

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case Nos. 07-3323, 07-3338

PATRICK L. BAUDE, *et al.*,
Plaintiffs/ Appellees,

v.

DAVID L. HEATH, in his official capacity as
Chairman of the Indiana Alcohol & Tobacco Commission,
Defendant/ Appellant,

And

WINE & SPIRIT WHOLESALERS OF INDIANA
Intervenor/ Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF INDIANA, NO. 1:05-CV-0735-JDT-TAB
THE HONORABLE JOHN DANIEL TINDER, JUDGE

**BRIEF *AMICUS CURIAE* OF WINEAMERICA, INC.
IN SUPPORT OF PLAINTIFFS/APPELLEES
PATRICK L. BAUDE, *et al.*,
AND URGING AFFIRMANCE**

WILLIAM L. WILSON
ANDERSON, AGOSTINO & KELLER, P.C.
131 SOUTH TAYLOR ST.
SOUTH BEND, INDIANA 46601
TEL. (574) 288-1510
FAX (574) 288-1650
WILSON@AAKLAW.COM

*Attorneys for Amicus Curiae
WineAmerica, Inc.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. 26.1, I hereby certify that amicus curiae WineAmerica, Inc. is a private non-profit corporation that is not publicly traded.

Furthermore, I hereby certify that the names of all law firms whose partners or associates have appeared for the amicus curiae in this case or who are expected to appear in this court are:

ANDERSON, AGOSTINO & KELLER, P.C.
131 South Taylor Street
South Bend, IN 46601
(574) 288-1510

William L. Wilson

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INTEREST OF THE *AMICUS CURIAE*

WineAmerica, Inc., the National Association of American Wineries (“WineAmerica”), has more than 800 member wineries from 48 states. WineAmerica represents the interests of American wineries and promotes the advancement of the wine industry. WineAmerica opposes protectionist state laws that prevent its members from selling their wine across the country directly to consumers.

Since 1979, WineAmerica has represented wineries across the United States at the state, federal and international levels. The mission of WineAmerica is to encourage sound public policy that allows for wineries to market their wines and for the growth of the entire wine industry. One mechanism for growth that WineAmerica has long endorsed is the ability of wineries to sell directly to consumers, while ensuring that states have some means to monitor such shipments. Indiana’s direct-shipping law does not fully meet these criteria. Provisions in the law—face-to-face transactions and the ban on a winery receiving a permit if they also use a wholesaler—put up unworkable barriers to wineries that wish to ship directly to their customers. The lower court struck down these provisions, correctly noting their unconstitutional nature. Should such barriers be allowed to stand, they would have negative consequences for the growth of the wine industry and would directly undermine the Constitutional support for a single market.

The Supreme Court has repeatedly acted to further the framers' original vision that the many states, while sovereign, should be united in a single national market, and has applied the dormant Commerce Clause to invalidate protectionist State laws discriminating against businesses in other states. Yet this vision of a more perfect Union remains unrealized for Americans who make and drink wine. Several states prohibit wineries in other states from shipping their products directly to consumers; instead, they compel out-of-state wineries that wish to sell their wines to consumers to subject themselves to the whims of cartel-like, archaic and overly restrictive distribution systems.

Presenting wineries with daunting economic constraints, and distributors with little incentive to serve wineries' needs, these systems effectively prevent consumers in these states from buying most of the wine labels in this country. By contrast, these states typically permit wineries within their borders to ship directly to consumers. The practical effects of this scheme are to limit access to the Indiana wine market to a small number of the country's largest wine producers and to prevent Indiana residents from buying many of the wines made in this country unless they visit the producing wineries in person.

The Supreme Court has ruled that the Twenty-first Amendment does not give States *carte blanche* to adopt protectionist measures. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Indiana's discriminatory barriers are clearly protectionist in nature and

have the practical effect of depriving most out-of-state wineries of their ability to sell wines to Indiana's residents. This discrimination cannot be justified by the states' legitimate interests under the Twenty-first Amendment. The experience of those states that permit direct wine shipment to their residents demonstrates that there is no need for the discriminatory laws at issue here.

In accord with the vision of the framers, this Court should affirm the District Court decision and strike as unconstitutional those provisions of Indiana law that pose unreasonable and unnecessary burdens upon the ability of out-of-state wineries to ship wine directly to Indiana consumers.

Pursuant to Seventh Circuit Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made monetary contribution to the preparation or submission of this brief.

