

AK LEGISLATURE FINANCE COMMITTEES FILES 2007-2008 3155

	A	B	C	D	E	F
1	STATE	Limits Prosecution/ Statute states not a violation of law	Relinquishing parent is provided immunity from prosecution	In any prosecution- *If child is 6 days old or older, but less than 30 days	Relinquishing parent may reclaim child (I did not see where age was determined) prior to terminating rights	Few states who have returned child after relinquishment of parental rights
2	Alabama	Yes		Yes		
3	Arizona					
4	Arkansas			Yes		
5	California		Yes		Yes	
6	Colorado			Yes		
7	Connecticut	Yes			Yes	
8	Delaware			Yes	Yes	
9	Florida		Yes		Yes	
10	Georgia		Yes			
11	Idaho		Yes		Yes	
12	Illinois	Yes			Yes	
13	Indiana			Yes		
14	Iowa		Yes		Yes	
15	Kansas		Yes			
16	Kentucky		Yes		Yes	
17	Louisiana	Yes				Yes
18	Maine			Yes		
19	Massachusetts					
20	Maryland		Yes			
21	Michigan			Yes	Yes	
22	Minnesota		Yes			
23	Mississippi		Yes	Yes		
24	Missouri			Yes	Yes	
25	Montana		Yes		Yes	
26	Nevada	Yes				
27	New Hampshire					
28	New Jersey			*Yes		
29	New Mexico		Yes		Yes	
30	New York			*Yes		

	A	B	C	D	E	F
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31	North Carolina		Yes			
32	North Dakota		Yes			
33	Ohio		Yes			
34	Oklahoma		Yes			
35	Oregon			*Yes		
36	Pennsylvania	Yes				
37	Rhode Island		Yes		Yes	
38	South Carolina		Yes			
39	South Dakota	Yes				Yes
40	Tennessee		Yes		Yes	Yes
41	Texas			*Yes		
42	Utah			*Yes		Yes
43	Virginia			*Yes		
44	Wisconsin		Yes			
45	Washington		Yes			
46	West Virginia			*Yes		
47	Wyoming			*Yes	Yes	

State by State

STATE	Days to surrender	Who can surrender	Focus of Law	Anonymity for parent or agent of parent may be expressly guaranteed in statute	Statute states that the safe haven cannot compel parent or agent of parent to provide identifying info
Alabama	3 days		Protecting newborns		
Arizona	3 days	a parent or a parents agent	Protecting newborns	Yes	Yes
Arkansas	30 days	a parent or a parents agent			
California	3 days	a parent or a parents agent or another person having custody of the child	Protecting newborns		Yes
Colorado	3 days		Protecting newborns		
Connecticut	30 days	a parent or a parents agent			Yes
Deleware	14 days	not specified		Yes	Yes
Florida	3 days		Protecting newborns	Yes	
Georgia	Less than 1 week	Mother only			
Idaho	30 days	Custodial parent			Yes
Illinois	3 days		Protecting newborns	Yes	
Indiana	45 days				Yes
Iowa	14 days	a parent or a parents agent			Yes

STATE	Days to surrender	Who can surrender a parent or a parents agent or another person having custody of the child	Focus of Law	Anonymity for parent or agent of parent may be expressly gaurenteed in statute	Statute states that the safe haven cannot compel parent or agent of parent to provide indendifying info
Kansas	45 days				
Kentucky	14 days		Protecting newborns	yes	
Louisiana	30 days				Yes
Maine	31 days	not specified			Yes
Massachuselts	Less than 1 week				Yes
		Mother only/or another person approved by the mother to deliver infant on her behalf	Protecting newborns		
Maryland	Less than 3 days				
Michigan	3 days		Protecting newborns		Yes
		Mother only/or another person approved by the mother to deliver infant on her behalf			
Minnesota	3 days		Protecting newborns		Yes
Mississippi			Protecting newborns		
Missouri	Less than 30 day	a parent or a parents agent			

State by State

STATE	Days to surrender	Who can surrender	Focus of Law	Anonymity for parent or agent of parent may be expressly guaranteed in statute	Statute states that the safe haven cannot compel parent or agent of parent to provide identifying info
Montana	30 days				Yes
Nevada	30 days				Yes
New Hampshire					Yes
New Jersey	30 days	not specified			Yes
New Mexico	90 days	not specified			Yes
New York	5 days	not specified			Yes
North Carolina	7 days				Yes
North Dakota	1 year	a parent or a parents agen			Yes
Ohio	3 days		Protecting newborns	Yes	
Oklahoma	7 days			Yes	Yes
Oregon	30 days				Yes
Pennsylvania					Yes
Rhode Island	30 days	a parent or a parents agent			
South Carolina	30 days	a parent or a parents agent			Yes
South Dakota	60 days				Yes
Tennessee	3 days	Mother only	Protecting newborns		Yes
Texas	60 days			Yes	
Utah	3 days	a parent or a parents agent	Protecting newborns	Yes	
Washington	3 days		Protecting newborns	Yes	

State by State

STATE	Days to surrender	Who can surrender	Focus of Law	Anonymity for parent or agent of parent may be expressly gaurenteed in statute	Statute states that the safe haven cannot compel parent or agent of parent to provide indendifying info
West Virginia	30 days			Yes	Yes
Wisconsin	3 days		Protecting newborns	Yes	
Wyoming		a parent or a parents agent		Yes	Yes



# NCSL STATE LEGISLATIVE REPORT

ANALYSIS OF STATE ACTIONS ON IMPORTANT ISSUES

SEPTEMBER 2001

VOLUME 26, NUMBER 8

## Safe Havens for Abandoned Infants

By Nina Williams-Mbengue, *Policy Specialist*

After 13 infants were abandoned in the Houston, Texas, area within a 10-month period in 1999, state lawmakers acted to encourage desperate parents to leave their children in a safe location rather than simply abandoning them. Since the Texas law was adopted, 34 more states have enacted so-called "safe haven" laws. All the statutes generally promise that women who relinquish unharmed infants in designated safe places will not be prosecuted or provide that abandonment in compliance with the law constitutes an affirmative defense to prosecution.

So far, the effects of the new laws appear to be limited. Although some newborns have been left at hospitals or police and fire stations, others continue to be found in unsafe places. Serious concerns remain regarding the general lack of research on abandoned babies and their mothers, the implications of these laws on states' adoption and child welfare practices, the rights of the infant's father and the relatively small number of infants involved. Some child welfare experts have expressed concern that the laws do not include an examination of existing statewide child abuse prevention strategies and services for women at risk.

This report examines what is known about infant abandonment, provides an overview of key aspects of the legislation, describes state experience with the new laws and discusses some policy implications for lawmakers.

### The Scope of the Problem

What do we know about the incidence of infant abandonment? Unfortunately, national and state data on the number of abandoned infants are practically nonexistent. Most states do not keep track of these infants and, so far, the federal government does not require states to do so. A recent media survey

#### Discarded Infants and Boarder Babies

The infants referred to are those abandoned in public places—other than hospitals—such as parks, roadsides and dumpsters. They also are known as "discarded infants" and should be distinguished from "boarder babies," who are abandoned in hospitals due to pre- or perinatal drug or HIV exposure as described in the Abandoned Infants Assistance Act (P.L. 104-23). In the law, Congress defined abandoned infants as "...infants and young children who are medically cleared for discharge from acute care hospital settings but who remain hospitalized because of a lack of appropriate out-of-hospital placement alternatives."

conducted by the U.S. Department of Health and Human Services (HHS) reported 65 babies abandoned in public places in 1991. This number increased to 105 in 1998, with 33 of the babies found dead. HHS officials state these numbers could simply reflect heightened media interest in the issue and do not necessarily indicate an actual increase in baby abandonment.

Abandonment of infants in public places appears to be part of a much larger problem. Due to parental drug addiction, 31,000 infants were abandoned in hospitals in 1998. The number of children who suffer abuse and neglect from parents or caretakers each year is even greater. According to HHS, 836,000 children were confirmed as abused in 1999. Of those children, 1,100 died.

### **What Do We Know about Mothers Who Abandon Their Infants?**

Little is known about women who discard their newborns. Most of the women are never found. Anecdotal evidence indicates that most of the women are very young; their race and income vary. Most are very much in denial of their pregnancies and appear to be unaware of or afraid to use the resources available to help them before and during their pregnancies. Questions also exist about the fathers' role, the mothers' family situation and how often the pregnancy is the result of rape or sexual abuse.

Some experts suggest that women who are likely to abandon their infants also are the most likely to commit infanticide. In 1996, researcher Michelle Oberman studied women who commit infanticide. Her conclusions may shed light on women who abandon their babies. Oberman noted that the most fundamental shared characteristic of these women is their "seemingly self-imposed silence and isolation during pregnancy." Often, not even the woman's family and close friends are aware of her pregnancy. Oberman also asserted that women who commit infanticide are in "massive denial." The combination of denial and isolation means that these women do not seek prenatal care and do not make any plans for the birth or care of the baby.

The women Oberman studied represent every race, ethnicity and socioeconomic background. Most are young, single and live with parents, guardians or other relatives. If forced to live on their own, they would be poor and, presumably, financially unable to care

*Most women who discard their newborns are very much in denial of their pregnancies and appear to be unaware of or afraid to use the resources available to help them before and during their pregnancies.*

for an infant. The women may have suffered rape or abuse and the pregnancy is most likely their first. Surprisingly, women who commit infanticide are unlikely to have a history of substance abuse.

In response to the limited information on infant abandonment, federal House Resolution 465, introduced and passed in April 2000, recommended that local, state and federal statistics be kept on the number of infants abandoned in public places. Federal House Resolution 422, also introduced in 2000, sought to establish a Baby Abandonment Task Force to collect information and maintain a database (through the Bureau of Justice Statistics) on incidents of child abandonment, including information on demographics, circumstances, outcomes and trends. The legislation was reintroduced in January 2001 as H.R. 7, the "Baby Abandonment Prevention Act of 2001." Additionally, the "Safe Havens Support Act of 2001," H.R. 2018, proposes using TANF funds to support infant safe haven programs and requires HHS to conduct a study to determine the number of infants relinquished, abandoned or found dead and the characteristics and demographics of parents who have abandoned an infant.

*Thirty-five states (including 19 that passed laws in the 2001 session) now have some type of safe haven legislation.*

### **Review of State Laws**

Most states have child abandonment laws that allow authorities to prosecute parents or caretakers who willingly and permanently abandon their children. The goal of the new safe haven laws is to allow a parent to safely leave a baby without fear of prosecution for child abandonment and without resorting to the dangerous practice of leaving an infant in a trash bin, in a wooded area or beside a highway.

Thirty-five states (including 19 that passed laws in the 2001 session) now have some type of safe haven legislation. Most of the laws designate hospitals, emergency medical services, fire stations and police stations as safe locations. One exception is New York, which stipulates that the baby may be left with a suitable person or may be left in a suitable location so long as an appropriate person is promptly notified. Immunity is granted generally to employees who are required to accept and care for relinquished infants. About half of the states will not prosecute parents who relinquish unharmed infants. The remainder allow an affirmative defense to prosecution. State laws vary on the age of infants who may be relinquished. The ages range from 72 hours old or younger up to 5 days old or younger. The most common ages found in the statutes are 72 hours and 30 days.

Some of the issues addressed in statute include anonymity, parental rights public awareness and court procedure. (See sidebar for additional provisions.)

#### *Anonymity*

A number of states with safe haven legislation do not specifically mention anonymity. Twenty-four states do allow for anonymity, in which the person leaving the child is not required to disclose any information or may remain anonymous. The laws state that the receiving entity may request relevant medical history information about the infant and the infant's parents, but the parents are not required to provide that or any other information. Most of the laws also require that the receivers offer the parent written or verbal information about the safe haven law, what will happen to the baby, adoption alternatives and how to contact social services. They also may offer medical history forms that the parent may voluntarily and anonymously mail in later.

*Anonymity provisions, while meant to encourage parents to safely drop off their newborns, create difficulties for the child welfare and legal systems.*

The goal of the anonymity provisions is to encourage women to safely surrender their infants without fear of identifying themselves. South Carolina requires the person accepting the infant to offer information about the legal repercussions of relinquishment. The person receiving the infant also must attempt to obtain information about the infant, but the parent is not required to share anything. In addition, the parent must receive a self-addressed, stamped envelope to mail to the Department of Human Services with information about the child. Minnesota receivers must not inquire about identity, but may ask about medical history and may tell the parent how to contact social services. California, Connecticut, New Mexico and North Dakota issue the parent a numbered identification bracelet. If the parent changes his or her mind, possession of the bracelet in Connecticut, New Mexico and North Dakota creates a presumption that the parent has standing to participate in a custody hearing. In California, a parent can reclaim custody within 14 days of surrendering the child if he or she has a matching bracelet. Tennessee requires the facility receiving the infant to seek identifying and medical history information whenever possible and to inform the parent that such information will facilitate the infant's adoption. The parent is not required to provide the information.

#### *Termination of Parental Rights*

The anonymity provisions, while meant to encourage parents to safely drop off their newborns, create difficulties for the child welfare and legal systems. In order to free abandoned infants for adoption, states must hold termination of parental rights proceedings in court

to remove a parent's legal rights and obligations to his or her child. To abide by constitutional requirements for due process for parents, the state must attempt to locate and notify the parents of the termination proceeding and give them an opportunity to respond and appear in court.

Twenty-one states (see sidebar) address the termination of parental rights proceeding notification requirement in several different ways. Generally, they either state that the act of voluntarily surrendering the infant to a safe haven terminates parental rights or they provide for some type of notice to parents or require the department to conduct a reasonable search to locate the biological parents. South Carolina requires the Department of Social Services to publish notice of an abandoned newborn and to send a news release to broadcast and print media in the area with information about the infant, including the permanency hearing date and location. Iowa's law outlines the termination of parental rights process and the timelines for filing petitions. The legislation also requires notice to be provided to any known parent and to possible putative fathers registered with the state registrar of vital statistics. Florida's law creates a presumption that the parent leaving the newborn consents to the termination of his or her parental rights; however, the parent may claim the child up until the court enters a judgment terminating parental rights. The law also requires the department or a child-placing agency that has custody of the infant to initiate a diligent search to notify and obtain consent from the parent whose identity and location are unknown, other than the surrendering parent. Several states give parents a specified amount of time in which to claim maternity or paternity of the infant. If they do not petition for custody within that time period, they waive right to notice of, or participation in, any judicial proceeding for the adoption of the infant.

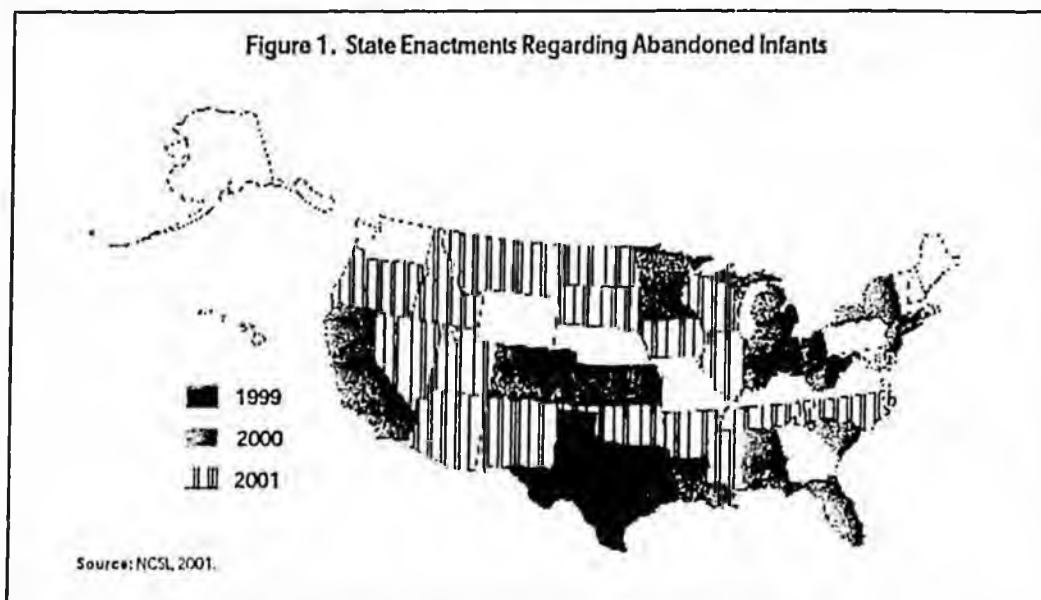
*South Carolina requires the Department of Social Services to publish notice of an abandoned newborn.*

#### *Public Awareness*

Thirteen states require media and public awareness campaigns to alert parents who are at risk of abandoning their infants to the new legal alternative. New Jersey's legislation requires the establishment of a public information program to promote safe placement alternatives for newborns, including a 24-hour, toll-free hotline. The law also appropriated \$500,000 for the program.

