

In the United States Court of Appeals
For the Third Circuit

No. 23-2922

JEAN-PAUL WEG, LLC, d/b/a The Wine Cellarage; LARS NEUBOHN,
Plaintiff-Appellants,

v.

DIRECTOR OF THE NEW JERSEY DIVISION OF ALCOHOLIC
BEVERAGE CONTROL; ATTORNEY GENERAL OF NEW JERSEY,
Defendants-Appellees,

FEDWAY ASSOCIATES, INC.; ALLIED BEVERAGE GROUP, LLC;
OPICI FAMILY DISTRIBUTING; NEW JERSEY LIQUOR
STORE ALLIANCE,
Intervenor Defendants - Appellees.

On appeal from the U.S. District Court for the District of New Jersey
Case No. 2:19-cv-14716, Hon. Julien X. Neals

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CORPORATE DISCLOSURE STATEMENT

Appellant Jean-Paul Weg, LLC, has no parent corporation and no publicly held company owns 10% or more of its stock.

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I. Introduction

Plaintiffs challenge the constitutionality of a New Jersey law that prohibits out-of-state retailers from selling wine online and shipping it to consumers but allows in-state retailers to do so. New Jersey issues the necessary licenses only to retailers with physical premises located in the state and will not issue licenses to retailers located outside the state.

Whether this difference in treatment is constitutional depends on the interplay between the Commerce Clause¹ which prohibits discrimination against interstate commerce, and § 2 of the Twenty-first Amendment² which gives states broad latitude to regulate the sale of intoxicating liquors within their borders. The proper balance between those two provisions is set out in three cases: *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 138 S.Ct. 2449 (2019); *Granholm v. Heald*, 544 U.S. 460 (2005), and *Freeman v. Corzine*, 629 F.3d 146 (3d Cir. 2010). They hold that when a liquor law is discriminatory, the burden is on the State to

¹“The Congress shall have the power [to] regulate commerce ... among the several states.” U.S. CONST., art. I, § 8, cl. 3.

²“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST., AMEND. XXI, §2.

demonstrate with concrete evidence that banning interstate commerce is reasonably necessary to protect public health or safety because nondiscriminatory alternatives (such as a permit system) would be ineffective. New Jersey has not met this burden.

The district court paid lip service to this standard but did not apply it. It did not place the burden on the State to prove with concrete evidence why it needed to totally ban interstate wine shipping by retailers when it uses a permit system to regulate all other aspects of liquor distribution. This was error because the Supreme Court holds that this inquiry is required. *Tenn. Wine*, 139 S.Ct. at 2474. The court did not give serious scrutiny to the state's ostensible public-safety justification that retailer shipping was dangerous when New Jersey allows out-of-state wineries to ship the same product to the same consumers. This was error because serious scrutiny is required by *Freeman v. Corzine*, 629 F.3d at 158-59. In the end, the court upheld the ban simply because out-of-state retailers were not physically located in New Jersey and were therefore outside the heavily regulated "New Jersey System." This, too, was error because the Supreme Court has held that a state may not require physical presence in order to ship wine to consumers. *Granholm v. Heald*, 544 U.S. at 475.

II. Jurisdiction

A. Subject-matter jurisdiction. Plaintiffs-Appellants brought this action in the District of New Jersey under 42 U.S.C. § 1983, alleging that New Jersey law, which prohibits out-of-state retailers from shipping wine to consumers, discriminates against interstate commerce in violation of the Commerce Clause. They sued state officials with responsibility for enforcing those laws in their official capacity, seeking declaratory and injunctive relief. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), which confer original jurisdiction on district courts to hear suits alleging the violation of rights under the U.S. Constitution.

B. Court of appeals jurisdiction. The Court of Appeals has jurisdiction under 28 U.S.C. § 1291. This is an appeal from a final judgment disposing of all claims and terminating the case. The court ruled on cross-motions for summary judgment as to all issues on August 22, 2023 (App 003). Intervenors filed a motion to reconsider on September 5, 2023. See App 039 (Dkt. 159). The court denied it but *sua sponte* modified its final order on October 13, 2023 (App 003). That disposed of all issues, and plaintiffs filed a timely notice of appeal on October 24, 2023 (App 001).

