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**COMMENT: IT'S STILL 1970 SOMEWHERE: HOW NORTH
CAROLINA'S SMALL CRAFT BREWERIES HOPE TO
"CRAFT FREEDOM" FROM ANTIQUATED STATUTES
FRIENDLY TO DISTRIBUTORS AND NATIONAL
MACROBREWERIES**

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I. INTRODUCTION

Beer is an American pastime and has been for centuries. It impacted the very beginning of America, as the Mayflower diverted from its original path in part due to a shortage of beer.¹ During the early nineteenth-century, Americans spent most of the day with a drink in hand—and the average colonist may have consumed three times as much alcohol as the average modern American.² In 2016, Americans bought over \$107.6 billion worth of beer, with “craft beer”³ accounting for about \$23.5 billion of that figure.⁴

Given the geographic and social diversity among the states and their laws, some states are friendlier than others to America’s beer industry. The Meccas of American brewing⁵ used to be Wisconsin (home of the aptly named baseball team, the Milwaukee Brewers⁶), Missouri (home of Anheuser-Busch⁷), and Colorado (where MillerCoors was “born in the Rockies”⁸); but with the explosion in popularity of craft beers, North

¹ See JAMES E. ROYCE, *ALCOHOL PROBLEMS AND ALCOHOLISM: A COMPREHENSIVE SURVEY* 38 (1st ed. 1981).

² See W.J. RORABAUGH, *THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION* 20–21 (1979) (“Alcohol was pervasive in American society; it crossed regional, sexual, racial, and class lines. Americans drank at home and abroad, alone and together, at work and at play, and in fun and in earnest. They drank from the crack of dawn to the crack of dawn. At nights taverns were filled with boisterous, mirth-making tipplers. Americans drank before meals, with meals, and after meals . . . [T]he American greeting was ‘Come, Sir, take a dram first.’ Seldom was it refused.”); Emma Green, *Colonial Americans Drank Roughly Three Times as Much as Americans Do Now*, *THE ATLANTIC* (June 29, 2015), https://www.theatlantic.com/health/archive/2015/06/benjamin-rush-booze-morality-democracy/396818/?utm_source=atlib.

³ See *infra* Section II.A (defining “craft beer” and describing its increasing popularity).

⁴ *National Beer Sales & Production Data*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics/national-beer-sales-production-data/> (last visited March 27, 2018). The Brewers Association defines a “craft brewer” as a brewery that produces less than 6 million barrels a year, is not owned by another alcohol beverage industry member that is not itself a craft brewer who has above a 25% ownership stake, and produces mainly beers “derived from traditional or innovative brewing ingredient and their fermentation.” *Craft Brewer Defined*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics/craft-brewer-defined/> (last visited March 27, 2018).

⁵ See Hillary Flynn, *Quaffing Down the Beer Tax*, *POLITICO* (Apr. 11, 2015, 9:00 AM), <http://www.politico.com/story/2015/04/beer-tax-congress-116849>.

⁶ See *Brewer’s History*, MLB: MILWAUKEE BREWERS BASEBALL CLUB, <http://mlb.mlb.com/ml/history/index.jsp> (last visited Mar. 27, 2018).

⁷ See, e.g., *About*, ANHEUSER-BUSCH, <http://www.anheuser-busch.com/about.html> (last visited Mar. 27, 2018).

⁸ See, e.g., MILLERCOORS, *Born in the Rockies: Place*, <https://www.ispot.tv/ad/73PB/coors-light-born-in-the-rockies->

Carolina has staked its claim to elite beer status.⁹ Examiner.com has dubbed Asheville, North Carolina “Beer City” four times—a moniker the city has enthusiastically embraced.¹⁰

Today, the American beer connoisseur has a seemingly endless selection of lagers, India pale ales, gooses, and stouts brewed by a similarly endless number of breweries, large and small. Despite this selection, beer is actually the second-most consolidated American manufacturing industry in terms of market share in the American economy,¹¹ and this remains the case despite the recent surge in the number and market share of small, craft breweries.¹² For perspective, Anheuser-Busch, purveyor of dive-bar staples Bud Light and Budweiser, among other popular brews, produced over ninety-six million barrels, and MillerCoors, maker of Miller Lite and Coors Light, produced over fifty-five million.¹³ Meanwhile, the third and fourth largest American breweries, Yuengling and Boston Beer respectively, brewed less than three million barrels each.¹⁴

The Craft Freedom movement in North Carolina, which hopes to repeal two statutes that limit the ability of the breweries to distribute their own products without using a distributor, is only one example of

place?fb_comment_id=900074640053092_930023843724838#f21cab28d0b1b (last visited Mar. 27, 2018).

⁹ See *North Carolina Craft Beer Sales Statistics, 2016*, BREWERS ASS'N, <https://www.brewersassociation.org/statistics/by-state/?state=NC> (last visited Mar. 27, 2018) (ranking North Carolina in the top-ten in four of six craft beer-related production and sales metrics).

¹⁰ See BEER CITY FESTIVAL, <http://www.beercityfestival.com/> (last visited Mar. 27, 2018); see also Cat Kessler, *Asheville Beer History*, EXPLOREASHEVILLE (Aug. 28, 2015), <https://www.exploreasheville.com/stories/post/asheville-beer-history/>; Jeri Rowe, *North Carolina Brews Reputation for Good Beer*, GREENSBORO NEWS & REC. (Aug 5, 2009), http://www.greensboro.com/news/columnists/north-carolina-brews-reputation-for-good-beer/article_d03c4b74-71e8-5438-85b1-2111cdb4a808.html.

¹¹ See Adam H. Callaghan, *The Fair BEER Act is a Red Herring Introduced by Big Brewers*, EATER (May 1, 2015, 12:16 PM), <https://www.eater.com/drinks/2015/5/1/8428403/the-fair-beer-act-is-a-red-herring-introduced-by-big-brewers>.

¹² *Id.*

¹³ Flynn, *supra* note 5.

¹⁴ *Id.*

continued . . .

the growing tension¹⁵ between “Big Beer”¹⁶ and the numerous craft breweries across the country. Super Bowl ads and battles on Capitol Hill are evidence of the growing turmoil. For example, Budweiser’s red-blooded Americana “Brewed the Hard Way” 2015 big game ad poked fun at the flannel-clad, mustachioed hipster stereotype often associated with craft beer aficionados.¹⁷ Big Beer and craft breweries have also clashed over issues as narrow as laws regulating growler usage in beer sales.¹⁸ Some commentators describe the tense relationships fueled by the Big Beer campaign contributions as “mob-era-style corruption.”¹⁹

This Comment focuses on the recent Craft Freedom movement that centers on increasing or removing North Carolina’s self-distribution cap and hopes to remove the State’s franchise law. Under the current self-distribution cap, the state limits a brewery to just 25,000-barrels a year, and once the 25,000-barrel threshold is met, the brewer must contract with a wholesaler for distribution.²⁰ 25,000-barrels is a sizeable amount

¹⁵ Telephone Interview with Shauna Barnes, Gen. Counsel, Dogfish Head Brewery (Sep. 13, 2017) (describing Anheuser-Busch’s ability to purchase a well-known craft brewery, such as Asheville’s Wicked Weed, then use its massive brewing facilities to mass-produce the recipe on a national scale and sell it at a lower price than the craft brewery could). Barnes also described Big Beer’s ability to simply buy up malt, hops, and other necessary brewing ingredients, thereby raising the price that smaller breweries must pay to even obtain their raw materials. *See id.*

¹⁶ *See* Andrew Tamayo, Comment, *What’s Brewing in the Old North State: An Analysis of the Beer Distribution Law Regulating North Carolina’s Craft Breweries*, 88 N.C. L. REV. 2198, 2199 n.2 (quoting *American Craft Brewer Definition*, BREWERS ASS’N, <http://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/craft-brewer-defined> (last visited Mar. 27, 2018)) (defining “traditional brewers,” “craft brewers,” and the four subsets of craft breweries by using their ingredients, annual barrel production, and ownership); *see also Market Segments*, BREWERS ASS’N, <http://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/market-segments> (last visited Mar. 27, 2018).

¹⁷ *See* Drew Harwell, *How Craft Beer is Fighting back Against Budweiser’s Belligerent Super Bowl Ad*, WASH. POST (Feb. 4, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/02/04/how-craft-beer-is-fighting-back-against-budweisers-belligerent-super-bowl-ad/?utm_term=.799dab51958a; *see also* Ryan R. Lee, *Prohibition’s Hangover: How Antiquated Illinois Beer-Law is Abused by Big Beer to the Substantial Detriment of Craft Breweries*, 37 N. ILL. U. L. REV. 144, 162 n.149 (2016).

¹⁸ *See, e.g.*, Adam Star, *Getting a Handle on Growler Laws*, 39 SEATTLE U. L. REV. 1079, 1080 (2016) (“Everything from the legality of growler use, to the parties that can distribute growlers, to the size of growlers is currently subject to debate.”).

¹⁹ Lee, *supra* note 17, at 161.

²⁰ Erin Maddrey, *A Cap on Craft Brewing Could Dry North Carolina’s Taps*, THRILLIST (Dec. 30, 2016), <https://www.thrillist.com/drink/charlotte/craft-freedom-beer-brewery-movement-north-carolina>.

of beer, but at least two North Carolina breweries have intentionally stunted their own growth so as to not exceed the cap and suffer the consequences.²¹ The franchise law generally requires a brewer who has crossed the 25,000-barrel threshold to enter into a binding franchise agreement with a wholesaler, who then, for the term of the agreement, controls all aspects of marketing, transportation, and distribution of the brewer's beer.²² As of the writing of this Comment, the litigation in North Carolina is currently at the Rule 12 stage, and the court's hearing on the state's motion to dismiss is forthcoming.²³

As craft beer has surged in popularity, there have been numerous articles and law review comments exploring the legal issues pertaining to craft beer in North Carolina, but this Comment seeks to distinguish itself by chronicling the recent movement led by Craft Freedom. Part II of this Comment defines craft beer and describes the historical and cultural background that gave rise to Prohibition, Repeal, and the current three-tiered distribution system and consolidation of the modern beer market. Part III discusses the three-tiered system in depth. Part IV discusses how changing social perceptions of drinking have subsequently led to more beer-friendly laws in North Carolina and beyond, although the tension between large and small brewers and their distributors persists. With this background in mind, Part V discusses Craft Freedom's lobbying efforts to amend or remove the North Carolina brewer self-distribution cap. Part VI describes Craft Freedom's subsequent efforts to challenge the constitutionality of the cap and the state's franchise law. Lastly, Parts VII and VIII analyze Craft Freedom's claims and assesses their viability, with Part VII focusing on the forthcoming ruling on the state's motion to dismiss and Part VIII discussing some of the more substantive claims pertaining to the statute's potential unconstitutionality.

II. HISTORICAL BACKGROUND

A. Introduction to Craft Beer and Its Rising Popularity

For the uninitiated, "craft beer" generally describes beers brewed with higher quality ingredients, often with a higher ABV; however, there is no one clear definition of what constitutes craft beer.²⁴ In the

²¹ *Id.*

²² *Id.*

²³ Jennifer Thomas, *Charlotte Craft Brewers Face Off in Court with State Over Self-Distribution Cap*, CHARLOTTE BUS. J., <https://www.bizjournals.com/charlotte/news/2018/03/20/charlotte-craft-brewers-face-off-in-court-with.html> (last updated Mar. 20, 2018, 5:22 PM).

²⁴ *Artisan Appeal: The Rise of Craft*, GOLDMAN SACHS (May 2016),

United States, the craft beer revolution took off in the 1960s as a niche market of beer drinkers who desired something different from the mass-produced light lagers.²⁵ Americans originally turned exclusively to imported craft beers until a domestic market developed.²⁶ Today, craft beer is nearly ubiquitous—one study by the Brewers Association, a trade association that advocates for the interests of small, independent craft brewers, indicated that 75% of drinking-age American adults live within a ten mile radius of a craft brewery.²⁷

There is certainly a time and place for mass-produced macrobrewery light lagers and their high levels of “drinkability.” However, craft beer aficionados would rather sip a Ballast Point Grapefruit Sculpin or a Dogfish Head 90 Minute Imperial IPA than quaff a Bud Light.²⁸ In some cities, craft beer has become a centerpiece of community events.²⁹ In Wake Forest University’s hometown of Winston-Salem, craft beer fanatics camp overnight outside of Foothills Brewing for the annual release of the year’s batch of Sexual Chocolate; and do not even bat an eye when asked to pay \$20 per bottle (subject to a twelve bottles per customer limit to ensure that everyone can enjoy this local event).³⁰

Although total national beer sales dropped by a slight 0.2% in 2015, craft beer is a burgeoning industry.³¹ The decrease in national beer

http://www.goldmansachs.com/our-thinking/pages/rise-of-craft.html?cid=PS_02_30_07_00_01_16_01&#mkwid=kEbZmuh4.

²⁵ Tamayo, *supra* note 16, at 2215 (citing AMY MITTELMAN, BREWING BATTLES: A HISTORY OF AMERICAN BEER 190–91 (2008)).

²⁶ *Id.*

²⁷ David R. Scott, *Brewing Up a New Century of Beer: How North Carolina Laws Stifle Competition in the Beer Industry and How They Should be Changed*, 3 WAKE FOREST J.L. & POL’Y 417 (2013) (citing *Craft Brewer Defined*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics/craft-brewer-defined/> (last visited Mar. 27, 2018)).

²⁸ See generally Tamayo, *supra* note 16, at 2215 (referring to craft beer as arising to cater to “discriminating beer drinkers . . . who wanted more beer variety and fuller flavor in comparison to the largely uniform offerings from the major domestic brewers”).

²⁹ See Tony Kiss, *Asheville Beer Fest Turns 20*, GREENVILLE NEWS (Sept. 4, 2016), <https://www.greenvilleonline.com/story/news/local/2016/09/14/asheville-beer-fest-turns-20/90351910/>; Tony Russo, *Brewpubs May Revive Craft Beer As Center of Community Life*, DELMARVA NOW (Sept. 21, 2017), www.delmarvanow.com/story/life/food/2017/09/21/brewpubs-craft-beer-taverns-history/685043001/.

³⁰ Dan Becker, *2016 Foothills Brewing Barrel Aged Sexual Chocolate Release Details*, THE FULL PINT (May 12, 2016), <http://thefullpint.com/beer-news/2016-foothills-brewing-barrel-aged-sexual-chocolate-release-details/>.

³¹ Suzanne Laucks, Note, *Brewing up Changes: Pennsylvania Should Modernize its Tax Laws and Policies to Encourage the Growth of its Craft Brewing Industry*, 14 PITT. TAX REV. 119, 119 (2016).

continued . . .

consumption is attributable to less interest in national macrobreweries, meanwhile craft beer is skyrocketing in popularity and market share.³² This circumstance is perhaps fueling Big Beer's insistence on protecting the status quo and other measures that favor them. One study showed that consumption of Budweiser, a brand so associated with red-blooded Americans that "America" was emblazoned on its cans as part of a 2017 marketing campaign, dropped 40% between 2004 and 2015.³³ Similarly, a study conducted by Anheuser-Busch itself revealed that nearly half of all regular drinkers between the ages of twenty-one and twenty-seven have yet to try the iconic brew.³⁴ Goldman Sachs noticed this trend and advised their clients that "like it or not . . . craft is here to stay."³⁵ To accommodate this change in consumer taste, large breweries are developing their own semi-craft products (like Anheuser-Busch's Shock Top), purchasing successful craft breweries (the craft beer community despises these sellouts as they fall victim to Big Beer's "Trojan Horse" strategy³⁶), and lobbying for favorable legislation.³⁷ It is with this pro-craft backdrop that Craft Freedom is challenging North Carolina's self-distribution cap.