In addition to the 19 states that enacted legislation so far in 2001 (see figure 1), 11 considered bills. As was the case in 2000, the proposals seek to grant immunity to parents who

surrender unharmed infants in designated locations. Most of the provisions are similar to those already discussed.



### State Experience: How Effective Are the New Laws?

So far, the laws appear to have had a limited effect. Several states have begun to report on infants abandoned after the passage of the safe haven legislation. Approximately 33 babies have been legally relinquished including five each in Texas, Michigan and Alabama, six in

#### Major Provisions of Safe Haven Legislation

*Parent will not be prosecuted:* Ariz., Calif., Conn., Fla., Idaho, Iowa, Ill., Kan., Minn., Mont., Nev., N.M., N.D., Ohio, Okla., R.I., S.C., S.D. Tenn. and Wis.

*Affirmative defense:* Ala., Ark., Colo., Del., Ind., La., Mich., Miss., N.J., N.Y., N.C., Ore., Texas, Utah and W. Va.

*Termination of parental rights:* Calif., Conn., Del., Fla., Idaho, Ill., Iowa, La., Mont., Nev., N.J., N.C., Ohio, Ore., R.I., S.C., S.D., Tenn., Utah, W. Va., and Wis.

*Missing child registry search:* Ark., Fla., La., N.J., Okla. and S.C.

*Public awareness:* Conn., Fla., Iowa, Ill., Mont., N.J., N.Y., N.C., Okla., Ore., S.C. and Tenn.

*Funds available for infant:* N.M. and Wis.

*Genetic testing to determine maternity/paternity:* Del., Fla., Idaho, Ill. And Ohio

*Putative father registry search:* Ill., Tenn., and Utah

*Additional study of infant abandonment:* Colo., Idaho, Ill., La. and N.J.

New Jersey, four in California, two in Connecticut, Minnesota and Ohio and one each in Kansas and South Carolina. The numbers are approximate because officials in several states reported that they are not officially tracking the numbers of infants or that they had unofficial media counts of infants. Officials in New York, West Virginia and Florida reported that they were not sure that any infants had been relinquished because their laws do not require reporting or tracking that information.

Unfortunately, safe haven legislation has not prevented all cases of unlawful abandonment. Texas reported at

least 12 infants have been abandoned illegally since the passage of its law, but the abandonments occurred before the start of a public awareness campaign. None have been abandoned outside safe havens since this publicity. Louisiana reported that five infants have been abandoned illegally since passage of its law. Three babies died, and the parents are being prosecuted. At least five babies were illegally abandoned in California; two more of them were found dead. In Connecticut, one baby was discarded near a highway. Three babies have been abandoned illegally in Colorado. In one case, the mother is attempting to regain custody. Michigan reported nine attempts including one in which a judge ruled that the case was not a safe haven surrender because the parents had not been given enough information on their legal rights.

Updated links to abandoned infant enactments and bills can be found at NCSL's Child Welfare Web Site at <http://www.ncsl.org/programs/cj/cw.htm>.

Several states also reported on their public awareness campaigns, which they believe will be key to the effective implementation of the new laws. Texas did not include provisions for public awareness and continued to find abandoned babies until a private foundation donated money for a campaign. New Jersey used its \$500,000 appropriation to produce public service announcements, posters, pocket cards and brochures and has advertised the program in local and college newspapers, on billboards and on buses. Michigan included a \$200,000 appropriation to establish a toll-free information line and distribute press releases, a brochure and a poster targeting youth. Connecticut developed a brochure for distribution in high schools, middle schools, homeless shelters and drug treatment centers. The effects of these campaigns remain to be seen.

States reported on their efforts to provide training for personnel responsible for receiving and caring for infants as an essential component. The New Jersey Hospital Association provides ongoing training for hospital staff, and the state's attorney general works with prosecutors to ensure that parents who legally relinquish infants are not prosecuted. Michigan developed protocols and training material to be sent to entities that are designated to receive the infants. California sent material to hospitals and conducted a training for hospital supervisors on procedures for accepting infants. Connecticut will work with the state hospital association to train hospital workers and will develop training material for law enforcement officers.

Finally, many officials see voluntary data collection about the mothers as a critical element in developing better policy to address the needs of women who abandon their babies. The

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information could include the mother's medical history, race, length and condition of the pregnancy, any history of sexual or substance abuse, family situation, economic background, presence of domestic violence and information about the father. There is also a need to collect as much information as possible about the infant, including medical history, date of birth, preferred name for the child, sex, location of the birth and any problems encountered at birth.

### **Areas of Concern for Policymakers**

Proponents of safe haven legislation believe that these laws will significantly reduce the risk that a newborn will be abandoned in a manner that may result in death. They also feel that the laws will protect parents who believe they have no option other than abandonment, but who want to deliver their newborn to a safe shelter. Others hope that the laws may offer young women an immediate alternative to abandoning their infants, while giving policymakers and the public time to examine the issue and create system-wide reform to include teen pregnancy prevention programs, prenatal counseling, health services, adoption promotion and other support programs.

Critics of safe haven laws continue to voice concern in a number of areas that could have major implications for state lawmakers.

#### *Need for Examination of Statewide Services for Women at Risk*

Many child welfare experts state that, although safe haven legislation may be a good idea, it needs to be part of a larger effort to enhance services for women who are at risk of abandoning their infants. Experts from the fields of child welfare, mental health, youth services, the medical establishment and teen pregnancy will want to work with young parents to examine the existing system of services. Such an examination might provide some answers about why this population of parents is unable -or unwilling- to use these services.

#### *Lack of a Comprehensive Strategy for the Prevention of Infant Abandonment*

Critics are concerned that states are not viewing safe haven programs as an integral part of child abuse prevention. Has infant abandonment been considered in the state's child abuse prevention efforts? Does the strategy target young women at risk of abandonment? These are just a few questions policymakers may want to ask as they work with public

*Many child welfare experts state that safe haven legislation needs to be part of a larger effort to enhance services for women who are at risk of abandoning their infants.*

health, child protection, child abuse prevention, mental health, families and others to develop a comprehensive strategy to prevent infant abandonment.

#### *Anonymity and Termination of Parental Rights*

Child welfare experts are apprehensive that the anonymity provided to parents in the safe haven laws conflicts with biological parents' due process rights in termination of parental rights proceedings. As previously mentioned, states have attempted to address this critical issue by providing some type of notice or search for the biological parents of the abandoned infant in an effort to include them in judicial proceedings related to the adoption of the infant. States will want to carefully examine their termination of parental rights statutes to avoid conflicts with safe haven laws.

#### *Relationship to Existing Child Welfare Statutes*

Likewise, states may want to examine all their existing statutes related to adoption, paternity, custody and all judicial proceedings associated with child abandonment. It also is important that states clarify their definitions of infant abandonment. For example, several states with new laws exempt safe haven abandonment from the statutory definition of abandonment, child abuse or child neglect. Other states add safe haven abandonment to their existing definition of abandonment.

#### *Father's Rights*

A few states require a check of the putative father registry and include provisions to contact the putative father, but most do not contain provisions to address notification of fathers who may not be aware of the child's birth. Critics contend that denying notification unfairly presumes that these fathers do not want to care for their children. Utah's legislation addresses this concern by requiring a search of the confidential registry for unmarried biological parents and requiring that notice be sent to each potential father identified in the registry. The termination of parental rights hearing must be scheduled as soon as possible if no one has identified himself as the father (or if the mother has not identified herself) within two weeks after notice is complete. If a non-relinquishing parent is not identified, the surrender of the newborn shall be considered grounds for termination of parental rights of both parents.

*Child welfare experts are apprehensive that the anonymity provided to parents in the safe haven laws conflicts with biological parents' due process rights in termination of parental rights proceedings.*

### *Adoption*

Adoption advocates are particularly concerned about the lack of medical and family history. They note that a lack of information about their backgrounds is often troublesome for adopted children and worry about the stability of the child and his or her adopted family later in life. They fear that the lack could be a setback to the trend in adoption policy to provide the adoptee with information about the birth family. Adoption and other child welfare experts also point out that the legislation may not be necessary because most states will not prosecute women who give birth and relinquish their newborns in the hospital. Additionally, every state allows women to voluntarily relinquish their infants for adoption.

*Adoption advocates are particularly concerned about the lack of medical and family history.*

### *Parental Irresponsibility*

Many policymakers are concerned that these laws may only encourage parental irresponsibility. Since so little is known about the women who abandon their babies, there is no proof that the legislation will discourage mothers from leaving their infants in unsafe places. For women who might otherwise seek help from family, friends and social service agencies, the enactment of safe haven laws might encourage them to anonymously abandon their newborns rather than take advantage of their traditional network of support.

### **Conclusion**

State safe haven laws are in various stages of implementation. The effectiveness of these new laws has yet to be measured. It is important that states begin to collect data about abandoned infants and their mothers. Such data could be researched to develop a profile of mothers who engage in this behavior to better target prevention and intervention efforts. Policymakers who are considering such legislation will want to carefully examine their states' existing statutory framework in the areas of juvenile court procedure, termination of parental rights and adoption practice to determine the future ramifications of abandoned infant laws.

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"Safe Havens for Abandoned Infants" (Vol. 26, No. 8) (ISBN 1-58024-179-4)	September 2001

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# ALASKA'S WOMEN'S LOBBY

AWL Mission: To defend and advance the rights and needs of Women,  
Children and Families in Alaska

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## Support for HB 29, Safe Havens February 2007

The Alaska Women's Lobby supports HB 29. The bill is an important safety measure to increase the likelihood that troubled parents will turn over their newborns to medical or other emergency personnel instead of leaving them in potentially dangerous situations.

Beginning in Texas in 1999, "Baby Moses laws" or infant safe haven legislation has been enacted as an incentive for mothers in crisis to safely relinquish their babies to a safe haven where the baby will be protected and provided with medical care until a permanent home can be found. Safe haven laws generally allow the parent, or an agent of the parent, to remain anonymous and to be shielded from prosecution for abandonment or neglect in exchange for safely surrendering the baby to a safe haven. According to the latest statistics these laws exist in 47 states. It is time for Alaska to join these other states. *We appreciate the sponsor's 21 day limit on the infant's age but would encourage committee discussion on what would be the best limit for Alaska.*

One important issue to consider as the bill moves through the committee process is public education about the bill when it becomes law. In 2003, 15 states had mandated public information campaigns to increase public awareness of safe haven legislation. Several common elements of such campaigns include toll-free hotlines, pamphlets and written material, and public service messages. Funding should be provided so that once the service is available, those who are eligible to receive the infants can be trained and the public can be made aware of the service throughout the state.

Thank you for hearing this piece of legislation. Creating avenues for parents to relinquish newborns in a way that protects both the parents and the newborns should lessen the odds of finding babies abandoned in dumpsters or empty parking lots.



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[www.alaskamidwives.org](http://www.alaskamidwives.org)

February 12, 2007

RE: In support of HB 29 "Safe Surrender of Infants Act"

I am writing on behalf of the Alaska Chapter of the American College of Nurse-Midwives (AK-ACNM) to express our support for HB 29.

We believe that providing parents who are overwhelmed, or otherwise incapable of caring for their infant, an avenue for safe surrender will save lives and protect these fragile, vulnerable children from harm.

We respectfully request that funding for training those eligible to receive infants and a public awareness/education campaign be addressed during the hearing process.

Thank you very much for taking our opinion into consideration during your deliberation on this important matter.

Sincerely,

Laura L. Sarcone, ANP, CNM  
Legislative Liaison  
AK-ACNM

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The Honorable Gabrielle LeDoux  
House of Representatives  
Alaska State Capitol  
Juneau, Alaska 99801-1182

February 5, 2007

Re: HB 29: Safe Haven Bill

Dear Representative LeDoux:

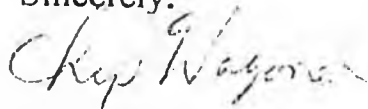
Thank-you for sponsoring House Bill 29, an Act relating to infants who are safely surrendered by a parent shortly after birth. The Alaska Conference of Catholic Bishops (ACCB) supports passage of this legislation.

The intent of the bill is not to circumvent the statutory adoption process a responsible parent would utilize in relinquishing a child. Rather, the intent of the bill is to provide an alternative to a parent who might otherwise abandon his or her child in an unsafe place. We support the bill because it might save the life of a child.

We find it truly sad that our society needs a "safe haven" bill at all. Unfortunately, the weak and vulnerable in society from conception to natural death are often treated as objects or things to be used, abused or discarded instead of being treated with dignity as very human life deserves. We also find it sad that a person with a newborn child feels so isolated and alone that abandoning his or her child in an unsafe place seems to be the only alternative available. The bill does not address these larger issues and is not a long term solution but even if only one life is saved, the legislation is worthy of passage.

We, therefore, urge support for HB 29. We further support the Office of Children's Services developing a public information campaign about the legislation should it pass to increase the bill's effectiveness.

Sincerely:

A handwritten signature in cursive script that reads "Chip Wagoner".

Chip Wagoner  
Executive Director  
Alaska Conference of Catholic Bishops

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**From:** infoweb@newsbank.com  
**Sent:** Wednesday, October 19, 2005 1:28 PM  
**Subject:** Requested NewsBank Article

Paper: Anchorage Daily News (AK)  
Title: INFANT FOUND AT UAA  
Author: TRACY BARBOUR Daily News reporterStaff  
Date: June 13, 1995  
Section: Metro  
Page: B1

A newborn boy abandoned on the sidewalk in front of a University of Alaska Anchorage building Monday morning was in serious condition by the end of the day. A campus employee found "Baby Doe" about 7

a.m. at the University Lake Building, which houses support services, said Nancy Killoran, a university spokeswoman.

Baby Doe, who appears to be white and a couple days old, was left wrapped in a blanket and with a shoestring tied around his umbilical chord, she said.

The university employee called campus security, who alerted the Anchorage Police Department.

Police found the newborn suffering from hypothermia. Otherwise, he appeared to be fine, Anchorage police Sgt. Gary Apperson said.

But by 7 p.m Monday, Baby Doe was listed in serious condition at Providence hospital, a hospital spokeswoman said. She refused to say what the child was suffering from.

Police said they have no idea who deserted the baby and that there was no note or other clues to the identity of the boy's parents.

Whoever abandoned the child faces charges of child abandonment and neglect, police said.

Author: TRACY BARBOUR Daily News reporterStaff  
Section: Metro  
Page: B1

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**From:** infoweb@newsbank.com  
**Sent:** Wednesday, October 19, 2005 1:59 PM  
**Subject:** Requested NewsBank Article

**Paper:** Anchorage Daily News (AK)  
**Title:** NEWBORN GIRL FOUND IN BATHROOM STALL AT HOSPITAL  
**Author:** PETER S. GOODMAN Daily News reporter Staff  
**Date:** December 1, 1994  
**Section:** Nation  
**Page:** A1

A newborn girl was found wrapped in a blanket in a bathroom stall at Alaska Regional Hospital on Wednesday morning. A hospital employee found the infant when she went into the first-floor women's restroom to get a cup of water about 7:30 a.m., police said. A note of explanation was found nearby, but investigators would not reveal what it said. Several people later told investigators they had heard the baby crying as they passed by the bathroom. Hospital staff rushed the newborn to the emergency room, said Mary Hofbauer, a nursing supervisor. Doctors pronounced her in satisfactory shape.

State child welfare authorities took formal custody of the child, who remained at the hospital late Wednesday.

Police spent much of the day trying to locate the baby's mother. Detective Terry Games said witnesses spotted a white woman with long brown hair near where the baby was found. She was described as being in her mid-to-late teens, 5-feet-6 to 5-feet-7-inches tall and wearing a long brown coat. Police "strongly believe" she is the baby's mother, Games said.

Hofbauer said the infant is a "pretty little baby" who appeared to be about 12 hours old at the time she was found. She had apparently been born full term. Police said she weighed about 7 pounds and measured about 19 inches long.

The state will likely place the baby in a foster home after doctors clear her to be released from the hospital, said Faye Moore, regional administrator at the Division of Youth and Family Services in Anchorage. What happens after that is uncertain.

Moore wouldn't discuss the particulars of the case, but she predicted there is less than an even chance the mother will be found. If the mother never enters the picture, the state would likely try to get court approval to put the baby up for adoption, she said.

Bob Newell, an intake officer with the youth services agency, said it would be several months before the baby can be adopted because the state is obligated to give the mother a chance to come forward and claim her child.

If the mother does turn up and shows an interest in taking the baby, the state would assess whether she's fit to be a parent, Moore said. She "would have the burden of demonstrating to us (she) can take care of the child."