III. Statement of the issues.

A. The substantive issue

Plaintiffs challenge the constitutionality of New Jersey's law prohibiting out-of-state retailers from selling wine online and shipping it to consumers but allowing in-state retailers to do so. They contend that this ban violates the Commerce Clause because it discriminates against interstate commerce. It is not protected by the Twenty-first Amendment because the State has not shown that banning a few wine shipments by out-of-state retailers is reasonably necessary to protect public health or safety, given that New Jersey already allows in-state retailers and out-of-state wineries to ship wine to consumers under a permit system. The district court upheld the law under the Twenty-first Amendment without giving any weight to the Commerce Clause or applying the standards set by the Supreme Court and this circuit. Plaintiffs raise one issue on appeal:

When properly considering both the Twenty-first Amendment and the Commerce Clause under the standard set in *Granholm, Tenn. Wine*, and *Freeman v. Corzine*, is it constitutional for New Jersey to prohibit out-of-state retailers from shipping wine directly to consumers when it allows in-state retailers to do so?

This issue was pled in the Third Amended Complaint ¶¶ 11-18, App 042-44, argued in summary judgment (Dkt. 102-3 at 6-12), and was the issue upon which the district court ruled. Opinion at 9-27, App 013-031.

B. Privileges and Immunities Clause issue.

Plaintiffs raised a second issue in their complaint: whether the ban on direct shipping by out-of-state retailers violated the Privileges and Immunities Clause. U.S. CONST., art IV, § 2. App 044-045. Plaintiffs abandoned that claim in the District Court and are not pursuing it.

C. Evidentiary issues

In the district court, the defendants proffered the expert reports of three witnesses, William Kerr, App 324, Pamela Erickson, App 314 & 341, and Patrick Maroney. App 307. Plaintiffs made timely and specific objections that this evidence violated FED.R.EVID. 702 because the opinions were not based on sufficient facts or the result of reliable methodology, and the reports consisted substantially of legal opinions. App. 037 (Dkt. 121, Pl. Memo. at 26-32). The district court neither ruled on these objections nor used the evidence in arriving at its decision, so this is not an issue on appeal. However, plaintiffs reserve the right to renew these objections if the appellees seek to present this evidence to this court.

IV. Related cases

A. There are no related cases or proceedings in this court or any district court in this circuit.

B. The following cases are pending in other circuits that involve similar issues about the constitutionality of state laws prohibiting out-of-state retailers from shipping wine.

1. *Chicago Wine Co. v. Holcomb*, No. 21-2068 (7th Circuit)
2. *Day v. Henry*, No. 23-16148 (9th Circuit)
3. *Block v. Canepa*, 2:20-cv-03686 (S.D. Ohio), on remand from 74 F.4th 400 (6th Cir. 2023)
4. *Anvar v. Dwyer*, 1:19-cv-00523 (D.R.I.), on remand from 82 F.4th 1 (1st Cir. 2023)
5. *Freehan v. Berg*, No. 1:22-cv-04956 (N.D. Illinois)

V. Standard of review

Plaintiffs are alleging that the district court erred in its formulation and application of constitutional law precedent when it granted summary judgment to the state. This court's review of an order granting summary judgment "is plenary, meaning we review anew the District Court's summary judgment decision[], applying the same standard it must apply." *Huber v. Simon's Agency, Inc.*, 84 F. 4th 132, 144 (3d Cir. 2023).

Summary judgment is appropriate if, when construing all facts and inferences in favor of the nonmoving party, the movant shows that there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Willis v. UPMC Children's Hosp. of Pittsburgh*, 808 F.3d 638, 643 (3d Cir. 2015). When cross-motions are filed, it does not mean that the court must grant one of the motions. Each is separately evaluated to determine whether there is a genuine dispute as to material facts that would require a trial. *Auto-Owners Ins. Co. v. Stevens & Ricci Inc.*, 835 F.3d 388, 402 (3d Cir. 2016).

