DECLARATION OF RON RICE

I, Ron Rice, hereby declare and state:

1. I am employed by the Gould Alcohol Control Commission as the Chief Regulator of the beer and wine division. I have been so employed for approximately twelve years. This declaration is being submitted in support of the Defendant's Motion for Summary Judgment.

2. As the Chief Regulator, I am in charge of overseeing all of Gould's regulated entities, including distributors, wholesalers, and retailers. I check to make certain they are in compliance with the current statutes and regulations governing their operations. My division also investigates allegations of noncompliance and communicates with noncompliant entities to ensure that they rectify any violations.

3. Based on my training and experience, I know that the State of Gould uses a three-tier system to regulate the distribution of all types of alcohol, including beer and wine. The three tiers are the producers, the distributors, and the retailers. The producers are typically wineries, breweries, and distillers. To sell their alcohol in Gould, producers must normally contract with a state-licensed wholesale distributor. The distributor is responsible for importing the alcohol, storing it, and transporting it. The distributors then sell the alcohol to licensed retailers, which are typically bars, stores,

and restaurants. Ultimately, the consumer gets the alcohol from one of the licensed retailers. Thus, as a general rule, if a winery wants to sell wine in Gould, it must do so through a licensed wholesale distributor.

4. At this time, there are five licensed wholesale alcohol distributors in Gould. These distributors purchase various kinds of alcohol, including wine, directly from the producers at a small markup to cost. They mark up the price again before they sell it to retailers. In my experience, it is common for the distributors to try to find alcohol that is relatively inexpensive so they can add a bigger markup to increase their profit margin.

5. Wine that is sold in the United States and Gould essentially falls into two categories. First, there are the lower-quality, higher-production wines, and second, there are the higher-quality, lower-production wines. Wholesale distributors tend to pick the wines they want to distribute based on consumer demand. Typically, the best selling wines are the lower-quality, higher-production wines. These wines are made almost exclusively by the five or six largest wineries in the country. Even the large wineries that produce both categories of wine typically sell only the lower-quality, higher-production wines through wholesale distributors because

the distributors can pick which wines they want to distribute and they overwhelmingly choose the lower-priced ones.

6. Small wineries that make good quality but expensive wine can, however, market their wines in Gould directly to consumers if they qualify for a "small winery" license under Section 1144 of the Gould Health and Safety Code. To qualify for such a license, the winery must produce no more than 90,000 gallons of wine per year. It must then apply to my agency for a "small winery license." If granted, the "small" winery can ship directly to consumers who reside in Gould, bypassing the three-tier system.

7. In 2009, there were a total of approximately 6,300 wineries in the United States. Of those, approximately 4,700 wineries qualified as "small" wineries under Section 1144, but that number is a little deceptive. About 98% of all the wine produced in the United States last year was produced by 600 of the largest wineries. Of the 4,700 "small" wineries, about 2,700 produced less than 10 gallons of wine, essentially claiming no market share, meaning that approximately 2,000 small

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wineries accounted for about 2% of the total wine production. There were and continue to be approximately 50 wineries in Gould, all of which qualify as "small" wineries.

I hereby declare under penalties of perjury that the foregoing is true and accurate.

Executed this 6th day of January, 2010 in Gould City, Gould.

Ron Rice

RON RICE

DECLARATION OF ALBERT ALLEN

I, Albert Allen, hereby declare and state:

1. I am employed by the Gould Alcohol Control Commission in the Advertising Division. I have been so employed for approximately five years. This declaration is being submitted in support of the Defendant's Motion for Summary Judgment.

2. To perform my duties in the Advertising Division, I had to become familiar with Gould Health and Safety Code Section 1145. Section 1145 was enacted last year as part of the Reduce Underage Drinking Act, otherwise known as RUDA. My division is responsible for enforcing Section 1145, which prohibits all student-run publications from running advertisements for alcohol.

3. While performing my duties in the Advertising Division, I have become familiar with the various newspapers that are published and distributed in Gould, including the Daily Laker and several other newspapers that are distributed in and around Gould University. Based on my training and experience, I believe that the Daily Laker is a "college student publication" covered by Section 1145. Because it is a student-run paper that is distributed on the Gould University campus, Section 1145 prohibits it from running advertisements for alcohol. The other newspapers that are distributed around the Gould University

campus are not student-run and therefore not covered by Section 1145.

4. Based on my review of the Commission's records, I am aware that on December 7, 2009, a winery called the Bruin Winery sent a letter to the Daily Laker, asking to place advertisements for its wines in the Daily Laker. The Daily Laker's faculty advisor sent a return letter, refusing to run the advertisements because of Section 1145. Based on my training and experience, I agree that it would violate Section 1145 to have advertisements for Bruin Winery wines appear in the Daily Laker.

5. Based on my training and experience, it is my understanding that Section 1145's restrictions are intended to combat the problem of underage drinking on and around the Gould University campus. Before Section 1145 was enacted, the Commission obtained and reviewed two studies conducted by independent research institutes; one was in another state and the other was in another country. Those studies focused on the effectiveness of restricting liquor advertisements in reducing underage drinking in certain geographic areas. Both studies concluded that advertising alcohol increases alcohol consumption in general, but they were inconclusive as to whether restricting advertising can be used to specifically reduce underage drinking. Overall, the Commission believed that those studies supported Section 1145's prohibition on advertising alcohol in

college newspapers as one way to reduce drinking by underage students at Gould University.

6. Section 1145 is one part of a larger plan put in place by the Commission to reduce underage drinking. The Commission has also used other methods to combat that problem. For instance, the Commission has distributed pamphlets on campus at Gould University warning of the dangers of underage drinking. The Commission also sent people to various public events that we suspected would attract college students to talk to the students about the dangers of excessive alcohol consumption. To date, those have been the only strategies used by the Commission to combat the problem of underage drinking. I am informed and believe that underage drinking remains an ongoing problem at Gould University, but the Commission does not have the financial resources to fund any other strategies to combat this problem.