According to Newell, the state typically does whatever it takes to help mothers become suitable parents. They may undergo drug or alcohol counseling, welfare assistance or job placement, Newell said.

According to Joyce Johnson at the Child Welfare League of America in Washington, D.C., women who abandon babies tend to be young, poor and isolated. They don't know how to cope with being pregnant and they lack the sophistication to get help, she said.

"Maybe they haven't located the father or they haven't told their family that they're pregnant," Johnson said. "It's a trauma. They're not thinking coherently. And there's fear. How are they going to take care of the child? Maybe they don't have any money."

Johnson said there are places for such women to go: social service organizations that counsel women on their options, provide shelter and find them medical care.

Elaine Stoneburner, the adoption coordinator at Catholic Social Services in Anchorage, has a list of two dozen couples waiting to adopt babies. They are likely to wait anywhere from 10 months to three and a half years for a child, she said. For those would-be parents, news of a newborn being left in a bathroom stings, she said.

Johnson said that abandoned children are usually left in public places where the mothers hope they'll be found and cared for. But not always. On New Year's Eve, police found a newborn girl outside a used-clothing store in Peters Creek. She was rushed to Providence Hospital and treated for hypothermia. She was eventually adopted.

If the mother of the hospital baby is found, she could face criminal charges for abandoning her child, police said. Assistant District Attorney Steve Branchflower said the mother's intentions would be weighed in any decision to prosecute.

"Is the baby in a Dumpster or in a hospital?" Branchflower asked. "That says something about a person's intent."

Joan Teel, a private adoption consultant and former state social worker, said that's an important detail.

"There should be no judgment passed," she said. "Let's applaud (the mother) for putting the baby somewhere safe and warm."

Author: PETER S. GOODMAN  
Daily News reporter  
Staff  
Section: Nation  
Page: A1

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**From:** infoweb@newsbank.com  
**Sent:** Wednesday, October 19, 2005 2:00 PM  
**Subject:** Requested NewsBank Article

**Paper:** Anchorage Daily News (AK)  
**Title:** ABANDONED BABY GETS A NEW YEAR'S EVE CHANCE DAY-OLD GIRL LEFT OUTSIDE  
**Author:** S.J. KOMARNITSKY Daily News reporter Staff  
**Date:** January 1, 1994  
**Section:** Nation  
**Page:** A1

It was a shocking discovery: a baby girl wrapped only in a blanket outside a used clothing store in Peters Creek in the freezing cold, her umbilical cord still attached and tied off with a piece of twine. The pudgy newborn would have faced a night outdoors in freezing temperatures if not for a woman's anonymous call to police and a quick search by two nurses from a nearby senior center. Instead, she was rushed to Providence Hospital, where she was listed in serious condition with hypothermia late New Year's Eve. A police investigator estimated she was about a day old.

Officers first heard about the baby just before 3 p.m. when a woman called from a pay phone at the Peters Creek Trading Post with an anonymous tip. The woman said there was a cold baby in a container at The Garret, a used-clothing store about a mile from the convenience store. The woman didn't make herself clear and hung up before dispatchers could get her name or ask her any questions.

But they made out enough to know there might be a baby somewhere around the clothing store. Dispatchers were still deciphering the message when they called the Chugiak Senior Center, where Sharon Cloud, 44, and Charlene Beckwith, 50, work as nurse's assistants. The center is just downhill from the store.

Beckwith said they were told a child had been dropped off in a container and were asked to take a look around.

So, she and Cloud started working their way up the hill toward the store, looking in Dumpsters along the way. Nothing. Then they started searching around the store, which was closed. Still nothing.

In the meantime, Officer Robert Dutton headed to The Garret to check things out. Dispatchers still weren't sure exactly what the woman had told them and sent Dutton without lights or sirens, he said. But another officer, hearing there might be a baby involved, told Dutton to speed up.

It was just after Dutton arrived that Cloud found the girl.

Beckwith said she and Cloud had already made one search around the building when Dutton showed up. They were about to go back, thinking it was a prank call. That's when Cloud started looking through a pile of donated clothes in plastic bags left on a walkway not in a container in front of the store and found the girl under a lampshade.

"I had just been going through the clothes and I had just seen a doll," Cloud said. "I thought it was another doll. But then she moved."

Dutton told the two women to get the baby into his car, where it was warm. He later said the temperature outside was about 21 degrees.

Beckwith said the girl never cried and it was hard to tell if she was suffering from hypothermia.

"She had that newborn baby look, kind of bluish-purple," she said.

But, once the two women got in the patrol car, Beckwith could see that the girl's toes and

fingers were "really blue." The baby acted like one of her feet was numb, Beckwith said.

Dutton drove Beckwith back to the senior center and headed for Providence Hospital with Cloud cradling the child in her arms in the back seat.

Arriving at Providence just before 4 p.m., the girl was rushed to an intensive care unit and immediately put under heat lamps.

Beckwith said she's glad they found the baby in time. The clothing store was closed for the day.

"She probably would not have made it through the night," she said.

Temperatures in Anchorage were forecast to be about 20 degrees Friday night.

So far, there are few clues to the mother's identity.

Dianne Hagerty, who works at the Trading Post, said nobody noticed a woman making a call from the store's pay phone around 3 p.m. The phone is around the corner, and the store gets a lot of traffic, she said.

"Usually you don't pay attention to who is on the phone anyway," she said.

Beckwith said a woman was dropping off clothes at The Garret when she and Cloud first came up the hill. But the woman looked to be in her 50s and she said she had just arrived, Beckwith said.

The woman was putting her donation right next to where the baby was. She said she never heard a peep, Beckwith said.

Police investigators are asking for the public's help in locating a woman who was in late pregnancy and now isn't, and who doesn't have a baby to show for it.

Lt. Bill Gaither said the woman could face a number of charges for abandoning the girl, including child abuse, child neglect, reckless endangerment and endangering the welfare of a minor.

That is if the child survives, he said. If she dies, the mother could face murder charges, he said.

Beckwith said that there's already a waiting list of staffers at the center and even one elderly resident who say they'd be happy to adopt the baby.

"She's a very cute little female, kind of pudgy infant," Beckwith said.

Beckwith said the image that stayed in her mind was what Cloud told her later, that, on the ride to the hospital, the girl clung to her finger the whole time.

"We couldn't believe anyone would do such an atrocity," Beckwith said. "It was just such a pathetic thing to see. The fact that she was so naked and outside was kind of devastating."

Author: S.J. KOMARNITSKY Daily News reporter Staff

Section: Nation

Page: A1

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**From:** infoweb@newsbank.com  
**Sent:** Wednesday, October 19, 2005 1:27 PM  
**Subject:** Requested NewsBank Article

Paper: Anchorage Daily News (TX)  
Title: INFANT FOUND IN BIN  
Author: DON HUNTER Daily News reporterStaff  
✓ Date: September 6, 1986  
Section: Metro  
Page: 1

A newborn baby boy abandoned in a box in a Muldoon alley Thursday night was in good condition Friday at Humana Hospital. The infant was wrapped in a towel and hidden in a cardboard box left on the ground beside a Salvation Army collection bin. He was found by two teen-age boys who heard him crying as they rode by on their bicycles.

"It was crying, real loud," 15-year-old Christian Chain said. Chain was interviewed Friday while walking his dog, Duke, in the neighborhood.

"The box was closed," he said. "There was no lid, but the sides were folded up on top of the baby. We opened it up and, you know, there was a baby . . .

"It was wrapped in a towel, a tan towel," he said.

"It was real young, not that old at all."

Only minutes before Chain and Lamont Williams, 14, found the baby, an anonymous caller told an Anchorage Police dispatcher a baby had been left at the bin.

the time officers arrived, the boys had picked up the box, climbed back on their bikes, and taken the baby to the Chain home, where they called police.

The boys discovered the baby shortly after 9 p.m., according to police. Officers took him to Humana Hospital about 9:30 p.m. Police Spokesman Joe Young said the infant was "a few hours old, at most."

Salvation Army dispatcher Alice Phillips said donations left at the bin are picked up about 11 a.m. every day. The bin is directly behind a Salvation Army thrift shop at 101 Muldoon Road.

Lynn Whitley, a hospital spokeswoman, said the baby weighed seven pounds, one ounce and was in satisfactory condition in the Humana nursery late Friday afternoon. He was stable, with vital signs within normal limits, she said.

The infant is now in the custody of the state division of family and youth services. Dolly Coke, a social worker supervisor, said in cases where the state assumes custody of children, they are placed in a foster home until a permanent placement is arranged.

Authorities have named the baby John Doe.

Storekeepers and residents of a trailer park across the street from the thrift shop said they had seen no unusual activity Thursday night. But a delivery man for a sandwich shop directly across Muldoon Road said he saw a young couple acting a little strangely.

"I was fixing to go out and make some deliveries, and I was sitting in my car adjusting packages and something caught my eye just across the street at the Goodwill box," said Chuck Argo.

ere was a couple in a late model, foreign pickup, sort of rummaging around in the boxes there. I thought it was unusual to see people with a truck like that looking in the bin .

"Then they had a bundle, looked like a bundle of clothes, and just kind of laid it over there in the boxes and took off. I didn't think anything of it until I got back (from making deliveries) and my supervisor said" police had been there.

"It didn't dawn on me it could have been a child," he said.

Young, the police spokesman, said another person called police late Thursday night after seeing reports of the abandonment on television. The caller said he had seen "a very pregnant woman in the area of the bin an hour or two before," Young said.

"That's not very much to go on," he said.

Coke, the social worker, said state law prevents her from discussing Baby Doe's specific case. She did describe procedures used in similar cases, however.

"It's very rare" for a newborn infant to be abandoned, she said. "I've been here five years, and I don't know of another infant I can remember who was abandoned . . .

"Whenever a child is abandoned you can usually assume the mother was under a great deal of stress, and may have assumed she could not provide for the child," she said.

"In these cases, it's my experience the parent will eventually surface," Coke said. "Sometimes, someone who has been pregnant suddenly isn't, and there's no baby, and someone who knows her will call. Or sometimes they have a second thought and the parent will come forth."

If the parent or parents do appear, social workers will counsel them and try to decide the best solution for the child, Coke said.

Author: DON HUNTER Daily News reporter Staff  
Section: Metro  
Page: 1

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## OPPOSITION TESTIMONY: HB 29

Bastard Nation: The Adoptee Rights Organization--the largest adoptee rights organization in North America--opposes HB 29, which if enacted would permit parents to abandon infants 21 days old or less.

Because infants surrendered under HB 29 are expected to be placed for adoption, Bastard Nation's objections to HB 29 focus on how the law will erode the civil rights of adoptees.

**(1) HB 29 erodes adoptee civil rights by making anonymous children available for adoption through unethical and unprofessional practices.**

HB 29 establishes parallel child welfare systems, where one system opposes the long-standing principles of the other. Those long-standing principles are informed consent and a full record of identifying information and social and medical histories. HB 29 eliminates the right of identity to those "surrendered" through Safe Haven programs by denying them access to original birth and heritage records--a right Alaska's adoptees have enjoyed for decades. Safe Haven laws were enacted within a year of Oregon and Alabama restoring adopted adults' right to their original birth records. That was no coincidence. The National Council for Adoption (NCFCA), a trade organization of conservative adoption agencies dedicated to sealed and secret adoptions, and opposed to adoptee identity rights, has admitted publicly that Safe Haven laws are the response to the increasingly successful movement in the US to restore the civil right of identity to adoptees.<sup>1</sup> NCFCA's own research showed that Alaska, with its long record of adoption openness, has one of the highest rates of child placement in the US.<sup>2</sup> But by arguing in favor of Safe Havens, NCFCA essentially states that only through anonymous abandonment can courts maintain "parental privacy." Adoption proceedings, however, are already closed and confidential in Alaska.

HB 29 denies parents, particularly non-surrendering parents (usually fathers), their due process right by rendering them unable to locate the dependency proceeding to which they are a party. By letting parents abandon solely for convenience or out of ignorance, HB 29 replaces professional best practice standards with unprofessional and unethical "non-bureaucratic placement." The law preys on parents who believe they are surrendering their child for adoption, instead of providing evidence to be used in an adversarial proceeding in which they have a right and duty to appear. The law literally encourages parents to default at their hearings. The supporters call that "proper" and "courageous."

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<sup>1</sup> "Opponents of option of privacy in adoption attack Safe Haven laws." Press Release, National Council for Adoption, March 15 2003.

<sup>2</sup> Marshner, Connaught, ed, Adoption Factbook III. Washington, DC: National Council for Adoption, 1999, 28.

**(2) HB 29 disenfranchises natural parents, encourages unethical behavior, and hides crime.**

No evidence shows that Safe Haven laws have decreased unsafe abandonment or neonaticide. A 2005 survey of county coroners in California found that the number of newborns dying from abandonment and neglect since 2001 remained at 13-15 per year. (See attachment A).

Safe Havens are promoted as an easy solution for mothers so desperate they will kill their children unless permitted to abandon their newborns anonymously. State-written reports and news accounts tell a different story.

The "Safely Surrendered and Abandoned Infants in Los Angeles County" ICAN report published in 2002 and updated in 2005, identified Safe Haven-protected parents as poor, overwhelmed, and ignorant of child welfare practice. Some parents were undocumented workers, leery of professional assistance. News accounts regularly speak of clean, immaculately dressed newborns, with stuffed animals, baby blankets, and notes to doctors, left at ER's in no danger of neglect or death.<sup>3</sup> Newspapers have reported about hospital officials encouraging confined mothers to leave their newborns at the hospital upon discharge, with no ethical parenting or child placement counseling to guide the parent. That occurs even though hospital policy discourages "boarder baby abandonment."

Safe Haven laws are open to further abuses as shown by the Twyana Davis case in Ohio. Davis, an adult, conceived a child with her 12-year old cousin. Davis recklessly abandoned the newborn. After years of supporting Safe Haven laws, Davis admitted the father's identity and age. In fall of 2006, she was sentenced to 10-25 years in prison for raping the father.<sup>4</sup> In April 2006, in Rochester, New York, Lamar Brown, 31, tried to drop off a newborn he claimed he found in a nearby park. Brown later confessed that he had had sexual relations with the 13-year old mother and had helped deliver the baby. He was charged with 2<sup>nd</sup> degree rape and endangering the welfare of a child.<sup>5</sup> Safe Haven proponents would have Davis and Brown legally abandon those babies anonymously and then call them heroes. The government is essentially offering parents who have committed, or are contemplating, crimes a cover up.

Abuses are not the exception. In several cases, the parent has communicated to the Safe Haven recipient that they were surrendering the child anonymously out of love or because they lacked resources. Those parents did not feel homicidal, but wanted a quick

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<sup>3</sup> Safe Haven for Abandoned Babies Task Force, "Data About Abandoned Newborns, 1999-2001." Los Angeles, 2002; Inter-Agency Council on Child Abuse and Neglect, "Safely Surrendered and Abandoned Infants in Los Angeles County, 200-2005." Los Angeles, 2006.

<sup>4</sup> Columbus Dispatch, April 26, 2006.

<sup>5</sup> Rochester Democrat and Chronicle, April 5, 2006.

or secret adoption. Due to the legal constraints placed on Safe Haven personnel, the parents, often ignorant of accepted child welfare practice, were kept from knowing about traditional ethical options and procedures. Temporary and permanent surrender options have existed for decades, and are used by thousands of new parents every year. We have welfare and other programs through children's services to help new parents.

Unfortunately, Safe Haven proponents have convinced parents they have only two options: The Dumpster or legalized abandonment. The responsible alternatives are not mentioned: counseling, public assistance, temporary surrender, permanent surrender for adoption, and family communication. Those omissions keep new and expectant parents ignorant of real solutions.

**(3) HB 29 subverts sections of the federal Indian Child Welfare Act (ICWA), compromising the welfare and rights of the Alaska's approximate 98,000 American Indian and Alaska Natives.**

The Indian Child Welfare Act of 1978 24 U.S.C. §§ 1912(a) states:

*In any involuntary proceeding in a State court, where the court...has reason to know that an Indian child is involved, the party seeking the...termination of parental rights...shall notify the parent and...the Indian child's tribe...of the pending proceedings and of their right of intervention. If the identity or location of the parent and the...tribe cannot be determined, such notice shall be given to the Secretary...who shall have fifteen days...to provide the requisite notice to the parent and the...tribe.*

ICWA authorizes tribes to intervene in child protection and adoption cases involving Indian children. HB 29 conflicts irreparably with ICWA by giving birthparents an absolute right to withhold information required to make American Indian Tribal jurisdiction determinations, and by directly prohibiting enforcement of 25 U.S.C. 1912(1) and 1913(a-c) (see attachment B: text of these sections of ICWA).

The National Council for Adoption has long opposed ICWA. Since at least 1996 NCFWA has used its influence in Washington to dismantle ICWA by calling Tribal jurisdiction racist and obstructive of the right of Indian children to permanency.

