No. 07-1513

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 FOR THE STATES OF NEW JERSEY, ALABAMA, ARKANSAS, DELAWARE, GEORGIA, IDAHO, INDIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEW HAMPSHIRE, NEW MEXICO, OHIO, OREGON, TEXAS, UTAH, WEST VIRGINIA, AND THE COMMONWEALTH OF PUERTO RICO AS AMICI CURIAE IN SUPPORT OF DEFENDANTS/APPELLEES AND IN SUPPORT OF AFFIRMANCE OF THE DECISION BELOW

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae, the States of New Jersey, Alabama, Arkansas, Delaware, Georgia, Idaho, Indiana, Massachusetts, Michigan, Mississippi, New Hampshire, New Mexico, Ohio, Oregon, Texas, Utah, West Virginia, and the Commonwealth of Puerto Rico, submit this brief pursuant to Fed. R. App. P. 29(a). The Amici expressly endorse the arguments in support of the District Court's ruling, as set forth by Defendant State of Maine, in addition to the arguments set forth herein.

The fact that alcoholic beverages are described as "intoxicating liquor" illustrates the serious nature of alcoholic beverage products. From the presidency of George Washington, alcohol has had a unique place in the social and governmental history of the United States. Even today, abuse of alcohol fuels domestic violence, family strife and economic difficulties. Moreover, states also struggle with other modern problems, such as drunk driving and teenage binge drinking. At one time, it was thought that the cessation of the sale of alcohol could cure society's ills. This culminated in the social cataclysm know as the Prohibition Era. Prohibition's failure, in turn, resulted in the Twenty-first Amendment, which is the foundation of the current litigation. Thus, alcohol has historically been recognized as a unique product that requires unique regulatory solutions. Indeed, alcohol is the only product that is the subject of a constitutional amendment.

The States file this amicus brief to assert the importance of their roles in regulating and controlling the flow of alcohol across their borders for consumption by their citizens. It is unquestionable that, in the absence of overt and specific discrimination against out-of-state products, the Twenty-first Amendment compels the Court to approve a state's alcoholic beverage regulatory scheme. Furthermore, neither the Commerce Clause nor the Twenty-first Amendment compel a state to waive its regulatory scheme as a means of giving out-of-state producers a cure for non-statutorily caused competitive disadvantage.

State regulations, such as the Maine law here under review, that even-handedly prohibit direct shipping by in-state as well as out-of-state wineries and require on-premises sales, are legitimate controls within a state's police powers and are plainly authorized by Section 2 of the Twenty-first Amendment. Under the auspices of this Amendment, the Amici States have enacted diverse alcoholic beverage laws and some are also currently in the midst of litigation regarding these enactments.[1] Nevertheless, the Amici States commonly recognize that a

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[1]The following cases are illustrative of the pending litigation in the various states: Freeman v. Fischer (D.N.J.) Civil Action No. 03-3140 (KSH); Family Winemakers of California, et al. v. Eddie J. Jenkins, Chairman, Alcoholic Beverages Control Commission of Massachusetts, et al. (D. Mass.) Civil Action No. 06-11682-RWZ , litigating Massachusetts Liquor Control Act, G.L. c. 138, §19F (added by St. 2006, c. 33, § 6, effective February 15, 2006).

failure to uphold a state's right to even-handedly regulate the sale and shipment of alcohol by wineries to in-state consumers will allow the unregulated flow of alcohol. This lack of regulation can lead to illegal activity, including shipment to underage individuals, the sale of adulterated products, and the possibility of organized crime involvement in disguised internet schemes. Indeed, this could lead to the collapse of the three-tier system many states have put in place to control the sale and consumption of alcohol.

The Amici States ask this Court to hold that state laws, such as the law of the State of Maine, that even-handedly regulate the flow of alcoholic beverage products to state residents by both in-state and out-of-state wineries, do not violate the dormant Commerce Clause of the United States. These laws are a valid and constitutional legislative option. Thus, the decision of the District Court validating the Maine law must be affirmed.

STATEMENT OF THE CASE[2]

The Amici States file this brief in support of the District Court's judgment entered in favor of the Defendants on March 5, 2007 (Aa60)[3]. This ruling was based upon the District Court's adoption of the Magistrate Judge's opinion issued on July 27, 2006, which found that the prohibition against direct shipping and the on-premises sales requirement in Maine's law applied even-handedly to in-state and out-of-state wineries (Aa41). Thus, the judge concluded that Maine's law is not facially discriminatory and is not subject to strict scrutiny. Additionally, the judge examined the Maine law and determined that it passes constitutional muster under the balancing test set out in Pike v. Bruce Church, 397 U.S. 137 (1970), and does not discriminate in violation of the dormant Commerce Clause (Aa57-59).