I hereby declare under penalties of perjury that the foregoing is true and accurate. Executed this 6th day of January, 2010 in Gould City, Gould.

Albert Allen

ALBERT ALLEN

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

BRANDON REILLY and BRUIN WINERY,

PLAINTIFFS,

v.

GOULD ALCOHOL CONTROL COMMISSION,

DEFENDANT.

Case No. CV 10-011-MB

HONORABLE MEGAN BRAZIEL, DISTRICT JUDGE, PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION FOR SUMMARY JUDGMENT

GOULD CITY, GOULD

JANUARY 15, 2010

APPEARANCES BY COUNSEL:

FOR THE PLAINTIFFS:
CRISTYN CHADWICK
1000 GRAND AVENUE
GOULD CITY, GOULD 90005

FOR THE DEFENDANT:
JAYSEN CHUNG
ATTORNEY AT LAW
600 SOUTH FIG STREET
GOULD CITY, GOULD 90005

GOULD CITY, GOULD: JANUARY 15, 2010

(COURT IN SESSION AT 1:30 P.M.)

CLERK: Calling CV No. 10-011-MB:

CRISTYN CHADWICK: Good afternoon, your Honor. Cristyn Chadwick appearing for Plaintiffs Brandon Reilly and Bruin Winery.

JAYSEN CHUNG: Good afternoon, your Honor. Jaysen Chung appearing for Defendant Gould Alcohol Control Commission.

COURT: I believe that Defendant has filed a motion for summary judgment, with the declarations of Ron Rice and Albert Allen attached in support of that motion. Am I correct?

CHUNG: Yes, your Honor.

COURT: Ms. Chadwick, I believe you have indicated that you wish to cross-examine both of Defendant's witnesses. Is that correct?

CHADWICK: Yes, your Honor.

COURT: Although it's unusual, I'll allow you to do so. Let's start with Mr. Rice.

DEFENDANT'S WITNESS RON RICE, CALLED AND SWORN

CLERK: Can you please state your name and spell your last name for the record?

RICE: My name is Ron Rice. R-I-C-E.

CROSS-EXAMINATION BY MS. CHADWICK

Q: Mr. Rice, of the 4,650 "small wineries" located in the United States outside of Gould, how many have been given a

"small winery license" by your division allowing them to sell their wines directly to Gould consumers?

A: Twenty-five.

Q: How many wineries are there in the State of Gould?

A: About fifty.

Q: Of those fifty, all qualify as a "small" winery, correct?

A: Yes.

Q: How many of these fifty wineries have been licensed as "small" wineries by your division?

A: Twenty.

Q: Is there any way for a "large" winery to ship directly to a customer in Gould?

A: Technically, yes, but they must contract directly with a Gould-licensed retailer to deliver the wine to a Gould resident.

Q: Is that difficult to do?

A: It can be difficult because both the winery and the retailer risk making their wholesale distributors angry if they bypass them to do direct retailing. That would probably put their contracts with the wholesalers at risk.

Q: Do you know if a winery called Bruin Winery ever applied to your department for a license to ship its wines directly to Gould residents?

A: Yes. In early December 2009, we received a letter from Mr. Brandon Reilly asking for such a license.

Q: Did you grant that license?

A: No. Bruin Winery admitted that it sells over 90,000 gallons of wine each year, meaning that it did not qualify for a Section 1144 "small" winery license so it cannot sell directly to Gould consumers. We sent Mr. Reilly a letter informing him that his request was denied.

Q: Thank you for your time, Mr. Rice.

COURT: Mr. Chung, any redirect?

MR. CHUNG: Just a couple questions, your Honor.

COURT: Proceed.

REDIRECT EXAMINATION BY MR. CHUNG

Q: As far as you know, has any large winery ever had a contract with a Gould-licensed retailer to deliver wine directly to a Gould resident?

A: No. Not as far as I know.

Q: Thank you. No further questions.

COURT: Ms. Chadwick, I believe you indicated previously that you also wish to cross-examine Defendant's second witness?

CHUNG: Yes, your Honor.

COURT: You may do so.

DEFENDANT'S WITNESS ALBERT ALLEN, CALLED AND SWORN

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Albert Allen. A-L-L-E-N.

THE CLERK: Thank you.

CROSS-EXAMINATION BY MS. CHADWICK

Q: Mr. Allen, isn't it true that Section 1145 not only restricts the actions of the newspaper by prohibiting certain ads, but also restricts businessmen like Mr. Reilly from publishing their ads in the media of their choice?

A: Well, on its face, Section 1145 only restricts the actions of the paper, but I suppose it also has the effect of preventing Mr. Reilly from getting his ads published in certain papers.

Q: And isn't Mr. Reilly therefore prevented from communicating with a certain audience, that is, the students who read that particular paper?

A: Well, I don't think that is really true. He probably can reach that audience in other ways. There are other papers.

Q: Mr. Allen, what is the composition of the student-body population at Gould University? What portion is underage, if you know?

A: Based on our research, Gould University students are approximately 50% underage and 50% over the legal drinking age.

Q: You mentioned earlier that the Commission sent officers to certain events that had college students in attendance. Is that still a Commission practice?

A: Well, we have had to cut down on our outreach activities recently because of the financial crisis. We lost a lot of our

funding, and we don't have officers available for those types of things.

Q: So, is it fair to say that the advertising restriction and the pamphlets are the only strategies the Commission is currently continuing to use?

A: Yes. I guess you could say that.

Q: In your declaration, you referred to a couple studies that your commission reviewed. Do you know specifically what research methodologies were used by those studies to support their conclusions that there was a link between banning alcohol ads and reducing drinking?