David Simmons, author of the 1996 ICWA *Legislative Summary for the National Indian Child Welfare Association* documented several stand-alone bills and amendments submitted to Congress to limit ICWA. Simmons specifically wrote that NCFWA sought an "all out repeal of ICWA."<sup>6</sup>

In 1997, NCFWA continued to undermine tribes by blaming ICWA for a supposed

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<sup>6</sup> Simmons, David, ICWA Legislative Summary - 1996, Portland, Oregon: National Child Welfare Association, 1996.  
<http://www.thepeoplespaths.net/govlaw/icwastry.htm>

increased abortion rate among native women. The Indian Child Welfare Association testified before the Senate Committee in Indian Affairs and House Resources regarding proposed amendments to ICWA. The association reported that the National Right to Life committee "based on suggestions by the National Council for Adoption that applications of ICWA may have the effect of encouraging abortion in Indian women." The ICWA witness unequivocally refuted that claim, showing documentation that abortion rates for Indian women had stayed constant or declined since 1978.<sup>7</sup>

The *NCFCA Factbook III* (1999) cites ICWA as a "barrier to adoption." The Factbook is a 600 page adoption handbook, funded by the rightwing Scaife Family Foundation and the Lynde and Harry Bradley Foundation, and distributed free by NCFCA to members of Congress and policymakers. The book's executive editor and founding NCFCA president, the late Dr William Pierce, argued that ICWA was racist "stand[ing] in the way of civil rights in adoption as surely as Governor George Wallace blocked Black students from entering the University of Alabama." After complaining about "the obscene profits from [Indian] gambling operations, Pierce concluded that ICWA... "often facilitates racist tribal agendas that impose native American Cultural bias on non-Indian families by preventing children from being voluntarily placed for adoption by their parents with the families of their choice. Recommendation: it is past time to repeal the Indian Child Welfare Act because it is an unconstitutional, discriminatorily law."<sup>8</sup> (NCFCA otherwise opposes the placement of children in which the identities of birthparents and adoptive parents are known to are other.)

NCFCA still opposes ICWA. In the Fall 2004 edition of its newsletter, *National Adoption Report*, NCFCA complained that ICWA "impedes the adoption of Native American children." Proposed amendments to strengthen ICWA, NCFCA claims, would be "harmful to adoption and the best interests of children," because they would "vest jurisdiction over adoption proceedings in the tribe, exclusively, in some cases, concurrently with the state in others; require notice to the child's tribe, extend the authority of tribal court judgments to other courts, and grant rights of intervention in state court proceedings, including the right of the child's extended family to intervene."<sup>9</sup>

Since NCFCA has not successfully dismantled ICWA, we believe its promotion of Safe Havens seeks to undermine tribes by chipping away the law one child at a time. What better way to do that than to encourage undocumented birth and anonymous newborn abandonment that strips Indian children of their native identity, families, and tradition and place them in non-Indian homes?

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<sup>7</sup> "Testimony of the National Indian Child Welfare Association regarding proposed amendments to the Indian Child Welfare Act: S 569 and HR 1082, June 19, 1997.

[https://www.nicwa.org/policy/legislation/HR2750/nicwa\\_testimony.pdf](https://www.nicwa.org/policy/legislation/HR2750/nicwa_testimony.pdf).

<sup>8</sup> *Factbook III*, 566-567.

<sup>9</sup> "Notes from the Hill: Congressional Update, National Adoption Report, Fall 2005, National Council for Adoption, 8.

**Finally, Alaska law does not need fixed.**

No epidemic of newborn abandonment and neonaticide exists in Alaska. In fact, Alaska has one of the cleanest newborn abandonment records in the United States. A survey of The Anchorage Daily News, Fairbanks News-Miner, and Juneau Empire reveal only four reported newborn abandonment cases in Alaska since 1985: 2 in Anchorage (1995, 2005) and 1 each in Muldoon (1986), and Peters Creek (1994).<sup>10</sup> All babies were left where they could be easily found, and all survived

HB 29 trivializes baby abandonment by presenting it as just another consumer choice. No blame. No shame. No name.

By encouraging identity erasure, parental ignorance, irresponsibility, and secrecy, and by subverting the due process rights of parents in Alaska and the mandates of ICWA, HB 29 endangers the integrity and safety of all families in Alaska--not just those at risk for unsafe abandonment.

No law is valid because it might "save a life." Otherwise, we would not have our Bill of Rights. We do not let the police pull drivers over randomly and give them Breathalyzer tests because "it might save a life." We do not outlaw guns because "it might save a life." The state should not help parents hide their own children's identities and histories because "it might save a life."

Alaska has a long history of protecting the rights of its adopted citizens. Let's keep it that way!

Protect Alaska families. Protect ICWA! Vote Do Not Pass on HB 29.

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<sup>10</sup> Anchorage Daily News, June 6, 1995, 1; August 6, 2005, B3; September 16, 1986, 1; January 1, 1994, 1A. No cases listed in other cases.

**ATTACHMENT B - ICWA**

From the U.S. Code Online via GPO Access

[wais.access.gpo.gov]

[Laws in effect as of January 20, 2004]

[Document not affected by Public Laws enacted between  
January 20, 2004 and December 23, 2004]

[CITE: 25USC1912]

TITLE 25--INDIANS

CHAPTER 21--INDIAN CHILD WELFARE

SUBCHAPTER I--CHILD CUSTODY PROCEEDINGS

Sec. 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings;  
additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

From the U.S. Code Online via GPO Access  
[wais.access.gpo.gov]  
[Laws in effect as of January 20, 2004]  
[Document not affected by Public Laws enacted between  
January 20, 2004 and December 23, 2004]  
[CITE: 25USC1913]

TITLE 25--INDIANS

CHAPTER 21--INDIAN CHILD WELFARE

SUBCHAPTER I--CHILD CUSTODY PROCEEDINGS

Sec. 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to,

or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

## SELECTED ORGANIZATIONS OPPOSED TO SAFE HAVEN LAWS

### UNITED STATES and CANADA

Bastard Nation: The Adoptee Rights Organization  
Adoptees Caucus for Truth  
Advocates for Pregnant Women  
American Adoption Congress  
American Coalition of Fathers and Children  
Ariadne Group  
Bay Area Birthmothers (San Francisco)  
Canadian Council of Natural Mothers/Conseil canadien des meres naturelles  
Center for Family Connections (Massachusetts)  
Child's Best Interest  
Concerned United Birth parents (CUB)  
Ethica: A Voice for Ethical Adoption  
Dad's Against Divorce Discrimination (DADS)  
Green Ribbon Campaign for Open Records  
Holt International  
Home for Little Wanderers  
Massachusetts Families for Kids  
Massachusetts Society for the Prevention to Cruelty to Children  
Mouvement Retrouvailles (Quebec)  
National Congress for Fathers and Children  
Nebraska Children's Home Society  
Oregon Adoption Rights Organizations  
Origins  
Origins-USA  
PACER (Post Adoption Center for Education and Research, San Francisco)  
Prevent Child Abuse Virginia  
Spence-Chapin Services to Family and Children  
Virginia Department of Health  
Virginia Poverty Laws Center  
Virginians for Adoption Reform

### INTERNATIONAL

#### France

Association des Mere de 'Ombre  
Association pour le Droit aux Origins les Enfants Nes sous X (ADONX)  
Coordination des Actions pour les Droit la Connaissance des Orgines (CADCO)

#### Germany

Babyklappen, Nein Danke!

#### Italy

Figli Adottvi de Genitori Naturall (FacGN)

#### Spain

Andas (Derrecho a Saber)

replaud

# FISCAL NOTE

STATE OF ALASKA  
2007 LEGISLATIVE SESSION

Fiscal Note Number: HB029CS(JUD)-DHSS-OCS-03-2  
Bill Version: CS HB 29 (JUD)  
( ) Publish Date: \_\_\_\_\_  
Dept. Affected: Health & Social Services  
RDU Children's Services  
Component Family Preservation

Revision Date/Time (Note if correction):  
Title SAFE SURRENDER OF INFANTS

Sponsor LEDOUX  
Requester HOUSE (JUD)

Component No. 1628

### Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual	50.0	50.0	50.0	50.0	50.0	50.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>50.0</b>	<b>50.0</b>	<b>50.0</b>	<b>50.0</b>	<b>50.0</b>	<b>50.0</b>

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES (0)						
------------------------	--	--	--	--	--	--

### FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	50.0	50.0	50.0	50.0	50.0	50.0
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
<b>TOTAL</b>	<b>50.0</b>	<b>50.0</b>	<b>50.0</b>	<b>50.0</b>	<b>50.0</b>	<b>50.0</b>

Estimate of any current year (FY2007) cost: \_\_\_\_\_  
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

### POSITIONS

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill provides for the safe surrender of infants whereby the parent may not be criminally prosecuted for surrendering an infant in the manner described.

Drawing on other states' experience with similar laws, the OCS believes that adequate public education is key to success. If the desired effect of this bill is to stop abandonment of babies, the public needs to be made aware of their options. This fiscal note would cover estimated costs for a campaign that provides for media advertising; notification to emergency medical services providers; and the production of brochures, posters, etc., to be distributed in hospitals, clinics, doctor's offices, public assistance offices, and other public areas. Estimated costs are based on similar campaigns and promotions managed within the Department.

Prepared by: Tammy Sandoval Phone 465-3191  
 Division Office of Children's Services Date/Time 03/28/2007  
 Approved by: Karleen Jackson, Commissioner Date 03/29/2007  
 Agency Department of Health and Social Services

AMENDMENT

OFFERED IN THE HOUSE  
TO: CSHB 29(JUD)

BY REPRESENTATIVE MEYER

1 Page 2, lines 5 - 11:

2 Delete all material and insert:

3 "(1) the parent, without expressing an intent to return for the infant,  
4 leaves the infant in the physical custody of a person who is a

5 (A) person the parent reasonably believes would provide for  
6 the health and safety of the infant;

7 (B) peace officer, community health aide, physician, hospital  
8 employee; or

9 (C) person who is employed by or is a volunteer for a fire  
10 department or emergency medical service, if the person is acting within the  
11 scope of the person's fire department or emergency medical service duties;  
12 and"

13

14 Page 2, line 14:

15 Delete "(c)"

16 Insert "(c)(1)(B) or (C)"

**HB**

**34**

**HFIN**

**FILE**

# ALASKA STATE LEGISLATURE



SESSION ADDRESS  
Alaska State Capitol  
Juneau, AK 99801-1182  
(907) 465-2487  
Fax (907) 465-4956

INTERIM ADDRESS  
112 Mill Bay Road  
Kodiak, AK 99615  
(907) 486-8872  
Fax (907) 486-5264

## Representative Gabrielle LeDoux

### **Sponsor Statement for House Bill No. 34 "An Act relating to sales of wine by a winery licensee."**

Wine production in Alaska has only begun to develop. Wineries in Alaska are "mom and pop" businesses. Under current state law, none of these wineries can sell or ship a bottle of wine to a customer within the state unless the customer is on the premises. Currently, out-of-state wineries can ship their product into the state of Alaska. This bill evens the playing field for small wineries in Alaska by enabling them to participate in direct sales to a niche market.

This bill will allow the holder of a winery license to ship less than five gallons of wine to an individual provided that the shipping address is not located in an area that has not prohibited or limited the importation or possession of alcoholic beverages. According to the Alaska Department of Revenue, in FY 2005 there were six wineries that produced approximately 1,900 gallons of wine and contributed approximately \$4,750 in taxes.

Alaskan wine is a value-added premium product, which is well suited to internet and phone sales. The intent is for small, local winery operations to take advantage of a very specialized market.



# FISCAL NOTE

**STATE OF ALASKA**  
**2007 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: HB 34  
 (H) Publish Date: 1/30/07

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Public Safety  
 Title Sales of wine by a winery licensee RDU Statewide Support  
 Component ABC Board  
 Sponsor Representative Ledoux  
 Requester House Labor & Commerce Component No. 2690

**Expenditures/Revenues** (Thousands of Dollars)  
 Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2006) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

There will be no fiscal impact on the Department of Public Safety.

Prepared by: Douglas B. Griffin Phone 269-0351  
 Division Alcoholic Beverage Control Board Date/Time 1/26/07 10:11 AM  
 Approved by: Commissioner Walt Monagan Date 1/26/2007  
 Agency Department of Public Safety

# LEGISLATIVE RESEARCH REPORT

FEBRUARY 10, 2006



REPORT NUMBER 06.123

## BEER AND WINE PRODUCTION IN ALASKA

PREPARED FOR REPRESENTATIVE GABRIELLE LEDOUX

BY ROGER WITHINGTON, LEGISLATIVE ANALYST

You asked for information regarding breweries and wineries in Alaska. Specifically, you wished to know the number of breweries and wineries operating in Alaska, and an estimate of the number of gallons produced and sold by each business.

According to Johanna Bales, Revenue Audit Supervisor with the Tax Division of the Alaska Department of Revenue, there are currently ten breweries in Alaska that produced approximately 1.2 million gallons of beer, and six wineries that produced approximately 1,900 gallons of wine during FY 2005.<sup>1</sup> Table 1 provides a list of our breweries and wineries.

Unfortunately, Alaska Statute 43.05.230, Disclosure of Tax Returns and Reports, prevents Ms. Bales from providing us with production and sales figures specific to each producer. In addition, of these businesses that have a website, none posted production and sales figures. Based on the Alcoholic Beverage Tax set forth in AS 43.60, Alaska breweries contributed approximately \$42,000 in taxes, while the in-state wineries contributed approximately \$4,750.<sup>2</sup>

<sup>1</sup> Johanna Bales, Revenue Audit Supervisor with the Alaska Department of Revenue, Tax Division, can be reached at 907-269-6628.

<sup>2</sup> All in-state breweries meet the definition of a small brewery set forth in AS 43.60.010.

Table 1: Alaska Breweries and Wineries		
Operation Type	Operation Name	Location
Breweries	The Glacier Brewhouse - Brews Brothers	Anchorage
	Moose's Tooth Brewing Co - Chugach Beverages LLC	Anchorage
	Midnight Sun Brewing Co	Anchorage
	Sleeping Lady Brewing Company	Anchorage
	Silver Gulch Brewing & Bottling Inc	Fairbanks
	Haines Brewing Company Inc	Haines
	Homer Brewing Company	Homer
	Alaskan Brewing, LLC	Juneau
	Kodiak Island Brewing Company L	Kodiak
	Great Bear Brewing Co – Pioneer Peak Brewing Co	Wasilla
Wineries	Denali Winery – U-Brew Wineries Inc	Anchorage
	Kodiak Island Winery	Chiniak
	Great Land Wines Ltd	Haines
	Bear Creek Winery, LLC	Kachemak
	Alaska Wilderness Wines	Kodiak
	Valley Winery LLC	Wasilla
<b>Notes:</b>	The businesses listed above were licensed with the Alaska Department of Revenue (DOR) during FY2005. Business are not required to be licensed with the DOR until they actually produce and sell alcohol. According to the Alaska Alcoholic Beverage Control Board (ABC), there are three additional business that are licensed for FY2006: the Mother Lode (Brewpub) in Anchorage, Alice's Champagne Palace (Brewpub) in Homer, and the Copper River Brewery in Cordova. Please keep in mind that a license from the ABC does not guarantee that the business will produce and sell alcoholic beverages.	
<b>Source:</b>	Johanna Bales, Revenue Audit Supervisor with the Alaska Department of Revenue, Tax Division, 907-269-6628.	

Attached, please find an excerpt from the Alaska Department of Revenue, Tax Division's *FY 2005 Annual Report of Operations* that provides summary information on Alaska's Alcoholic Beverage Tax.

---

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

The New York Times


 Consider  
BORAT

May 16, 2005  
 Supreme Court Strikes Down Bans on Wine Shipments  
 By DAVID STOUT

WASHINGTON, May 16 - The Supreme Court ruled today, in a case of interest to millions of wine-drinkers and those who make a living in the multibillion-dollar industry, that people can buy wine directly from out-of-state vineyards.

In a 5-to-4 decision that struck down laws in New York and Michigan, and by extension calls into question the laws in 22 other states, the court held that laws that discriminate against out-of-state vineyards violate the Constitution's Commerce Clause, which empowers Congress to regulate interstate commerce.

"Laws such as those at issue contradict the principles underlying this rule by depriving citizens of their right to have access to other states' markets on equal terms," the majority held, in an opinion by Justice Anthony M. Kennedy.

Today's ruling does not leave state lawmakers powerless to regulate direct shipments of alcohol, but if they do so they must not favor their own states over other states. Indeed, Nida Samona, the chairwoman of the Michigan Liquor Control Commission, told The Associated Press that her commission would urge lawmakers to bar direct shipments for both local and out-of-state wineries.