Pursuant to Rule 37.3, *amicus* states that Appellants and Appellees granted consent to the filing of this brief via electronic mail to counsel for *amicus* on December 12, 2007.

ARGUMENT

I. Commerce Clause

For almost two hundred years, the Supreme Court has applied the Commerce Clause to promote the development of a national market. As Justice Johnson observed: "If there was any one object riding over every other in the adoption of the constitution,

it was to keep the commercial intercourse among the States free from all invidious and partial restraints.” *Gibbons v. Ogden*, 22 U.S. 1, 290 (1824) (concurring opinion). The founders recognized that the grant of power to Congress in the Commerce Clause “grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves.” See James Madison, *4 Letters and Other Writings of James Madison* 14-15 (1865) (letter to Joseph C. Cabell dated 13 Feb. 1829) available at http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces19.html (last visited on December 3, 2007). As Justice Jackson famously wrote:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

To these ends, the Supreme Court has applied the dormant Commerce Clause to “prohibit[] economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). “Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. The

clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (citations omitted). "The Court has consistently found parochial legislation of this kind to be constitutionally invalid" *Id.* at 627 (describing cases in which "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy"). As the Supreme Court noted in *Granholm*, "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Granholm v. Heald*, 544 U.S. 460, 487 (2005), quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986).

If the founders were concerned about isolation and economic warfare that might take place in a nation without a Commerce Clause, the current patchwork of state wine regulations proves that their fears were prescient because the framers' vision of a seamless economic union is not a reality when it comes to interstate shipment of wine. But for the Commerce Clause, one might expect all states to have trade laws legislated to favor in-state businesses as indeed the Indiana wine statutes are designed to benefit the in-state distributor cartel-like network.

In applying the dormant Commerce Clause to void protectionist measures, the Supreme Court has looked past pretextual defenses. For example, the Court affirmed

the entry of a permanent injunction barring the State of Arizona from requiring a cantaloupe grower to build new packing sheds in Arizona instead of shipping the fruit across the California border for packing, concluding that the threat to the reputation of other Arizona cantaloupe growers was incommensurate with the burdens of requiring the grower to go into the packing business. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145-46 (1970). As *Pike v. Bruce Church* reflects, the “Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere.” *Id.* at 145. In *Granholm*, the Court directed that states cannot discriminate between in-state and out-of-state wineries, and left no doubt about its intent: “If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.” *Granholm v. Heald*, 544 U.S. at 493.

II. Evolution of the American Wine Producing Industry

Prohibition was repealed in 1933 by the Twenty-first Amendment. At the time there were only a handful of nascent wineries in the country and in the next few years, as states developed their laws governing the marketing of wine, there were still only a handful of wineries. From that perspective, it made some sense to develop a mandatory three tier system of wine marketing with all wine sold in a state required to first be sold from producer and importer to distributor and then from distributor to retailer before ultimate sales to the consumer. Such a system was simple to administer, allowed for

easy control and collection of taxes and did not particularly handicap the few large wineries which dominated American wine production.

By 1975 the number of American wineries had climbed substantially to just under 600. In the ensuing 30 plus years that number has increased exponentially to more than 5,000 current wineries (TTB FAA Permit Listing for Wine Producers 0707), with the number more than doubling since the year 2000. Since 1975 wineries outside of California have expanded in number much more quickly so that the percentage of producers in California has declined from 57 percent to less than 43 percent. Clearly such an increase in producers and locations of wineries has structurally changed the environment for marketing and purchasing wines.

This new diversity of wineries offers connoisseurs and novices alike unprecedented opportunities to discover and appreciate the artistic skills of vintners across the country. The vast majority of wineries are small, farm-based, family-run enterprises. A typical winery occupies 20 acres and produces 4,000 cases of wine annually, either from its own fruit or fruit grown by local farmers. More than 70% of the nation's wineries produce fewer than 10,000 cases yearly, and more than four-fifths produce fewer than 25,000 cases – a quantity which can be sold entirely through on-site tasting rooms and by direct shipment to consumers via the internet and other means. Indeed, most wines are “hand sold” through direct contact between a person familiar with the wine (often a winery employee) and the buyer. Except for the largest

producers, advertising is too expensive for winemakers. Instead, consumers most often find their wines through one-on-one contact—perhaps through the recommendation of a waiter, a wine store proprietor, or a friend. Or customers may seek a specific wine because they have read about the wine or visited the winery.