A: I am not a researcher, so I don't really know exactly what methodology they used. I just know that they were conducted near college campuses, and I think it was fair to rely on them because their results are supported by common sense. It is pretty obvious to me that if you take away the ads, the students won't see them and they won't be as inclined to drink.

Q: But you don't have any other specific statistics or scientific evidence about the correlation?

A: No.

Q: Thank you, Mr. Allen.

A: You're welcome.

COURT: Any redirect?

MR. CHUNG: No, your Honor.

COURT: OK. The witness is excused. Any additional witnesses or evidence for either side?

MS. CHADWICK: No, your Honor.

MR. CHUNG: No, your Honor.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

BRANDON REILLY and BRUIN WINERY,	)	CV No. 10-011-MB
PLAINTIFFS,	)	ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
v.	)	
GOULD ALCOHOL CONTROL COMMISSION,	)	
DEFENDANT.	)	

This matter comes before the Court on Defendant Gould Alcohol Control Commission's motion for summary judgment, seeking the dismissal of Plaintiffs Brandon Reilly and Bruin Winery's complaint alleging that their constitutional rights were infringed by Gould Health and Safety Code Sections 1144 and 1145, in violation of 42 U.S.C. § 1983 (2006). More specifically, Plaintiffs argue that: (1) Gould Health and Safety Code Section 1144 (2009) violates the Commerce Clause and (2) Gould Health and Safety Code Section 1145 (2009) violates the First Amendment. Based on the following Findings of Fact and Conclusions of Law, Defendant's Motion for Summary Judgment is GRANTED.

I. FINDINGS OF FACT

Based on the parties' stipulation, the Court hereby finds that the following facts are undisputed and relevant.

1. Plaintiff Bruin Winery is owned and operated by Plaintiff Brandon Reilly. The winery is located in the State of Wooden, which borders the State of Gould.

2. Plaintiffs produce about 93,000 gallons of wine per year. Their most popular product is a wine called Meritage, commonly known as "2 Buck Huck," which has won numerous awards for quality while remaining at the low price of two dollars per bottle. Sixty percent of all 2 Buck Huck orders are placed by students at Wooden State University, which is located in the neighboring State of Wooden near Bruin Winery.

3. Recognizing that a possible new market for their wines existed at and around Gould University, in early December 2009, Plaintiffs petitioned Defendant Gould Alcohol Control Commission for permission to ship their wine directly to residents in the State of Gould.

4. Shortly thereafter, Defendant sent Plaintiffs a letter denying Plaintiffs' request, citing Gould Health and Safety Code Section 1144.[1]

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[1] Gould Health and Safety Code Section 1144 states:

> Except as provided below in subsections (a) and (b), all suppliers of alcoholic beverages must distribute their product through the three-tier distribution system described in Health and Safety Code Sections 1140-1143.
>
> (a) All wineries producing less than 90,000 gallons of wine per year may apply for a "small" winery license, exempting them from the three-tier distribution system

5. After Plaintiffs were denied the right to ship directly to residents in Gould, they attempted to promote their wines by advertising in local Gould newspapers. Plaintiffs submitted and paid for an advertisement to run in the Daily Laker, a student-run newspaper with offices located on the campus of Gould University in the State of Gould.

6. Shortly thereafter, Plaintiffs received a letter from the faculty advisor of the Daily Laker, stating that the newspaper could not run Plaintiffs' advertisement because it was precluded from running advertisements for alcohol pursuant to Gould Health and Safety Code Section 1145.[2]

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described above and allowing them to distribute their product directly to residents of the State of Gould.

(b) Wineries producing more than 90,000 gallons of wine per year may ship directly to consumers in the State of Gould only through a retailer licensed in compliance with the restrictions set forth in Section 1143.

[2] Gould Health and Safety Code Section 1145 states:

(a) No advertisement for alcohol shall be permitted in any booklet, program book, yearbook, magazine, newspaper, periodical, brochure, circular, or other similar publication published by, for, or on behalf of any college student publication.

(b) A "college student publication" is defined as any publication that is prepared, edited, or published primarily by college students, is sanctioned as a curricular or extra-curricular activity by a college or university, and which is distributed or intended to be distributed primarily to persons under 21 years of age.

7. Sections 1144 and 1145 were enacted last year as part of the Reduce Underage Drinking Act, commonly known as RUDA. During the floor debates regarding RUDA, at least one legislator made comments indicating that the purpose of Section 1144 was to help local wineries and discriminate against out-of-state wineries.[3] Yet, testimony at the hearing on Defendant's motion also revealed that only twenty in-state "small" wineries have taken advantage of Section 1144 by obtaining a license to ship directly to Gould consumers, while twenty-five out-of-state "small" wineries have obtained such licenses.

II. CONCLUSIONS OF LAW

The complaint raises two substantive issues. First, does Section 1144's prohibition of the direct distribution of wine to Gould residents by wineries producing greater than 90,000 gallons of wine per year violate the Commerce Clause, taking into account the Twenty-First Amendment? Second, does Section 1145's prohibition of alcohol advertisements in college newspapers violate the First Amendment? The Court hereby finds that both sections are constitutional.

> (c) For purposes of this subsection, the term "advertisement for alcohol" shall mean any advertising of alcoholic beverages through the medium of newspapers, periodicals, other such publications, outdoor advertisement, or any form of electronic transmission.

[3] See Exhibit A.