Today's ruling is of intense interest not only to the states - 26 of which already allow direct shipment from out-of-state wineries - but also to the wholesale liquor industry, which fears eventually being left out of what is now a state-run three-tier system: liquor producer to licensed wholesaler to licensed retailer.

The worry for liquor wholesalers has been that if the justices ruled that consumers could buy wine directly from out-of-state producers, so might liquor retailers be able to do so, at least in theory.

Today's decision, in the cases of *Granholm v. Heald*, No. 03-1116, from Michigan, and *Swedenburg v. Kelly*, No. 03-1274 from New York, had to do with interpretation of the Constitution, the intent of the 1933 Amendment that ended Prohibition and changing personal tastes in the age of the Internet.

When the case was argued before the justices on Dec. 7, lawyers for New York and Michigan asserted that the Prohibition-ending 21st Amendment to the Constitution gave states such wide authority over the importation of alcohol that it trumped the principle embodied in the Commerce Clause: that the states may not, without Congressional authorization, discriminate against one another.

New York's and Michigan's lawyers insisted then that the goals of preventing minors' access to alcohol and assuring that the states could collect taxes from out-of-state shippers justified their states' statutes. Solicitor General Caitlin J. Halligan of New York told the justices that the case "goes to the very core of the 21st Amendment."

Justice Kennedy responded - tellingly, it would appear from today's ruling - that "it also goes to the very core of the Commerce Clause."

Justice Kennedy wrote today that the real object of the Michigan and New York statutes was not protection of minors but rather to give in-state wineries a competitive advantage over those in other states. Justice Kennedy, who was joined by Justices Antonin Scalia, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer, said New York and Michigan "provide little evidence for their claim that purchasing wine over the Internet by minors is a problem."

"The 26 states now permitting direct shipments report no such problem, and the states can minimize any risk with less restrictive steps, such as requiring an adult signature on delivery," the majority said. Moreover, the majority said, the states could devise tax-collection procedures without resorting to discrimination in interstate commerce.

"In all but the narrowest circumstances" the states violate the Commerce Clause if they erect barriers to help in-state business at the expense of outsiders, the majority said in describing the Commerce Clause as "essential to the foundations of the Union."

The majority observed that "the current patchwork of laws - with some states banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity - is essentially the product of an ongoing, low-level trade war."

Chief Justice William H. Rehnquist and Justices John Paul Stevens, Sandra Day O'Connor and Clarence Thomas dissented.

Justice Stevens conceded that the New York and Michigan laws would be "patently invalid" if they regulated sales of "an ordinary article of commerce," not wine. "But ever since the adoption of the 18th Amendment and the 21st Amendment, our Constitution has placed commerce in alcoholic beverages in a special category," Justice Stevens wrote. (The 18th Amendment ushered in the era of Prohibition and, some social historians have said, the bootleggers and speak-easies that accompanied it.)

"Today, many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to the same market and legal controls as other consumer products," Justice Stevens wrote. "That was definitely not the view of the generations that made policy in 1919 when the 18th Amendment was ratified or in 1933 when it was repealed by the 21st Amendment."

That alcoholic beverages are something apart in the world of commerce is obvious from what happened after Prohibition ended, Justice Stevens went on: "So-called 'dry states' entirely prohibited such commerce; others prohibited the sale of alcohol on Sundays; others permitted the sale of beer and

wine but not hard liquor; most created either state monopolies or distribution systems that gave discriminatory preferences to local retailers and distributors."

Small local wineries were elated by today's ruling. "This is the best day for wine lovers since the invention of the corkscrew," Clint Bolick, counsel for the Institute for Justice, which represented local wineries, told The Associated Press. "It demonstrates that in the era of the Internet the court will vindicate the principles of free trade that made this country great."

And Juanita Swedenburg, the Middleburg, Va., vintner who sued to overturn the New York law, told The A.P. that the ruling was "a boon for America's wine-loving consumers who like to have various wines from throughout the nation."

The laws overturned today are not identical. Michigan's statute flatly prohibited direct shipments by out-of-state wineries. New York's permitted such shipments in theory - as long as the winery maintained a physical presence in New York, including a warehouse to store wines before sale. No out-of-state winery has qualified for this exception in the 35 years that the law has been on the books.

Among the other states that ban direct shipments from out-of-state wineries are Connecticut, Delaware, Pennsylvania, New Jersey, Vermont, Massachusetts and Florida. A few states even make importing a felony. (A map showing the wine laws throughout the country can be viewed on the Institute for Justice's Web site, [www.ij.org](http://www.ij.org).)

In issuing their ruling today, the justices reversed the United States Court of Appeals for the Second Circuit, which had affirmed the New York law, and it upheld the Court of Appeals for the Sixth Circuit, which had voided the Michigan law.

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## U.S. Supreme Court Rules on Direct Shipping

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**FARELLA BRAUN + MARTEL LLP**  
By Matthew J. Lewis and David E. Stoll of Farella Braun & Martel LLP

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On May 16, 2005, the United States Supreme Court struck down direct shipping laws in Michigan and New York holding that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, and that the discrimination is neither authorized nor permitted by the 21<sup>st</sup> Amendment.

For wineries and wholesalers, *Granholm v. Heald* is notable for different reasons. For wineries, the case makes clear that States' powers to regulate alcohol under the 21<sup>st</sup> Amendment are not absolute, and that States must treat in-state and out-of-state wineries the same when it comes to the direct shipment of wine. For wholesalers, the decision reaffirmed the legitimacy of the three-tier system and did not establish a right to direct ship.

While the decision is a clear victory for those in favor of direct shipping, the real impact will only be known once we see how States choose to rewrite their laws to respond to the decision, and how the lower courts apply the decision to future challenges to the three-tier system.

### Background: The Battle for Shelf Space in a Consolidating Industry

In striking down the Michigan and New York laws, the U.S. Supreme Court recognized the significant and ongoing consolidation in the wine industry. Fewer wineries and fewer distributors now control a larger than ever portion of the wine market, making it increasingly difficult for small wineries to distribute their wines.

At the same time that large wineries and distributors are consolidating, the number of small wineries in the United States is proliferating rapidly, making competition for retail shelf space even fiercer. Furthermore, as the Court noted, even if small wineries could find distributors for their wine in States that prohibit direct shipping, the distributor's mark-up would render such sales through the three-tier system economically infeasible.

As a result, more and more small wineries are turning to direct sales – via the tasting room, mailing list and over the Internet -- as the principal means to sell their wine. This is especially true given the recent technological advancements allowing for the sale of wine over the Internet, without the need for any physical contact with the customer at all.

### **The States' Powers Are Not Absolute**

The States put forth three main arguments to justify discriminatory restrictions on out-of-state wineries: preventing the direct sale of alcohol to minors, improving the ability of states to collect sales tax, and that alcohol is simply different than other articles of commerce. None of these arguments persuaded the Court.

With regard to preventing the direct sale of alcohol to minors, the Court found that minors are less likely to consume wine as opposed to other forms of alcohol, and that minors have easier and quicker means to obtain alcohol than direct purchase through the mail. Moreover, less restrictive means are available to prevent the direct sale of alcohol to minors through the mail; such as requiring an adult signature for delivery and a label stating the requirement on the package itself.

With regard to the collection of sales tax, the Court found that if licensing and self-reporting provide adequate tax collection safeguards for wine distributed through the three-tier system, such mechanisms should work for direct shipments as well. States could require a license as a condition of direct shipping, with a requirement for licensees to submit sales reports and pay sales taxes. Notably, this is the approach recommended by the National Conference of Legislatures in their Model Direct Shipping Bill.

The third justification – that States' should be able to discriminate with regard to commerce in alcohol because alcohol is a unique article of commerce—is harder to dismiss. Concerns about the evils of alcohol abuse are so strong in our nation's history that a State's right to regulate the commerce of alcohol is enshrined in the Constitution itself. Despite acknowledging the unique history of alcohol in the United States, and that States have near absolute power to regulate the commerce of alcohol, the Court refused to allow the States to do so in a discriminatory manner. If a State desires to restrict the commerce of alcohol, it must do so in a way that does not differentiate based on whether a business is located in state or not.

### **The 21<sup>st</sup> Amendment and its Limitations**

As clear as the Court was in holding that States' may not discriminate against out-of-state wineries with regard to the direct shipment of wine, the Court was equally clear in upholding the validity of the three-tier system and the States' rights to regulate or even ban the commerce of alcohol. The Court noted that the three-tier system is "unquestionably legitimate" and that the 21<sup>st</sup> Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.

States' powers to regulate commerce in alcohol are limited only by other provisions of the Constitution itself. In this case, the Court held the Commerce Clause—which stands for the proposition that States cannot treat businesses differently based on whether the business is located in or out of state—trumps the 21<sup>st</sup> Amendment. According to Justice Kennedy, "if a State chooses to allow direct shipments of wine, it must do so on evenhanded terms."

### Unintended Consequences: Are Reciprocal Laws Unconstitutional?

Although the ruling focuses on two States' laws that clearly discriminate against out-of-state wineries, the decision likely renders unconstitutional the direct shipping laws of other States whose laws are not commonly viewed as discriminatory. Good examples are those States with so-called reciprocal laws—laws that allow direct shipping only from States who in turn allow direct shipping into their State.

Ironically, California is a prime example of a State whose reciprocal direct shipping laws are now arguably unconstitutional under *Granholm v. Heald*. In fact, the Supreme Court in its ruling specifically mentioned California's reciprocal laws as illustrating the type of fragmented, alliance-driven patchwork of laws that has led to discrimination against out-of-state wineries. As the Court stated: "The current patchwork of laws—with some States banning direct shipments altogether, other doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war."

Anticipating a challenge, the California Family Winemakers and the Wine Institute, among others, are already working on direct shipping amendments to replace the existing reciprocal laws in California with laws allowing for direct shipping from all States, regardless of reciprocity.

### More Questions Than Answers: What Now?

It is worth repeating that the Court's decision does not authorize direct shipping. In fact, for those States that prohibit all direct shipping, the ruling has no direct affect because such laws treat in-state and out-of-state wineries the same. For those States whose laws do discriminate in one form or another, as stated by the Wine Institute, these states will have to take some legislative or regulatory action to address the discrimination issue and to build a framework for shipments to be made.

The ruling does suggest that requiring a physical presence in-state as a condition to direct ship is unconstitutional. This calls into question state laws that require in-state retailers, who buy from wholesalers, to buy from wholesalers located in-state. Costco is currently challenging such a law, among others, in the State of Washington. Also called into question are laws that allow in-state wineries, but not out-of-state wineries, to sell directly to restaurants and other retailers located in-state. Such a law currently exists in California, and if repealed, would adversely affect many California wineries that rely heavily on local retail direct sales.

Another broader question is in those States where the legislature requires all alcohol sales to go through a licensed entity, can these States require that the licensee maintain a physical in-state presence? From one perspective, the Court suggests it strongly disfavors state statutes that require in-state business operations. On the other hand, the three-tier system's middle tier is highly dependent on the in-state business requirement, and the Court went out of its way to declare the three-tier system as "unquestionably legitimate."

Although these positions seem at odds with each other, one way to reconcile them might be to reinterpret the Court's holding to be that States may not discriminate against out-of-state wineries *unless they have a good reason for doing so*. Thus far, the States' arguments have not been persuasive. It remains to be seen whether the lower courts will allow certain types of discrimination to survive if the States are able to provide strong enough justifications for doing so.

For example, what if States focused regulations on production amounts rather than the location of the winery? If States could assure wholesalers that the largest wineries would have to use the three-tier system, the wholesalers' interests might be satisfied. For smaller wineries, their low production could qualify them for an exemption from the three-tier system and allow them to direct ship.

#### **The Opportunity and the Danger: Legislative Free for All**

For all the noise this case has generated, the only thing we know for sure is that many States legislatures will be called on to rewrite their direct shipping laws. This presents an opportunity for wineries to push for legislatures to open their laws to direct shipping. However, it also presents a danger that the powerful wholesalers' lobby will convince State legislatures to impose more onerous restrictions on direct shipping than already exist, or to shut direct shipping down completely. Even in states like California where the wineries are at their strength, direct shipping proponents have an uphill battle to push through any legislation without the support of the wholesalers' lobby.

As part of any new legislation, many believe the wholesalers' lobby will push hard to include onerous paperwork, licensing and fee requirements in an attempt to make it as inconvenient and expensive as possible to direct ship. The more onerous the paperwork, the license requirements and the fees, the less wineries stand to gain.

---

 FARELLA BRAUN & MARTEL LLP

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For Your Information: March 30, 2004

Related Documents:

**FTC Staff: New York Direct Shipment of Wine Bills Would Promote E-commerce and Consumer Welfare**

***Bills Remove a Significant Barrier to Greater E-Commerce***

In response to requests from three New York state legislators, the staffs of the Federal Trade Commission's Office of Policy Planning, Northeast Regional Office, and Bureaus of Competition, Consumer Protection, and Economics have provided comments regarding three bills that would allow out-of-state vendors to ship wine directly to New York consumers if the vendors comply with certain regulatory requirements. According to the staff comments, the bills would promote e-commerce and give New York residents access to a greater variety of wines at lower prices, while allowing the state to satisfy its other public policy goals.

Todd Zywicki, Director of the FTC's Office of Policy Planning, stressed that the bills would help consumers. "Based on our empirical research, the bills could allow consumers to save significantly on more expensive wines. The bills would also give consumers access to thousands of wines from around the country," he said. Asheesh Agarwal, Assistant Director of the Office of Policy Planning, added that the bills would promote e-commerce. "By eliminating the requirement that out-of-state sellers maintain a physical presence in New York, the direct shipping bills would eliminate the single largest regulatory barrier to expanded e-commerce in the wine industry," he said.

The comments, available on the Commission's Web site, were sent to William Mageo, Chairman of the State Assembly Agriculture Committee; John R. Kuhl, Jr., Chairman of the State Senate Committee on Transportation; and Dean G. Skelos, Deputy Majority Leader of the State Senate. The comments analyze three New York bills, Assembly bill 9560-A, Senate bills 6060-A and 1192.

The staff comments first summarize the FTC's experience studying the direct shipment of wine to consumers, including a comprehensive report issued last July and congressional testimony delivered last October. The comments then analyze the pending bills, describing the regulatory requirements on shippers and common carriers. The comments conclude that the bills would allow consumers to purchase a greater variety of wines at lower prices.

The comments then summarize the experiences of states that currently allow interstate direct shipping of wine. The comments note that these states generally report few if any problems with direct shipments to minors, or with collecting taxes from those shipments. The comments also note that the bills contain all of the safeguards recommended by both the National Academy of Sciences and FTC staff, such as requiring an adult signature at the point of delivery. Finally, the comments discuss the implications of physical presence requirements for e-commerce generally, stating that "if extended to other industries, physical presence requirements could seriously imperil the growth of e-commerce."

In concluding its comments, the FTC staff said, "Based on an extensive review of the evidence, FTC staff believes that, if enacted, any of the bills would enhance consumer welfare and would allow New York to meet its other public policy goals."

The Commission vote authorizing staff to file the comments was 5-0. The comments represent the views of the staff of the FTC's Office of Policy and Planning, Bureaus of Competition, Consumer Protection, and Economics, and Northeast Regional Office, and not necessarily those of the Commission or any individual Commissioner.

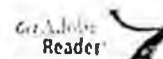
Copies of the document mentioned in this release are available from the FTC's Web site at <http://www.ftc.gov> and also from the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Call toll-free: 1-877-FTC-HELP.

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*Comments of the Staff of the Federal Trade Commission Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection, Bureau of Economics, and Northeast Regional Office (March 2004) to the Chairman, Assembly Agriculture Committee, Chairman, Senate Committee on Transportation and Deputy Majority Leader, New York Senate, Concerning New York Assembly bill 9560-A, and Senate bills 6060-A and 1192. (V040012)*

- Text of the Staff Comments [PDF 67KB]



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(FTC File No. V040012)

(<http://www.ftc.gov/opa/2004/03/nywine.htm>)

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FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580



Office of Policy Planning  
Bureau of Competition  
Bureau of Consumer Protection  
Bureau of Economics  
Northeast Regional Office

March 29, 2004

William Magee  
Chairman, Assembly Agriculture Committee  
Legislative Office Bldg, Room 641  
Albany, NY 12248

John R. Kuhl, Jr.  
Chairman, Senate Committee on Transportation  
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Deputy Majority Leader, Senate  
503 State Capitol Bldg  
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Re: Assembly bill 9560-A, Senate bills 6060-A and 1192

Dear Chairmen Magee and Kuhl, and Deputy Majority Leader Skelos:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection, Bureau of Economics, and Northeast Regional Office are pleased to respond to your requests for comments on New York Assembly bill 9560-A, and Senate bills 6060-A and 1192. These bills would allow out-of-state vendors to ship wine directly to New York consumers if the vendors comply with certain regulatory requirements, such as labeling delivery packages and reporting sales to state authorities. In letters dated February 10 and 25, 2004, you asked us to examine the bills, and specifically to discuss the information regarding "the opponents' arguments related to sales to minors and harm to the three-tier system, as well as the proponents' arguments regarding the positive impact for consumers and state revenues."<sup>1</sup> You also referenced pending litigation.<sup>2</sup>

<sup>1</sup> This letter expresses the views of the FTC's Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection, Bureau of Economics, and Northeast Regional Office. The letter does not necessarily represent the views of the Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

<sup>2</sup> See *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004) (upholding New York's direct shipping regulations).