B. Historical Background of North Carolina Beer Laws

North Carolina has not always been so beer-friendly. North Carolina was the first in the United States to implement Prohibition, and the State originally refused to sign the Twenty-first Amendment in 1933.³⁸ Specifically, Temperance advocates in North Carolina and throughout the country viewed saloons as "bastions of immorality," lawlessness and the social ills of drunkenness, gambling, and prostitution; reminiscent of an episode of *Westworld*.³⁹ Other recent articles discussing North Carolina alcohol laws have provided much more extensive discussions of the Temperance movement, Prohibition, and the subsequent environment of brewery consolidation.⁴⁰ This

³² See Tamayo, *supra* note 16, at 2229.

³³ Harwell, *supra* note 17.

³⁴ *Id.*

³⁵ *Artisan Appeal: The Rise of Craft*, *supra* note 24.

³⁶ See Jim Vorel, *Anheuser Busch and the Quest to Co-Opt "Craft" Beer*, PASTE (July 27, 2017, 9:19 AM), <https://www.pastemagazine.com/articles/2017/07/anheuser-busch-and-the-quest-to-co-opt-craft-beer.html>.

³⁷ Star, *supra* note 18, at 1102; *Artisan Appeal: The Rise of Craft*, *supra* note 24.

³⁸ Star, *supra* note 18, at 1102.

³⁹ See Tamayo, *supra* note 16, at 2208; see also *Westworld* (Home Box Office 2016).

⁴⁰ See Brian D. Anhalt, *Crafting a Model State Law for Today's Beer Industry*, 21 ROGER WILLIAMS U.L. REV. 162 (2016); Lee, *supra* note 17, at 147-48; Scott,

Comment will offer only a surface-level overview to provide the reader with the general background of how breweries were perceived and targeted by state legislatures following the Prohibition era.

After ratification of the Twenty-first Amendment in 1933, the American beer scene was vastly different from the time that preceded Prohibition. Only the largest brewers survived Prohibition by producing colas, “medicinal malt syrups,” and other products rather than their signature brews.⁴¹ The larger surviving breweries flexed their financial muscle and bought up the smaller remaining breweries, obtaining a majority market share in the process.⁴² This trend continued into the following decades.⁴³ In 1947, the Nation’s five largest breweries together constituted 19% of the national beer market—a sum that rose to over 87% by 2001.⁴⁴ In 1979, there were only forty-four breweries in the country.⁴⁵

Fearing that this consolidation may lead to a monopoly, states began to enact franchise laws⁴⁶ in the early 1970s.⁴⁷ The aim of these franchise laws was to protect beer distributors⁴⁸ from larger breweries, who might wield their market share as a bargaining chip during distribution negotiations, and lock producers into an unfavorable franchise relationship.⁴⁹ Legislatures feared that, absent protection for the distributors, a brewery could use its popularity to “appropriate the brand value the wholesaler has created—through its promotional efforts—by going to another wholesaler and asking for more reasonable rates, or by threatening their existing wholesaler with termination and obtaining more reasonable rates.”⁵⁰ Legislatures hoped to bring the

supra note 27; Star, *supra* note 18; Tamayo, *supra* note 16.

⁴¹ Lee, *supra* note 17, at 148 (citing GREG KOCH, STEVE WAGNER & RANDY CLEMENS, *THE CRAFT OF STONE BREWING CO.: LIQUID LORE, EPIC RECIPES, AND UNABASHED ARROGANCE* 24 (2011)).

⁴² *Id.*

⁴³ Tamayo, *supra* note 16, at 2212.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *infra* Part VI (discussing North Carolina’s franchise law and Craft Freedom’s efforts to challenge the law’s constitutionality).

⁴⁷ Tamayo, *supra* note 16, at 2213.

⁴⁸ “Wholesaler” and “distributor” are interchangeable industry terms that describe the second-tier entities that purchase alcohol from licensed producers, promote the beer with marketing efforts, and coordinate shipping. Telephone Interview with Shauna Barnes, *supra* note 15. These terms are used interchangeably throughout this Comment.

⁴⁹ Tamayo, *supra* note 16, at 2213.

⁵⁰ See *id.* (citing DOUGLAS GLEN WHITMAN, *STRANGE BREW: ALCOHOL AND GOVERNMENT MONOPOLY* 10–11 (2003)); see also *id.* at 2231 n.108 (“It is also vital . . . to recognize the beer franchise statutes are a by-product of the abuses by some brewers back in the 1960s and 1970s. Then the big players consistently told their

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powerful consolidated breweries down to the level of “fragmented, weak players that [were] unable to wield political and marketing power” to maintain the relative equality among the three-tiered system.⁵¹ To understand the context in which these laws were passed, it is important to note that the distributors in the early 1970s were not the massive organizations they are today, but rather local, family-owned operations.⁵²

Franchise laws did serve a legitimate purpose by capping the power of 1970s-era breweries.⁵³ To fully comprehend this concept, one must understand the role that wholesalers play in the three-tiered system. Generally, the producer tier sells to the wholesaler tier who then sell beer and other alcoholic products to the retailer tier.⁵⁴ To do this, distributors engage in market promotion and buildup of the brand(s) of beers that they sell.⁵⁵ However, without any type of statutory protection, breweries can “prematurely terminate a wholesale agreement and appropriate the brand value the wholesaler has created.”⁵⁶ Breweries can then sign with a new wholesaler, who will pay the breweries accordingly for the built-up value of the brand.⁵⁷

Obviously, contractual provisions could be used to protect the interests of the wholesalers, but the distributors’ lobbying departments were able to convince state legislatures that they lacked sufficient bargaining power, compared to the consolidated brewery industry, to have such terms included in their agreements.⁵⁸ Today, small yet massively popular craft breweries in North Carolina and beyond

distributors and dealers: ‘Do as we say, because we and only we own the brand, we can move or do with it as we wish. Cross us, and then you’ll get nada when we terminate.’”).

⁵¹ Tamayo, *supra* note 16, at 2213 (alteration in original) (citing Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, in *SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY* 35 (Carole J. Jurkiewicz & Murphy J. Painter eds., 2008)).

⁵² Tamayo, *supra* note 16, at 2213.

⁵³ *Id.* (citing Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, in *SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY* 33 (Carole J. Jurkiewicz & Murphy J. Painter eds., 2008)).

⁵⁴ See *infra* Part III (describing the three tiers in the three-tiered system).

⁵⁵ Tamayo, *supra* note 16, at 2213 (citing DOUGLAS GLEN WHITMAN, *STRANGE BREW: ALCOHOL AND GOVERNMENT MONOPOLY* 10–11 (2003)).

⁵⁶ *Id.*

⁵⁷ *Id.* at 2213–14.

⁵⁸ *Id.* at 2214 (citing Susan C. Cagann, *Contents Under Pressure: Regulating the Sales and Marketing of Alcoholic Beverages*, in *SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY* 57, 68 (Carole J. Jurkiewicz & Murphy J. Painter eds., 2008)).

continued . . .

struggle to overcome antiquated laws that were passed when giant, consolidated breweries were the only players in the market. These concerns are only intensified by the fact that the Nation’s distributors have undergone some market consolidation since Prohibition as well.⁵⁹ The belief among Craft Freedom and its supporters is that economic and social shifts—namely the rise of craft beer’s market share and relaxed attitudes towards drinking—have reversed this situation, and while weaker breweries have risen to prominence, the distributors remain ensconced in their statutory protections.⁶⁰

III. INTRODUCTION TO THE THREE-TIERED ALCOHOL DISTRIBUTION SYSTEM

Prohibition was implemented in the United States at the behest of Temperance advocates who sought to combat the moral ills of alcohol use.⁶¹ After the Twenty-first Amendment repealed Prohibition, courts interpreted Section Two of the Twenty-first Amendment to grant the states “broad authority to regulate alcohol” within their borders.⁶² Although some states have successfully challenged the validity of alcohol-related state activities that affect interstate commerce, Justice

⁵⁹ Tamayo, *supra* note 16, at 2202; *see supra* notes 27–30 and accompanying text.

⁶⁰ For discussion of these concerns before Craft Freedom began their campaign see *Granholm v. Heald*, 544 U.S. 460, 494–95 (2005) (Stevens, J., dissenting). *See also* Tamayo, *supra* note 16, at 2240 n.291 (quoting DOUGLAS GLEN WHITMAN, *STRANGE BREW: ALCOHOL AND GOVERNMENT MONOPOLY* 6 (2003)) (“[A] statute that was designed to promote public health, safety and welfare has, over time, been subverted by the economic interests of the entities it was intended to regulate. Now, the legalized system operates primarily to prevent competition, protect anti-competitive conduct and otherwise thwart the functioning of a free market in the manufacture, distribution and sale of alcohol beverages.”); *Id.* at 2202 n.26 (citing GARRET PECK, *THE PROHIBITION HANGOVER: ALCOHOL IN AMERICA FROM DEMON RUM TO CULT CABERNET* (2009)) (“[D]iscussing the developments in the alcohol industry and the different social movements that have occurred since the time of Repeal.”); *Id.* at 2211 (citing *Panelists at NBWA/Brewers Legislative Conference Discuss Three-Tier Threats*, MOD. BREWERY AGE (Apr. 25, 2005), <https://www.thefreelibrary.com/Panelists+at+NBWA%2fBrewers+Legislative+conference+discuss+three-tier...-a0133516334> (“Wholesalers, however, seem to assume uniformity in social norms and the alcohol industry between the 1930s and today.”)); *Id.* at 2225. North Carolina distributors have other statutory protections, such as state laws that mandate exclusive distribution territories – a provision that prohibits two or more distributors from distributing a brand in a given area and thereby prevents one distributor from enjoying the fruits of another’s marketing efforts in that service territory. *See, e.g.*, N.C. GEN. STAT. § 18B–1303 (2017).

⁶¹ *See* Tamayo, *supra* note 16, at 2207.

⁶² U.S. CONST. amend. XXI, § 2; *Granholm*, 544 U.S. at 488–89; *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247, 1250–52 (W.D. Wash. 2005).

Kennedy declared the underlying three-tiered system to be “unquestionably legitimate.”⁶³

States developed the predecessor to the three-tiered system in response to the “Toward Liquor Control” study. The study, commissioned by Temperance advocate John D. Rockefeller, suggested that a three-tiered system would encourage temperance, and provided states with guidance on how to best use their new Twenty-first Amendment powers to regulate alcohol.⁶⁴ Although not required by federal law,⁶⁵ each state has imposed a largely similar system.⁶⁶

Legislatures used these laws to prohibit “tied houses.”⁶⁷ Federal law prohibits vertical integration between the tiers,⁶⁸ and North

⁶³ *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)); Tamayo, *supra* note 16, at 2206 n.49 (citing Elizabeth D. Lauzon, Annotation, *Interplay Between Twenty-First Amendment and Commerce Clause Concerning State Regulation of Intoxicating Liquors*, 116 A.L.R. 5th 149 (2004)).

⁶⁴ Tamayo, *supra* note 16, at 2209–10 (citing Mark R. Daniels, *Toward Liquor Control: A Retrospective*, in *SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY* 217, 218 (Carole J. Jurkiewicz & Murphy J. Painter eds., 2008)). Tamayo provides an excellent discussion of the history behind the “Toward Liquor Control” study and the research conducted by its pro-Temperance authors, who proposed a licensing system to accomplish the goals of early 20th century Americans—namely to eliminate saloons. *See id.* at 2209–11.

⁶⁵ *See* Federal Alcohol Administration Act, 27 U.S.C. §§ 201–211 (2012) (describing federal regulation of the alcohol industry without mandating a wholesaler tier requirement in the state’s system); *see also Granholm*, 544 U.S. at 466 (citing 27 U.S.C. § 205; *Bainbridge v. Turner*, 311 F.3d 1104, 1106 (11th Cir. 2002)). *But see* Tamayo, *supra* note 16, at 2206 (“Nonetheless, the Federal Alcohol Administration Act creates a legal backstop by prohibiting retailers from purchasing alcohol exclusively from one source. . . . Federal law does not mandate that there be a wholesaler tier – it just prohibits certain conduct between brewers and retailers.”).

⁶⁶ Tamayo, *supra* note 16, at 2206 n.52 (citing DOUGLAS GLEN WHITMAN, *STRANGE BREW: ALCOHOL AND GOVERNMENT MONOPOLY* 4 (2003)).

⁶⁷ *Id.* at 2210–11. (“Fosdick and Scott believed that the tied-house was particularly responsible for the bad reputation of saloons due to the problem of absentee ownership. They argued that because the brewer was not present in the saloon’s community, he was insulated from its negative effects while his profit motive—maximized by increasing volume sold—remained. Thus, Fosdick and Scott concluded that ‘[a] license law should endeavor to prohibit all [financial] relations between the manufacturer and the retailer, difficult though this may be.’ The states took this recommendation to another level by interposing a wholesale between the supplier and retailer, creating what is known today as the three-tier system.” (alteration in original) (citing and quoting RAYMOND B. FOSDICK & ALBERT L. SCOTT, *TOWARD LIQUOR CONTROL* 43–44 (1933); Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, in *SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY* 33 (Carole J. Jurkiewicz & Murphy J. Painter eds., 2008))).

⁶⁸ *Granholm*, 544 U.S. at 466 (citing 27 U.S.C. § 205; *Bainbridge*, 311 F.3d at 1106).

Carolina law accomplishes this by prohibiting any mixing of wholesalers and retailers.⁶⁹ This means that a manufacturer, or licensed wholesaler, may not have any direct or indirect financial interest in a licensed retailer.⁷⁰

A. The Three Tiers

The first “tier” is composed of producers.⁷¹ These are the vineyards, distillers, or breweries that produce alcoholic products.⁷² In North Carolina, all producers must obtain a permit from the federal Alcohol and Tobacco Tax and Trade Bureau, and pay the federal excise tax in addition to all associated state taxes.⁷³ Washington, a state that is an exception to the norm, allows producers to directly sell as licensed retailers.⁷⁴

The second tier is composed of distributors, also known as wholesalers.⁷⁵ Upon first glance, the distributor’s role appears to be that of a mere middleman who purchases beer from the breweries at a wholesale rate and then flips it to retailers, but distributors also handle marketing and retailer’s order-fulfillment.⁷⁶ All told, distributors do play a helpful role for any brewery that has aspirations of regional or national distribution.⁷⁷

Retailers—bars, restaurants, convenience stores, or any other entity that sells packed or open-container alcoholic beverages to consumers⁷⁸—occupy the third tier.⁷⁹ In North Carolina, like most states, retailers must obtain a permit in order to sell alcoholic beverages to consumers.⁸⁰ Brewpubs are one exception to this system, as they are

⁶⁹ See, e.g., N.C. GEN. STAT. § 18B–1116 (2017).

⁷⁰ *Id.* at §§ 18B–1116(a)(2), 18B–1119; *Beskind v. Easley*, 325 F.3d 506, 510 (4th Cir. 2003). For example, Anheuser-Busch is prohibited from owning any stake in Buffalo Wild Wings bars or Harris-Teeter grocery stores that sell beer.

⁷¹ See Tamayo, *supra* note 16, at 2200–01.

⁷² *Id.*

⁷³ Laucks, *supra* note 31, at 122–23.