VI. Statement of the case

A. The laws at issue

Plaintiffs challenge the constitutionality of New Jersey law that prohibits out-of-state retailers from shipping wine directly to consumers. This prohibition is not written down explicitly in a statute but is the result of several interrelated laws and administrative practices.

First, New Jersey requires that anyone who wants to sell or distribute alcohol in the state must obtain a license, N.J. STAT. § 33:1-2(a),³ but it

³“It shall be unlawful to ... distribute alcoholic beverages in this State, except pursuant to ... and within the terms of a license.” N.J. STAT. § 33:1-2(a). *Accord*, N.J. Admin Code § 13:2-21.1. Unlicensed shipping is a crime.

has no license available to wine retailers whose premises are located outside the state. New Jersey issues retail licenses only to retailers whose premises are physically located in the state. N.J. STAT. §§ 33-1:12(3a);⁴ 33-1:-24. The State agrees that a physical presence in New Jersey is a legal prerequisite for obtaining a retail wine license. App 078 (Answer ¶ 13);⁵ App 089-94 (Def. Admission 3, Resp. to Interrogs. 15-17).⁶ Requiring a physical presence in the state in order to sell and ship wine is unconstitutional under *Granholm v. Heald*, 544 U.S. at 475.

N.J. STAT. § 33:1-50(a).

⁴“[R]etail distribution licenses [to] sell any alcoholic beverages for consumption off the licensed premises ... shall be fixed by the governing board or body of the municipality in which the licensed premises are situated.”

⁵In their Answer ¶ 13, App 078, “Defendants admit the allegations contained in Paragraph 13” of the 3rd Amended Complaint that “Retail distribution licenses in New Jersey are issued only by municipalities and local boards, who are authorized only to issue licenses for retailers whose premises are located in that municipality.” 3rd Am. Compl. ¶ 13, App 043.

⁶In Admission 3, App 089, the State agreed that a retailer must have premises physically located in New Jersey to be eligible for a license. In answer to Interrog. 16, App 094, the State agreed that retailers whose premises were located outside New Jersey were not allowed to sell wine online and ship it to consumers. In answer to Interrog. 15, App 091, the State explained that every retailer must have a class C license and sales may only originate on its licensed premises. In answer to Interrog. 17, App 094, it clarified that the premises must be located in New Jersey.

Second, New Jersey requires that any retailer who wants to sell wine to New Jersey consumers must obtain that wine from New Jersey wholesalers. No statute imposes this limitation, but it appears in N.J. Admin. Code 13:2-23.12,⁷ and New Jersey ABC officials confirm the rule. App 437 (Johnson Depo. at 8:21-23); App 477 (Sapolnick Decl. ¶ 8). It is impossible for most out-of-state retailers to comply with this rule because they are required to buy their wine from wholesalers in their home states. *E.g.*, FLA. STAT. 561.14(3); N.C. GEN. STAT. § 18B-1006(h); OH. REV. CODE § 4301.58 (C). Plaintiff Jean-Paul Weg LLC could not comply because it is located in New York and gets its wine from New York wholesalers. App 390 (Neubohn Depo. 62:1-15). The requirement is unconstitutional under *Granholm v. Heald*, 544 U.S. at 490-93, because it would directly regulate business practices in other states, override the other state's regulations, and have the same practical effect as an explicit ban on direct shipments.

Plaintiffs are not challenging the basic requirement that everyone who wants to distribute wine in New Jersey must have a license. They *want* a license, App 042-44 (Compl. ¶¶ 6, 17, 29), but New Jersey will not give

⁷“No retail licensee shall ... obtain any alcoholic beverage except from the holder of a New Jersey ... wholesaler's license.”

them one because their premises are not located within the state. New Jersey reserves the exclusive privilege to make home deliveries of wine to its own local retailers. N.J. STAT. §§ 33-1:12(3a). Protecting local businesses from competition violates the Commerce Clause under *Tenn. Wine*, 139 S.Ct. at 2474.