We believe that, if enacted, all three bills would enhance consumer welfare and allow New York to meet its other public policy goals. By allowing interstate direct shipping, the bills could allow New York residents to purchase a greater variety of wines at lower prices. Senate bill 1192 would provide the greatest benefits by allowing both out-of-state wineries and retailers to obtain out-of-state shipper's licenses. In addition, by requiring vendors and common carriers to comply with various regulatory requirements, similar to those adopted in other states, all three bills would allow New York to limit shipments to minors and to collect taxes on out-of-state shipments. Finally, the bills would remove one of the largest barriers to greater e-commerce in the wine industry. We base our analysis on a recent FTC staff report that extensively analyzed the direct shipping issue, and on the Commission's testimony at a recent congressional hearing (copies of both attached). A summary of our analysis is below:

- Variety. Direct shipping allows consumers to purchase many wines that are not available in nearby bricks-and-mortar stores. An FTC staff study found that 15% of a sample of popular wines available online were not available from retail wine stores within ten miles of McLean, Virginia. Direct shipping also gives consumers easier access to thousands of labels from smaller wineries.
- Prices. Depending on the wine's price, the quantity purchased, and the method of delivery, consumers can save money by having wine shipped directly to them. Because shipping costs do not vary with the wine's price, consumers can save more money on more expensive wines, while less expensive wines may be cheaper in bricks-and-mortar stores. The FTC staff study suggests that, if consumers use the least expensive shipping method, they could save an average of 8-13% on wines costing more than \$20 per bottle, and an average of 20-21% on wines costing more than \$40 per bottle.
- Sales to minors. The states that permit interstate direct shipping generally report few or no problems with shipments to minors. These states have generally adopted less restrictive means of regulating interstate direct shipments, such as requiring that package delivery companies obtain an adult signature at the time of delivery. The pending bills contain these same types of safeguards.
- Taxes. Several states collect taxes on interstate direct shipments. States such as New Hampshire have sought to achieve voluntary compliance through less restrictive means, such as by requiring out-of-state suppliers to obtain permits. Most of these states report few or no problems with tax collection.
- E-commerce. State bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine. Approximately half the states prohibit or severely restrict out-of-state suppliers from shipping wine directly to consumers. Many of these same states, however, allow intrastate direct shipping, such as from in-state wineries and retailers.

For these reasons, we believe that, if enacted, the bills would enhance consumer welfare and allow New York to meet its other public policy goals.

### Interest and Experience of the Federal Trade Commission

The FTC is charged by statute with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.<sup>3</sup> Under this statutory mandate, the Commission seeks to identify business practices and regulations that impede competition without offering countervailing benefits to consumers. In particular, Commission staff have often assessed the competitive impact of regulations involving alcohol distribution. For example, the staff has analyzed franchise laws that grant wholesalers preferential contract rights. In Illinois, the staff examined a bill that would have prevented suppliers from terminating contracts with wholesalers except for good cause, and suggested that the bill would harm consumers by limiting suppliers' flexibility in changing distributors.<sup>4</sup> In North Carolina, the staff noted that a bill that would have tightened exclusive territorial arrangements between wineries and wholesalers would likely diminish consumer welfare.<sup>5</sup> Another type of state regulation deters wholesalers from cutting prices. In Massachusetts, FTC staff discussed the consumer benefits of a proposal that would have repealed regulations requiring wholesalers to post prices on a monthly basis and to adhere to those posted prices for an entire month.<sup>6</sup>

FTC staff have also studied the direct shipping issue. In October 2002, the Commission held a workshop to evaluate possible anticompetitive barriers to e-commerce in wine and many other industries.<sup>7</sup> At the workshop, FTC staff heard testimony from all sides of the wine issue, including wineries, wholesalers, and state regulators. The staff also gathered evidence from package delivery companies, the Alcohol and Tobacco Tax and Trade Bureau ("TTB"), and regulators in states that allow direct shipping. Finally, FTC staff conducted the first empirical study of a wine market in a state that banned interstate direct shipping. The study examined the wine market in McLean, Virginia ("McLean study"), and compared the prices and choices that consumers could find in area stores to those available online. The authors chose McLean as a relevant retail area because the socio-economic status of many residents in McLean (and northern Virginia, generally) made it likely that several local bricks-and-mortar outlets would

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<sup>3</sup> Federal Trade Commission Act, 15 U.S.C. § 45.

<sup>4</sup> FTC Staff Letter to Illinois Sen. Dan Cronin (Mar. 31, 1999), at <http://www.ftc.gov/bc/v990005.htm>.

<sup>5</sup> FTC Staff Letter to North Carolina Sen. Horton and Rep. Miller (Mar. 22, 1999), at <http://www.ftc.gov/bc/v990003.htm>.

<sup>6</sup> FTC Staff Statement to the Commonwealth of Massachusetts Alcoholic Beverages Control Commission (June 26, 1996), at <http://www.ftc.gov/bc/v960012.htm>.

<sup>7</sup> Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet, 67 Fed. Reg. 48,472 (2002). The workshop's homepage is at <http://www.ftc.gov/opp/e-commerce/anticompetitive/index.htm>, its transcript is at <http://www.ftc.gov/opp/e-commerce/anticompetitive/021008antitrans.pdf>, and all of the panelists' written statements are at <http://www.ftc.gov/opp/e-commerce/anticompetitive/agenda.htm>.

cater to sophisticated wine drinkers.<sup>8</sup> In July 2003 FTC staff issued a comprehensive report on the direct shipping issue ("Wine Report"),<sup>9</sup> and in October 2003, the Commission testified at a related congressional hearing.<sup>10</sup>

### Analysis of Pending Bills

All three bills would allow out-of-state vendors to ship wine directly to New York residents if those vendors satisfy certain regulatory requirements. Under Senate bill 1192, both out-of-state manufacturers and retailers could obtain an out-of-state shipper's license if those vendors hold a license to sell or manufacture wine in another state, and if that other state affords New York's vendors reciprocal treatment. To obtain an out-of-state shipper's license, vendors must pay an annual fee of \$125 and present New York's state liquor authority with a copy of a current license from the other state. A license allows vendors to ship wine directly to New York residents who are 21 years or older.

Senate bill 1192 imposes several requirements on out-of-state shippers. In sending the wine, the shipper must ensure that the delivery package has a conspicuous label noting that the package contains alcohol and requires an adult signature for delivery, and the shipper must require common carriers to obtain an adult signature at the time of delivery. In addition, the shipper must provide the state liquor authority with annual reports that include, among other information, the total volume of shipments into New York and the purchaser's name and birth date. The shipper must pay all state and local sales and excise taxes, keep records for three years, and consent to New York's jurisdiction for enforcement purposes. Finally, the bill gives the state liquor authority the power to suspend or revoke an out-of-state shipper's license.

Assembly bill 9560-A and Senate bill 6060-A have similar provisions, with a few important exceptions. These bills would allow only out-of-state wineries, not retailers, to obtain out-of-state shipper's licenses, and in addition to a license, an out-of-state winery would have to obtain a "certificate of authority" and a "registration as a distributor." The bills also cap wine shipments at two cases per month to any New York resident. Finally, the bills directly require common carriers to verify the age of recipients.

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<sup>8</sup> See Wine Report at 18 n.81. It is likely that, in larger markets, bricks-and-mortar retailers may offer somewhat more choices, and that in smaller markets, bricks-and-mortar retailers may offer somewhat fewer choices.

<sup>9</sup> FTC Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003), at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

<sup>10</sup> See Prepared Statement of the FTC Concerning "E-Commerce: The Case of Online Wine Sales and Direct Shipment," Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, United States House of Representatives (October 30, 2003), at <http://www.ftc.gov/os/2003/10/031030ecommercewine.htm>.

## I. The Bills Would Allow Consumers to Purchase a Greater Variety of Wines

The bills would substantially increase the variety of wines available to consumers. Through direct shipping, and particularly through the Internet, consumers can conveniently purchase many wines that are not available in nearby bricks-and-mortar stores. The Internet effectively expands the geographic market by allowing online vendors to compete nationally. An individual online store may feature more products than many bricks-and-mortar retail locations. More importantly, the total number of varieties available online may surpass the total number available in bricks-and-mortar stores that are within a reasonable distance of a particular consumer. As a result, direct shipping can give consumers convenient access to many more wines, including popular labels. Using the *Wine and Spirits* list of the top 50 most popular wines in America, the McLean study found that 15% of the wines available online were not available from retail wine stores within ten miles of McLean. For the bottles that were unavailable in the McLean vicinity, 8 out of 15 came from among the 20 most popular bottles.<sup>11</sup> In addition to popular wines, direct shipping also gives consumers access to thousands of smaller labels from around the country.

Bricks-and-mortar retailers may not have the demand or shelf-space to justify keeping a large variety of wines in stock. According to a trade association, domestic wineries produce approximately 25,000 wine labels, and even in a large market like Illinois, only slightly more than 500 of these labels are available through the three-tier system.<sup>12</sup> Moreover, smaller wineries may be unable to distribute their wines through the three-tier system. One court found that Florida's interstate direct shipping ban "has the practical effect of preventing many small wineries from selling their wine in Florida. This result occurs because it is not cost-effective for the smaller out-of-state wineries to acquire a Florida wholesaler."<sup>13</sup> Another court found that the three-tier system "may lock most [out-of-state producers] out of any access to Texas markets, even if they are willing to take on the additional costs. Such discrimination is especially felt by small, family-run wineries with limited production."<sup>14</sup>

Consumers are likely to value having a variety of wines from which to choose. One wine magazine, for example, reviews over 10,000 different wines annually. Similarly, an economist

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<sup>11</sup> See Wine Report, App. A. The FTC's Bureau of Economics contributed to the Wine Report, and the McLean study, which is attached to the report, has been published as Alan E. Wiseman and Jerry Ellig, *How Many Bottles Make a Case Against Prohibition?* (Bureau of Economics, Federal Trade Commission, Working Paper No. 258, March 2003).

<sup>12</sup> See Wine Report at 24.

<sup>13</sup> *Bainbridge v. Bush*, 148 F.Supp.2d 1306, 1311 n.7 (M.D. Fla. 2001), *vacated on other grounds*, *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002).

<sup>14</sup> *Dickerson v. Bailey*, 212 F.Supp.2d 673, 694-95 (S.D. Tex. 2002), *aff'd*, 336 F.3d 388 (5th Cir. 2003).

testified that “the value to consumers of direct wine shipments com[es] primarily from access to wines that are not available in their communities.”<sup>15</sup>

## II. The Bills Could Allow Consumers to Purchase Wine at Lower Prices

Depending on the wine's price, the quantity purchased, and the method of delivery, consumers can save money by purchasing wine online. Because shipping costs do not vary with the wine's price, consumers can save more money on more expensive wines, while less expensive wines may be cheaper in bricks-and-mortar stores. The McLean study suggests that, if consumers use the least expensive shipping method, they could save an average of 8-13% on wines costing more than \$20 per bottle and an average of 20-21% on wines costing more than \$40 per bottle. In addition, direct shipping lets consumers avoid the “cost” of spending time to travel to a bricks-and-mortar store.<sup>16</sup>

Moreover, even if consumers choose to buy wine from a bricks-and-mortar retailer, direct shipping still encourages price competition between online and offline sources. In states that allow direct shipping, the Internet allows wineries and other merchants across the nation to compete with local bricks-and-mortar retailers. The Internet helps consumers comparison shop and lets suppliers compete in geographic markets that otherwise may be closed to them, perhaps due to the three-tier system or franchise laws.<sup>17</sup> This competition likely forces down prices. One court found that the ban on interstate direct shipping constituted “economic protectionism, negatively impacting Texas consumers because of more limited wine selection and higher prices.”<sup>18</sup> Likewise, a Nobel laureate in economics has explained how direct shipping benefits consumers:

consumers benefit from free markets operated with the minimum government regulation required for consumer protection. . . . The restrictions on direct

<sup>15</sup> See Daniel L. McFadden, Written Statement 2, at <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/mcfadden.pdf>. On the importance of variety, see Thomas B. Leary, *The Significance of Variety in Antitrust Analysis*, 68 ANTITRUST L.J. 1007 (2001). Some, however, have determined that consumers already have enough choices. See Statement of Juanita D. Duggan Concerning “E-Commerce: The Case of Online Wine Sales and Direct Shipment” 18, Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, United States House of Representatives (October 30, 2003) (“The average retail store in most States carries between 300 and 500 different wine brands at any given moment. Can you imagine selecting from that many toothpastes or contact lenses or cars?”).

<sup>16</sup> See generally Clifford Winston, *Conceptual Developments in the Economics of Transportation: An Interpretive Survey*, 23 J. ECON. LIT. 57, 77 (Mar. 1985) (discussing costs of travel time).

<sup>17</sup> See, e.g., Public Comments, American Bar Association, Section of Antitrust Law at 10, at <http://www.ftc.gov/opp/e-commerce/anticompetitive/comments/aba.pdf>.

<sup>18</sup> *Dickerson v. Bailey*, 212 F.Supp.2d 673 (S.D. Tex. 2002), incorporating *Dickerson v. Bailey*, 87 F.Supp.2d 691, 709-10 (S.D. Tex. 2000), *aff'd*, 336 F.3d 388 (5th Cir. 2003).

purchase of premium wines and their interstate shipment that have been adopted by a number of States are, I believe, another example of abuse of the regulatory process to protect concentrated economic interests, going far beyond the minimum regulations needed to maintain the integrity of taxation and to protect minor consumers.<sup>19</sup>

Because all three bills permit direct shipping, all would increase competition and allow consumers to find lower prices. Of the three bills, Senate bill 1192 would increase competition the most by allowing out-of-state retailers, as well as wineries, to obtain out-of-state shipper's licenses. This additional competition likely would allow consumers to find even lower prices. The McLean study found that "the lowest online prices overwhelmingly come not from wineries, but from out-of-state retail outlets that have web-accessible inventories."<sup>20</sup>

To provide New York consumers with the greatest benefits, the bills should ensure that licensing procedures for out-of-state vendors are not overly burdensome. For example, to ship into New York, Assembly bill 9560-A and Senate bill 6060-A require out-of-state wineries to obtain a "certificate of authority" and a "registration as a distributor" in addition to an out-of-state shipper's license. All three bills require out-of-state vendors to pay an annual fee of \$125. Such restrictions may constrain competition. Depending on the volume of purchases in a state, even seemingly small fees can deter smaller wineries from shipping wine.<sup>21</sup> In addition, some states have created complex licensing procedures and regulations that deter suppliers and package delivery companies from shipping wine to those states. Furthermore, all three bills allow out-of-state vendors to obtain New York licenses only if those vendors are located in states that afford New York's vendors reciprocal treatment. This restriction will prevent some out-of-state vendors from shipping to New York residents, thereby somewhat limiting competition and consumer choice. To obtain the greatest benefits from competition, a policy should ensure that permit procedures, fees, and regulations are reasonably calculated to meet the state's legitimate regulatory goals.

### III. States that Permit Interstate Direct Shipping of Wine Generally Report Few or No Problems with Direct Shipments to Minors

Although direct shipping can provide consumers with important benefits, policymakers have expressed concern that direct shipping might exacerbate the problem of underage drinking. As FTC staff recognized in the Wine Report and in other documents, underage alcohol use

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<sup>19</sup> See Daniel L. McFadden, Written Statement 1, at <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/mcfadden.pdf>.

<sup>20</sup> Wine Report at App. A 25 n.22.

<sup>21</sup> See Wine Report at 41.

imposes significant costs, in both human and economic terms.<sup>22</sup> In the context of the direct shipping of wine, however, the evidence shows that the states that permit interstate direct shipping generally report few or no problems with shipments to minors.

#### A. Evidence from States That Allow Direct Shipping

FTC staff contacted officials from many states that allow interstate direct shipping and asked them whether they had experienced problems with shipping to minors. These states generally report few, if any, problems with direct shipping to minors. Most of them do not believe that interstate direct shipment of wine to minors is currently a serious problem, although several of them believe that it is possible for minors to buy wine online. None of them report more than isolated instances of minors buying or even attempting to buy wine online.<sup>23</sup> State regulators uniformly expressed greater concern about underage access to alcohol through traditional avenues.