⁷⁴ WASH. REV. CODE § 66.24.244(2)(a) (2015) (“[M]icrobrewery licensed under this section may also act as a distributor and/or retailer for beer . . . of its own production.”).

⁷⁵ See Tamayo, *supra* note 16, at 2200–01; see also *supra* note 48 (discussing the interchangeable nature of the industry terms “wholesaler” and “distributor”).

⁷⁶ *What is a Beer and Wine Distributor?*, N.C. BEER & WINE WHOLESALERS ASS’N, <http://ncbeerwine.com/about/> (last visited Mar. 27, 2018).

⁷⁷ Telephone Interview with Shauna Barnes, *supra* note 15.

⁷⁸ *Types of Retail Permits*, N.C. ALCOHOLIC BEVERAGE CONTROL COMMISSION, <http://abc.nc.gov/Permit/RetailTypes> (last visited Mar. 27, 2018).

⁷⁹ Laucks, *supra* note 31, at 125.

⁸⁰ See N.C. GEN. STAT. § 18B–102(a) (2017).

producers who are allowed to sell their beer for consumption on-site.⁸¹ However, other arrangements are not permitted, as this would lead to the development of a tied house.⁸²

B. The Three-Tiered System in North Carolina

In North Carolina,⁸³ the legislature implemented the three-tiered system via a licensing scheme which requires that all beer producers must first obtain a brewery permit,⁸⁴ wholesalers must obtain a malt beverage wholesaler permit,⁸⁵ and retailers must obtain a retail permit.⁸⁶ These permits are further intertwined in that holders of brewery permits may only sell to holders of wholesale permits, who may then only sell to holders of retail permits.⁸⁷ One exception to the North Carolina system allows breweries that produce less than 25,000-barrels to obtain wholesaler permits.⁸⁸ Compliance with the 25,000-barrel limit and the accompanying franchise requirement forms the crux of Craft Freedom's grievances and thus serves as the centerpiece of this Comment.

IV. CHANGING SOCIAL PERSPECTIVES ON ALCOHOL AND CORRESPONDING CHANGES IN LAW

As Americans' views on alcohol change, and alcohol is viewed as less and less of a social ill, laws will shift to account for this change.⁸⁹ Tensions certainly exist, but Justice Stevens' dissent in *Granholm v.*

⁸¹ See, e.g., N.C. GEN. STAT. §§ 18B-1001-1104 (2017) (permitting breweries under the 25,000-barrel threshold to obtain a special retail permit to sell alcohol to customers at their premises).

⁸² See Tamayo, *supra* note 16, at 2201.

⁸³ North Carolina must also comply with the Federal Alcohol Administration Act. See Federal Alcohol Administration Act, 27 U.S.C. §§ 201-211 (2012). By outlawing tied house agreements, this requirement is easily satisfied. Tamayo, *supra* note 16, at 2206.

⁸⁴ See N.C. GEN. STAT. § 18B-1104 (2017).

⁸⁵ See *id.* at § 18B-1109.

⁸⁶ *Id.* at § 18B-1001.

⁸⁷ *Id.* at §§ 18B-1104, 1109; see also *Beskind v. Easley*, 325 F.3d 506, 509-10 (4th Cir. 2003) ("As in many states that implemented the Twenty-first Amendment, the structure in North Carolina is a familiar three-tiered one in which out-of-state sellers of alcoholic beverages may sell their alcoholic beverages only to licensed wholesalers, who in turn may sell only to other wholesalers and licensed retailers.").

⁸⁸ § 18B-104(a)(8).

⁸⁹ See *supra* text accompanying notes 23-46; see also Jennifer Latson, *A Toast to the End of Prohibition*, TIME (Dec. 5, 2014), <http://time.com/3605609/a-toast-to-the-end-of-prohibition/>; Herb Scribner, *2017 Changes to Liquor Laws Join Other Significant State Actions*, DESERET NEWS (Mar. 11, 2017, 6:45 PM), <https://www.deseretnews.com/article/865675434/2017-changes-to-liquor-laws-join-other-significant-state-actions.html>.

Heald, describing alcohol as an “ordinary article of commerce” rather than the vice that social conservatives in earlier generations considered it to be, is indicative of this trend.⁹⁰

A. Micro/Macro Tension: Beer Excise Taxes

The federal tax code imposes an excise tax on the production, importation, and sale of all distilled spirits, beer, and wine.⁹¹ This excise tax was last revised in 2017 by the Tax Cuts and Jobs Act (TCJA) to be slightly more friendly to small craft brewers.⁹² Commercial brewers must pay an excise tax on each barrel produced, and the amount of the tax varies according to the level of production—\$3.50 for the first 60,000 barrels, \$16 a barrel for the next 5.94 million barrels, and \$18 per barrel after that.⁹³ Without further action, these rates will expire on January 1, 2020, and return to pre-TCJA rates.⁹⁴ Excise taxes on beer alone accounted for about \$3.6 billion in tax revenue in 2013 and 2014.⁹⁵

The emergence of an American craft beer industry has not gone unnoticed on Capitol Hill. The House of Representatives boasts a Small Brewers Caucus of 142 members and there is also a Senate counterpart.⁹⁶ Seeing an easy opportunity to score political points with their increasingly alcohol-tolerant constituents, lawmakers used the TCJA to pass a revision to the code that promoted the burgeoning craft beer industry by reforming the excise taxes levied on brewers in 2017.⁹⁷

Before the TCJA was passed, two proposed statutes challenged the federal beer excise tax framework. The interplay between those two

⁹⁰ *Granholm v. Heald*, 544 U.S. 460, 494–95 (2005) (Stevens, J., dissenting) (“Today many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products. That was definitely not the view of the generations that made policy in 1919 when the Eighteenth Amendment was ratified or in 1933 when it was repealed by the Twenty-first Amendment. On the contrary, the moral condemnation of the use of alcohol as a beverage represented not merely the convictions of our religious leaders, but the views of a sufficiently large majority of the population to warrant the rare exercise of the power to amend the Constitution on two occasions.”).

⁹¹ I.R.C. §§ 5001, 5041, 5051, 13802 (2018).

⁹² *Id.* at §§ 5001, 5041, 5051, 13802.

⁹³ *Id.* at §§ 5001, 5041, 5051, 13802.

⁹⁴ *Id.* at § 13802(a).

⁹⁵ Flynn, *supra* note 5.

⁹⁶ Juana Summers, *A Craft Beer Tax Battle is Brewing on Capitol Hill*, NPR (Mar. 12, 2015), <http://www.npr.org/sections/thesalt/2015/03/12/392550170/a-craft-beer-tax-battle-is-brewing-on-capitol-hill>.

⁹⁷ § 13802.

statutes exemplifies the tensions that exist between brewers large and small.⁹⁸ The Small Brewer Reinvestment and Expanding Workforce Act (Small BREW Act), championed by craft breweries, would have lowered the excise tax framework from \$7 to \$3.50 for the first 60,000 barrels, \$16 per barrel for any excess up to 2,000,000 barrels, then \$18 per barrel for those barrels beyond the 2,000,000 barrel mark.⁹⁹ Senator Susan Collins promoted the bill, and argued that beer sales support the underlying framework of farmers, suppliers, and other workers, thereby creating jobs.¹⁰⁰

Larger breweries lobbied for an excise tax revision that would better serve their interests.¹⁰¹ The result was the Fair BEER Act, which proposed eliminating the excise tax for the first 7,143 barrels; imposing excise taxes of \$3.50 per barrel for every barrel between 7,143 and 60,000; imposing excise taxes of \$16 per barrel between 60,001 and 2,000,000; and imposing excise taxes of \$18 per barrel beyond 2,000,000.¹⁰² Additionally, the Fair BEER Act would have extended this excise tax cut to importing breweries.¹⁰³ Proponents of the Big-Beer friendly Fair BEER Act argued that it would help all brewers, not just the small breweries.¹⁰⁴ Jim McGreevy, of the Big-Beer-friendly Beer Institute—a national trade group that purportedly represents American brewers “both large and small”—pitched the Fair BEER Act as friendly to craft breweries, calling it “a way of reforming a tax that’s invisible to consumers that potentially hinders new brewers from getting into the marketplace.”¹⁰⁵ Anheuser-Busch, MillerCoors, and the Beer Institute supported the Fair BEER Act; but not the Small BREW Act.¹⁰⁶

Smaller breweries were wary of Big Beer’s policy comments.¹⁰⁷ Some Small BREW Act advocates realized that the political deck was

⁹⁸ Fair BEER Act, H.R. 767, 114th Cong. § 2(a)(1) (2015); Small BREW Act, H.R. 232, 114th Cong. § 2(a)(1)(A)(i)–(b)(1)(A) (2015); I.R.C. §§ 5001, 5041, 5051 (2018).

⁹⁹ Summers, *supra* note 96.

¹⁰⁰ Callaghan, *supra* note 11.

¹⁰¹ *Id.*

¹⁰² Summers, *supra* note 96.

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*; Overview, BEER INSTITUTE, <http://www.beerinstitution.org/about/overview/> (last visited Mar. 27, 2018).

¹⁰⁶ Callaghan, *supra* note 11.

¹⁰⁷ *See* Summers, *supra* note 96 (“Cheston compares the way things are now to a documentary he once saw about bull riders. ‘One of the bull riders said, ‘Well, we’re not competing against each other. We’re all competing against the bull,’ he says. ‘So the small craft brewers are not competing against each other. We’re competing against Anheuser Busch and MillerCoors.’”).

stacked against them and that neither bill would advance.¹⁰⁸ In terms of political capital, the fractured craft breweries could not compete with Anheuser-Busch and MillerCoors' combined millions in lobbying expenditures.¹⁰⁹ In the end, both bills died in the House Ways and Means Committee.¹¹⁰ Although the small brewers eventually got a temporary excise tax relief in the TCJA for tax years 2018 and 2019, the tension between Big Beer and the growing power of craft breweries was left to ferment.¹¹¹

B. Changing Perspectives on Alcohol in North Carolina

In the larger context of macro/micro tension, North Carolina law has been undergoing a decidedly pro-beer transformation and is turning away from its historical "blue-law" attitude.¹¹² In 1930, the North

¹⁰⁸ See Callaghan, *supra* note 11 ("Sullivan believes that the Fair BEER Act's extreme cuts make it unlikely to pass, something its supporters don't mind. If legislators and business people advocate for the Fair BEER Act over what Sullivan calls the 'realistic, common sense proposal' in the Small BREW Act, they'd be backing a horse intended to lose, he contends.").

¹⁰⁹ Flynn, *supra* note 5 (totaling \$11.4 million in 2013 and \$14.6 million in 2014 in lobbying expenditures).

¹¹⁰ *All Information (Except Text) for H.R. 767 – Fair BEER Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/767/all-info> (last visited Mar. 27, 2018). The Small BREW Act was introduced by several Congressmen in the 2015–2016 session, most recently in February of 2015, but all died in committee. *S. 375 – Small BREW Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senatebill/375?q=%7B%22search%22%3A%5B%22small+brew+act%22%5D%7D&r=1> (last visited Mar. 27, 2018).

¹¹¹ After the Small BREW Act and Fair BEER Act fizzled in committee, Congress reintroduced the Craft Beverage Modernization and Tax Reform Act of 2017 which, among other favorable provisions for the alcohol industry, would lower the excise taxes on beer and other alcoholic beverages in a very similar manner as that proposed in the Small BREW Act. *Craft Beverage Modernization and Tax Reform Act Reintroduced in 115th Congress*, BREWERS ASS'N (Jan. 31, 2017), <https://www.brewersassociation.org/press-releases/craft-beverage-modernization-tax-reform-act-reintroduced-115th-congress/>. The revised excise tax rates would levy a \$16 per barrel tax for the first 6 million barrels brewed by a domestic brewer or \$18 per barrel for the first 6 million barrels which did not meet that description, if any. *Id.* The revised code would also lower the excise tax on the first 60,000 barrels of a domestic brewer who produces 2 million or fewer barrels per year from \$7 to \$3.50 per barrel. *Id.* These same revisions were adopted in 2017 as part of the TCJA, which contains additional provisions that are generally friendly to businesses both large and small, such as the lower overall corporate tax rate, a new deduction for pass-through entities, and immediate expensing of equipment. See Katie Marisic, *How the Tax Cuts and Jobs Act Could Impact Small and Independent Craft Brewers*, BREWERS ASS'N (Jan. 2, 2018), <https://www.brewersassociation.org/current-issues/tax-cuts-jobs-act-impact/>.

¹¹² Tamayo, *supra* note 16, at 2221 n.164.

Carolina General Assembly imposed a 6% alcohol by volume (ABV, or the percentage of the beer that is pure alcohol) limit on all beer sold or brewed in the state.¹¹³ Efforts to avoid compliance with this law, and Prohibition in general via bootlegging, led to the affinity for stock car racing in North Carolina.¹¹⁴ But in 2003, grassroots efforts by the state's then-fledgling craft beer scene organized support to have the ABV cap raised through the "Pop the Cap" movement.¹¹⁵ These efforts sparked a brief debate over many of the same temperance concerns as opponents claimed that making higher-ABV beers would encourage drunkenness (especially among minors), drunk driving, sexual promiscuity, and other accompanying social ills.¹¹⁶ Proponents were able to successfully refute these claims and the General Assembly raised the cap, opening the door for greater craft-beer flexibility in North Carolina.¹¹⁷ Of note, the same General Assembly that once fought over the "Pop the Cap" issue has since expressed and avowed interest in supporting the state's thriving craft beer industry.¹¹⁸

V. CRAFT FREEDOM'S LOBBYING EFFORTS TO AMEND NORTH CAROLINA'S SELF-DISTRIBUTION CAP

To be clear, the 25,000-barrel cap, which functions as an exception to the general prohibition of producer self-distribution, allows North Carolina craft brewers to self-distribute quite a lot of beer. For comparison, the entire state of North Carolina drinks about 25,000 barrels a day (about 8.3 million bottles), and you could fill an Olympic size swimming pool with all that beer.¹¹⁹ However, after crossing the 25,000-barrel threshold, a brewery is prohibited from self-distributing any of its beer—not just the beer above the 25,000 barrels.¹²⁰ Rather, the brewer is mandated by law to enter into a franchise agreement with a distributor.¹²¹ These agreements give distributors control over the

¹¹³ Maddrey, *supra* note 20.

¹¹⁴ *Id.*

¹¹⁵ Tamayo, *supra* note 16, at 2222–24.

¹¹⁶ *Id.* at 2222 n.170.

¹¹⁷ See Act of Aug. 4, 2005, ch. 18B, sec. 1, § 101(9), 277, 2005 N.C. Sess. Laws 1076, 1076–77 (Aug. 15, 2005) (codified at N.C. GEN. STAT. § 18B-101(a) (2009)).

¹¹⁸ See N.C. GEN. STAT. § 18B-902 (2009); see also Tamayo, *supra* note 16, at 2223 n.180 (discussing a North Carolina's malt beverage special event bill that passed by a much wider margin than the "Pop the Cap" bill).

¹¹⁹ Maddrey, *supra* note 20; Emery P. Dalesio, *Craft Brewers Sue Over NC Law That Takes Away Sales Control*, WSOC-TV (Mar. 21, 2018, 7:07 AM), <https://www.wsoc.tv/news/north-carolina/copy-of-craft-brewers-sue-over-nc-law-that-takes-away-sales-control/719256358>.

¹²⁰ Maddrey, *supra* note 20.