As wine drinkers grow more sophisticated, they increasingly turn to small labels. American wine drinkers increasingly prefer individualistic, hand-crafted wines in lieu of commodity-type wines. One measure of consumers' increasing sophistication is the popularity of wine magazines such as *The Wine Spectator*, which reviews more than 10,000 wines each year.

Today there are more than 50,000 domestic wine labels, most of which are produced by small wineries. There is heightened interest in reserve wines (made from particular vineyard blocks where the soil produces better grapes), wines based on variations of winemaking technique (unfiltered, unfinned, or carbonic maceration, for example), various blends (such as "Meritage"), and fruit wines. A typical winery may make ten to twenty different offerings from each vintage year. Vintners compete with one another by crafting wines that express the character and nature of the particular wine variety and style, as well as the vintner's own interpretation of the varietal ideal. Many consumers have strong opinions about every step in the production of a wine, from the region and location where the fruit is grown, to the variety of grapes used, to the planting of the vine and the harvest of the fruit, to the means of aging and bottling

of the wine. All of these factors affect the ultimate expression of the vintner's efforts, which is why wines made from the same variety of grape (say, a Cabernet Sauvignon) produced by a winery in one state will differ from a wine made from a similar line of grapes by a different winery in another state.

In the wine world, the word "*terroir*," a French term without an adequate English counterpart, has a special power, referring to the aromas and tastes specific to wines of a particular area. *Terroir* depends on the characteristics of a particular vineyard—the interaction of climate, sun exposure, grape variety, water, soil, and local winemaking techniques. A winery producing 10,000 cases annually usually requires fewer than 50 vineyard acres to grow its grapes. Similarly, somewhat larger wineries craft wines from the grapes of a single vineyard. Because they attempt to capture something unique about a place, single-vineyard wines can only be made in limited quantities.

Small wineries are important to the rural economy. A typical new winery will provide regular employment for five to ten people, and will have annual sales of \$200,000 to \$1.5 million. Wineries also attract tourists, with the corresponding benefits to the areas where they are located.¹ In areas where wineries flourish, restaurants, bed-and-breakfasts, inns, retail boutiques and other farm and craft businesses also succeed. Employment associated with small wineries has transformed economically depressed

1 For every \$3 a winery receives in gross revenue from all sources, tourists will add roughly \$1 to the local economy. Nelson and Greene, *Components of a Model Winery Law*, *Winery and Vineyard Management* (Vol. 29, No. 3, May/June 2003).

rural communities, such as the Finger Lakes and Hudson Valley districts in New York, southern Oregon, and eastern Washington. To spur this sort of economic growth, Indiana—like other states—recently launched a “wine trail,” a network of wineries within a short drive of each other.

Given the economic benefits associated with the growth of small wineries, it is easy to understand why state governments would want to promote the development of local rural wineries. Indeed, some of the rural areas which have benefited most from a burgeoning wine industry, like the Finger Lakes region of New York and the Leelanau Peninsula of Northern Michigan, are in states with a history of protectionist regimes that were recently overturned in favor of more consumer and market friendly versions that allow the states to continue to foster strong wine industries.

III. Allowing Wineries to Market Their Wine

A few wineries are large enough that they have contracts with distributors to sell their wines in other states, and their wines may be found in stores and restaurants across the country. But the typical winery does not offer enough business to interest distributors, and must sell its wines directly to consumers—or not at all.

As indigenous wine production has developed and prospered, states have moved to substantially liberalize their strict three-tier systems for in-state wineries in order to provide reasonable marketing channels appropriate to these businesses, to

foster growth of wineries and to expand the industry through the addition of new wineries. (Nelson & Greene, *Components of a Model Winery Law*, Winery and Vineyard Management (Vol. 29, No. 3, May/June 2003)). Typically states have modified their three-tier framework to allow their wineries to sell at retail directly to consumers and frequently to sell at wholesale to restaurants and retailers. Additionally, most states allow in-state wineries to ship wines directly to consumers (38 out of 50 representing 86 percent of the country's population).

As the Supreme Court has made abundantly clear, the founders envisaged a national market without protectionist barriers. Indiana's statute provides a very difficult and in many ways insurmountable barrier for out-of-state wineries seeking to market their wines to Indiana consumers.

A winery seeking access to consumers in a state barring direct shipment has only one real option—to obtain a wholesaler to distribute its products. Most cannot do so, and those that do learn that the three-tier system serves them—and consumers—poorly.