B. Proceedings below

The original complaint was filed on July 3, 2019, by multiple plaintiffs challenging New Jersey's ban on interstate wine shipping. See App 032 (Dkt. 1). Amended complaints were filed on October 2, 2019, see App 032 (Dkt. 16) and April 30, 2020. See App 033 (Dkt. 37). A third and final amended complaint was filed May 6, 2021. App 040. Three wine wholesalers and a trade association intervened as defendants: Fedway Associates, see App 033 (Dkt. 39), Allied Beverage and Opici Family Distributors, see App 033 (Dkt. 55), and the New Jersey Liquor Store Alliance. See App034 (Dkt. 66). Answers were filed by all defendants substantially denying the allegations in the third amended complaint. App 075 (State defendants), App 049 ((N.J. Liquor Stores), App 059 (Allied & Opici), and App 067 (Fedway).

A motion for summary judgment was filed by the plaintiffs on November 4, 2021. See App 036 (Dkt. 102). Cross-motions for summary judgment were filed on December 6, 2021, by the state defendants, see App 037 (Dkt. 114), intervening defendants Allied and Opici, see App 037 (Dkt. 111), and intervening defendant Fedway. See App 037 (Dkt. 112). All briefing was completed on Feb. 18, 2022.

The district court did not hear oral arguments. On August 22, 2023, it issued its opinion and order denying the plaintiffs' motion for summary judgment, granting the state's motion for summary judgment, and denying the intervenors' motions as moot. App 003 et seq. On September 5, 2023, the intervening wholesalers filed a motion to reconsider whether its cross-motion should have been denied as moot. See App 039 (Dkt. 159). On October 13, 2023, the court denied the motion to reconsider but decided *sua sponte* to amend its final order to grant, rather than deny, the intervenors' motions for summary judgment. See App 030 (Dkt. 163). It docketed the modified order as ECF 158. App 003. This disposed of all remaining issues in the case. Plaintiffs filed a timely notice of appeal on October 24, 2023. App 001.

C. Summary of facts

1. A retailer located in New Jersey may obtain a retail distribution license that allows it to sell wine online and ship it to consumers without the customer appearing in person at the store. App 089 (Def. Admission 3), App 090-91 (Resp. to Interrog. 9). In order to obtain a license that provides the privilege to ship wine to consumers in New Jersey, a retailer must have physical premises located in New Jersey. *Id.*; App 094 (Resp. to Interrog. 17). Retailers whose premises are located outside New Jersey are not allowed to sell wine online and ship it to consumers. App 094 (Resp. to Interrog. 16). State officials intend to enforce this prohibition. App 088-89 (Def. Admission 2).

2. Plaintiff Jean-Paul Weg, LLC, d/b/a The Wine Cellarage (hereafter “the Wine Cellarage”), is a wine retail store in Bronx, New York. It is owned and operated by Lars Neubohn. App 085 (Neubohn Decl. ¶ 2). It engages in internet wine sales and has customers from all over the country, including many from New Jersey. *Id.* ¶¶ 4-5. It has received requests that it ship wine to New Jersey from potential customers that it has had to decline because such shipping is unlawful. Because of the prohibition, the Wine Cellarage has lost sales, profits, and the opportunity

to expand its business to include more customers from New Jersey. *Id.* ¶¶ 7-8.

3. The Wine Cellarage intends to ship wine directly to consumers in New Jersey in the future if the law prohibiting such shipments is removed or declared unconstitutional. It will obtain a New Jersey shipping permit if one is required and would comply with the conditions of that permit, including remitting taxes, reporting sales, and verifying the ages of the recipients. App 085-86 (Neubohn Decl. ¶¶ 9-10).

4. Many wines are available online that are not available in local bricks-and-mortar stores. For the 36-month period from July 1, 2018 to July 1, 2021, the federal Alcohol and Tobacco Tax and Trade Bureau (TTB) approved 349,955 wines for sale in the U.S., but only about 20% of them are distributed in New Jersey. App 236 (Tanford Decl. ¶¶ 2-4); App 130-31 (Wark Report ¶¶ 8-11). Individual stores typically carry 1000-4000 wines. App 132 (Wark Rep. ¶ 20). Banning interstate direct shipments limits consumers' access to the vast majority of wines sold in the country. App 099 (FTC Report at 3); App 130-31 (Wark Rep. ¶¶ 8-10).