¹²¹ Complaint at 8–9, *Craft Freedom, LLC. v. North Carolina*, (N.C. Super. Ct.

beer's marketing, sale, delivery, distribution, and quality control during transportation.¹²² In response, some North Carolina craft breweries have banded together to create their own self-distribution networks, but these breweries cannot hope to match the resources of the big distributors.¹²³

A. Craft Freedom's Lobbying Efforts to Amend the Self-Distribution Cap

Originally championed by Charlotte's Olde Mecklenburg Brewery (Olde Meck) and NoDa Brewing Company (NoDa) (the only two North Carolina breweries within striking distance of the self-distribution cap), over sixty North Carolina breweries have now signed onto the movement to challenge the 25,000-barrel limit.¹²⁴ Other non-brewing entities have joined the fray in the name of protecting individual rights and small businesses, as well as advocating for limited government.¹²⁵ Other authors writing on the flaws in the current self-distribution cap point to the tangential benefits of allowing more self-distribution such as retaining beer dollars in-state and reducing pollution resulting from shorter transportation distances.¹²⁶

2017) (17–CVS–005976). North Carolina's Franchise Law is the product of various statutes in Chapter 18B of the North Carolina General Statutes. Those statutes include sections 18B–102(a), 102(b), 1006(h), and 1301–09. These laws dictate the terms and duration of the distribution agreements that breweries must enter once they exceed the Distribution Cap. *See* N.C. GEN. STAT. §§ 18B–102(a), 102(b), 1006(h), 1301–09.

¹²² Maddrey, *supra* note 20.

¹²³ *Id.* This is only one instance of the craft-beer community banding together to help each other. In another example, many craft breweries will serve each other's beers on their taps. *See also* Star, *supra* note 18, at 1099–1100. This helps, rather than hurts, each brewery, because craft beer is such a specialized industry that serving an outside brewery's beers on your own taps encourages the growth of the craft beer industry as a whole, rather than "cannibalizing business." *Id.*

¹²⁴ *Together We Stand for Craft Freedom*, CRAFT FREEDOM, <http://craftfreedom.org/together-we-stand/> (last visited Mar. 27, 2018).

¹²⁵ *Id.*; Maddrey, *supra* note 20. Of note, Grover Norquist of Americans for Tax Reform (who compared the law and subsequent disincentive to hire to the Affordable Care Act), Greer-Walker, the John Locke Foundation, the Civitas Institute, and the National Federation of Independent Businesses have all lent financial and intellectual aid to Craft Freedom's efforts to amend what they characterize as "a needless regulation that hurts entrepreneurs and impedes investment, hiring, and economic growth across North Carolina." *Grover Norquist, Founder of Americans for Tax Reform, Sends Letter to North Carolina Legislators Supporting Craft Freedom*, BLADENONLINE, (Mar. 6, 2017), <https://bladenonline.com/grover-norquist-founder-of-americans-for-tax-reform-sends-letter-to-north-carolina-legislators-supporting-craft-freedom/>.

¹²⁶ Tamayo, *supra* note 16, at 2228.

To start, Craft Freedom retained a political strategy firm, Strategic Partners Solutions (SPS), and began lobbying the North Carolina General Assembly during the 2017 session.¹²⁷ From the outset, SPS acknowledged the challenge before them, with SPS's own Paul Shumaker,¹²⁸ who also represents North Carolina's U.S. Senators Richard Burr and Thom Tillis,¹²⁹ calling it a "true David versus Goliath legislative battle."¹³⁰ Craft Freedom rallied support and deployed typical political campaign strategies; pollsters, grassroots organizers, campaign buttons, and rallies at participating breweries.¹³¹ Also, Craft Freedom heavily utilized social media to get word out about their efforts, and thus, engage North Carolina's vibrant craft beer community.¹³² Craft Freedom's efforts found support in groups that are not necessarily associated with beer-drinkers; one poll of 800 registered voters in North Carolina revealed that 77% of North Carolinian churchgoers surveyed supported Craft Freedom's efforts to amend the self-distribution cap, and among non-churchgoers support was 83%.¹³³ A representative from the North Carolina Beer and Wine Wholesalers Association (NCBWWA), a trade group of approximately 5,600 employees of beer and wine distributors across the state, criticized the poll for being filled with inflammatory "hot-button phrases."¹³⁴

Unsurprisingly, North Carolina's beer distributors resisted Craft Freedom's lobbying efforts.¹³⁵ Generally, distributors defended their position by claiming that their tier plays a vital role in the system by creating local distribution jobs, providing for a clear chain of custody, ensuring payment of taxes, and promoting temperance.¹³⁶ NCBWWA

¹²⁷ See Maddrey, *supra* note 20.

¹²⁸ See Jim Morrill, *The Politics of Beer: How Craft Brewers Are Using Election-Style Tactics to Get a Law Changed*, NEWS AND OBSERVER (Raleigh, N.C.) (Mar. 31, 2017, 8:46 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article142082089.html> ("'There's an inside ball game and an outside ball game,' says strategist Paul Shumaker. 'Lobbyists specialize on the inside game. I specialize in the outside game.'").

¹²⁹ See *id.*

¹³⁰ Maddrey, *supra* note 20.

¹³¹ See Morrill, *supra* note 128.

¹³² See *id.*; see, e.g., Craft Freedom, FACEBOOK, <https://www.facebook.com/CraftFreedomNC/> (last visited Mar. 27, 2018) (listing events sponsored by Craft Freedom, including rallies at participating breweries and a Craft Beer Festival).

¹³³ David Mildenberg, *Tar Heel Church Ladies Like Their Craft Beer Too, Polls Show*, BUS. N.C. (Feb. 16, 2017), <http://businessnc.com/tar-heel-church-ladies-like-craft-beer-poll-shows/>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Tamayo, *supra* note 16, at 2230 (citing *Beskind v. Easley*, 325 F.3d 506, 516 (4th Cir. 2003)); Mark Binker, *Battle's Brewing Over Law*, GREENSBORO NEWS &

executive director Tim Kent criticized the effort as “an effort by a handful of breweries to create a special privilege for themselves at the expense of everyone else in a highly competitive beer business.”¹³⁷ The NCBWWA also defended the current cap by arguing that any increase to the cap would destroy many distribution jobs in North Carolina,¹³⁸ although supporters of Craft Freedom have balked at this notion, claiming that compliance with the cap also eliminates jobs by forcing breweries to terminate their in-house distribution personnel.¹³⁹

Further, Kent argued that North Carolina has more permissive craft beer laws than many other states, pointing to the arrival of several out-of-state big names in craft beer (Sierra Nevada, New Belgium, and Oskar Blues) as evidence that things cannot be that dire for the North Carolina craft beer industry.¹⁴⁰ Kent claimed that “[t]he 25,000 barrel number is in place to provide incubator breweries an opportunity to get started and obtain access to market. 25,000 barrels is a lot of beer. . . . Any brewer at that level is far past the incubation point.”¹⁴¹ Kent’s

REC. (Mar. 14, 2009), http://www.greensboro.com/news/battle-s-brewing-over-law/article_141823b3-7a0c-5627-968b-1b0a8181418e.html.

¹³⁷ Maddrey, *supra* note 20.

¹³⁸ Editorial, *Our Opinion: Give N.C. Craft Breweries the Freedom to Self-Distribute*, WILSON TIMES (Wilson, N.C.) (May 17, 2017, 9:10 PM), <http://www.wilsontimes.com/stories/our-opinion-give-nc-craft-breweries-the-freedom-to-self-distribute,85248> [hereinafter WILSON TIMES] (“[L]egislators should understand that every deviation from the three-tier system takes business away from those in-state business and could ultimately cost the [state] jobs and revenue While direct-to-consumer sales are currently only a small percentage of the sales nationwide, that number could increase dramatically over time – to the detriment of your in-state wholesalers and retailers.”). *Cf.* Family Winemakers of Cal. v. Jenkins, No. 06–11682–RWZ, 2008 U.S. Dist. LEXIS 1102074, at *17 (D. Mass. Jan. 14, 2010) (providing another distributor’s argument in court).

¹³⁹ Maddrey, *supra* note 20; *see also* WILSON TIMES, *supra* note 138 (comparing the distributor requirement to paying taxes before the purported simplification of the federal tax code by the recent Tax Cuts and Jobs Act).

[I]f the federal tax code was streamlined and written in plain language so more folks felt confident filing their own returns, a lot of tax preparers would be out of work. But shielding middleman jobs created by bad legislation simply isn’t a valid reason to keep wrongheaded laws on the books.

WILSON TIMES, *supra* note 138.

¹⁴⁰ Maddrey, *supra* note 20.

¹⁴¹ *Id.* The mention of an “incubation” period is interesting because similar concerns have been used in the past to justify self-distribution. *See* Telephone Interview with Shauna Barnes, *supra* note 15. Breweries and vineyards often face difficulty when first attempting to join a distribution network due to their lack of substantial customer appeal. *Id.* (describing Dogfish Head’s efforts, begging distributors to carry their product in the early days before a customer base had been developed). And, a distributor is unlikely to promote a product without much

continued . . .

“incubator” argument is supported by the fact that breweries are often paid a bonus when they sign a franchise agreement.¹⁴² The amount of the bonus varies, but it compensates for any pre-existing customer base created by the brewery’s self-distribution efforts.¹⁴³

In addition, the NCBWWA defends the franchise system on the basis that the system plays the fundamental role of monitoring distribution and tax collection, among other roles that supposedly benefit society.¹⁴⁴ When a component of North Carolina’s franchise system was challenged in 2003, the state defended the three-tiered system before the Fourth Circuit on the grounds of:

[R]egulating the consumption of alcoholic beverages, channeling the distribution of alcoholic beverages, enforcing a minimum age for the purchase and consumption of such beverages, limiting the location from where they are sold, controlling the contents of such beverages, and collecting taxes in connection with their sale and distribution.¹⁴⁵

However, many breweries took offense to this rationale and argued that if this was true, then the North Carolina Department of Revenue ought to be championing the cause to ensure the payment of taxes, not the distributors.¹⁴⁶

Perhaps most interestingly, the NCBWWA defended the 25,000-barrel cap by citing policy reasons that originally led to the development of the three-tiered system in the wake of Prohibition and Repeal; specifically, that the separation of players in the alcohol industry discourages many social ills associated with drinking by generally promoting temperance.¹⁴⁷ Much less surprisingly, Craft Freedom’s

consumer support. *Id.* Yet, this argument assumes that once a wholesaler gets enough support to become attractive, a wholesaler is entitled to carry the brewery’s beer.

¹⁴² Tamayo, *supra* note 16, at 2233.

¹⁴³ Telephone Interview with Shauna Barnes, *supra* note 15.

¹⁴⁴ Press Release, N.C. Beer and Wine Wholesalers Ass’n, N.C. Beer Distrib. Generate 3,869 Direct Jobs, \$1.39 Billion in Total Econ. Impacts (Feb. 7, 2013), http://www.ciclt.net/sn/clt/ncbwwa/displayos.aspx?ClientCode=ncbwwa&FileName=os_news_pressreleases.

¹⁴⁵ *Beskind v. Easley*, 325 F.3d 506, 516 (4th Cir. 2003).

¹⁴⁶ Tamayo, *supra* note 16, at 2240.

¹⁴⁷ *Id.* at 2203–04 (citing Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 361–65 (1999)) (“Many question, though, whether this resistance is truly based on a desire to ‘promote temperance’ or whether such defensiveness is merely an expression of the wholesalers’ economic interests.”); *id.* at 2240 (citing THE NORTH CAROLINA BEER AND WINE WHOLESALERS ASS’N, *What is a Beer and Wine*

supporters balk at this policy-based defense.¹⁴⁸

Courts, including the Fourth Circuit, have recognized various non-temperance state interests in upholding the three-tiered system.¹⁴⁹ Such interests include encouraging small retail establishments,¹⁵⁰ maintaining “orderly market conditions” (which might reduce “excessive consumption”),¹⁵¹ keeping alcohol out of the hands of those under the legal age of consumption (a legal, not moral, interest),¹⁵² and collecting taxes on alcohol imported from out of state.¹⁵³

B. Craft Freedom’s Lobbying Failure

At the start of Craft Freedom’s grassroots efforts, it seemed as if change may be on the horizon. In early 2017, bills carrying the Craft Freedom message were introduced in both the North Carolina House and Senate,¹⁵⁴ specifically House Bill 500.¹⁵⁵ It proposed raising the self-distribution cap to 200,000 barrels and contained numerous other provisions friendly to North Carolina’s small craft breweries (i.e. more freedom to homebrew and permitting the sale of “crawlers”).¹⁵⁶

Distributor?, <http://ncbeerwine.com/about/> (last visited Mar. 27, 2018)) (“[T]he [NCBWWA] on its Web site, . . . discusses the need for accountability and a chain of custody, for efficient collection of taxes, and for promotion of temperance.”).

¹⁴⁸ *Id.* (quoting Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 361–65 (1999)). This opinion is not unique to Craft Freedom and it existed before their efforts began. *Id.* at 2240 (quoting DOUGLAS GLEN WHITMAN, *STRANGE BREW: ALCOHOL AND GOVERNMENT MONOPOLY* 6 (2003)) (“[D]istributors continue to ‘couch their argument in terms of protecting the public,’ [and] the underlying economic reality appears instead to reflect a battle to prevent lost profits to which the distributors are, at the moment, statutorily entitled to have.”).

¹⁴⁹ *Beskind*, 325 F.3d at 516. “Efficient administration of tax collection, safety, and the like would certainly balance in favor of retaining the existing general system” *Id.* (quoting *Beskind v. Easley*, 197 F. Supp. 2d 464, 472 (W.D.N.C. 2002)).

¹⁵⁰ *Cal. Retail Liquor Dealers Ass’n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112 (1980).

¹⁵¹ *Id.* at 112 n.15.

¹⁵² *Granholt v. Heald*, 544 U.S. 460, 489–91 (2005) (acknowledging the states’ argument that they were trying to keep alcohol out of the hands of minors, but ultimately concluding the argument was unsupported by the evidence).

¹⁵³ *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

¹⁵⁴ *Craft Freedom – When is Craft Freedom Legislation Arriving?*, NC BEER GUYS (Mar. 21, 2017), <https://www.ncbeerguys.com/craft-freedom-when-is-craft-freedom-legislation-arriving/>.

¹⁵⁵ See Morrill, *supra* note 128 (discussing brewers’ support of the HB 500 bill which would raise the 25,000-barrel self-distribution cap).

¹⁵⁶ Daniel Hartis, *This New Bill is About Way More Than Raising a Brewery’s Self-Distribution Cap*, CHARLOTTEFIVE (Apr. 13, 2017), <http://www.charlottefive.com/house-bill-500-craft-freedom/>.

continued . . .

But at the eleventh hour, the North Carolina Alcoholic Beverages Commission (ABC) “gutted” House Bill 500, removing the self-distribution cap amendment.¹⁵⁷ Sponsor Rep. Chuck McGrady stated “[t]he reason we struck [the amendment] is we didn’t have the votes.”¹⁵⁸ He further went on to state that “[he] didn’t have the votes in the committee” and “[he] wasn’t sure [he] had the votes in the House” and “[he] was pretty sure [he] wouldn’t have the votes in the Senate.”¹⁵⁹

Craft Freedom condemned the result as symptomatic of “backroom politics,” and Olde Meck announced that as a result it had to halt plans to build a second brewery in Cornelius.¹⁶⁰ News articles chronicled Craft Freedom’s frustration with other events that appeared to be anything but coincidence—such as lawmakers being told earlier in the month that nearly one quarter of North Carolina’s craft breweries were failing to wholly comply with all relevant excise tax reporting and avowed critics of raising the cap being named to the ABC in the years prior.¹⁶¹ Others bemoaned any effort to negotiate the barrel number for the new cap.¹⁶²

This result should not have come as a surprise, since an earlier lobbying attempt by Red Oak Brewery in 2009 met a similar fate.¹⁶³ The NCBWWA’s healthy bipartisan campaign contributions could not

¹⁵⁷ Jim Morrill, *NC Craft Brewers Lose Battle to Big Distributor: ‘It’s Backroom Politics’*, CHARLOTTE OBSERVER (Apr. 20, 2017 03:44AM), <http://www.charlotteobserver.com/news/politics-government/article145602789.html>.