1. Most small wineries cannot get distributors to carry their wines.

Small wineries are unlikely to find wholesalers willing to distribute their wines. Even when they are willing to sacrifice a substantial proportion of their profit margin for the sake of getting their wines distributed to consumers, most American wineries rarely succeed in obtaining distributors. The fundamental problem is that small wineries produce insufficient volume to interest wholesalers. By denying shelf space to

small products that impose higher handling costs, the wholesaler creates more shelf space or bottle “faces” for products that turn over more quickly.

Given considerable consolidation that has occurred among wholesalers and distributors in recent years, small wineries also face an increasingly narrow choice of wholesalers. As the number of small wineries has exploded, the number of wholesalers has dwindled.² For most industries, the distribution system can be illustrated by an inverted funnel with a small number of suppliers at the narrow end, a greater number of distributors at the point where the funnel begins to open, and a still larger number of consumers at the base. Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003), page 4. In contrast, wine’s distribution system is shaped like an hour-glass, with many producers, many consumers, and only a few distributors between them. Wholesalers tend to focus almost exclusively on the well-known, high-volume wines to the exclusion of the smaller, lesser-known brands. *Id.* at 45-59.

Consolidation among distributors has not alleviated this problem and may exacerbate it.

2 As the Supreme Court noted in *Granholtm*, “The increasing winery-to-wholesaler ratio means that many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. FTC Report 6. This has led many small wineries to rely on direct shipping to reach new markets. Technological improvements, in particular the ability of wineries to sell wine over the Internet, have helped make direct shipments an attractive sales channel.” 544 U.S. at 467.

And that is only part of the story. Wholesalers rarely generate retail demand for the products of small wineries. That responsibility also falls to the winery and can be prohibitively expensive.

Having no access to wholesalers, wineries cannot meet the demand for their product from interested consumers who reside in states barring direct shipment. Popular wineries without national distribution are located across the nation in states as diverse as North Carolina, Georgia, Missouri, Texas, Washington, Virginia, Oregon, and New York. These wineries are major tourist attractions that individually welcome from 50,000 to 1,000,000 visitors per year from around the nation. Yet because of laws barring the direct shipment of wine or creating unnecessary barriers, none of these wineries can distribute their products in more than a handful of states. Consequently, it is impossible for wineries to accept orders from would-be customers in these states.

2. If a small winery does find a wholesaler, its difficulties are not over.

Even for the rare small winery that succeeds in gaining the representation of a wholesaler, the hard fact is that the winery is likely to realize little or no profit from out-of-state sales. Wholesalers ordinarily do little in exchange for the high costs they charge small wineries. The cost of using a wholesaler is overwhelming from a small winery's perspective and saps its entire profit, or more. Yet the small winery provides negligible income to the wholesaler, which has little incentive to market products that contribute only a small fraction of its total revenue.

Wholesalers are not motivated to aggressively market the products of small wineries, from whom they realize comparatively minimal gross profit. Moreover, because most wine is “hand sold,” and because a wholesaler’s sales personnel never comes into direct contact with the ultimate customer, the influence of wholesalers on the marketing of the sorts of wines produced by small wineries is dramatically limited.

Not surprisingly, wineries that succeed in obtaining wholesalers often complain that the wholesaler fails to maintain contact with restaurants or wine shops after making an initial sales call. Some wineries learn that restaurants have stopped selling their wines because the wholesaler has told the restaurant the wine is unavailable even though the wholesaler actually has the wine in stock. As a result, wineries with wholesalers often find they must incur additional marketing expenses, further draining their narrow margins. For example, wineries must bear the costs of expensive marketing trips to build retailer interest. In *Swedenburg v. Kelly*, the companion case to *Granholtm v. Heald*, the costs to a winery of supporting a wholesaler’s operation—exclusive of the wholesaler and retailer’s mark-ups—were estimated at approximately \$4.00/bottle if only 100 cases are sold, and \$8.00/bottle if only 50 cases are sold. Small wineries find that, as a practical matter, they must incur these costs for the wholesalers to sell their wines.

Of course the margins collected by wholesalers and retailers also take money from the wineries, preventing small wineries from recouping their investment. When

wine is sold through the three-tier system, the winery typically nets less than half of the retail price of a bottle of wine. Almost half of the margin is retained by the retailers and wholesalers. For a bottle of wine selling for \$20.00 at retail, the retailer usually will collect about \$6.50 and the wholesaler usually will collect about \$3.00. After other selling expenses, a small winery will net less than \$10.00 per bottle, from which the marketing costs described above must also be deducted. The ultimate net, from \$2.00 to \$6.00 is almost always less than the winery's cost of production. In contrast, where direct shipment is allowed, a winery selling \$20.00 bottles of wine will receive a net of about \$19.00 per bottle.

