue. The discrimination that *Granholm* invalidated was a State's allowing its wineries to ship directly to consumers but prohibiting out-of-state wineries from doing so. Texas grants in-state and out-of-state wineries the same rights. TEX. ALCO. BEV. CODE §§ 54.01-54.12.

Such discrimination – among producers – is not the question today. When analyzing what else is invalid under the Supreme Court's *Granholm* reasoning, we find direction in a source for some of the Court's language. The Court quoted a 1986 precedent that "a comprehensive system for the distribution of liquor

within [North Dakota's] borders" was "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1986)). North Dakota employed a three-tier system similar to that in Texas, in which producers sell to state-licensed wholesalers, who sell to state-licensed retailers. *North Dakota,* 495 U.S. at 428. That sort of system has been given constitutional approval. The discrimination that would be questionable, then, is that which is not inherent in the three-tier system itself. If *Granholm*'s legitimizing of the tiers is to have meaning, it must at least mean that. The legitimizing is thus a caveat to the statement that the Commerce Clause is violated if state law authorizes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm*, 544 U.S. at 472 (internal quotation marks and citation omitted).

Therefore, the foundation on which we build is that Texas may have a three-tier system. That system authorizes retailers with locations within the State to acquire Texas permits if they meet certain eligibility requirements. Those retailers must purchase their alcoholic beverages from Texas-licensed wholesalers, who in turn purchase from producers. Each tier is authorized by Texas law and approved by the Twenty-first Amendment – so says *Granholm* – to do what producers, wholesalers, and retailers do.[6]

Wine Country argues that the three tiers have tumbled because Texas has permitted retailers to make home deliveries within a confined range. At least in part, this must be an argument that Texas retailers are being allowed to act in ways that are unacceptable for retailers in a constitutionally sound system. The defect is one of discrimination: Texas retailers are doing what a retailer in

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[6] Wine Country at oral argument emphasized a provision of Texas law allowing Texas retailers to receive direct shipments from Texas wineries, bypassing the wholesaler tier. *See* TEX. ALCO. BEV. CODE § 110.053. This provision is not on the list of those enjoined by the district court and is not a subject of this appeal. *Siesta Vill Mkt..*, 530 F. Supp. 2d at 851.

California or Florida physically and practically can do, which is to use a licensed shipper to deliver to a Texas consumer, but legally cannot do.

To address the argument, it would be useful to know what specific actions allegedly caused the retailers to stop being *Granholm*-approved, traditional third-tier retailers. If Texas allowed a retailer to carry the beverages to a customer's vehicle parked in its lot, or across the street, would that be a problem? If a retailer's own delivery trucks traveled to the customer, is that discrimination? Does discrimination not begin until a retailer uses a licensed shipper? Relevant to the answer, Texas has not defended on the basis that retailers are just permitted to serve their usual local markets in enhanced, customer-friendly ways. Indeed, at oral argument, the Texas Solicitor General said that the geographical limits to local deliveries were irrelevant. The prior state-wide delivery version of the provision would be constitutional under that argument. We need not and do not reach the broader definitional issue.

In analyzing "retailing" for Twenty-first Amendment purposes, we find a useful warning in concurring Judge Calabresi's observations in *Arnold's Wines*. He found a tension between the original (likely) meaning of the Twenty-first Amendment and the current interpretation, a change largely the result of Supreme Court reaction to the changing economic and social world since the adoption of the Amendment. *Arnold's Wines*, 571 F.3d at 198-201 (Calabresi, J., concurring). He also concluded that uncertainty existed about the direction the Supreme Court will take with its developing interpretation of the Amendment. Yet he agreed that the majority applied the best understanding of its current meaning. The best understanding is also what we seek.

We pull back from any effort to define the reach of a traditional three-tier retailer. Instead, we resolve whether what Texas has allowed here is so substantially different from what retailing must include as not to be third-tier retailing at all. Because of *Granholm* and its approval of three-tier systems, we

know that Texas may authorize its in-state, permit-holding retailers to make sales and may prohibit out-of-state retailers from doing the same. Such an authorization therefore is not discrimination in *Granholm* terms. The rights of retailers at a minimum would include making over-the-counter sales. Wine Country's argument implies that is where *Granholm*-approved retailing ends and where the potential for discrimination begins. We disagree. Texas has adjusted its controls over retailers by allowing alcoholic beverage sales to customers other than those who walk into a store. Still, sales are being made to proximate consumers, not those distant to the store. Retailers are acting as retailers and making what conceptually are local deliveries.

Our read of *Granholm* is that the Twenty-first Amendment still gives each State quite broad discretion to regulate alcoholic beverages. The dormant Commerce Clause applies, but it applies differently than it does to products whose regulation is not authorized by a specific constitutional amendment. Regulating alcoholic beverage retailing is largely a State's prerogative.