¹⁵⁸ Sarah Willets, *HB 500 Sponsor: Wholesaler’s “Made Clear They Weren’t Going to Discuss” Raising Barrel Cap*, INDY WEEK: NEWS BLOG (Apr. 20, 2017, 12:38PM), <https://www.indyweek.com/news/archives/2017/04/20/hb-500-sponsor-wholesalers-made-clear-they-werent-going-to-discuss-raising-barrel-cap> (alteration in original).

¹⁵⁹ *Id.* (alteration in original).

¹⁶⁰ Morrill, *supra* note 157.

¹⁶¹ *Id.*; Matt McKenzie, *Craft Freedom Continues Fight After House Bill 500 Change*, CHARLOTTE MAG. (Apr. 20, 2017), <http://www.charlottemagazine.com/Charlotte-Magazine/April-2017/Craft-Freedom-vows-to-continue-fight-after-sudden-change-to-House-Bill-500/> (including John Bell, the new member, receiving a \$4,000 campaign contribution from the NCBWWA in 2016).

¹⁶² Morrill, *supra* note 157 (“‘We weren’t given an opportunity to provide any input on the bill,’ Tim Kent of the NCBWWA said. ‘We were sort of put in a position of take it or leave it. And we chose to leave it.’”); McKenzie, *supra* note 161 (stating that Craft Freedom had proposed 200,000 as a highball number at the advice of SPS, but later revelations revealed that Craft Freedom officials would have been open to negotiating a new cap anywhere between 35,000 and 100,000 barrels).

¹⁶³ Tamayo, *supra* note 16, at 2232 (citing Mark Binker, *Battle’s Brewing Over Law*, GREENSBORO NEWS & REC. (Mar. 14, 2009), http://www.greensboro.com/news/battle-s-brewing-over-law/article_141823b3-7a0c-5627-968b-1b0a8181418e.html).

have hurt.¹⁶⁴ In the end, Craft Freedom’s lobbying efforts proved fruitless. Compared to the lobbying force of NCBWWA, Craft Freedom brought a “knife to a gunfight.”¹⁶⁵ To borrow Shumaker’s biblical analogy, Goliath won handily.¹⁶⁶

VI. CRAFT FREEDOM’S CONSTITUTIONAL CHALLENGE TO THE NORTH CAROLINA SELF-DISTRIBUTION CAP AND FRANCHISE LAW

A. Craft Freedom’s Constitutional Challenge to the 25,000 Self-Distribution Cap

Despite the previous loss, Craft Freedom is again taking its fight to the courts. Craft Freedom hired Drew Erteschik¹⁶⁷ and former North Carolina Supreme Court Justice, Bob Orr,¹⁶⁸ and decided to challenge the constitutionality, under the North Carolina Constitution, of both the cap and franchise requirement.¹⁶⁹ Orr has expressed optimism, despite the earlier defeat; “[t]here’s a strong constitutional and legal claim that these craft brewers can make that these restrictions (on production) are unconstitutional It’s a very strong case under our state constitution of just pure economic protectionism for our wholesalers.”¹⁷⁰

Craft Freedom filed its initial complaint on May 15, 2017, in the Wake County Superior Court of North Carolina.¹⁷¹ In essence, Craft Freedom argues that the General Assembly is artificially suppressing economic growth via the distribution cap and the alcohol franchise

¹⁶⁴ Dalesio, *supra* note 119 (“The political-action committee affiliated with the North Carolina Beer & Wine Wholesalers Association gave more than \$500,000 to political candidates of both parties and the parties themselves in the five years prior to this election year, according to state campaign finance records. Executives of the state’s roughly two dozen wholesalers gave more.”).

¹⁶⁵ Willets, *supra* note 158 (“During the 2012, 2014, and 2016 election cycles, the association gave a total of \$696,462 in political contributions. For comparison, in the 2016 cycle, the Craft Brewers Guild gave \$13,000 and New Belgium Brewing Company \$8,000. Neither gave in the previous two cycles.”).

¹⁶⁶ Maddrey, *supra* note 20; *see* Willets, *supra* note 158.

¹⁶⁷ *See* Thomas, *supra* note 23.

¹⁶⁸ Andrew Dunn, *NoDa Brewing and OMB are Taking Their Freedom Fight to Court*, CHARLOTTE AGENDA (May 16, 2017), <https://www.charlotteagenda.com/90779/noda-brewing-omb-taking-freedom-fight-court/>.

¹⁶⁹ Complaint at 1–2, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (17-CVS-005976).

¹⁷⁰ Morrill, *supra* note 157.

¹⁷¹ Complaint at 22, *Craft Freedom*, (17-CVS-005976). *See also* N.C. GEN. STAT. § 1–267.1(b1) (noting that any facial challenge to the validity of an act of the General Assembly shall be heard and determined by a three-judge panel of the Superior Court of Wake County).

law.¹⁷² The complaint states that the laws “punish small business owners for their hard work by stripping them of their businesses when they achieve ‘too much success’ forcing them to hand their businesses to private parties who reap the profits.”¹⁷³

The complaint takes specific issue with the franchise requirement; appealing to free-enterprise concepts in arguing that “[l]ike any business, the plaintiffs are entitled to enjoy the fruits of their own labor as well as the freedom to choose where, when, to whom, and for how much their own product is sold.”¹⁷⁴ Further, the suit contends that social and economic changes in the way beer is brewed and distributed have “flipped on its head” the purpose behind the law, effectively “insulat[ing] private distributors—and, ironically, mega-breweries . . . from natural market competition . . . [by] self-distributing craft breweries.”¹⁷⁵ The suit also points to the disincentive for investment by potential entrepreneurs who may suddenly see the value of the investment drop off after yielding its distribution and intellectual property rights to a wholesalers “because the brewery’s access to market rests in the hands of other private companies that have no vested interest in the success of the brewery.”¹⁷⁶ Ex parte thoughts on the matter were not so muted and rooted in policy; Olde Meck’s founder, John Marrino, called the wholesalers a “cartel.”¹⁷⁷

B. Craft Freedom’s Constitutional Challenge to the Franchise Law

In addition to challenging the constitutionality of North Carolina’s self-distribution cap, Craft Freedom is also seeking to have the state’s franchise law declared unconstitutional.¹⁷⁸ The current law states that producers cannot merely use distributors temporarily, or on a per-transaction basis, but rather, producers must enter into a binding franchise agreement that may only be terminated in limited circumstances.¹⁷⁹ The legislature originally intended to protect small distributors against huge, consolidated wholesalers, but with the rise of small, independent craft breweries, the distributor requirement is

¹⁷² Jennifer Thomas, *Craft Brewers v. North Carolina: Lawsuit Contends Self-Distribution Cap is ‘Unconstitutional’*, CHARLOTTE BUS. J. (May 15, 2017, 2:09 PM), <https://www.bizjournals.com/charlotte/news/2017/05/15/craft-brewers-vs-north-carolina-lawsuit-contends.html>.

¹⁷³ Complaint at 2, *Craft Freedom*, (17–CVS–005976).

¹⁷⁴ *Id.*

¹⁷⁵ Complaint at 7, *Craft Freedom*, (17–CVS–005976) (alteration in original).

¹⁷⁶ *Id.*

¹⁷⁷ Thomas, *supra* note 172.

¹⁷⁸ Complaint at 2, *Craft Freedom*, (17–CVS–005976).

¹⁷⁹ N.C. GEN. STAT. §§ 18B–1300–09 (2016).

backfiring.¹⁸⁰ Once locked into a franchise agreement, it is extremely difficult for the brewer to exit, although recent revisions have made terminations somewhat easier.¹⁸¹ With a diminished ability to terminate the relationship and enforce the terms that were negotiated, breweries often find themselves at the mercy of their distributor.¹⁸²

1. *A Problem with “Parking”*

Under the franchise system, distributors may contract with multiple breweries while simultaneously selling each brewers’ products, but brewers do not have the ability to contract with two or more distributors.¹⁸³ This dilemma creates the risk of “parking”—an industry term describing the situation in which a neglected brewery’s product collects dust in the distributor’s warehouse, while the distributor focuses on selling other brewer’s products, for reasons other than customer preference.¹⁸⁴ Distributors deny the existence of this problem, especially considering many states require distributors to purchase the beer they will deliver.¹⁸⁵ The recent efforts of macrobrewers to create their own mass-produced quasi-craft beers, such as Anheuser-Busch’s Shock Top, only complicates matters—as these products allow retailers to purchase something beyond Bud Light while remaining in the good graces of Big Beer.¹⁸⁶ Meanwhile, distributors can become frustrated with a brewery’s “pie-in-the-sky” expectations that their product will become the next big thing.¹⁸⁷

In Illinois, for example, state law prohibits producers or distributors from giving “anything of value” to bars, with narrow exceptions for

¹⁸⁰ *Id.* at § 18B–1300 (2016).

¹⁸¹ See *infra* notes 204–11 and accompanying text (discussing recent revisions to North Carolina’s franchise law).

¹⁸² Tamayo, *supra* note 16, at 2243–44; Cagann, *supra* note 58, at 69; see also Telephone Interview with Shauna Barnes, *supra* note 15 (noting that just because a brewer has the ability to leave its distribution agreement does not mean that the brewer will do so without good reason, since it hurts a brewer’s reputation to change distributors “willy-nilly”). “Note that under franchise laws, there’s no guarantee that the distributor will meet these [bargained for] requirements, and termination of a franchise is a costly and time-consuming endeavor of uncertain success, even with the strongest case.” E-mail from Shauna Barnes, Gen. Counsel, Dogfish Head Brewery, to Luke Basha (Sept. 28, 2017, 05:53 EST) (on file with author) (alteration in original).

¹⁸³ Tamayo, *supra* note 16, at 2234.

¹⁸⁴ *Id.* at 2234 n.245.

¹⁸⁵ *In re Beer Distrib. Antitrust Litig.*, 188 F.R.D. 549, 551 (N.D. Cal. 1998).

¹⁸⁶ *The History of Shock Top*, SHOCK TOP BEERS, <https://shocktopfacts.weebly.com/history.html> (last visited Mar. 27, 2018).

¹⁸⁷ Tamayo, *supra* note 16, at 2234–35.

signage and marketing materials.¹⁸⁸ Ideally, this means that a bar has no motivation, other than customer choice, to serve one beer over another. However, “[s]tories are not uncommon of breweries with deep pockets installing taplines or other equipment, or throwing in free kegs of beer for every so many kegs purchased, with the goal to win the allegiance of bar owners.”¹⁸⁹ Such instances are not limited to under the table dealings in Illinois; but rather, Anheuser-Busch has set up a dealer-incentive program that rewards distributors for focusing their efforts on selling Anheuser-Busch products.¹⁹⁰

2. *Yielding of Marketing Control*

A typical franchise agreement requires that a brewery yield control of marketing efforts to its distributor.¹⁹¹ Some breweries welcome the chance to bring in a hired-gun who: (1) knows how to sell beer, (2) has relationships with retailers, and (3) maintains the infrastructure to handle the logistics of delivery, as they realize that not all brewers are master salesmen, and beyond a certain point, self-distribution is inefficient.¹⁹² For better or worse, utilizing a distributor allows a brewery to cut the cost of its in-house distribution and marketing departments.¹⁹³

Some beer purists see the arrangement as a chance to free themselves of the paperwork associated with their craft, so in turn, they can focus on brewing.¹⁹⁴ The benefit of a distribution relationship is further supported by the notion that some North Carolina breweries have determined that the costs incurred from self-distribution roughly equate to the profit markup that is yielded to the distributor.¹⁹⁵ Other more passionate brewers feel confident in their own marketing

¹⁸⁸ Lee, *supra* note 17, at 152.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 164 n.163; Tamayo, *supra* note 16, at 2217 n.133 (citing David Kesmodel, *Beer Distributors Across U.S. Look Beyond Anheuser Busch*, TUCSON CITIZEN (Feb. 7, 2008), <http://tucsoncitizen.com/morgue/2008/02/13/76319-beer-distributors-across-u-s-look-beyond-anheuser-busch/>) (explaining the “100 percent Share of Mind” that Anheuser-Busch used to incentivize distributors to exclusively carry their products).

¹⁹¹ N.C. GEN. STAT. § 18B-105 (2016).

¹⁹² Tamayo, *supra* note 16, at 2234, 2235-36 (“Oscar Wong, owner of Highland Brewery in Asheville, believes that above a certain limit, which he estimates to be 10,000 barrels, self-distribution is no longer economically efficient); Telephone Interview with Shauna Barnes, *supra* note 15 (“[O]nce you get to a certain size, self-distribution does not make any sense.”).

¹⁹³ Maddrey, *supra* note 20.

¹⁹⁴ Tamayo, *supra* note 16, at 2233.

¹⁹⁵ *Id.* at 2232 n.230, n.238.

abilities—as one Oregon distributor admitted, “[n]o one can tell the story of your beer as well as you can.”¹⁹⁶

The fact that Craft Freedom breweries are pushing ahead despite open admissions from some North Carolina breweries that self-distribution above 10,000-barrels is not economically feasible¹⁹⁷ indicates not only that Craft Freedom breweries truly care about maintaining control over their product, but also their reputation. Bill Sherrill of Red Oak recognizes that much larger breweries have fallen, and are still falling, out of public favor as consumers perceive their beer as lower quality.¹⁹⁸ Generally, most consumers do not care who delivers their beer (to the extent it does not affect the price),¹⁹⁹ but Sherrill is extremely proud of the fact that Red Oak is brewed in accordance with the German Purity Law of 1516.²⁰⁰ This centuries-old law governs the brewing process and handling of the beer during distribution, and Bill Sherrill knows that many beer-drinkers view this as a selling point.²⁰¹ For Red Oak, yielding control of distribution to a distributor via a franchise agreement risks falling out of compliance with the Purity Law and possibly even losing their trademark,²⁰² although a brewery with such a requirement is free to negotiate such terms to ensure compliance with the Purity Law into a franchise agreement.²⁰³

¹⁹⁶ *Id.* at 2235 n.248.

¹⁹⁷ *See id.* at 2235–38 (discussing the debate between various interviewed North Carolina brewers as to whether self-distribution is profitable beyond annual production of 10,000 barrels).

¹⁹⁸ *Id.* at 2236 (citing PHILIP VAN MUNCHING, BEER BLAST 44 (1997)); *see supra* notes 32–35 and accompanying text (discussing the declining popularity of Budweiser).

¹⁹⁹ Tamayo, *supra* note 16, at 2236–37.

²⁰⁰ *Id.* at 2236 n.255.