Barred from directly shipping to states governed by the three-tier system, and effectively prevented from selling their wines through wholesalers, most American wineries are excluded from the market in states mandating the three-tier system. At the same time, many such states permit domestic producers to ship wine directly to their residents. While these protectionist regimes undoubtedly serve in-state distributors and producers, they stand in the way of the national market envisioned by the Constitution's drafters.

3. The importance of direct shipment for wineries.

As a direct result of the dysfunction and inadequacy of the three-tier system for wineries, direct shipment is the only practical marketing channel for smaller wineries and indeed for the specialized products of larger wineries to reach interested consumers

outside of their home state. In recognition of the importance of direct shipping as a means of marketing the wines of small wineries and in response to the mandates of the Supreme Court to eliminate discrimination between in-state and out-of-state wineries in their ability to ship directly to consumers, 38 states with some 86% of the country's population now allow interstate direct shipment. The experience of these states strongly suggests that interstate direct shipment of wine, without unreasonable burdens, can be accomplished without compromising a state's interest in collecting taxes, preventing underage sales, and maintaining an orderly market.

4. The aftermath of *Granholm*.

Subsequent to the landmark decision of the Supreme Court in *Granholm*, the number of states allowing some form of Interstate direct shipment of wine has expanded to encompass 37 states and the District of Columbia, which together comprise 86% of the country's population. While that expansion represents genuine progress, the individual winery nevertheless faces the daunting task of maneuvering through extremely complex and opaque statutes for each state which seem to have been enacted, in many cases, with more of an intent to impede commerce than to allow the development of a true national market. This patchwork of state regulation is precisely the type of economic Balkanization that the Constitutional Convention sought to prevent in adopting the Commerce Clause. As stated in *Granholm*

The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not

be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests. Cf. U. S. Const., Art. I, §10, cl. 3. Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented.

Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms...generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid.

544 U.S. at 473–474.

Like many of the complex laws enacted by other states, Indiana’s statute calling for an initial face-to-face transaction and prohibiting wineries that wholesale from shipping to Indiana consumers contributes to a system of regulation making business for the small winery next to impossible. These requirements go beyond a rational basis. No one has demonstrated that extraordinary means or regulating direct shipment of

wine are necessary to prevent sales to minors as the 38 jurisdictions allowing such shipping have not experienced significant problems.³

Indiana's onerous requirements amount to taking so called "geographical advantage" to the point of ingenious protectionism. Without court intervention, clever lawmakers working with in-state lobbyists for powerful interests like the Wine and Spirits Wholesalers of Indiana can be very creative and easily exploit superficially non-discriminatory laws as a means to favor in-state businesses in direct contradiction to *Granholm*. Thus, seemingly even handed, statutes can be manipulated to provide effective discrimination in favor of in-state businesses.

3 "The States provide little evidence that the purchase of wine over the Internet by minors is a problem. Indeed, there is some evidence to the contrary. A recent study by the staff of the FTC found that the 26 States currently allowing direct shipments report no problems with minors' increased access to wine. FTC Report 34. This is not surprising for several reasons. First, minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor. *Id.*, at 12. Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who, in the words of the past president of the National Conference of State Liquor Administrators, " 'want instant gratification.' " *Id.*, at 33, and n. 137 (explaining why minors rarely buy alcohol via the mail or the Internet). Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions. Under our precedents, which require the "clearest showing" to justify discriminatory state regulation, *C & A Carbone, Inc.*, 511 U. S., at 393, this is not enough." 544 U.S. at 490.

IV. Specifics of Indiana's Statute

There are three provisions in Indiana's statute that unreasonably burden interstate direct shipment of wine from wineries. These are the requirement that direct shipments be preceded by at least one face-to-face transaction, the exclusion from ability to obtain a direct sales permit for all wineries permitted to wholesale their products or obtain a wholesaler license, and the disqualification of wineries that have distributed their wines in Indiana within the past 120 days.

As Judge Tinder has made abundantly clear, there seems to be little doubt that these restrictions are meant to undermine the national market for direct shipment of wine by imposing unreasonable and unnecessary burdens selectively upon out-of-state wineries. The net effect of these restrictions is to preclude Indiana consumers from accessing the vast majority of wines produced in the United States.