Specifically, Maine alcoholic beverage law allows "farm wineries" to sell wine directly to retailers and consumers. 28-A M.R.S.A. §1355(3)(B) & (D). Any winery, wherever located, that ferments, ages, and bottles its own wine, not

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[2] A more detailed description of the background of this case and the law regarding the applicable standards of review is thoroughly examined in the brief submitted by the State of Maine.

[3] Ab refers to Plaintiffs' brief.
Aa refers to Plaintiffs' appendix.
Db refers to Defendant State of Maine's brief.

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). Farm wineries may sell wine directly to consumers, but the sale must occur on the premises of the winery or at a retail outlet. 28-A M.R.S.A. §1355(3)(B). A farm winery may open up to two retail outlets. 28-A M.R.S.A. §1355(3). Farm wineries may also "sell or deliver" their wines to licensed retailers, including restaurants and clubs. 28-A M.R.S.A. §1355(3)(D). See Db16-17.

Therefore, wineries, whether in-state or out-of-state, are eligible for a farm winery license in Maine; farm wineries may sell and ship wine directly to retailers; and farm wineries may sell directly to consumers, but only in face-to-face transactions. Maine specifically prohibits its residents from purchasing alcoholic beverages, including beer, wine and spirits, over the internet, by mail, over the phone, or through any other "remote" means (Db2). Instead, all alcohol must be purchased in face-to-face transactions, where the seller can confirm that the buyer is of legal age.

Plaintiffs contend that Maine's face-to-face sale requirement violates the Commerce Clause, because it has the effect of making it harder for some out-of-state wineries to sell wine directly to Maine consumers (Ab8). They argue that this constitutes discrimination against out-of-state sellers. The District Court

correctly rejected this argument. The District Court noted that in Maine, all wineries, whether located in or outside the State, are subject to the face-to-face sale requirement, and must establish an on-premises operation in Maine from which to sell wine (Aa55).

The District Court distinguished the statutory scheme in Maine from that found unconstitutional by the Supreme Court in Granholm v. Heald, 544 U.S. 460 (2005). The judge noted that in Granholm, the laws at issue allowed in-state wineries to sell over the internet to consumers, but did not allow out-of-state wineries to do so, or at least made it practically impossible for them to do so. Maine's law does not contain such discrimination, since all wineries, wherever located, are subject to the face-to-face sale requirement and are prohibited from shipping alcohol directly to consumers (Aa56-57).

Because there is no facial discrimination, the District Court found that the strict scrutiny test used by the Supreme Court in Granholm did not apply, and instead looked to the Pike balancing test (Aa57).[4] Applying this test, the Magistrate Judge found that the face-to-face sale requirement passes the Pike test,

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[4]The Magistrate Judge noted that Plaintiffs relied exclusively on a strict scrutiny analysis and did not argue based on the Pike test. Thus, the Magistrate Judge found that Plaintiffs have waived any Pike challenge. Indeed, Plaintiffs concede in their brief that they do not make a challenge under Pike (Ab4).

because Maine's interest in protecting minors from alcohol outweighs any incidental effect on interstate commerce (Aa58).

Furthermore, the District Court rejected Plaintiffs' claim that Maine discriminates against out-of-state wineries, since the State permits farm wineries in Maine to sell wine on their premises, while out-of-state wineries cannot since they have no location in Maine. Before the District Court, Plaintiffs contended that the State must permit them to ship wine directly to consumers, even though in-state wineries are not permitted to do so, to avoid offending the dormant Commerce Clause and to create equal access to the Maine market for the out-of-state wineries. Plaintiffs continue to make this argument in their brief before this Court (Ab16-17).

The Magistrate Judge's opinion characterized Plaintiffs' "equal access" argument as "highly peculiar" and concluded that it did not deserve "any protracted discussion"(Aa58). The judge concluded that it was "not for this court to second-guess" Maine's "policy determination" to forbid all mail order transactions in wine. Given this policy determination, it held that "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" (Aa58-59). The Amici States endorse the reasoning set out in the District Court opinion and urge this Court to affirm.

SUMMARY OF ARGUMENT

The District Court of Maine's decision must be upheld, since state laws that even-handedly regulate the flow of alcoholic beverage products to state residents by both in-state and out-of-state wineries, are unquestionably constitutional. Specifically, such laws do not violate the dormant Commerce Clause of the U.S. Constitution and are authorized by the Twenty-first Amendment.