²⁰¹ *Id.*

²⁰² *See* Dawn Donut Co. v. Hart’s Food Stores, Inc., 267 F.2d 358, 366 (2d Cir. 1959) (“[T]he Lanham Act places an affirmative duty upon a licensor of a registered trademark to take reasonable measures to detect and prevent misleading uses of his mark by his licensees or suffer cancellation of his federal registration.”). If Red Oak advertises its beer as brewed in accordance with the German Purity Law and the distributor stores it in a way that causes the beer to fall out of accordance with the law, Red Oak must monitor its distributor for such breaches or risk losing their trademark. *See* Tamayo, *supra* note 16, at 2236 n.255.

²⁰³ Telephone Interview with Shauna Barnes, *supra* note 15. Most distribution agreements set out some terms governing the conditions under which the beer will be stored before the wholesaler resells it to the retailer. *Id.* There are some standard industry expectations (i.e. that the wholesaler will not leave the beer out in the sun to “skunk”), but a brewer with more stringent expectations must negotiate for these additional storage and transportation responsibilities to be undertaken by the wholesaler—their success will hinge on the brewer’s bargaining power, which is linked to their market share and popularity. *Id.* Of course, if terms providing for

3. *Recent Revisions to the North Carolina Franchise Law*

Although some North Carolina brewers doubt the profitability of self-distribution beyond a certain production limit, the brewers were nearly unanimous in thinking that the state's distribution franchise laws were in need of a facelift.²⁰⁴ In 2012, brewers got their wish with Senate Bill 745, a compromise bill, but Craft Freedom raised more criticisms of the franchise system in its complaint.²⁰⁵ The revisions contained several key alterations that made it easier for brewers to exit an existing franchise agreement, including prohibiting any modifications to the statutory definition of "good cause" meriting termination in the franchise agreement.²⁰⁶ Another change allows a brewer to effectively buy their way out of an existing franchise agreement by paying the "fair market value for the distribution rights for the affected brand" to the wholesaler.²⁰⁷ The Bill provides that fair market value is determined not as an average price, but as the "the highest dollar amount at which a seller would be willing to sell and a buyer willing to buy."²⁰⁸

The revisions also impose a mandatory mediation requirement for disputes between wholesalers and suppliers,²⁰⁹ a noteworthy addition, since few states have such a requirement.²¹⁰ The mediation requirement does not govern the current dispute because Craft Freedom is challenging the constitutionality of the franchise requirement.²¹¹ If Olde Meck were to have a major disagreement with one of its distributors, then the mediation requirement would govern.

such added responsibility (i.e. to implement storage and transportation policies consistent with the German Purity Law) are negotiated, the brewery ought to also negotiate a right to occasionally inspect the distributor's premises and practices, and a breach of such requirements is likely a material breach, allowing the brewer to terminate the franchise agreement, unless the wholesaler has negotiated an opportunity to remedy the breach or state law provides for such a remedy period. *Id.*

²⁰⁴ Tamayo, *supra* note 16, at 2242.

²⁰⁵ Complaint at 2–3, 9–19, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (17–CVS–005976); *see also New North Carolina Beer Franchise Act Now Effective*, STRIKE & TECHEL, (June 15, 2012), <http://www.alcohol.law/digest/new-north-carolina-beer-franchise-act-now-effective>.

²⁰⁶ N.C. GEN. STAT. § 18B–1305(a) (2016).

²⁰⁷ *New North Carolina Beer Franchise Act Now Effective*, *supra* note 204.

²⁰⁸ § 18B–1305(a1).

²⁰⁹ *New North Carolina Beer Franchise Act Now Effective*, *supra* note 204.

²¹⁰ *Id.*

²¹¹ N.C. GEN. STAT. § 1–267.1(b1) (2016) (noting that any facial challenge to the validity of an act of the General Assembly shall be heard and determined by a three-judge panel of the Superior Court of Wake County).

VII. ANALYSIS OF CRAFT FREEDOM'S ARGUMENTS AT THE RULE 12 STAGE

Craft Freedom's complaint, news articles covering the lobbying attempt, and the subsequent lawsuit have attracted public and national attention to Craft Freedom's challenges to the self-distribution cap and franchise law.²¹² As of the time of writing this Comment, both parties have submitted their briefs supporting or opposing the state's motion to dismiss; Judge Allen Baddour heard oral arguments; and his decision to grant or deny dismissal is forthcoming.²¹³ Therefore, this Comment will evaluate Craft Freedom's claims and discuss contradictory arguments that the state has used to combat Craft Freedom's challenges. This analysis will cover the larger arguments each party has raised in their respective motions related to the state's motion to dismiss but will not provide an exhaustive review of every theory advanced in those briefs.

A. Standing

The matter of standing garnered particular attention at the Rule 12 stage. Olde Meck and NoDa have yet to cross the 25,000-barrel threshold, and therefore, arguably have not suffered the requisite injury necessary to challenge the cap and franchise law.²¹⁴ On this matter, special deputy attorney general Matthew Tulchin argued that the breweries have not proved that their injury is "imminent" or that they have exhausted all administrative remedies before suing.²¹⁵

As a background matter, standing is a threshold requirement for a court to be able to assert subject matter jurisdiction.²¹⁶ For federal courts, the matter of standing is drawn from the "case or controversy" language derived from Article III of the United States Constitution;²¹⁷ and the Supreme Court established a three-pronged test for determining

²¹² See, e.g., Dalesio, *supra* note 119; John Trump, *Craft Breweries Make Constitutional Challenge to Beer Distribution Laws*, CAROLINA J. (May 16, 2017, 4:43 AM), <https://www.carolinajournal.com/news-article/craft-breweries-make-constitutional-challenge-to-beer-distribution-laws/>.

²¹³ See Thomas, *supra* note 23.

²¹⁴ See Maddrey, *supra* note 20; Thomas, *supra* note 23.

²¹⁵ See Thomas, *supra* note 23.

²¹⁶ *Aubin v. Susi*, 149 N.C. App. 320, 324 (2002) ("Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction.").

²¹⁷ *Transcon Gas Pipe Line Corp. v. Calco Enter.*, 132 N.C. App. 237, 246 (1999) ("Constitutionally, a plaintiff can only have standing if it satisfies the 'case or controversy' requirement of Article III of the Constitution of the United States.") (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

if Article III standing exists in *Lujan v. Defenders of Wildlife*.²¹⁸ However, States are not bound by the standing requirements in Article III.²¹⁹ Nonetheless, some States, including North Carolina, still look to the federal court's standing analysis for guidance in making their own determination of standing.²²⁰

The matter of whether the court would require the breweries to actually cross the 25,000-barrel threshold, and in turn, violate the statute is hotly debated.²²¹ If a brewery did this, they would likely incur criminal penalties from the North Carolina Alcoholic Beverage Commission (NC ABC)²²²—and Tulchin argued that the extent of the breweries' injuries, if any, is unknown at the moment since the severity of the penalty may vary based on the extent of the violation.²²³ In court,

²¹⁸ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (“Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical.”’ Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.’ Third, it must be likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” (alteration in original)).

²¹⁹ *See New York State Club Ass’n v. City of New York*, 487 U.S. 1, 8 n.2 (“Nonetheless, an independent determination of the question of standing is necessary in this Court, for the special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts.”).

²²⁰ *Next Advisor Continued, Inc. v. LendingTree, Inc.*, 15 CVS 21379, 2017 WL 2590777, at *7 n.8 (N.C. Super. Ct. June 14, 2017). “Although ‘North Carolina courts are not constrained by the “case or controversy” requirement of Article III of the United States Constitution[,]’ North Carolina courts have ‘refer[red] generally to a party’s right to have a court decide the merits of a dispute’ as a question of ‘standing.’” *Id.* (quoting *Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114 (2002)).

²²¹ *State’s Brief in Support of Its Motion to Dismiss and Motion to Transfer*, at 22, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (17–CVS–005976) (“As the Complaint makes perfectly clear, Plaintiffs do not produce or sell more than 25,000 barrels of beer in a year. Therefore, the statutory provisions of which Plaintiffs complain are not applicable to them[.]”); *Plaintiff’s Brief in Opposition to the State’s Motion to Dismiss and Motion to Transfer*, at 17, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (17–CVS–005976) (“[T]he State’s argument on standing is just a game of cat and mouse: The State taunts the Plaintiffs for not violating the challenged laws, but it knows that if the Plaintiffs had done so, it would pursue them as criminals.”).

²²² N.C. GEN. STAT. § 18B–102(b) (2016) (“Violation a Class 1 Misdemeanor”); *see also* § 18B–1304(4)–(5) (criminalizing a supplier proposing an arrangement to a wholesaler where the parties could “waive compliance with any provision of this Article”).

²²³ *See Thomas, supra* note 23.

Judge Baddour inquired into this theory by asking what the state would prefer the breweries do before challenging the constitutionality of the statutes.²²⁴ He also noted that “[t]hey [Craft Freedom] are trying to handle this in a way that doesn’t violate first and ask questions second.”²²⁵

The current cap has already had concrete effects on Craft Freedom brewers—albeit indirectly. Olde Meck chose to shelve plans to build a second brewpub in Cornelius, North Carolina due to the barrel cap after House Bill 500’s failure.²²⁶ Olde Meck bought the twenty-four acre Cornelius site in February 2017; so perhaps the fact that it already owned the property before House Bill 500 failed adds to the standing analysis.²²⁷ For what it is worth in the standing analysis, the Cornelius project is back on.²²⁸ Jocelyn Ruark, Olde Meck’s marketing director, bluntly stated that Olde Meck would have to artificially stunt its own growth to not go over the cap.²²⁹ Additionally, Olde Meck pointed out that the current self-distribution cap would force them to terminate their in-house distribution employees.²³⁰ Olde Meck believes that compliance with the current cap would cost about 30% of their total revenue.²³¹

The State argues that the cap does not prohibit Olde Meck from opening and operating the new Cornelius site,²³² but rather provides an indirect disincentive based on Olde Meck’s pre-existing barrel production.²³³ This is part of the artificial “stunt[ing of economic] growth” that the petitioners mentioned in their Complaint and at the Rule 12 hearing.²³⁴ In a rather humorous exchange, Craft Freedom lawyers pointed out that a growing brewery’s choices are effectively

²²⁴ *Id.*

²²⁵ *Id.* (alteration in original).

²²⁶ McKenzie, *supra* note 161.

²²⁷ *Id.*

²²⁸ Jennifer Thomas, *OMB Moving Forward with Cornelius Brewery Plans, Eyes 2019 Opening*, CHARLOTTE BUS. J. (Mar. 8, 2018, 2:47 PM), <https://www.bizjournals.com/charlotte/news/2018/03/08/omb-moving-forward-with-cornelius-brewery-plans.html>.

²²⁹ Maddrey, *supra* note 20 (“NoDa has grown at a rate of 75–100% annually for the past three years, but that will drop to about 30% growth this year in part due to the concerns of this law.”); *see also* Complaint at 9, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. May 15, 2017) (No. 17–CV–005976).

²³⁰ Maddrey, *supra* note 20.

²³¹ *Id.*

²³² State’s Brief in Support of Its Motion to Dismiss and Motion to Transfer, at 21, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (17–CVS–005976) (“Plaintiffs have failed to allege facts sufficient to show they have suffered an ‘injury in fact.’”).

²³³ McKenzie, *supra* note 161.

²³⁴ Complaint at 9, *Craft Freedom*, (No. 17–CV–005976) (alteration in original).

limited—although they can certainly go back to school or become a barber.²³⁵ This delay to Olde Meck's business plan will likely be considered an economic injury, which suffices for satisfying Article III standing.²³⁶

Case law from a different jurisdiction indicates that the brewers should be able to establish standing, and the State's attempt at dismissal on the grounds of lack of standing should fail. Although the breweries did not cite this particular case, the United States District Court for the Western District of Kentucky provides a relevant analysis of a vineyard's standing to challenge a state self-distribution law.²³⁷ In *Cherry Hill Vineyards v. Hudgins*, a vineyard challenged a state law that prohibited out-of-state wineries that produced less than 50,000 gallons a year from shipping wine to Kentuckians, while allowing some Kentucky wineries to do so.²³⁸ As required of all federal courts, the United States District Court for the Western District of Kentucky cited the established Article III standing test from *Lujan*,²³⁹ and found that

²³⁵ Plaintiff's Brief in Opposition to the State's Motion to Dismiss and Motion to Transfer, at 34–35, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (No. 17–CV–005976).

Q: [Brewers] really only have two choices, right? They can enter into an agreement with a distributor or they can stunt their growth by producing fewer than 25,000 barrels . . . Is there another choice that I'm missing? A: They could become a distributor and not be a brewer. Q: So they could change professions, essentially? A: There's a lot of different opportunities. People do it all the time. Q: They could become barbers too, right? A: Absolutely. Q: So if they want to remain a brewer, then their choices are to enter into a perpetual lock-in contract with the distributor, or stunt their growth by remaining small under that 35 distribution cap? Is there a third choice? You said 'many choices.' A: I said there were other opportunities that they had. Q: Like changing professions? Anything else I'm missing, though? A: Well, they could go back to school.

Id. at 171–72 (citing Deposition of Robert A. Hamilton).

²³⁶ *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601, 606–07 (W.D. Ky. 2006) (citing *NRA of Am. v. Magaw*, 132 F.3d 227, 287 (6th Cir. 1997)). However, Olde Meck recently announced their plans to surge ahead with the Cornelius brewery location despite the ongoing litigation. Thomas, *supra* note 228. Similarly, NoDa will build a taproom and restaurant in Charlotte Douglas International Airport—although this does not necessarily affect their standing calculus since no additional beer will be brewed in the airport, but production will have to increase to meet the additional demand. Jennifer Thomas, *Inside NoDa Brewing's Expansion Plans for CLT*, CHARLOTTE BUS. J. (Feb. 15, 2018, 4:39 PM), <https://www.bizjournals.com/charlotte/news/2018/02/15/inside-noda-brewing-s-expanded-plans-for-clt.html>.

²³⁷ *Cherry Hill Vineyards*, 488 F. Supp. 2d at 606–08.

²³⁸ *Id.* at 605–06.

²³⁹ *Id.* at 606 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

the plaintiffs possessed standing and had suffered an injury in fact, even though they had not technically crossed the threshold.²⁴⁰ Although the United States Supreme Court has instructed federal courts “not to entertain constitutional questions in advance of the strictest necessity,” the *Cherry Hill* court realized that as a policy matter, nothing would be gained by requiring the plaintiff to violate the statute before challenging its constitutionality.²⁴¹ Although the *Cherry Hill* court was required to use the *Lujan* test for traditional Article III standing, the fact that a vineyard that had yet to cross the statutory threshold passed the same test that a North Carolina court is likely to employ supports the notion that standing should not be an issue for Craft Freedom in North Carolina state court.²⁴²

B. A Challenge of the Three-Tiered System

The State has also framed Craft Freedom’s challenges as an improper assault on the three-tiered system at-large.²⁴³ This is understandable, as the general three-tiered system has withstood plenty of judicial scrutiny and emerged “unquestionably legitimate.”²⁴⁴ And to an extent, they may be right.

Under current law, the self-distribution cap operates as an exception to the three-tiered system—without the self-distribution cap, suppliers could not self-distribute. Craft Freedom is not seeking to amend the cap; they want to repeal it to the extent that breweries would be allowed to self-distribute to their heart’s content.²⁴⁵ Although this might effectively allow suppliers to operate as distributors, this does not necessarily undermine the entire three-tiered system. After all, the self-distribution cap and three-tiered system currently coexist. For this reason, the State’s creative argument will also likely fail.

Note that this Article III standing test is not necessarily determinative in North Carolina state court. See *supra* notes 216–20 and accompanying text.

²⁴⁰ *Id.* at 606–07.