A. Section 1144 Does Not Violate the Commerce Clause

Plaintiffs argue that Section 1144's prohibition barring wineries that produce more than 90,000 gallons of wine per year from shipping directly to Gould residents creates a protectionist regime that violates the Dormant Commerce Clause. Plaintiffs rely on Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010), to support their claim. In Family Winemakers, California winemakers challenged a Massachusetts statute that regulated the direct shipment of wine to Massachusetts residents. Id. at 4. Wineries that produced less than 30,000 gallons of wine per year could obtain a license to ship directly to consumers, as well as distribute their wine through a conventional three-tier distribution system. Id. Wineries that produced more than 30,000 gallons per year could also obtain a license to ship directly to consumers but would have to forgo distribution through the conventional three-tier system. Id. at 8. The First Circuit invalidated the law, holding that the Massachusetts regulation had a discriminatory effect on out-of-state wineries and was not exempted from traditional Commerce Clause analysis by the Twenty-First Amendment. Id. at 21.

In coming to its conclusion, the First Circuit relied on Granholm v. Heald, 544 U.S. 460 (2005), the Supreme Court decision that invalidated a New York and a Michigan law because

they were facially discriminatory against out-of-state wineries. In Granholm, the Supreme Court held that the Twenty-First Amendment did not grant individual states the authority to enact facially discriminatory laws in violation of the Commerce Clause. Id. at 484. In Family Winemakers, the First Circuit applied this same reasoning, finding that the Massachusetts regulation violated the Commerce Clause even though it was facially neutral because it had the discriminatory effect of changing the "competitive balance between in-state and out-of-state competitors." 592 F.3d at 5. The First Circuit further concluded that the statute was not saved by the Twenty-First Amendment because there was no evidence to suggest that the legislative intent behind the Twenty-First Amendment was to reduce Commerce Clause scrutiny. Id. at 21.

Defendant disagrees with this analysis and argues that the Twenty-First Amendment supports the right of states to regulate alcohol, regardless of the traditional Commerce Clause analysis. Defendant relies on the Second Circuit case Arnold's Wine, Inc. v. Boyle, 571 F.3d 185 (2d Cir. 2009). In Arnold's Wine, an Indiana wine retailer and New York residents challenged a New York statute allowing in-state retailers to ship alcohol directly to New York residents but prohibiting out-of-state retailers from doing the same. Id. at 188. The plaintiffs argued that New York's statutory scheme had the effect of

creating a protectionist regime, which was constitutionally impermissible under Granholm. Id. at 190. The Second Circuit rejected this argument, noting that the statute did not alter the standard three-tier distribution system and all liquor, except wine, was required to pass through that system regardless of whether it was produced in state or out of state. Id. at 191.[4] Thus, the statute was constitutional because it even-handedly regulated the distribution of alcohol. Id. Moreover, because the statute was even-handed as applied, its enactment was a permissible use of the state's constitutional authority under the Twenty-First Amendment to regulate the distribution of alcohol. Id. at 192.

In this case, for the same reasons that the Second Circuit upheld the New York statute, Section 1144 should be upheld as a proper use of the state's authority under the Twenty-First Amendment. Section 1144 requires all wineries to distribute their product through a constitutionally permissible three-tier system. The challenged provision is facially neutral and has had an overall non-discriminatory effect, as more out-of-state wineries than in-state wineries have obtained licenses to distribute wine directly to Gould consumers. The Granholm analysis is inapplicable to Section 1144 because, unlike in

[4] The New York law made an exception for wineries, which were all allowed to ship directly to consumers regardless of whether they were in or out of state.

Granholm, in which the statutes were facially discriminatory, here, Section 1144 is facially neutral and not protectionist in nature. The mere fact that it may have had a discriminatory purpose is not sufficient to render it unconstitutional.

B. Section 1145 Does Not Violate the First Amendment

Plaintiffs also argue that Section 1145's prohibition of advertisements for alcohol in student-run college newspapers violates their First Amendment right to free speech. They rely on Pitt News v. Pappert, 379 F.3d 96 (3d Cir. 2004), to support their claim. In Pitt News, the Third Circuit held that a Pennsylvania statute that prohibited advertisers from paying for alcoholic-beverage advertising in college media was unconstitutional because it violated the First Amendment by improperly restricting protected commercial speech. Id. at 113. The Third Circuit used the test announced by the Supreme Court in Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980), to evaluate the constitutionality of this commercial speech restriction. To satisfy the Central Hudson test, a statute must meet four requirements: (1) it must concern lawful activity and not be misleading; (2) the asserted governmental interest for the restriction must be substantial; (3) the restriction must "directly and materially" advance the state's substantial interest; and (4) the restriction must be reasonably narrowly drawn. See Pitt News, 379 F.3d at 101. The

Third Circuit held that the Pennsylvania statute failed the third and fourth prongs because the state did not show that prohibiting alcohol ads in college papers would substantially alleviate alcohol abuse in underage drinkers. Id. at 111-12.

In contrast, the Fourth Circuit examined a similar state statute and found it to be constitutional. See Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583, 586 (4th Cir. 2010). In Educational Media, the Fourth Circuit analyzed a Virginia statute restricting alcohol advertisements on college campuses, also applying the Central Hudson test. Id. at 590-91. The Fourth Circuit held that the Virginia statute easily satisfied the first two prongs of the Central Hudson test. The court further held that the state had ample evidence, in the form of history, consensus, and common sense, that banning the advertisements was linked to decreased alcohol demand in the student population, thereby satisfying the third prong. Id. Finally, the statute met the fourth prong because it was reasonably narrowly tailored; it did not, on its face, affect all publications that were distributed on campus and was therefore sufficiently tailored to meet the state's goal of reducing underage drinking on college campuses. Id. at 591-92.

This Court is persuaded by the Fourth Circuit's reasoning. Here, Section 1145 easily meets the first two prongs of the Central Hudson test, and the Gould Alcohol Control Commission

met its burden of satisfying the third and fourth prongs. The testimony of the state's witnesses supports a finding that Section 1145 is materially connected to the substantial interest of decreasing the consumption of alcohol by underage college students. Further, the restriction does not affect all campus publications, but rather only those run by students. Thus, Section 1145 is reasonably narrowly drawn.