Plaintiffs claim that the on-premises sales privileges for wineries located in Maine discriminate against out-of-state wineries under the dormant Commerce Clause and that the Supreme Court opinion in Granholm v. Heald, 544 U.S. 460 (2005), supports their position. While the Granholm decision prohibits states from enacting discriminatory or protectionist statutory barriers to interstate commerce, it does not place an affirmative obligation on states to ensure that out-of-state wineries, no matter where they are geographically located, have the same economic opportunities as local wineries. Indeed, the Supreme Court in Granholm affirmed that states may strictly regulate alcohol, as long as it is done in an even-handed fashion. Id. at 490.

State laws that prohibit all direct shipping and permit on-premises sales are not discriminatory in purpose or effect. These laws do not impose a burden on or place out-of-state wineries at a competitive disadvantage. Geography may provide

an economic advantage to in-state wineries, since they are naturally closer to a state's consumers, but this is not violative of the Commerce Clause. Indeed, constitutional jurisprudence does not hold that state statutes which allow on-site selling of products by in-state businesses are discriminatory under the dormant Commerce Clause. See Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200 (2d Cir. 2003).

Furthermore, even if the Court were to find fault with Maine's statutory scheme, the remedy sought by Plaintiffs, unfettered direct shipping to in-state consumers, cannot be endorsed. This remedy would allow out-of-state wineries shipping privileges prohibited to in-state wineries, thus creating a mirror image of the in-state versus out-of-state inequity specifically outlawed by the Supreme Court in Granholm.

Moreover, in a broader sense, this case may affect the ability of states to require face-to-face or on-premises sales of products, other than alcohol, that are potentially hazardous if not carefully regulated. This includes products such as cigarettes, pharmaceuticals, weapons, fireworks and chemicals. For all of these reasons, the challenge by Plaintiffs in Maine must be dismissed by this Court and their request for the ability to directly ship wine to Maine consumers denied.

ARGUMENT

POINT I

THE DISTRICT COURT'S DECISION MUST BE AFFIRMED, SINCE IT CORRECTLY HOLDS THAT MAINE'S ALCOHOLIC BEVERAGE LAW MEETS THE STANDARDS SET OUT BY THE SUPREME COURT IN GRANHOLM V. HEALD AND COMPLIES WITH THE REQUIREMENTS OF THE DORMANT COMMERCE CLAUSE.

A. THE MAINE LAW MEETS THE STANDARDS SET OUT IN GRANHOLM v. HEALD.

The Supreme Court's decision in Granholm v. Heald, 544 U.S. 460 (2005), does not compel the State of Maine to give to Plaintiffs the singular privilege of being allowed to ship wine directly to its consumers, while in-state wineries are prohibited from doing so. Indeed, a review of the Granholm opinion reveals that it was limited to the issue of a state's power to prohibit or severely limit an out-of-state winery's ability to ship wine directly to consumers, while providing this privilege to in-state wineries. There is no such limitation in Maine's statutory framework, since all wineries, both in and out-of-state, are equally eligible to obtain Maine's farm winery licenses (Db17). Similarly, all wineries, both in and out-of-state, are subject to Maine's ban on shipping and on-premises sales requirements.

In Granholm, the Supreme Court addressed whether state laws that permit in-state wineries to ship wine directly to in-state residents, but restrict the ability of out-of-state wineries to do so, violate the dormant Commerce Clause. At issue in Granholm were state laws in Michigan and New York that regulated the direct shipment of wine. The Michigan law permitted Michigan's approximately 40 in-state wineries to obtain licenses that allowed them to sell and ship their wine directly to in-state consumers, but did not permit out-of-state wineries to sell or ship their wine directly to in-state consumers. Id. at 469. Michigan permitted out-of-state wineries to sell their wine only to in-state wholesalers, who distributed it within the confines of Michigan's three-tier system. Id. at 468-69. The New York law permitted wineries that produced wine solely from New York grapes to obtain licenses that allowed them to ship wine directly to in-state consumers. Id. at 470. New York permitted out-of-state wineries to ship directly to New York consumers only if they became licensed New York wineries, which required them to establish a branch factory, office or storeroom within the State of New York. Id.

In a 5-4 decision, the Court held that such regulatory schemes violated the dormant Commerce Clause. The Court explained that "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 Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 99 (1994)); see also Granholm, 544 U.S. at 472 ("States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses"). Under these standards, the Court concluded that Michigan and New York discriminated against interstate commerce through their direct-shipping laws, because they required out-of-state wineries to distribute their wine through the States' three-tier systems, but allowed in-state wineries to bypass those systems entirely. Id. at 476.