Granholm prohibited discrimination against out-of-state *products* or *producers*. Texas has not tripped over that bar by allowing in-state *retailer* deliveries. Yet it also has not discriminated among retailers. Wine Country is not similarly situated to Texas retailers and cannot make a logical argument of discrimination. The illogic is shown by the fact that the remedy being sought in this case – allowing out-of-state retailers to ship anywhere in Texas because local retailers can deliver within their counties – would grant out-of-state retailers dramatically greater rights than Texas ones.

Wine Country argues that Texas has created the need for that outsized remedy through its discrimination, and Texas can eliminate local unfairness by broadening the rights granted its own retailers. The problem with the argument is that it ignores the Twenty-first Amendment. When analyzing whether a State's alcoholic beverage regulation discriminates under the dormant

Commerce Clause, a beginning premise is that wholesalers and retailers may be required to be within the State. Starting at that point, we see no discrimination in the Texas law.

We view local deliveries as a constitutionally benign incident of an acceptable three-tier system. That view is consistent with the unquestioning reference by the Supreme Court in *Granholm* to a Michigan statute that authorized retailers to make home deliveries under certain conditions. *Granholm*, 544 U.S. at 469.[7] A State's granting this authority to retailers is neither recent nor unique. Texas has permitted direct delivery and carrier shipment by in-state retailers at least since 1977. TEX. ALCO. BEV. CODE § 22.03 (Vernon 2006, adopted Sept. 1, 1977). Some other States also allow delivery by in-state retailers.[8] A State's right to authorize a variety of retail practices for alcoholic beverages free of dormant Commerce Clause barriers may not be limitless. Yet it seems to us that implementing consumer-friendly practices for in-state retailing of these products often has more to do with changing economic realities than with the Constitution.

We hold that the limited rights Texas has given its state-licensed retailers to make deliveries do not transgress the dormant Commerce Clause.

We now turn briefly to the separate provisions regarding personal importing. As mentioned before, Texas has placed a limit on the quantity of alcoholic beverages that an individual can purchase out-of-state and then bring into Texas. TEX. ALCO. BEV. CODE §§ 107.05(a) & 107.07(a). Preliminarily, it

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[7] Michigan has subsequently repealed this provision and banned all direct shipment by retailers, perhaps in response to the ruling of the district court in *Siesta Vill. Mkt.*, 596 F. Supp. 2d 1035. *See* MICH. COMP. LAWS ANN. § 436.1203(2) (amend. eff. March 31, 2009)).

[8] *See, e.g.*, COLO. REV. STAT. ANN. § 12-47-407(3) & § 408(3); FLA. STAT. ANN. § 561.57(1); 235 ILL. COMP. STAT. ANN. § 5/5-1(d); IND. CODE ANN. § 7.1-3-9-9; IOWA ADMIN. CODE r. 185-17.1(1); ME. REV. STAT. ANN. tit. 28-A, § 2077(2) & (3); MD. CODE ANN. art. 2B, § 2-301(b)(1); MASS. GEN. LAWS ANN. ch. 138, § 22; MINN. R. 7515.0580; N.J. ADMIN. CODE § 13:2-20.3; N.Y. COMP. CODES R. & REGS. tit. 9, § 67.1; 02-040-016 R.I. CODE R. § 4(10).

should not be overlooked that Texas did not, indeed can not, limit the number of alcoholic beverages consumers may buy at an out-of-state retailer. Any purchase limits would have to come from the other State's laws. The barrier Texas imposes is at its border.

We conclude that the incidental effect on foreign retail sales resulting from limits on quantities to be brought into Texas is at worst an acceptable balancing. The interests of Texas consumers in purchasing alcoholic beverages outside of Texas are recognized, but the State validly insists that the vast majority of the alcoholic beverages consumed in Texas be obtained through its own retailers. In effect, Texas has granted a limited exception to the three-tier system. We find no constitutional defect. *See Brooks,* 462 F.3d at 353-54 (similar provision in Virginia law upheld against dormant Commerce Clause challenge).

CONCLUSION

We reverse the district court's holding that the personal import exception authorized by Texas Alcoholic Beverage Code sections 107.05(a) and 107.07(a), has any defect under the dormant Commerce Clause.

We also reverse the district court's invalidation of provisions that only retailers with a physical presence within the State could deliver to consumers in the State. The provisions as listed by the district court are Texas Alcoholic Beverage Code sections 6.01, 11.01, 22.01, 22.03, 24.01, 24.03, 37.01, 37.03, 37.03, 41.01, 43.04, 54.12, and 107.07(f).

Consequently, in those respects the district court's judgment is VACATED. We REMAND for entry of judgment consistent with this opinion.