III. CONCLUSION

Section 1144 is a valid and proper use of the state's authority to regulate alcohol under the Twenty-First Amendment and does not violate Plaintiffs' rights under the Commerce Clause. Similarly, Section 1145's ban of alcohol advertisements in college-student-run publications is justified by the state's need to control underage drinking and does not violate Plaintiffs' First Amendment right to free commercial speech. Based on the foregoing, Defendant's Motion for Summary Judgment is GRANTED.

Dated: January 17, 2010

Megan Braziel

MEGAN BRAZIEL
United States District Judge

EXHIBIT A

EXCERPT FROM THE COMMITTEE HEARING ON THE
REDUCE UNDERAGE DRINKING ACT, SECTIONS 1144 AND 1145
HEARING DATE: February 11, 2009

PRESIDING MEMBER CROSSMAN: Good afternoon. My name is Matthew Crossman and I am the Chairman of the State Senate Public Safety Committee. Today we are considering a statute that would limit the ability of wineries to ship their products directly to residents in the State of Gould, save for a few exceptions. I will allow each member who wishes to be heard to speak. We will begin with the statute's primary sponsor, Mr. Blake Horn.

MR. HORN: Thank you, Chairman Crossman. The State of Gould is home to a very rich and lush topography. The rolling hills in the north of the state along the coast present perfect conditions for growing grapes. Several of our residents in that area have taken advantage of this landscape, and a number of new wineries have emerged. These emerging wineries, though small, have produced wines that have placed highly in several international wine-tasting competitions, but they are struggling to compete with the large out-of-state wineries. If we allow our "small" wineries to ship directly to our residents, we can give them a much needed competitive advantage. This will be good not just for our wineries, but also for our entire state economy. If our wineries do better, it will mean increased

production, which means more jobs for our residents. The wineries and the companies that ship their wine would need more employees. Furthermore, more wine sales means more sales tax for our state. All in all, this statute provides nothing but positive effects for our state and its residents.

CHAIRMAN CROSSMAN: Thank you, Mr. Horn. We now recognize a co-sponsor of the statute, Ms. Mariani.

MS. MARIANI: Thank you, Chairman Crossman. I wanted to talk about another issue that this statute addresses. According to a recent article in the Gould Plain Dealer titled "A Day In The Life: Grape Pickers," employees of the fifty largest wineries in the country work in some of the most dismal conditions of all manual labor industries. They work in the hot sun, over eight hours a day with no overtime pay and very little time for breaks. To support these types of business practices would fly in the face of the values that we in Gould wish to support.

CHAIRMAN CROSSMAN: Thank you, Ms. Mariani. We now recognize another co-sponsor of the statute, Mr. Ho.

MR. HO: Thank you, Chairman Crossman. I would like to point out the additional aims of Section 1145, which is another new provision that would ban alcohol advertisements in college newspapers. Underage drinking on college campuses has reached an all-time high; in an effort to cure the problem, the Gould Alcohol Control Commission has found studies that show that

forbidding those advertisements in student-run newspapers, which are frequently read by the entire school population, will be an effective strategy to cut down on the dangerous levels of underage drinking prevalent in our state's college communities.

CHAIRMAN CROSSMAN: Thank you to each member. We will now take a recess to consider this matter.

IN THE UNITED STATES COURT OF APPEALS

FOR THE

TWELFTH CIRCUIT

Case No. 10-1923

Decided August 25, 2010

BRANDON REILLY and BRUIN WINERY,

PLAINTIFF-APPELLANTS,

v.

GOULD ALCOHOL CONTROL COMMISSION,

DEFENDANT-APPELLEE.

APPEAL from a judgment of the United States District Court for the District of Gould. Before Zalkin, Vessey, and Clark. Opinion by Zalkin, J. Reversed.

Plaintiff-Appellants Brandon Reilly and the Bruin Winery appeal the decision of the district court granting Defendant-Appellee's motion for summary judgment and holding that Gould Health and Safety Code Sections 1144 and 1145 (2009) are constitutional. Appellants argue that Section 1144's prohibition barring wineries that produce more than 90,000 gallons of wine per year from shipping directly to Gould residents creates a protectionist regime that violates the Dormant Commerce Clause and is not authorized by the Twenty-First Amendment. We agree. Deciding an issue of first impression in this circuit, we hereby hold that Section 1144 violates the Commerce Clause and that violation is not cured by the Twenty-First Amendment.

Additionally, Appellants argue that Section 1145's prohibition of alcohol advertisements in student-run college newspapers violates the First Amendment by improperly preventing them from expressing protected commercial speech. Again, we agree. Deciding another issue of first impression in this circuit, we hereby hold that Section 1145 unconstitutionally infringes Appellants' right to free commercial speech.

Accordingly, we find that the district court erred in granting Appellee's motion for summary judgment. Sections 1144 and 1145 are unconstitutional and unenforceable.

I. FACTUAL AND PROCEDURAL SUMMARY

Plaintiff-Appellant Bruin Winery is owned by Plaintiff-Appellant Brandon Reilly and located in the State of Wooden, which borders the State of Gould. Bruin Winery specializes in the production of affordable, high-quality wine. Last year, it produced 93,000 gallons of wine. Its most popular product is a wine called Meritage, commonly known as "2 Buck Huck," an extremely affordable (two dollars per bottle) product that has won numerous awards as a "best buy" wine. This product is especially popular on college campuses; currently, 60% of 2 Buck Huck's sales come from students attending Wooden State University.

In an effort to expand their customer base, Appellants decided to move into the nearby Gould market. In early December 2009, Appellant Reilly submitted an advertisement to the Gould University student-run newspaper, the Daily Laker. The proposed advertisement announced the Bruin Winery's new direct-shipping program and promoted its most popular product, Meritage, known as "2 Buck Huck." The paper's faculty adviser sent a return letter informing Appellants that the paper could not print the ad because it would violate Gould Health and Safety Code Section 1145, which prohibits the paper from publishing ads for alcohol.[5]

[5] The text of Gould Health and Safety Code Section 1145 is set forth accurately in the district court order.