Even though it invalidated the Michigan and New York direct shipping laws, the Supreme Court made a point of clarifying that its decision did not "call into question the constitutionality of the three-tier system." Id. at 488. The Court unequivocally stated: "We have previously recognized that the three-tier system itself is 'unquestionably legitimate.' North Dakota v. United States, 495 U.S. 423, 432 (1990)." Id. at 489. It also expressly reiterated its conclusion in California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980), that "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." Granholm, 544 U.S. at 488. The Court made equally clear that the Twenty-first Amendment grants the states plenary authority to

regulate the transportation and importation of alcohol through non-discriminatory, even-handed laws. "State policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent." Id. at 489.

The District Court decision here under review found that the Maine statutory scheme complies with the requirements outlined by the Supreme Court in Granholm. The District Court noted,

> Unlike the records compiled regarding the statutory schemes at issue in Granholm, the plaintiffs in this case have failed to demonstrate the existence in Maine of any mail order local market that is afforded to in-state farm wineries and denied to out-of-state wineries [Aa55].

Thus, the District Court concluded that Maine's law does not set up a system that discriminates against out-of-state wineries, since the on-premises or "face-to-face" restriction applies equally to both, and because the record does not present evidence of any situation where an in-state winery could lawfully ship its product to a Maine consumer. The District Court concluded that there is no basis in the record to find that Maine's statutory scheme is protectionist in purpose or effect. For this reason, the District Court determined that the facts in this case do not require a strict scrutiny analysis, which was used by the Supreme Court in Granholm.

Plaintiffs' argument that Maine's law is contrary to Granholm is without merit. In reality, Plaintiffs' argument is an attempt to expand the boundaries of the ruling in Granholm, while severely limiting a state's constitutional authority to regulate alcohol. The Supreme Court's decision in Granholm overturned state statutes that it found to be economic protectionism. It did not place on states an affirmative obligation to develop a statutory scheme that addresses the alleged competitive disadvantages of out-of-state producers.

As the District Court recognized, Maine's law does not discriminate between out-of-state and in-state wineries in any manner and is readily distinguishable from the state laws found unconstitutional in Granholm. Overturning the District Court's ruling would eviscerate a state's well recognized rights and obligations under the Twenty-first Amendment to regulate alcohol within its own borders. Thus, the District Court's ruling must be affirmed.

B. THE MAINE LAW COMPLIES WITH THE REQUIREMENTS OF THE DORMANT COMMERCE CLAUSE AND READILY PASSES AN ANALYSIS BASED ON THE TEST SET OUT IN PIKE v. BRUCE CHURCH.

Not only did the District Court find that Maine's law is non-discriminatory and thus not subject to the strict scrutiny test as described in Granholm, but the District Court also found that Maine's law complies with the requirements of the

dormant Commerce Clause (Aa58). Moreover, it concluded that Maine's statutes readily meet the test set out in Pike v. Bruce Church, 397 U.S. 137, 142 (1970) (when a "statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits"). The District Court held that Maine's interest in preventing underage sales and protecting minors from alcohol outweighs any incidental effect on interstate commerce (Aa58-59). This analysis is correct and must be affirmed.

In their appeal of the District Court's ruling, Plaintiffs simply ignore the Pike test. Although Plaintiffs cannot dispute the facial neutrality of Maine's law, they argue that out-of-state wineries should be allowed to ship wine directly to state residents in order to mitigate their inherent geographical disadvantage. Thus, Plaintiffs contend that Maine has an affirmative constitutional obligation to allow them additional privileges over in-state licensees to ship directly to Maine consumers from out-of-state locations by means of mail order. This argument is without merit.

Nothing in Granholm or any of the Supreme Court's other dormant Commerce Clause decisions supports the claim that states have an affirmative

obligation under the dormant Commerce Clause to create a level economic playing field for all potential market participants, no matter how geographically remote, or to ensure that out-of-state producers have the same economic opportunities as in-state producers. While the Granholm decision prohibits states from enacting discriminatory or protectionist statutory barriers to interstate commerce, it does not place an affirmative obligation on states to ensure that out-of-state wineries, no matter where they are geographically located, have the same economic opportunities as local wineries. See Granholm, 544 U.S. at 472; see also Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) (a state economic regulation is discriminatory within the meaning of the dormant Commerce Clause only when it constitutes "simple economic protectionism," based on either a "discriminatory purpose" or "discriminatory effect").

In a recent opinion denying a Commerce Clause challenge to two New York county waste flow ordinances, the Supreme Court reiterated the principle that the Commerce Clause does not protect "the particular structure or method of operation of a market." United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 127 S.Ct. 1786, 1796 (2007), citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978) (Court rejected a Commerce Clause claim regarding a state statute prohibiting producers or refiners of