²⁴¹ *Id.* at 607 (citing *NRA of Am. v. Magaw*, 132 F.3d 272, 287 (6th Cir. 1997)).

²⁴² *Id.* at 606; see also *Lujan*, 504 U.S. at 560–61; *Next Advisor Continued, Inc. v. LendingTree, Inc.*, 15 CVS 21379, 2017 WL 2590777, at *7 n.8 (N.C. Super. Ct. June 14, 2017).

²⁴³ State’s Brief in Support of Its Motion to Dismiss and Motion to Transfer, at 31, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (17–CVS–005976).

²⁴⁴ *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

²⁴⁵ Complaint at 20, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. May 15, 2017) (No. 17–CV–005976).

C. Transfer to A Three-Judge Panel

As a procedural fallback if the case is not dismissed, the State is also seeking to have the case transferred to a three-judge panel, as opposed to a single Superior Court judge.²⁴⁶ This request is rooted in a dispute over the overall characterization of the constitutional challenge since North Carolina law requires facial challenges to statutes to be heard by a three-judge panel.²⁴⁷

Facial challenges arise when a plaintiff attempts to rebut the statute's presumption of constitutionality by "establishi[ng] that no set of circumstances exists under which the act would be valid."²⁴⁸ An as-applied challenge exists when a plaintiff contends that the particular statute is a constitutional "reasonable regulation."²⁴⁹ Presumably, the state believes that three-judges are better than one.

A cursory review of the complaint indicates that Craft Freedom is framing their lawsuit as an as-applied challenge, so a single judge is proper.²⁵⁰ Judicial recharacterization is not unheard of,²⁵¹ but the breweries will also likely prevail on this Rule 12 matter.

D. Sovereign Immunity

The State has also raised the sovereign immunity defense.²⁵² In doing so, they have characterized the breweries' request for "declaratory relief and injunctive relief directly under the North Carolina Constitution"²⁵³ as "claims pursuant to the Declaratory Judgment Act seeking injunctive relief"²⁵⁴—despite the fact that no references to the Declaratory Judgment Act appear in the complaint. This characterization would help the state since the Declaratory

²⁴⁶ See Thomas, *supra* note 23.

²⁴⁷ N.C. GEN. STAT. § 1-267.1(b1), 1A-1(b)(4) (2016).

²⁴⁸ State v. Bryant, 359 N.C. 554, 564 (2005) (alteration in original) (quoting State v. Thompson, 349 N.C. 483, 491 (1998)).

²⁴⁹ State v. Whitaker, 201 N.C. App. 190, 204 (2009).

²⁵⁰ Complaint at 4, *Craft Freedom*, (No. 17-CV-005976) ("[T]his lawsuit is an as-applied challenge . . .").

²⁵¹ Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring) ("Recharacterization is unlike 'liberal construction,' in that it requires a court deliberately to override the pro se litigant's choice of procedural vehicle for his claim. It is thus a paternalistic judicial exception to the principle of party self-determination . . .").

²⁵² See Thomas, *supra* note 23.

²⁵³ Complaint at 3, *Craft Freedom*, (No. 17-CV-005976).

²⁵⁴ State's Brief in Support of Its Motion to Dismiss and Motion to Transfer, at 15, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (17-CVS-005976).

Judgment Act is not a waiver of sovereign immunity.²⁵⁵

In its brief opposing the motion to dismiss, Craft Freedom’s lawyers point out that their claims are brought under the North Carolina Constitution directly, not any statute, just as the North Carolina courts allow.²⁵⁶ Further, Craft Freedom’s references to *Corum v. Univ. of North Carolina* are especially persuasive since the language from their complaint seems to directly mirror the state Supreme Court’s line of thought before declaring that “sovereign immunity is inapplicable.”²⁵⁷ For these reasons, it seems unlikely that the state will prevail on a matter that “could hardly have been clearer.”²⁵⁸

E. Statute of Limitations

At play is a three-year statute of limitations for constitutional wrongs.²⁵⁹ As is the case with any statute of limitations analysis, the parties are debating when the statute of limitations was tolled. The State contends that it tolled “approximately fifteen (15) years ago” when the particular statutes were enacted.²⁶⁰ Thus, the breweries’ time would be up. Craft Freedom countered that this theory is both “novel and aggressive” and that the “continuing wrong” doctrine governs.²⁶¹ In an especially clever maneuver, the plaintiffs cited a case where the judge, named Allen Baddour no less, struck down a ninety-eight-year-old

²⁵⁵ See generally *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 546–47 (2008) (discussing waiver of sovereign immunity).

²⁵⁶ Plaintiff’s Brief in Opposition to the State’s Motion to Dismiss and Motion to Transfer, at 11–12, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (No. 17–CV–005976) (citing *Tully v. City of Wilmington*, 2018 N.C. LEXIS 65, at *11) (“[T]his Court ‘has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights’ when no other state law remedy is available.”).

²⁵⁷ *Id.*; Complaint at 3, *Craft Freedom*, (No. 17–CV–005976); *Corum v. Univ. of North Carolina*, 330 N.C. 761, 783 (1992) (“This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights. . . . Having no other remedy, our common law guarantees plaintiff a direct action under the State Constitution for alleged violations of his constitutional freedom . . .”).

²⁵⁸ *Craig v. New Hanover County Bd. Of Educ.*, 363 N.C. 334, 338 (2009).

²⁵⁹ N. C. GEN. STAT. § 1–52(2) (2016).

²⁶⁰ State’s Brief in Support of Its Motion to Dismiss and Motion to Transfer, at 24, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (No. 17–CV–005976).

²⁶¹ Plaintiff’s Brief in Opposition to the State’s Motion to Dismiss and Motion to Transfer, at 19, *Craft Freedom*, (No. 17–CV–005976); *Williams v. Blue Cross Blue Shield*, 357 N.C. 170, 179 (2003) (“‘[C]ontinual unlawful acts’ . . . restart[] the running of the statute of limitations.”).

statute that prohibited use of profane language on public roads.²⁶²

F. The Rule 12 Stage

As the above analysis may have made clear, the parties seem to have drastically different ideas as to the nature of the suit and its procedural requirements. Such disputes over the nature of background facts are often the subject of disagreement when a Rule 12(b)(6) motion has been deployed since dismissal is only warranted when “it appears certain that plaintiffs can prove no set of facts which would entitle them to relief under some legal theory.”²⁶³

In fact, the plaintiffs went as far as to call the state’s characterization as “alternative facts,” and provided a helpful chart comparing how the breweries’ language in their complaint and the State’s subsequent characterization before claiming that “[t]he Rule 12 stage is no place for this dispute.”²⁶⁴ Although the State has done its due diligence to cut this lawsuit off at the knees, the author finds Craft Freedom’s argument persuasive, and some of the parties’ disagreement will serve as great fodder for the judge or judges that eventually hear this case.

VIII. ANALYSIS OF CRAFT FREEDOM’S BROADER CONSTITUTIONAL ARGUMENTS

At the risk of sounding obvious, if Craft Freedom survives the State’s motion to dismiss, as is likely, the North Carolina Superior Court of Wake County will hear the case on the merits. While the above discussion in Part VII may have bored the casual reader with discussion of the parties’ procedural maneuvering, this Part will attempt to discuss some of the more substantive matters that the breweries have brought to the court’s attention. After all, the Twenty-first Amendment gives states powers to regulate alcohol, but it “doesn’t mean they can ignore the rest of the Constitution.”²⁶⁵ Yet even if the state is victorious on its motion to dismiss, this analysis of some of the constitutional claims may still prove useful in evaluating Craft Freedom’s then-inevitable appeal.

²⁶² Plaintiff’s Brief in Opposition to the State’s Motion to Dismiss and Motion to Transfer, at 19–20, *Craft Freedom*, (No. 17–CV–005976).

²⁶³ *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225 (2010).

²⁶⁴ Plaintiff’s Brief in Opposition to the State’s Motion to Dismiss and Motion to Transfer, at 1, 26–29, *Craft Freedom*, (No. 17–CV–005976).

²⁶⁵ *Ind. Petro. Marketers & Convenience Store Ass’n v. Cook*, 808 F.3d 318, 322 (7th Cir. 2015).

A. Freedom to Contract

One of Craft Freedom's claims is that the franchise agreement requirement limits a brewery's freedom to contract.²⁶⁶ The seminal case on freedom to contract is *United States v. Lochner*, in which the Supreme Court held that a State may only restrict a person's freedom to contract when it is in the best interest of the health and safety of the State's citizens.²⁶⁷

At the Rule 12 hearing, Tulchin countered with a constitutional argument of its own.²⁶⁸ He framed the issue as "whether the brewery has a constitutional right to distribute its beer," before citing the American government's "long and complex history regulating the production [but not distribution] of alcohol" and other activities, such as gambling, as evidence of instances where the right to absolute contractual freedom clearly does not exist.²⁶⁹ This argument is reminiscent of how alcohol originally received special treatment by the courts, but is now viewed as an ordinary article of commerce.²⁷⁰

²⁶⁶ Complaint at 10, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (17-CV-005976) ("These laws dictate the terms and duration of the distribution agreements that breweries must enter once they exceed the Distribution Cap. As described below, the mandatory provisions of these laws are oppressive, one-sided, non-negotiable, and unconstitutional."). Of note, the distribution contracts signed in a brewery's early days may be a barebones contract of the absolutely essential terms. This is not necessarily a symptom of the brewery's diminished bargaining power, but more borne of their desperation as a fledgling brewery to get their products to market and establish a customer base, which can then be used as bargaining power when subsequently entering into a distribution agreement. *See supra* note 42 and accompanying text (discussing use of customer base as a negotiating factor); Telephone Interview with Shauna Barnes, *supra* note 15 ("We signed some of our initial distributor deals on what I affectionately call 'beer soaked napkins,' which were essentially one page documents that said: this distributor, these brands, this territory, and nothing else. Some of these do have beer rings on the originals, from where you can see that Sam [founder of Dogfish Head] and the distributor tried the beer before signing.").

²⁶⁷ *Lochner v. New York*, 198 U.S. 45, 58 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

²⁶⁸ *See* Thomas, *supra* note 23.

²⁶⁹ *See id.* (alteration in original); *see also* Dalesio, *supra* note 119.

²⁷⁰ *Granholt v. Heald*, 544 U.S. 460, 494-95 (2005) (Stevens, J., dissenting) ("Today many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products. That was definitely not the view of the generations that made policy in 1919 when the Eighteenth Amendment was ratified or in 1933 when it was repealed by the Twenty-first Amendment. On the contrary, the moral condemnation of the use of alcohol as a beverage represented not merely the convictions of our religious leaders, but the views of a sufficiently large majority of the population to warrant the

Although Craft Freedom may argue that the self-distribution cap no longer is needed to further the health and safety of the State since the cap is no longer needed to protect distributors from greedy breweries,²⁷¹ the *Lochner* era ended long ago. Additionally, the Supreme Court has since upheld statutes that infringe upon a party's total freedom to contract.²⁷²

B. Implied Obligation of Good Faith and Fair Dealing

The NCBWWA will likely claim that Craft Freedom's concerns of "parking" are moot since a brewery's relationship with a distributor contains an implied obligation to employ its "best efforts" in marketing and distributing.²⁷³ Given that beer is a fungible good, Article 2 of the Uniform Commercial Code (UCC) and its implied "best efforts" term applies to an exclusive brewer-wholesaler franchise relationship—unless otherwise negotiated.²⁷⁴ But, practically speaking, this implied contractual duty only goes so far: a wholesaler cannot possibly dedicate 100% of its efforts to sell one brewery's products when it has a portfolio full of other brands. Even if a retailer's customers request more craft IPAs, any wholesaler worth their salt will carry multiple brands, and consequently, cannot wholeheartedly promote the craft IPA over other beers in their portfolio. It will be particularly interesting to see how a "primary effort" clause, like Anheuser-Busch's, is viewed in this case.²⁷⁵ Therefore, the presence of a contractual implied "best efforts"

rare exercise of the power to amend the Constitution on two occasions.").

²⁷¹ T.A.C. Hargrove II, *Stone Didn't Come, But We Got the Bill: An Analysis of South Carolina Laws Affecting Craft Breweries*, 9 CHARLESTON L. REV. 335, 339 n.26 (2015).

²⁷² See, e.g., *W. Coast Hotel*, 300 U.S. at 400 (upholding state minimum wage laws); Stephen A. Siegal, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 19 n.78 (1991).

²⁷³ UCC § 2-306(2) (1999).

²⁷⁴ *Id.* ("A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale."); see also N.C. GEN. STAT. § 18B-1203 (2017) (providing that distributors are entitled to exclusive distribution of a particular brewer within their territory); UCC § 2-306 cmt.5 ("[T]he exclusive agent is required . . . to use reasonable effort and due diligence in the expansion of the market or the promotion of the product, as the case may be. The principal is expected . . . to refrain from supplying any other dealer or agent within the exclusive territory.").

²⁷⁵ Plaintiff's Brief in Opposition to the State's Motion to Dismiss and Motion to Transfer, Exhibit B, at 2, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. 2017) (17-CVS-005976), (containing Amended and Restated Anheuser-Busch, Inc. Wholesaler Equity Agreement).

continued . . .

term should not prevent Craft Freedom’s challenges.

C. Prohibition Concerns

To combat the distributors’ temperance-based defense of the 25,000-barrel cap, which the distributors have already raised in the press, the breweries argue that a higher barrel limit will not violate any of the principles of the temperance movement.²⁷⁶ There is a substantial amount of empirical evidence indicating that there is not any correlation between allowing self-distribution and higher per-capita alcohol consumption; if anything, prohibiting self-distribution seems to lead to higher levels of consumption.²⁷⁷ California, for example, has no barrel limit for self-distribution, and had an annual per-capita consumption of 19.9 gallons in 2008.²⁷⁸ Meanwhile, Louisiana prohibits self-distribution and had a per capita consumption of 27.1 gallons.²⁷⁹

The effect or lack thereof is not regional; North Carolina had a per capita consumption of 20.8 gallons;²⁸⁰ while South Carolina, which does not allow self-distribution, had 25.9 gallons.²⁸¹ Conversely, self-distribution may lower beer prices by as much as 25% by eliminating mark-ups charged at each stage in the process, and basic economics indicates that lower beer prices are likely to encourage more drinking.²⁸² However, all things considered, Craft Freedom should be able to present a public policy argument that survives the wholesalers’ temperance-policy defenses. If Craft Freedom’s lawyer’s ability to draw out admissions that “[a]ll three tiers can” effectively prevent overconsumption is any indication, this point is squarely in favor of the breweries.²⁸³

Wholesaler agrees that its primary effort will be to sell the Products, that it will devote greater effort to the Products than it devotes to any other products or services now or hereafter sold or distributed by Wholesaler, and that the efforts and resources devoted by Wholesaler to the sale of the Products will have priority over all other products and services sold or distributed by Wholesaler.

Id.

²⁷⁶ Tamayo, *supra* note 16, at 2238.

²⁷⁷ *Id.* at 2239.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Scott, *supra* note 27, at 431, 434.

²⁸³ Plaintiff’s Brief in Opposition to the State’s Motion to Dismiss and Motion to Transfer, Exhibit A, at 114–15, Craft Freedom, LLC v. North Carolina, (N.C. Super. Ct. 2017) (17–CVS–005976) (“Q: What do distributors do to prevent overconsumption, if anything? A: They provide advertising against the ills of

continued . . .