Around the same time, Appellant Reilly sent a letter to Appellee Gould Alcohol Control Commission requesting permission to ship Bruin Winery wines directly to customers residing in Gould. The Commission responded with a letter informing Appellant Reilly that his request was denied because such sales would violate Gould Health and Safety Code Section 1144, which prohibits direct sales of wine to consumers residing in Gould by wineries that produce more than 90,000 gallons of wine per year.[6]

Appellants then filed an action in United States District Court for the District of Gould alleging that Sections 1144 and 1145 infringed their constitutional rights, in violation of 42 U.S.C. § 1983 (2006). More specifically, Appellants argued that Section 1144 violates the Commerce Clause and Section 1145 violates the First Amendment. Appellee moved for summary judgment. Appellee's motion was supported by the declarations of two witnesses, Ron Rice and Albert Allen. The district court held a hearing on the motion. At the hearing, the court allowed Appellants' counsel to cross-examine Appellee's witnesses. In his declaration, Mr. Rice stated that, currently, all wine in the State of Gould must pass through a statutorily mandated three-tier system unless it is produced by a "small" winery. Mr. Rice confirmed that all of the wineries located in Gould

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[6] The text of Gould Health and Safety Code Section 1144 is set forth accurately in the district court order.

qualified as "small," as defined by Section 1144. Furthermore, Mr. Rice testified that of the 4,650 "small" wineries in the rest of the country, only twenty-five had applied for and been granted a "small" winery license to operate in Gould. He further testified that only twenty of the fifty wineries in Gould, all of which would qualify for "small" status, had applied for and been granted the same license.

With respect to Section 1145, Mr. Allen testified that it bans advertising alcohol in college newspapers, including the Daily Laker. He further testified that it was enacted as part of an effort to curb underage drinking. Mr. Allen described two additional strategies employed by the Commission to reach its goal of reducing underage drinking, distributing pamphlets to students and sending Commission employees to public events to educate students about the dangers of drinking.

The district court granted Appellee's motion for summary judgment, holding that both sections were constitutional. Appellants appealed to this Court. Having reviewed the record and the parties' briefs, this Court hereby finds that the district court erred, reverses the district court's order, and remands the matter for further proceedings.

II. DISCUSSION

A. Standard of Review

An appellate court reviews de novo a district court's decision to grant a motion for summary judgment, viewing the evidence in the light most favorable to the losing party. Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583, 586 (4th Cir. 2010).

B. Section 1144 Violates the Commerce Clause Because It Has a Discriminatory Effect that Is Not Cured by the Twenty-First Amendment

The Commerce Clause states, in pertinent part, that "Congress shall have the power . . . [t]o regulate commerce with foreign nations, and among the several states." U.S. Const. art. 1, § 8, cl. 3. It is well established that this positive grant of authority also implies the negative, meaning that the Commerce Clause forecloses the individual states' ability to engage in economic protectionism through regulation of interstate commerce. Healy v. Beer Inst., Inc., 491 U.S. 324, 326 (1989). Thus, a state statute cannot favor in-state economic interests while burdening out-of-state economic interests. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994).

"A finding that state legislation constitutes economic protectionism may be made on the basis of discriminatory purpose or discriminatory effect." Chem. Waste Mgmt., Inc. v. Hunt, 504

U.S. 334, 344 (1992). The burden of showing discrimination is on the plaintiff. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). If a law is found to be discriminatory, it "will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives." Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008).

1. Section 1144 Has a Discriminatory Effect

To begin our analysis, we must determine whether Section 1144 is discriminatory. Nothing in the statute facially discriminates against out-of-state wineries, but the facts in this case show that it did have the discriminatory effect of creating a protectionist economic environment.

A "discriminatory effect" occurs when in-state companies receive a demonstrable benefit that is not given to out-of-state companies as a result of an otherwise facially neutral statute. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350-54 (1977). In Hunt, the Supreme Court invalidated a North Carolina regulation prohibiting the display of state apple grades on shipping containers. Id. at 337. The Court found that this regulation had a discriminatory effect because it would force the Washington apple industry to adopt much more costly means for shipping its apples, while having no effect on North Carolina apple growers. Id. at 340.

Here, as in Hunt, the facially neutral statute has the effect of conferring a benefit on local wineries that is unavailable to out-of-state wineries. The Bruin Winery has an established practice of shipping directly to consumers, thus helping to keep down its costs and prices. Section 1144 essentially forces Bruin Winery into Gould's three-tier supply chain, placing it at the mercy of a few licensed wholesale distributors. If the wholesale distributors do not believe that Bruin Winery's wines are going to generate much of a profit margin, they can simply refuse to sell them. Unlike the small wineries in the State of Gould, which all can ship directly to consumers, the Bruin Winery cannot ship its wines directly to Gould consumers.

Moreover, Section 1144 has the effect of shutting out 98% of all wine produced by out-of-state producers from the direct shipping market in Gould, thereby altering the conditions of competition in the wine market to favor in-state interests over out-of-state competitors. While it is true that the evidence shows that 72% of all wineries in the country are eligible for a Gould "small winery" license, this number is not accurate in a practical sense.[7] Six hundred of the largest wineries in the

[7] In 2009, there were approximately 6,300 wineries in the United States. Of those, approximately 4,700 wineries produced less than 90,000 gallons of wine per year. Of those, 2,700 produced less than ten gallons per year, leaving approximately 2,000

country produce 98% of all the wine sold in the United States. None of those wineries qualifies to get a license to do direct shipping to Gould consumers. While these numbers may seem obtuse, the effect is clear: consumers in Gould have direct access to only 2% of the United States wine market, and the overwhelming majority of out-of-state wineries that would want to ship directly to Gould consumers cannot do so. Because every winery in Gould qualifies as a "small" winery, Section 1144 gives a significant marketing advantage to in-state wineries. More specifically, out-of-state wineries, like Bruin Winery, are effectively denied access to the Gould market because they are not large enough to be attractive to the licensed wholesale distributors but are sufficiently large to be ineligible for a license to sell directly to Gould consumers. Accordingly, we hereby find that as applied Section 1144 has a discriminatory effect.