Most wineries in the country do have some form of wholesale privileges. The Indiana statute removed those privileges from in-state wineries but provided alternative and unusual mechanisms to market their wines to retailers. By prohibiting most out-of-state wineries from obtaining a direct sales permit Indiana has clearly created a discriminatory barrier to commerce.

The requirement that before shipping any wine to an Indiana consumer, a winery must first have verified the age of the buyer through an in person transaction is excessively burdensome. Driving to an in-state winery is much less expensive and

much less troublesome than a journey of thousands of miles to another state. The experience of states that allow shipping as documented by the FTC and substantiated by the lack of evidence of significant problems in other states after the post-Granholm expansion of interstate direct shipping indicates that shipments of wine to under-age persons can be prevented by mechanisms which do much less violence to the Commerce Clause than the in-person requirement.⁴

Finally it is difficult to find a non-protectionist justification for the disqualification of wineries that have distributed their wines in Indiana. While it is true that out-of-state wineries could apply for an Indiana Farm Winery Permit, and thus be exempt from the 120-day ban, this adds another layer of red tape and cost that in-state wineries do not face. The primary reason for excess regulation is often to protect state interests—in this case the distributors. Thirty-seven states aside from Indiana have some form of direct shipping laws and the vast majority allow wineries to obtain shipping permits regardless of their use of distributors. These states have intact three-tier systems, they increase market access for small wineries and meet Constitutional requirements for open markets. Our country is based on competition. All wineries should be allowed to take advantage of opportunities to market their wine provided by Indiana to some wineries. As Judge Tinder rightly pointed out, the Constitution

4 Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003). In this report the FTC examined issues of tax collection and underage sales. The FTC concluded that state laws governing and allowing direct shipping adequately address those concerns.

generally prohibits protectionism through laws with disparate impact and this provision should be struck as protectionist and without good public policy justification.⁵

V. Conclusion

There is great and growing demand for the products of America's small wineries, which are eager to meet it, but Indiana law severely burdens out-of-state wineries through its provisions requiring initial face-to-face transactions and the exclusion of wineries allowed to wholesale their own product. Indiana law transparently favors in-state businesses, both wineries and distributors. There can be no question the provisions in dispute owe their existence to the clout of distributors and their desire to protect a virtual monopoly on sales and distribution of wine and to the invisibility of non-resident wineries in state legislatures. Yet the unresponsive nature of the wine distribution system and the burdensome regulations of the Indiana direct ship statute make it virtually impossible for most out-of-state wineries to market their wines to Indiana consumers.

For the public, these laws raise prices and decrease selection. For wineries, these laws Balkanize and erect barriers to the national market. Such laws limit the viability of many wineries across this country. It is difficult to appreciate a compelling state need to protect the cartel-like wholesalers who have not been hurt in other states when direct

5 See judicial opinion for *Baude v. Heath*, p.22. Judge Tinker refers to *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

shipment of wine has been allowed. The dormant Commerce Clause does not tolerate discriminatory burdens, and as the Supreme Court has made clear in *Granholm* the Twenty-first Amendment does not excuse them. WineAmerica urges this Court to affirm Judge Tinder's decision.

Respectfully submitted,

William L. Wilson
ANDERSON, AGOSTINO & KELLER, P.C.
131 S. Taylor Street
South Bend, IN 46601
(574) 288-1510 Tel.
(574) 288-1650 Fax
wilson@aaklaw.com

Attorneys for Amicus WineAmerica

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,267 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: December 13, 2007

William L. Wilson
Attorney for Amicus Curiae WineAmerica, Inc.

CERTIFICATE OF SERVICE

I hereby certify that two copies of this brief were served upon:

James A. Tanford
Indiana University School of Law
211 S. Indiana Avenue
Bloomington, IN 47405

Thomas M. Fisher
Solicitor General
Office of the Indiana Attorney General
IN Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis IN 46204

Robert D. Epstein
Epstein, Cohen, Donohoe & Mendes
50 South Meridian St. #505
Indianapolis IN 46204

Fred R. Biesecker
Ice Miller, LLP
One American Square, Suite 3100
Indianapolis IN 46204

April Edwards Sellers
Baker & Daniels
300 North Meridian, Suite 2700
Indianapolis, IN 46204

By first class United States Mail, postage prepaid, on December 13, 2007.

William L. Wilson