D. State Power to Regulate Distribution of Alcohol

Section 2 of the Twenty-first Amendment reserves to the States certain powers to regulate traffic in liquor and to control their liquor distribution systems.²⁸⁴ Twenty-first Amendment jurisprudence affords a state law a strong presumption of validity,²⁸⁵ and it “insulates state regulation of intoxicating liquors from many federal regulations.”²⁸⁶ States are given “wide latitude” to regulate as a result of Supreme Court decisions, although it is worth noting that the preeminent Twenty-first Amendment case was decided by a 5-4 margin.²⁸⁷ Though the text of the Amendment only gives States the power to regulate the “transportation or importation” of liquor, the Supreme Court has noted that “such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol.”²⁸⁸ The language of Section 2, rather than the history surrounding it, has been the focus of the Supreme Court.²⁸⁹

The Twenty-first Amendment is interpreted to give States “virtually complete control over whether to permit importation or sale of liquor and [, more importantly to the matter at hand,] how to structure the liquor distribution system.”²⁹⁰ The grant of power from the Twenty-first Amendment is also sometimes defined as a “broad power.”²⁹¹ The “virtually complete control” language continues to appear whenever the issue is raised.²⁹² A congressional bill proposed in 2010 sought to

overconsumption and for under-age consumption. They might sponsor events or provide grants to underage programs. Q: Is there any reason that breweries that self-distribute couldn't do those same things? A: All three tiers can do that. Q: So that's a yes? A: Yes.”).

²⁸⁴ *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 106 (1980); *see also* *Craig v. Boren*, 429 U.S. 190, 204–07 (1976); *Beskind v. Easley*, 325 F.3d 506, 512–13 (4th Cir. 2003) (holding that the Twenty-first Amendment was drafted in a way to incorporate several pre-Prohibition laws).

²⁸⁵ *North Dakota v. United States*, 495 U.S. 423, 433 (1990).

²⁸⁶ *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 101.

²⁸⁷ *Granholm v. Heald*, 544 U.S. 460, 464 (2005); *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 108 (quoting *Joseph E. Seagram, Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966)).

²⁸⁸ *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 107 (citing *Ziffirin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939)).

²⁸⁹ *Id.* at 106–07 (citing *State Board v. Young's Market Co.*, 299 U.S. 59, 63–64 (1936)); *contra* *Granholm*, 544 U.S. at 485 (“The Court also declined, contrary to the approach we take today, to consider the history underlying the Twenty-first Amendment.”).

²⁹⁰ *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 110 (alteration in original).

²⁹¹ *Capital Cities Cable v. Crisp*, 467 U.S. 691, 712 (1984) (citing *Ziffirin, Inc.*, 308 U.S. at 138).

²⁹² *Granholm*, 544 U.S. at 488 (citing *Cal. Retail Liquor Dealers Ass'n*, 445

continued . . .

codify this presumption and make challenges to state regulations under the Twenty-first Amendment extremely difficult.²⁹³

However, the States' ability to regulate the distribution of alcohol within their jurisdiction is subject to limitations. The Supreme Court has resisted efforts to advance the claim that Section 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution."²⁹⁴ The Supreme Court noted that it "should not, however, lose sight of the explicit grant of authority" contained in the Twenty-first Amendment.²⁹⁵ Federal interests are protected and have survived the Twenty-first Amendment.²⁹⁶ In cases where state and federal laws conflict, the state law survives when it relates to the time, place, and manner in which liquor can be sold or imported.²⁹⁷ Generally, the Twenty-first Amendment does not overrule the Commerce Clause, as this would be "an absurd oversimplification."²⁹⁸ States cannot control anything under the purview of the federal government, such as alcohol sales in national parks and military bases.²⁹⁹

Even though state laws restricting the time, place, and manner of distribution exist, courts are "show[ing] increasing skepticism of the state justifications for defending alcohol laws."³⁰⁰ For example,

U.S. at 110); *North Dakota v. United States*, 495 U.S. 423, 431 (1990).

²⁹³ See *Tamayo*, *supra* note 16, at 2231 n.224. ("Just recently, a house representative proposed a congressional bill, H.R. 5034, also known as the Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010, with the stated purpose of 'reaffirm[ing] and protect[ing] the primary authority of States to regulate alcoholic beverages.' See H.R. 5034, 111th Cong. (2010). This bill would, by amending parts of Chapter 27 of the U.S. Code, give a strong presumption of validity to state alcohol laws and put the burden on plaintiffs seeking to challenge state laws to show that such laws have no effect on the promotion of temperance, regardless of the degree to which they interfere with interstate commerce. See *id.* The general view among online commentators is that this bill was lobbied for by the National Beer and Wine Wholesalers Association in an effort to combat the perceived erosion of their distribution rights under *Granholm*.").

²⁹⁴ *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 108 (quoting *Young's Market Co.*, 299 U.S. at 64).

²⁹⁵ *Id.* at 107.

²⁹⁶ *Id.* at 108 n.11. "[T]he Twenty-first Amendment gives the States the highest degree of control, [but it] is not altogether beyond the reach of the federal commerce power" *Id.* (quoting *Nippert v. Richmond*, 327 U.S. 416, 425–26 n.15 (1946)).

²⁹⁷ *Capital Cities Cable v. Crisp*, 467 U.S. 691, 716 (1984).

²⁹⁸ *Id.* at 712–13 (citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331–32 (1964)).

²⁹⁹ See generally *North Dakota v. United States*, 495 U.S. 423, 441 (1990) (holding that the state regulation did not conflict with federal law); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 530 (1938).

³⁰⁰ *Tamayo*, *supra* note 16, at 2221 (alteration in original). See also *Beskind v. Easley*, 325 F.3d 506, 516–17 (4th Cir. 2003) (finding that a discriminatory wine

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economic protectionism is not a valid rationale to support a state's alcohol legislation.³⁰¹ However, Craft Freedom's complaint does not assert that in-state brewers are given preference over out-of-state brewers.³⁰² It is important to note that when protectionism is raised in these cases, it is often in the context of a state hoping to protect its in-state producers, and these statutes invariably fail.³⁰³ Craft Freedom's attorney characterized the advantages the distributors are given as "protectionist."³⁰⁴ At the Rule 12 hearing, Craft Freedom lawyers reiterated the breweries' larger theme that the cap operates as an "economic protectionism scheme" and a "barrier" or "wall" to natural economic growth that embodies the legislature's failure to understand how the beer market has shifted.³⁰⁵ However, this is a different use of the term than in cases where plaintiffs previously succeeded in challenging Twenty-first Amendment state laws.³⁰⁶ Critically, out-of-state brewers do not face location-based disadvantages under the current self-distribution cap so it is not "protectionist" in a problematic sense. Regrettably, this may be the Achilles' heel in Craft Freedom's argument.

distribution law violated the Commerce Clause and was not saved by North Carolina's core Twenty-first Amendment concerns); *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 901–04 (9th Cir. 2008) (holding that a state "post-and-hold" pricing regulation violated antitrust laws and the Twenty-first Amendment).

³⁰¹ See *supra* notes 165–169 and accompanying text (describing policy rationales that the Fourth Circuit and other courts have approved as valid bases for Twenty-first Amendment state laws).

³⁰² See generally Complaint, *Craft Freedom, LLC v. North Carolina*, (N.C. Super. Ct. May 15, 2017) (No. 17–CV–005976).

³⁰³ See, e.g., *Granholm v. Heald*, 544 U.S. 460, 489 (2005) ("State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment."); *Beskind*, 325 F.3d at 509; *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 35 (1st Cir. 2007) (stating the central purpose of the Twenty-first Amendment was not to empower States to favor local liquor industries by erecting barriers to competition); *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247, 1248–49 (W.D. Wash. 2005).

³⁰⁴ Complaint at 1, 2, 15, 19, 21, *Craft Freedom, LLC*, (17–CV–005976).

³⁰⁵ See Thomas, *supra* note 23 ("This case highlights an economic protectionism scheme designed to benefit one party at the expense of another, says Drew Erteschik, co-counsel for the craft brewers.").

³⁰⁶ Compare *id.* at 15, 21 (describing the only reason for the laws are to prohibit distributors' competition in order to maintain economic "protectionism"), with *Granholm*, 544 U.S. at 489 (explaining that in this case, attempts to discriminate in favor of local producers is not protected under the Twenty-first Amendment).

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E. Other States' Challenges to Self-Distribution Caps

There is little case law for either party to rely on since most case law challenging state alcohol distribution laws deal with alleged protectionist violations of the Commerce Clause, although some of these challenged statutes do have self-distribution components.³⁰⁷ Of the thirty-four states that allow self-distribution, none of the self-distribution caps have been directly challenged as unconstitutional.³⁰⁸ For this reason, the eyes of the entire American beer market are on Raleigh. A Craft Freedom victory would certainly result in other states' statutes coming under attack.³⁰⁹

F. North Carolina's Defense of the Cap

Observers originally mused as to how Governor, and former Attorney General, Roy Cooper would defend the current self-distribution cap.³¹⁰ Specifically, some observers noted that Governor Cooper "made it fashionable to refuse to represent the state in cases where it did not agree with the law being challenged."³¹¹ This meant that if Governor Cooper agreed with Craft Freedom and wanted North Carolina law to continue its relatively pro-alcohol trend, he could direct current Attorney General Josh Stein to effectively stand down.³¹²

After reaching the Rule 12 stage, it is clear that those predictions were premature. The state is presenting a thorough defense, reminiscent of their judiciary-approved defense in *Beskind* which focused on the state's interests in "regulating the consumption of alcoholic beverages, channeling the distribution of alcoholic beverages, enforcing a minimum age for the purchase and consumption of such beverages, limiting the location from where they are sold, controlling the contents of such beverages, and collecting taxes in connection with their sale and distribution."³¹³ Aside from Red Oak's earlier lobbying attempt to raise

³⁰⁷ See, e.g., *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 340 P.3d 849, 852 (Wash. 2015); *Family Winemakers of Cal. v. Jenkins*, 2008 U.S. Dist. LEXIS 112074, at *13–14 (D. Mass. 2008); *Cherry Hill Vineyard*, 505 F.3d at 32.

³⁰⁸ Telephone Interview with Shauna Barnes, *supra* note 15.

³⁰⁹ *Id.*

³¹⁰ Dunn, *supra* note 168.

³¹¹ *Id.*

³¹² See generally Chris Ruffin, *Gov. Roy Cooper Signs "Brunch Bill"*, WXII 12 NEWS, <http://www.wxii12.com/article/gov-roy-cooper-signs-brunch-bill/10248288> (last updated June 30, 2017, 11:31 PM) (discussing the recent so-called "Brunch Bill" signed by Gov. Cooper, which allows restaurants to sell alcohol before 10 AM on Sunday mornings).

³¹³ *Beskind v. Easley*, 325 F.3d 506, 516 (4th Cir. 2003).

the self-distribution cap and the *Beskind* lawsuit,³¹⁴ this is the only time that anyone has attacked the constitutionality of North Carolina's Twenty-first Amendment laws; and it will be interesting to see how a supposedly increasingly pro-craft beer government will react to the pressure and the risk of alienating the NCBWWA and its healthy campaign contributions.³¹⁵

IX. POTENTIAL ALTERNATIVES TO THE 25,000 BARREL SELF-DISTRIBUTION SYSTEM

Some observers have called for a compromise where brewers could always self-distribute on their “home-turf” where demand is highest and the logistics of delivery would be easiest, but must contract with distributors under a franchise agreement to expand their reach beyond that narrow geographic “home-turf” zone, regardless of their barrel production.³¹⁶ This alternative seems to remedy the concerns of the brewers and maintains a useful role for distributors, while solving the profitability concerns that are currently holding back a few North Carolina brewers from endorsing self-distribution outright.

Some writers support an alternative in the form of a small brewer exception to North Carolina's beer franchise laws, specifically that “brewers that constitute less than a specified percentage of a wholesaler's business are not subject to the mandatory contract terms specified by North Carolina's beer franchise law.”³¹⁷ This potential

³¹⁴ *Id.*; Tamayo, *supra* note 16, at 2232 n.230.

³¹⁵ See *supra* Section IV.B (discussing the General Assembly's expressed desire to grow the state's craft beer scene). Of course, the North Carolina judiciary and the General Assembly are not the same body and the courts are designed to be cordoned off from popular opinion. Furthermore, the General Assembly—the body that is designed to react to the will of the public most quickly—effectively rejected Craft Freedom's earlier lobbying efforts.

³¹⁶ WILSON TIMES, *supra* note 138.

³¹⁷ Tamayo, *supra* note 16, at 2224 (citing BREWERS ASS'N, *BA Position Statements*, <http://www.brewersassociation.org/pages/government-affairs/ba-position-statements> (click “Franchise Laws/Access to Market”) (last visited Mar. 27, 2018); see also Telephone Interview with Shauna Barnes, *supra* note 15 (“The argument in my mind is as follows: if the goal of franchise laws is to keep distributors from suffering irreparable harm, in that they'd have to close their doors and shut down their company if a critical supplier moves their brands, a craft brewery that comprises a small percentage of a wholesaler's total volume of beer sold should be able to enjoy freedom of contract if they're not getting the attention they feel they deserve in a wholesaler's house [an industry term]. A barrel metric isn't as great a metric: in a small distributor house, a 25bbl brand could comprise a significant portion of a brand's sales volume. In a larger house, a 25bbl brand is a blip. I'd also, frankly, liberalize the definition of ‘just cause’—which currently, in most states, is an incredibly high burden to meet. Finally, if it helps to have another comparison point—franchise laws protecting spirits distributors are very rare – these

carve-out would only give the brewer an exemption from the franchise requirement if it constituted a small percentage of the distributor's portfolio—a situation that would normally give a small brewery little negotiating power due to their small market share.³¹⁸ Other states have implemented this exception to their franchise requirement.³¹⁹

X. CONCLUSION

It appears that the breweries under the Craft Freedom banner have a convincing policy argument, but their argument unfortunately lacks legal precedent. The lack of any identical case law means that any permissive and pro-state case law may govern. The cases closest to being directly on point strike down alcohol regulations couched in protectionism; however, courts have only discussed this protectionism in the context of interstate commerce, not legislative efforts to protect the distributor class, and North Carolina lacks a statute that perfectly fits the mold of Craft Freedom's claims.³²⁰ Procedurally, they should certainly survive the State's motion to dismiss and earn their day in court, yet the final resolution of their efforts is less likely to be so successful. From a legal perspective, Craft Freedom's claim appears satisfying, but sadly it is all foam.

relationships are governed by contract where the traditional rules of efficient breach exist and flourish, and these distributor houses remain incredibly profitable businesses (Southern Wine & Spirits Glaziers, Breakthru Beverage, Charmer Sunbelt), even though some of the largest spirits brands in the world are swapped between distributor houses on a regular basis." (alteration in original)).

³¹⁸ Tamayo, *supra* note 16, at 2246.

³¹⁹ Beth Hatef, *Accommodation of Small Brewers in State Beer Franchise Laws*, BREWERS ASS'N, <https://www.brewersassociation.org/wp-content/uploads/2015/07/State-Law-Small-Brewer-Accommodations-Updated-7-27-2015.pdf> (July 2015) (describing various small brewer exceptions to the standard franchise agreement requirement enacted in Arkansas, Colorado, Illinois, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, and Washington). For North Carolina, the exceptions affect the ability of a small brewer to buy out their agreement for fair market value under N.C.G.S. § 18B-1305(a1) as discussed in *supra* notes 201-02 and accompanying text. *See id.*

³²⁰ *See supra* notes 279-284 and accompanying text.