The state officials offered many possible explanations for their experiences. Several state officials opined that minors are more interested in beer and spirits than wine.<sup>24</sup> New Hampshire concluded that minors are less likely to purchase wine online because of the extra expense of ordering over the Internet.<sup>25</sup> This conclusion corresponds with the McLean study, which found that when transportation costs are included, lower-end wines are more expensive when purchased over the Internet than through the three-tier system.<sup>26</sup> Minors would have to pay a hefty premium, from 33-83%, to purchase a bottle of wine costing less than \$20 online and have it delivered to them via 2<sup>nd</sup> Day Air. Similarly, several state officials also commented that, based on their experience, minors were much more likely to buy alcohol through offline sources than over the Internet.<sup>27</sup> In a 2002 survey, large percentages of high school students, from 68-95%, said that it is "fairly easy" or "very easy" to get alcohol.<sup>28</sup>

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<sup>22</sup> See *id.* at 26-38; FTC, *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers* App. A, pp. iii-iv (Sept. 1999), at <http://www.ftc.gov/reports/alcohol/alcoholreport.htm>.

<sup>23</sup> See Wine Report at 26-40.

<sup>24</sup> See *id.* at 32 (chart summarizing state responses), App. B (letters from state officials). See also Wall Street Journal, Editorial, *The Carafe is Half Full*, WALL ST. J., July 3, 2003, at A10 (arguing that teenagers are not interested in expensive wines, and that "[t]hirty states allow wine shipments within their borders without a surce in teen drinking").

<sup>25</sup> *Id.* at App. B (New Hampshire letter).

<sup>26</sup> See *id.* at App. A.

<sup>27</sup> See *id.* at App. B (California testimony; letters from New Hampshire and Wisconsin).

<sup>28</sup> See *id.* at notes 47-50 and accompanying text.

Of course, the fact that states have received few complaints about direct shipments to minors does not establish that minors are not purchasing wine online. As noted by a Michigan Assistant Attorney General, minors who buy wine online are unlikely to report their purchases to the authorities, and neither the package delivery company nor the supplier may know or care that they are delivering wine to a minor.<sup>29</sup> FTC staff cannot rule out the possibility that minors are buying wine online undetected by state officials.

Nevertheless, the staff is aware of no systematic studies assessing whether direct shipping increases alcohol consumption by minors. FTC staff found only one study that might address the impact of direct shipping of wine on underage drinking. This study examines the impact of "home delivery" of keg beer and other alcohol on underage drinking from such traditional retailers such as local liquor stores.<sup>30</sup> Although the study raises important issues of concern, it provides little information upon which to assess interstate direct shipping of wine. The study does not specifically address online sales, interstate direct shipment via package delivery companies, or wine. For example, one of the study's key findings is that "[o]utlets providing delivery services were more likely to sell keg beer." Moreover, the study itself states that "data presented here do not reveal the frequency of delivery use or whether delivery purchases served as a primary source of alcohol," and the study does not assess whether home delivery or direct shipping increases underage alcohol consumption above the level that would occur without those channels.<sup>31</sup>

The data from state compliance checks, or stings, in theory could provide additional evidence on the impact of interstate direct shipping on underage drinking. Several states have conducted stings on interstate direct shipments of wine. Typically in these stings, states provide a minor with a credit card to see whether the minor can purchase wine online, and whether the supplier or package delivery company will refuse to deliver it to the minor. These data, however, are also inconclusive. Stings and anecdotes have shown that minors are able to buy wine online, but there are not enough data from which to conclude that minors can buy wine more or less easily online than offline. For instance, Michigan found that "[a]bout one in three websites contacted" (roughly 33%) agreed to sell alcohol to the minor with no more age verification than a mouse click, and that UPS delivery people did not properly verify the recipients' ages.<sup>32</sup> On the other hand, New Hampshire has run compliance checks in the past but

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<sup>29</sup> See Testimony of Irene Mead 196, at <http://www.ftc.gov/opp/e-commerce/anticompetitive/021008antitrans.pdf>.

<sup>30</sup> Linda A. Fletcher et al., *Alcohol Home Delivery Services: A Source of Alcohol for Underage Drinkers*, J. STUD. ALCOHOL 61: 81-84 (2000).

<sup>31</sup> The National Academy of Sciences cites this study, and only this study, for the proposition that "[s]urveys of underage purchase of alcohol over the Internet or through home delivery show that small percentages (10 percent) of young people report obtaining alcohol in this manner." See *Reducing Underage Drinking: A Collective Responsibility* 174-75 (2004). As noted in the text, however, the cited study does not discuss the Internet or sales from out-of-state vendors.

<sup>32</sup> See Wine Report at 35.

did not report any problems with interstate direct shipping to minors.<sup>33</sup> Moreover, the bricks-and-mortar sting data show comparable results. These stings typically find that minors are able to buy alcohol between 15-30% of the time. In Michigan, minors were able to buy alcohol 55% of the time after showing a valid Michigan license that identified the customer as a minor.<sup>34</sup> Ultimately, there are little data indicating whether a retail clerk is a more or less reliable gatekeeper than a common carrier's delivery person. Of course, efforts should be made to minimize underage purchases of alcohol, both online and offline, and New York's bills incorporate safeguards against direct shipping to minors.

#### B. Less Restrictive Regulatory Tools

Many states have decided that they can prevent direct shipping to minors through non-discriminatory, less restrictive means than a complete ban. For example, some states have applied the same types of safeguards to direct shipments that already apply to bricks-and-mortar retailers, such as requirements that package delivery companies obtain an adult signature at the time of delivery. In addition, several states, including Nebraska, New Hampshire, and Wyoming, require out-of-state suppliers to register and obtain permits (a permit can be conditioned on the out-of-state supplier's consent to submit to the state's jurisdiction). None of these states reported any problems with interstate direct shipping to minors.<sup>35</sup>

New York's bills contain these types of safeguards. In sending the wine, the shipper must ensure that the delivery package has a conspicuous label, and the common carrier must obtain an adult signature at the time of delivery. In addition, the shipper must register with the state and consent to jurisdiction within New York for enforcement purposes. Finally, the bills give the state liquor authority the power to suspend or revoke an out-of-state shipper's license. Notably, New York's bills contain all of the safeguards recommended by both the National Academy of Sciences, which recommended "tightening access" rather than banning interstate direct shipping, and FTC staff.<sup>36</sup>

To the extent that minors do buy wine online, some argue that they lack adequate enforcement tools against out-of-state suppliers. They contend that the states cannot readily inspect the records of out-of-state suppliers, and that because of jurisdictional constraints, "there is no easy way to shut [out-of-state suppliers] down if violations occur." They also argue that out-of-state suppliers have little incentive to prevent sales to minors, in part because of enforcement difficulties, but also because individual states can only punish out-of-state suppliers with the loss of a small part of their market, not the loss of a license. They note that, in contrast,

<sup>33</sup> See *id.* at App. B (New Hampshire letter).

<sup>34</sup> See *id.* (noting a success rate of 30% in bricks-and-mortar stings); Letter from Tina Schultz, National Alcohol Beverage Control Association, to FTC 2-4 (Jan. 31, 2002) (citing state statistics).

<sup>35</sup> See Wine Report at App. B (letters from Nebraska, New Hampshire, and Wyoming).

<sup>36</sup> See Wine Report; NAS, Reducing Underage Drinking: A Collective Responsibility 174-75 (2004).

they can readily inspect in-state wholesalers and retailers on-site, run compliance checks, and punish violators with the loss of a license, fines, and other penalties.<sup>37</sup>

States, however, have a variety of legal remedies against out-of-state suppliers that ship to minors. The Twenty-First Amendment Enforcement Act gives state attorneys general the power to bring civil actions in federal court for injunctive relief against out-of-state suppliers that violate the state's liquor laws.<sup>38</sup> At the time the law took effect, in 2000, state authorities agreed that the Act would help them enforce their laws against out-of-state suppliers. The National Alcohol Beverage Control Association ("NABCA"), an association of state regulators, stated that the Act would "provide state governments with an effective tool to use in preventing the illegal interstate flow of alcohol beverages, some of which finds its way into the hands of underage drinkers."<sup>39</sup> NABCA also said that the Act would help states "overcome the jurisdictional hurdles" in enforcing their laws.<sup>40</sup> Finally, TTB, which has authority to revoke a winery's basic permit, will assist states in combating significant violations of state law.<sup>41</sup>

States also can request assistance from other states' alcohol agencies. New Hampshire will punish suppliers licensed in New Hampshire if another state proves that the supplier is shipping wine illegally into that state.<sup>42</sup> Likewise, when officials in Louisiana learn of a violation, they have a duty to notify both TTB and the state that licensed the violator, and to "request those agencies to take appropriate action."<sup>43</sup>

Overall, the evidence shows a few clear results. States that permit interstate direct shipping have adopted various procedural safeguards and enforcement mechanisms to prevent sales to minors. These states generally say that direct shipping to minors currently is not a serious problem, and that they have received few or no complaints about direct shipping to minors. The McLean study suggests that an interstate shipping ban primarily deprives consumers of access to lower-cost sources of high-end, expensive wines, and to a larger variety

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<sup>37</sup> See Wine Report at 29-30.

<sup>38</sup> 27 U.S.C. § 122a (2002); Letter from Sheryl L. Walter, Acting Assistant Attorney General, U.S. Department of Justice, to Hon. Dennis Hastert, Speaker, U.S. House of Representatives 2 (May 3, 2001); *Bolick v. Roberts*, 199 F.Supp.2d 397, 442 (E.D. Va. 2002) (addendum), *vacated on other grounds*, *Bolick v. Danielson*, 330 F.3d 274 (4th Cir. 2003).

<sup>39</sup> Letter from James M. Goldberg, counsel for NABCA, to Jonathan Ruseh, Special Counsel for Fraud Prevention, U.S. Department of Justice 2 (Mar. 19, 2001), attached as an enclosure to the Walter letter.

<sup>40</sup> *Id.* See also Wine Report at App. B (noting that Illinois could use the Act).

<sup>41</sup> ATF, Industry Circular No. 96-3, Direct Shipment Sales of Alcohol Beverages (Feb. 11, 1997), at [http://www.atf-treas.gov/pub/ind\\_circulars/ic\\_96-3.htm](http://www.atf-treas.gov/pub/ind_circulars/ic_96-3.htm).

<sup>42</sup> N.H. REV. STAT. ANN. § 178:14-a(VIII) (2000).

<sup>43</sup> LA. REV. STAT. ANN. § 26:359(G) (West 2001).

of all wines. FTC staff has seen no evidence indicating whether higher prices for these types of fine wines would curtail consumption significantly either among the general populace, minors, or problem drinkers. There is, therefore, apparently no empirical evidence that bans on interstate direct shipping promote temperance. Because New York's bills contain the same types of recommended safeguards as those adopted by states that allow interstate direct shipping and report few problems, it is likely that New York will experience few, if any, problems with direct shipments of wine to minors.

#### IV. States that Permit Interstate Direct Shipping of Wine Generally Report Few or No Problems with Tax Collection

Some states also have adopted less restrictive means of protecting tax revenues while permitting direct shipping, such as by requiring out-of-state suppliers to obtain permits and to collect and remit taxes.<sup>44</sup> New York's bills incorporate these types of requirements. Of these states, most report few, if any, problems with tax collection. Nebraska, for example, reports that they "have also not, as yet, had any problems with the collection of excise tax[es]."<sup>45</sup> North Dakota reports that "Taxes are collected. No problems to date that we are aware of."<sup>46</sup>

To the extent that states have problems with out-of-state suppliers, they have addressed the problem in less restrictive ways than banning all interstate direct shipping. New Hampshire, for example, works with out-of-state suppliers:

[T]he State of New Hampshire Liquor Commission collects an 8% fee on all shipments into the State of New Hampshire. When the NH Liquor Commission discovers an improper shipment we contact the company and inform them of the laws in NH. Once the company learns of NH laws they normally get a permit or stop shipping into NH. The NH Liquor Commission is working with out-of-state supplier[s] and encouraging them to obtain a permit.<sup>47</sup>

Furthermore, to the extent that out-of-state suppliers fail to comply voluntarily, states can report problems to TTB or other states, or use the Twenty-First Amendment Enforcement Act. On the other hand, there is no evidence showing that states must ban interstate direct shipping, rather than adopting a less restrictive alternative, to raise revenue.

Finally, regardless of whether states permit or prohibit interstate direct shipping, there is no reason to believe that legalized direct shipping would increase tax evasion. It is unlikely that

<sup>44</sup> See, e.g., LA. REV. STAT. ANN. § 26:359(B)(1); N.H. REV. STAT. ANN. § 178:14-a(V); NEV. REV. STAT. § 369-462.

<sup>45</sup> See Wine Report at App. B (Nebraska letter).

<sup>46</sup> See *id.* (North Dakota letter).

<sup>47</sup> See *id.* (New Hampshire letter).

states would increase illegal interstate direct shipping by creating procedures that would allow out-of-state suppliers to ship legally and pay taxes. Michigan, for example, reports that many out-of-state suppliers ship wine illegally into Michigan, and that those suppliers do not pay taxes to Michigan. Michigan, however, already prohibits out-of-state suppliers from shipping wine into Michigan, and out-of-state suppliers that ship into Michigan are already breaking the law. By legalizing direct shipping and requiring shippers to pay taxes as a condition for receiving a license, states could allow interstate direct shipping from out-of-state suppliers that comply with the law. If suppliers who currently ship illegally continue to ship illegally, then the level of tax evasion would remain unchanged, but if some suppliers who currently ship illegally decide to ship legally, then tax evasion would fall. Moreover, if interstate direct shipping increases overall commerce in wine, overall tax revenue could rise.<sup>48</sup>

## V. The Bills Would Promote E-Commerce and Interstate Commerce

The Internet lets consumers purchase an unprecedented array of goods and services from the convenience of their homes. Consumers can find thousands of goods, from thousands of suppliers around the country, and have those goods delivered to their doors. State bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine. In states that ban interstate direct shipping, the bans prevent consumers from conveniently purchasing wine from suppliers around the country.<sup>49</sup>

The direct shipping issue has broader implications for interstate e-commerce. In many industries, including many professional and financial services, states require that potential suppliers maintain a physical office within the state, or that they hire state residents.<sup>50</sup> Under current New York law, for example, out-of-state wineries can obtain a license to distribute and sell alcohol in New York only if they “comply with the licensing requirements of [New York] Law, including establishing and maintaining a physical presence in New York.”<sup>51</sup> These requirements ostensibly allow states to maintain tighter regulatory control over the supplier, but they also significantly raise the cost to online suppliers to doing business within a particular state. They deprive online suppliers of one of the main efficiency benefits of e-commerce, the ability to provide goods and services over large distances without the need for a substantial, far-flung physical presence. They also demonstrate how seemingly neutral restrictions can deprive online firms of a legitimate competitive advantage. State physical presence laws apply equally

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<sup>48</sup> See *id.* at 39-40.

<sup>49</sup> See, e.g., Virginia Postrel, *A Look at Wine Sales over the Internet Shows the Price of Some Regulations in the Name of Consumer Protection*, N.Y. TIMES, July 17, 2003, at C2 (criticizing bans on interstate direct shipping as a barrier to e-commerce).

<sup>50</sup> At the workshop, FTC staff examined potentially anticompetitive barriers to e-commerce in many other industries: auctions; automobiles; caskets; contact lenses; cyber schools; online legal services; real estate, mortgages, and financial services; retailing; and telemedicine and online pharmaceutical sales. See Workshop Homepage, at <http://www.ftc.gov/opp/e-commerce/anticompetitive/index.htm>.

<sup>51</sup> *Swedenburg v. Kelly*, 358 F.3d 223, 228-29 (2d Cir. 2004).

to in-state and out-of-state firms. In reality, though, these requirements impose disproportionate costs on online firms by diminishing or eliminating one of their advantages. Moreover, online firms, unlike bricks-and-mortar firms, may not enjoy the full financial benefits of maintaining an in-state office, because only part of their client base will reside in any particular state.