2. Section 1144 Does Not Promote a Legitimate Local Purpose and There Are Reasonable Alternative Means to Achieve Its Stated Goal

A finding of discriminatory effect, while providing a presumption of invalidity, does not automatically render a statute invalid. An otherwise invalid statute may remain valid

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small wineries that might realistically be interested in selling wine to consumers. Of the 1,600 wineries that produced more than 90,000 gallons per year, 600 of the largest wineries produced approximately 98% of all the wine sold in the United States.

"if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives." Davis, 533 U.S. at 128.

Here, the stated intent of the legislature in passing Section 1144 was twofold: (1) to benefit the local wineries in Gould by giving them a competitive edge over the larger out-of-state wineries and (2) to address the problem of workers in large wineries being treated poorly. Gould Comm. Hrg. Feb 11, 2009. The first stated intent cannot, in light of the Court's Dormant Commerce Clause jurisprudence, be a legitimate local purpose because it essentially acknowledges that Gould intended to create an economically protectionist regime. Such motivation is prohibited by the Dormant Commerce Clause. See Healy, 491 U.S. at 326 (affirming that Dormant Commerce Clause forecloses a state's ability to engage in economically protectionist behavior).

As to the second purpose, although a desire to prevent poor working conditions in large wineries is a noble idea, in Granholm v. Heald, 544 U.S. 460, 489 (2005), the Supreme Court rejected equally laudable concerns as insufficient to satisfy the "legitimate local purpose" standard; in Granholm, the Court rejected both facilitating the collection of taxes and curbing the risk of underage drinking as "legitimate local purposes" sufficient to justify a discriminatory statute. Id. Both of

the concerns in Granholm seem at least as weighty as those raised by the Gould legislature in this case.

Additionally, Appellee fails the second half of the "legitimate local purpose" test because it did not show an absence of reasonable nondiscriminatory alternatives that could have been used to advance the only legitimate purpose, that is, the improvement of working conditions in large wineries. See Chemical Waste, 504 U.S. at 342. In Chemical Waste, the government argued that a fee levied on waste sourced outside of Alabama did not violate the Commerce Clause, in part because there were no reasonable alternatives to achieve its purpose of protecting the health and safety of Alabama's citizens. Id. at 342-43. The Court disagreed, listing several viable alternatives that would not have Commerce Clause implications. Id. at 345.

In this case, if the stated goal of Section 1144 is to bring attention to poor business practices of large wineries, there are many viable alternatives that could accomplish this end without creating an unconstitutionally protectionist regime. For example, the Gould legislature could fund an ad campaign bringing to light the issue.

Thus, Appellee cannot satisfy the "legitimate local purpose" test because its stated purposes were not sufficient to outweigh the need to avoid discriminatory practices, and there

were reasonable nondiscriminatory alternatives that could be used to achieve those purposes.

3. The Twenty-First Amendment Does Not Immunize Section 1144 from Commerce Clause Restrictions

In the alternative, Appellee argues that the Twenty-First Amendment grants states authority to regulate the importation of alcohol as they see fit, even if a particular regulation would otherwise be invalidated by the Commerce Clause. We are not persuaded by this argument.

Section 2 of the Twenty-First Amendment states:

> 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.

Appellee relies on this language to immunize Section 1144 from Commerce Clause analysis. However, in Granholm, when analyzing a statute that facially discriminated against out-of-state wineries, the Supreme Court rejected the argument that the Twenty-First Amendment authorized such actions by the state. Granholm, 544 U.S. at 468-70. In rejecting that argument, the Court looked to the origins of the Twenty-First Amendment and concluded that it was not intended to grant plenary control of alcohol sales and importation. Id. at 484. Instead, it had the more limited goal of "constitutionalizing the Commerce Clause framework" established by the Webb-Kenyon and Wilson Acts. Id.

The Wilson Act, which predated the Twenty-First Amendment, empowered states to regulate not only domestic liquor but also imported liquor. Id. at 478. The Webb-Kenyon Act, which predated the Twenty-First Amendment, prohibited the transportation of liquor in violation of state law. Id. at 481. As the Court pointed out in Granholm, the intent behind these Acts was not to allow states to engage in economic protectionism but rather to empower them to regulate alcohol only as long as the regulation was even-handed. Id. at 481.

Although Section 1144 is being challenged as having a discriminatory effect as opposed to being facially discriminatory, that fact does not undermine the continued validity of the Court's analysis in Granholm regarding the intent and scope of the Twenty-First Amendment. The First Circuit recognized this in Family Winemakers of California v. Jenkins, 592 F.3d 1, 18 (1st Cir. 2010). Family Winemakers dealt with a statutory scheme in Massachusetts, much like the one in this case, that discriminated against out-of-state wineries by allowing "small" wineries to ship directly to customers.[8] In rejecting the challenge to the statute, the First Circuit adopted the reasoning of Granholm and acknowledged that to distinguish facially neutral from facially discriminatory

[8] In Family Winemakers, the cap was 30,000 gallons, while Gould's cap is 90,000.

statutes, "we would have to find that these Acts not only recognized the difference between facially discriminatory and facially neutral but discriminatory state laws, but also affirmatively intended to protect the latter and not the former. All evidence points to the contrary." Id. at 19.