On the other hand, there is little evidence that in-state office requirements are necessary to advance consumer protection goals. For instance, there is little evidence that in-state office requirements reduce the incidence of consumer fraud by "fly-by-night" operators who deceive consumers and then disappear. FTC staff have ample experience demonstrating that deceptive lending can harm consumers, particularly for low-income and unsophisticated borrowers.<sup>52</sup> There is, however, no necessary correlation between a lender's propensity to deceive consumers and the presence or absence of in-state offices or personnel. In a number of the most significant deceptive lending cases brought by the Commission, the lenders operated in-state offices.<sup>53</sup>

Physical presence is not necessary to ensure accountability.<sup>54</sup> Nor is the issue of enforcement unique to wine. As with catalogue sales or online sales of other products, a variety of general laws and regulations protect consumers and provide legal remedies. Consumers can use general contract and tort law, as well as other specific state consumer protection laws and federal laws, to seek legal redress against out-of-state suppliers. State enforcement agencies can use a variety of legal tools, such as the Twenty-First Amendment Enforcement Act and cooperation with other states' enforcement agencies. Moreover, federal agencies, including the FTC, TTB, and Department of Justice, have authority to bring enforcement actions against sellers who violate the law. At best, physical presence requirements are an expensive, inefficient means of getting an incremental increase in regulatory authority. At worst, if extended to other industries, physical presence requirements could seriously imperil the growth of e-commerce.

Finally, your letter asked us to comment on arguments regarding "harm to the three-tier system." The FTC's statutory mandate, of course, is to promote competition and consumer welfare, not producer welfare. Having said that, the evidence suggests that expanded e-commerce would improve market conditions by giving wineries (including New York wineries), the first tier of the system, extra distribution outlets. Moreover, expanded e-commerce likely would not spell the end of bricks-and-mortar wholesalers or retailers. Because of shipping costs, consumers generally can find lower prices for less expensive wines in bricks-and-mortar stores.

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<sup>52</sup> See Prepared Statement of the Federal Trade Commission on Efforts to Combat Unfair and Deceptive Subprime Lending, before the Senate Special Committee on Aging 4-8, February 24, 2004, at <http://www.ftc.gov/os/2004/02/02242004subprimelendingtest.pdf>.

<sup>53</sup> See, e.g., *The Associates*, No. 1:01-CV-00606 (N.D. Ga. 2001); *First Alliance Mortgage Co., et al.*, No. SACV 00-964 DOC (Eex) (C.D. Cal. 2000); *Mercantile Mortgage Co.*, No. 02-5079 (N.D. Ill. 2002).

<sup>54</sup> *Cf. Swedenburg*, 358 F.3d at 237-38.

In states that permit interstate direct shipping, such as California and Illinois, wholesalers and retailers continue to enjoy the bulk of sales.<sup>55</sup>

### Conclusion

Based on an extensive review of the evidence, FTC staff believes that, if enacted, any of the bills would enhance consumer welfare and would allow New York to meet its other public policy goals. FTC staff also believes that Senate bill 1192 would provide greater benefits to consumers than Assembly bill 9560-A or Senate bill 6060-A, because that bill would allow both out-of-state wineries and retailers to obtain out-of-state shipper's licenses.

Respectfully submitted,

Todd J. Zywicki, Director  
Office of Policy Planning

Susan A. Creighton, Director  
Bureau of Competition

Howard Beales, Director  
Bureau of Consumer Protection

Luke M. Froeb, Director  
Bureau of Economics

Barbara Anthony, Director  
Northeast Regional Office

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<sup>55</sup> See Daniel L. McFadden, Written Statement 2, at <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/mcfadden.pdf> ("If direct interstate wine shipments were reopened, I would foresee some competitive pressure on distributors and retailers, primarily from direct wine sales to large retailers, but no substantial restructuring of the industry. I find it particularly sad that the anti-interstate shipping legislation that has been passed is so disproportionate in its negative impact on consumers relative to the very modest protection it provides to traditional distributors and retailers").

**HB**

**35**

**HFIN**

**FILE**



# FISCAL NOTE

**STATE OF ALASKA**  
**2007 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB 35  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Not if correction): \_\_\_\_\_ Dept. Affected: Commerce  
 Title Extend Board of Midwives RDU Corp, Bus & Prof Licensing (117)  
 Component Corp, Bus & Prof Licensing  
 Sponsor Representative Kawasaki  
 Requester House Finance Committee Component No. 2360

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services		12.9	12.9	12.9	12.9	12.9
Travel		2.4	2.4	2.4	2.4	2.4
Contractual		4.9	4.9	4.9	4.9	4.9
Supplies		0.0	0.0	0.0	0.0	0.0
Equipment		0.0	0.0	0.0	0.0	0.0
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>		<b>20.2</b>	<b>20.2</b>	<b>20.2</b>	<b>20.2</b>	<b>20.2</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1156 Receipt Supported Services		20.2	20.2	20.2	20.2	20.2
<b>TOTAL</b>	<b>0.0</b>					

Estimate of any current year (FY2007) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This legislation extends the Board of Certified Direct-Entry Midwives to June 30, 2015. FY 2008 funding is included in the FY 2008 operating budget request. The costs shown for subsequent fiscal years reflect the direct costs included in the FY 2008 budget.

The program is required to cover its costs with licensing fees under AS 08 01.065, and revenue generated by board fees are anticipated to cover the board's full operating costs. New funds are not required to implement this bill.

Prepared by: House Finance Committee  
 Division: \_\_\_\_\_  
 Approved by: Representative Meyer  
Representative Chenault

Phone 465-4945  
 Date/Time 3/6/07 12:00 AM  
 Date \_\_\_\_\_

# FISCAL NOTE

STATE OF ALASKA  
2007 LEGISLATIVE SESSION

Fiscal Note Number: 1  
Bill Version: HB 35  
(H) Publish Date: 3/1/07

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Commerce  
Title Extend Board of Midwives RDU Corp, Bus & Prof Licensing (117)  
Component Corp, Bus & Prof Licensing  
Sponsor Kawasaki, Wilson  
Requester House Labor & Commerce Component No. 2360

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services		12.9	12.9	12.9	12.9	12.9
Travel		2.4	2.4	2.4	2.4	2.4
Contractual		4.9	4.9	4.9	4.9	4.9
Supplies		0.0	0.0	0.0	0.0	0.0
Equipment		0.0	0.0	0.0	0.0	0.0
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>20.2</b>	<b>20.2</b>	<b>20.2</b>	<b>20.2</b>	<b>20.2</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other 1156-Receipt Supported Services		20.2	20.2	20.2	20.2	20.2
<b>TOTAL</b>	<b>0.0</b>	<b>20.2</b>	<b>20.2</b>	<b>20.2</b>	<b>20.2</b>	<b>20.2</b>

Estimate of any current year (FY2007) cost: 20.2  
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This legislation extends the Board of Certified Direct-Entry Midwives to June 30, 2015. In accordance with AS 08.03.020, funding is extended one year following the termination date allowing the Board to conclude its affairs. FY 2008 funding is included in the Operating Budget request. The costs shown for subsequent fiscal years reflect the direct costs included in the FY 2008 budget.

The program is required to cover its costs with licensing fees under AS 08 01.065, and revenue generated by board fees are anticipated to cover its full operating costs. New funds are not required to implement this bill.

Prepared by: Chris Wyatt, Administrative Manager Phone (907) 465-2572  
Division: Corporations, Business, and Professional Licensing Date/Time 2/28/07 9:30 AM  
Approved by: Emil Notti, Commissioner Date 2/28/2007  
Agency: Commerce, Community, and Economic Development



# Representative Scott Jiu Wo Kawasaki

Alaska State Legislature

District 9 Fairbanks

## House Bill 35 Sponsor Statement

Title: "An act extending the termination date for the Board of Certified Direct-Entry Midwives; and providing for an effective date."

House Bill 35 extends the sunset date of the Board of Certified Direct-Entry Midwives until June 30, 2015, in accordance with the recommendations of the Legislative Auditor.

The purpose of the board is to protect the health and safety of the public by identifying individuals who are willing to pursue training and meet the qualifications necessary to become a licensed midwife. The board is composed of five members: two certified direct-entry midwives, one certified nurse midwife, one physician licensed by the Alaska State Medical Board, and one public member. Board members are appointed by the Governor to serve four year terms.

The Board examines applicants and issue certificates to qualified applicants, adopts regulations establishing certification and renewal requirements, and issues permits to apprentice midwives. It makes decisions and takes disciplinary action against people who violate the licensing laws. It maintains all educational records; approve curricula, training, and programs for direct entry midwives and apprentices.

The Board has worked proactively to ensure that public safety has been maintained while improving the profession of Midwives. The Board successfully incorporated Certified Professional Midwife standards into Alaska's Certified Direct-Entry Midwives licensing program. The Board continued to work to create and revise regulations that ensure proper training and increase educational requirements. The Board monitors and reviews all applicants desiring to become an Alaskan Midwife.

The legislative auditor has concluded the Board of Certified Direct-Entry Midwives meets the statutory requirements of public need and is in compliance with AS 08.01.065(c), which requires occupational licensing fees to cover the regulatory costs of that occupation.

Accordingly, Alaska's business and professional communities will be well served by your support of this reauthorization.

House H&SS Committee Testimony for HB 35

My name is Kaye Kanne. I am a Certified Direct-Entry Midwife and Executive Director of the Juneau Family Birth Center. Thank you for this opportunity to testify to your committee. I am asking for your support on HB 35, a bill to extend the Certified Direct-Entry Licensing Board to 2015. I sat on the Board of Certified Direct-Entry Midwives from its inception in 1992 until I had completed two terms and resigned in 2000. I worked hard with this legislature to create the CDM Board in 1992. Alaska has excellent midwifery standards thanks to the past efforts of our legislators.

The Board has done an excellent job of writing and implementing regulations for the governing of Certified Direct-Entry midwives in Alaska. The Board continues to strive for the highest standards for CDM's and as a result, midwives in Alaska are professional, well trained and provide safe, excellent care for women and families. Training standards are high, with Certified Direct-Entry Midwife students required to attend twice as many births to achieve licensing as a Certified Nurse Midwife.

Alaska has one of the best midwifery laws in the United States. Many other states have looked to us as an example when passing midwifery legislation. Alaska is at the forefront of Direct-Entry Midwifery licensing. Midwives serve healthy, low-risk women. Alaska is a young state with a very large birthing population. We serve approximately 10% of all the births in Alaska, and the numbers are growing. Let's continue the excellent work we have been doing by continuing the Certified Direct-Entry licensing Board until 2015.

I am available for questions. Thank you for your continued support of midwifery issues, families, and children in Alaska.

Kaye Kanne, CDM  
Executive Director  
Juneau Family Birth Center  
3225 Hospital Drive #106  
Juneau, Alaska 99801  
907-586-1203

# Boards & Commissions

State of Alaska > Governor > Boards and Commissions

## Midwives

**Board:** Board of Certified Direct-Entry Midwives

**Board identification number:** 172

**Department:** DEPARTMENT OF COMMERCE COMMUNITY AND ECONOMIC DEV

**Authority:** AS 08.65.010

**Status:** Active

**Sunset date:** 6/30/2007

**Requirements:** Legislative Confirmation

**Prohibitions:** A member may serve no more than two complete consecutive terms on the board (AS 08.65.010 (d)).

**Term:** 4 years

**Description:** 5 members appointed by the Governor: 2 certified direct-entry midwives; 1 physician (licensed by the State Medical Board) who has an obstetrical practice or has specialized training in obstetrics; 1 certified nurse midwife (licensed by the Board of Nursing); 1 public member.

**Function:** Regulates the policies and procedures for the practice of direct-entry midwifery in Alaska; controls applications, licenses, and appeals in the direct-entry midwifery profession.

**Chair:** Board selects.

**Special facts:** Members serve at the pleasure of the Governor. Board elects chair and secretary from among members to terms of 1 year. Members serve until a successor is appointed and qualified. A member who has served all or part of two successive terms on a board may not be reappointed to that board unless four years have elapsed since the person has last served on the board (AS 08.01.035).

**Compensation:** Standard Travel and Per Diem.

**Meetings:** Shall meet twice a year. Other mtgs as called by chair or as requested by 2 members.

**For further information contact:**

Mr. Steve Snyder  
Corporations, Business, and Professional Licensing  
DCED, P.O. Box 110806 M/S 0806  
Juneau, AK 99811-0806  
Phone: (907) 465-2580, FAX: (907) 465-2974

## State of Alaska

### Office of Boards and Commissions Roster

#### MIDWIVES (172)

Member	Date Appointed	Reappointed	Term Expires
Dana L. Brown, CDM, CPM Certified Direct-Entry Midwife Alaska Family Health & Birth Clinic 728 Gaffney Street, Suite 100 Fairbanks, AK 99701-4610	1/19/2000	4/30/2004	3/1/2008
Mila (Melinda) A. Cosgrove Public Department of Administration 1003 B Street Juneau, AK 99801	11/20/2002	2/24/2006	3/1/2010
Barbara Norton Certified Nurse Midwife Geneva Woods Birth Center 3730 Rhone Circle, Suite 101 Anchorage, AK 99508	6/3/2005		3/1/2009
Mark E. Richey, M.D. Physician/OB practice 1200 Airport Heights, Suite 205 Anchorage, AK 99508-2969	2/20/1997	8/25/2003	3/1/2007
Holly M. Steiner, R.N., C.D.M. Certified Direct-Entry Midwife 2201 Porcupine Trail Wasilla, AK 99654	6/3/2005		3/1/2008

Return to the fact sheet



DEPARTMENT OF  
**COMMERCE**  
COMMUNITY AND  
ECONOMIC DEVELOPMENT

Office of the Commissioner

*Frank H. Murkowski, Governor*  
*William C. Noll, Commissioner*

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OCT 19 2006

LEGISLATIVE AUDIT

September 29, 2006

Ms. Pat Davidson, CPA  
Legislative Auditor  
Legislative Budget and Audit Committee  
Division of Legislative Audit  
P.O. Box 113300  
Juneau, Alaska 99811-3300

Dear Ms. Davidson,

Thank you for the opportunity to comment on the preliminary audit report for the Board of Certified Direct-Entry Midwives.

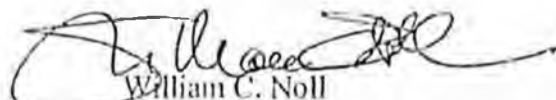
The department concurs with the audit findings. There are two items in the report that I would like to bring to your attention:

On page 8, the second to the last paragraph begins "The board sets fees..." should be corrected as identified in the previous paragraph, it is the "Department" who sets fees after consulting with the Board.

Additionally, on page 9, the first paragraph under Exhibit 1 discusses a proposal to set up a fund to cover legal costs. In FY05, the Division of Corporations, Business and Professional Licensing did propose the idea of creating a Legal Defense Fund patterned after a similar fund in the State of Colorado. However, there was strong opposition to that proposal by OMB and by members of the Legislature. Such a fund could help to avoid large increases in licensing fees when litigation costs arise.

Thanks again for the opportunity to comment on your findings.

Sincerely,

  
William C. Noll  
Commissioner

P.O. Box 110800, Juneau, Alaska 99811-0800

Telephone: (907) 465-2500 Fax: (907) 465-5442 Text Telephone: (907) 465-5437

Email: [questions@commerce.state.ak.us](mailto:questions@commerce.state.ak.us) Website: <http://www.commerce.state.ak.us/>

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OCT 31 2006  
LEGISLATIVE AUDIT



Alaska Family Health & Birth Clinic  
728 Gaffney Road, Suite 100  
Fairbanks, AK 99701  
(907) 456-3719

Alaska State Legislature  
Legislative Budget and Audit Committee  
Division of Legislative Audit  
P.O. Box 113300  
Juneau, AK 99811-3300

October 26, 2006

To Whom It May Concern:

This is written in response to the preliminary audit report concerning the Board of Certified Direct-entry Midwives. I concur with the recommendation that legislature extend the termination date of the board to June 30, 2015. My conclusions are the same as those in the audit report. In the Analysis of Public Need section on page 8, it implies that the board increased certification requirements for apprentice direct-entry supervisors. We tried to do this but were unable to change regulation because of wording in statute. Someday the Midwives Association of Alaska will need to go to legislature and try to get legislation passed to change wording in statute so that certain regs. can be addressed. I concur with the rest of the report. I am very pleased with the report.

Sincerely,

Dana Brown  
CDM Board Chair

LEGISLATIVE AUDITOR'S ADDITIONAL COMMENTS

LEGISLATIVE BUDGET AND AUDIT COMMITTEE  
Division of Legislative Audit



P.O. Box 113300  
Juneau, AK 9811-3300  
(907) 465-3830  
FAX (907) 465-2347  
legaudit@legis.state.ak.us

October 26, 2006

Members of the Legislative Budget  
and Audit Committee:

We have reviewed the response to our preliminary audit from the Board of Certified Direct-Entry Midwives. The response points out that the board was unsuccessful in their attempt to effect regulatory changes to 12 AAC 14.210 to increase certification requirements for apprentice direct-entry supervisors due to statutory language (AS 08.65.090(b)). We agree that certification requirements for apprentice direct-entry supervisors did not increase during the audit period, and that section of the report has been corrected.

Handwritten signature of Pat Davidson in cursive.

Pat Davidson, CPA  
Legislative Auditor