Because we are persuaded that there is no reason not to apply the Court's reasoning in Granholm to this case, we find that the Twenty-First Amendment does not grant the individual states authority to enact alcohol regulations that would otherwise be invalidated by the Commerce Clause.

C. Section 1145 Is Unconstitutional Because It Fails the Central Hudson Test and Impermissibly Infringes on Appellants' Right to Free Commercial Speech

The First Amendment states in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The First Amendment, as applied to the states through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 761-62 (1976). Commercial speech is not given the "absolute" protection afforded the speech of the First Amendment's core; rather, commercial speech enjoys a limited level of protection commensurate with its subordinate position in the scale of First Amendment values. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).

The protection available for a particular commercial expression turns on both the nature of the expression and the governmental interests served by the regulation. Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980). The Supreme Court has long recognized a four-prong analysis in determining whether a regulatory burden placed on commercial speech violates the First Amendment. Id. at 566. First, to be entitled to First Amendment protection, the speech in question must concern lawful activity and not be misleading. Id. at 562-63. Second, if the speech is not unlawful or misleading, the Court must then determine if the asserted governmental interest for the regulation is "substantial." Id. Third, the regulation must directly and materially advance the substantial governmental interest asserted. Id. at 566. Fourth, the regulation must not be more extensive than is necessary to serve that interest. Id. at 569-70.

The third and fourth prongs are the most frequently disputed. To satisfy Central Hudson's third prong, the government must demonstrate that the harm underlying the state's substantial interest is real and that the restriction on speech will alleviate that harm to a material degree. See Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999). This burden is not satisfied by "mere speculation or conjecture." Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

The state does, however, have great latitude in showing the relationship and may justify restrictions based on "history, consensus, and 'simple common sense.'" Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001) (quoting Fla. Bar, 515 U.S. at 628).

The fourth prong requires the regulation to be no more "extensive than necessary" to further the state's asserted interests. Cent. Hudson, 447 U.S. at 569-70. The state is not required to use the least restrictive means to reach its objective but must use "a reasonable fit . . . narrowly tailored" to meet the objective. See Lorillard, 533 U.S. at 555. The existence of other less-burdensome alternatives can be used to determine whether the "fit" between the restriction and its ends is reasonable. Fla. Bar, 515 U.S. at 632.

While this Court has never directly addressed whether a state law restricting advertisements for alcoholic beverages in college-student-run publications violates the First Amendment, the Third and Fourth circuits have analyzed this question in relation to similar state statutes. See Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583 (4th Cir. 2010); Pitt News v. Pappert, 379 F.3d 96 (3d Cir. 2004). In Pitt News, the Third Circuit held that a Pennsylvania statute that banned advertisers from paying for advertising in college-associated media violated the First Amendment. 379 F.3d at 101. The court found that

imposing a financial burden based on the speaker's expression amounted to a restriction on commercial speech and was therefore subject to the Central Hudson analysis. Id. at 105-06. The statute failed the third and fourth prongs of the Central Hudson test because the state could not show that the regulation combated underage drinking to a "material degree" or that it was narrowly tailored to meet that objective. Id. at 108. The regulation was found to be both underinclusive, because it did not apply to all newspapers, and overinclusive, because it affected adults as well as underage students. Id. at 109.

In contrast, in Educational Media, the Fourth Circuit held that a Virginia statute banning alcoholic advertisements in college-student publications was valid under the Central Hudson test because the link between advertising bans in college newspapers and a decrease in demand for alcohol among the students was supported by the state's evidence and by history, consensus, and common sense. Educ. Media, 602 F.3d at 590-91. Further, the court held that the advertising ban met the reasonable fit standard of Central Hudson's fourth prong because it restricted only certain types of advertisements and did not affect all "possible" publications on campus. Id.

Applying the Central Hudson test and agreeing with the reasoning of the Third Circuit, we hold that Section 1145 amounts to an unconstitutional restriction of protected

commercial speech. Although the aim of controlling underage drinking is a substantial goal, the state failed to meet its burden of demonstrating that Section 1145 is sufficiently linked to that goal and sufficiently narrowly drawn. Preventing alcohol advertisements on campus will not shield underage students from seeing other advertisements, both off campus and in other media. Moreover, there are other means by which the Gould Alcohol Control Commission could achieve its objective that would be less restrictive than the total ban of alcohol advertisements in student publications. Thus, we find that Section 1145's total ban on alcohol advertising in student-run college publications is unconstitutional.

III. CONCLUSION

The trial court misinterpreted the scope and intent of the Commerce Clause and the Twenty-First Amendment, as well as the interplay between the two. The Dormant Commerce Clause ensures that no state may engage in economic protectionism, purposely or incidentally. To uphold a statute like Section 1144 that allows a protectionist regime, regardless of the facial neutrality of the statute, would set a precedent that this Court is not comfortable setting. We see no reason why the analysis in Granholm regarding the scope of the Twenty-First Amendment should not apply to facially neutral but nonetheless discriminatory laws.

The trial court also incorrectly found that Section 1145 passed the Central Hudson test. While the Appellee's stated interests are substantial, the statute itself is not sufficiently linked to those interests, nor is it sufficiently narrowly tailored.

Therefore, we hold that the trial court erred in granting Appellee's motion for summary judgment. We reverse that order and remand the matter to the district court for further proceedings.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. 10-81

BRANDON REILLY and
BRUIN WINERY,

Respondents,

v.

GOULD ALCOHOL CONTROL
COMMISSION,

Petitioner.

The petition for writ of certiorari is granted, limited to consideration of the following questions presented by the petition:

1. Does a state statute that prohibits the direct shipment of wine to residents except by "small" wineries violate the Commerce Clause even though it is facially nondiscriminatory and the Twenty-First Amendment allows states to regulate the distribution of alcohol?

2. Does a state statute that prohibits alcohol advertisements in student-run college newspapers improperly restrict protected commercial speech in violation of the First Amendment?