5. Many highly recommended international wines are not available in New Jersey. Of the twenty-four Greek wines recommended by Wine

Enthusiast and New York Times, App 139-47, eight are not sold in New Jersey. App 236-37 (Tanford Decl. ¶ 5). Of nineteen South African wines recommended by Wine Spectator, App. 148-52, five are not sold in New Jersey. App 236-37 (Tanford Decl. ¶ 5). Of ten Portuguese wines recommended by Wine Enthusiast, App 153-54, six are not sold in New Jersey. App 236-37 (Tanford Decl. ¶ 5).

6. Foreign wines not available in New Jersey cannot be purchased directly from the winery but may only be obtained by a consumer from an out-of-state retailer. App 132-33 (Wark Rep. ¶ 21).

7. Local retailers cannot special-order any of the 279,000 wines not authorized for sale in New Jersey because they may obtain their wine only from New Jersey wholesalers who carry only state-approved wines. App 091 (Resp. to Interrog. 11). Most of these wines are available for sale somewhere in the U.S. from a retailer who will ship it to consumers. App 465 (Wark Depo.80:11-20); App 131-33 (Wark Report ¶¶ 16, 21-22).

8. Local wine stores usually do not carry rare, unusual, small-production, hard-to-find, or older-vintage wines. App 133 (Wark Report ¶¶ 23-24). Collectors can find them only at auction or from specialty wine retailers in other states, mostly in California and New York. App 155

(Arger Aff. ¶¶ 6, 9); App 157 (Gralla Aff. ¶ 12). Many such specialty retailers will not ship wine to states like New Jersey that do not authorize such shipments. App 157-58 (Gralla Aff. ¶ 11(f)); App 159 (K&L Wines policy).

9. There is no danger that direct shipping by out-of-state retailers would increase consumption by flooding the market with cheap wine. Shipping costs raise the price of wine from \$3-15 per bottle depending on shipping method. App 136 (Wark Rep. ¶ 38); App 162-67 (FedEx rates). It is therefore usually cheaper to buy from local stores. App 099 (FTC Report at 3). Indeed, cheap wine is readily available throughout New Jersey for less than \$5.00 per bottle. App 168 (Total Wine web page); App 169 (ShopRite Wine web page); App 170 Circus Wines web page).

10. Forty-five states allow some form of direct-to-consumer wine shipping and most regulate it through a permit system that requires the out-of-state shipper to limit quantity, comply with minimum price laws, consent to jurisdiction, report all sales and shipments, pay taxes, allow audits, label packages, and use a state-approved carrier who verifies age on delivery. App 132, 135 (Wark Rep. ¶¶ 21, 33). For an example, see CONN. GEN. STAT. § 30-18a.

11. Twelve states have allowed shipping by out-of-state wine retailers. App 234-35 (Table of state laws).⁸ They have not experienced any significant alcohol-related public health or safety problems attributable to interstate shipping. App 191-96 (Correspondence); App 126-28 (Maryland Study at 6-8). They do not have higher rates of wine consumption, App 202-05 (NIH data and summary), or more consumption-related problems like traffic fatalities, App. 208-12 (NHTSA data and summaries), aggravated assaults, App 213-19 (FBI data and summary); domestic violence, App 220 (Data summary); sexually transmitted diseases, App 221-28 (CDC data and summary); or teen pregnancies. App 229-31 (HHS data). In each situation, some direct-shipping states are above the national average and some are below. The State's own expert admits there are no studies that show any correlation between direct wine shipping and any alcohol-related public health or safety problem. App 512 (Kerr Rep. ¶ 34).

⁸Since the factual record was made in this case, Connecticut has begun allowing shipping, CONN. GEN. STAT. § 30-18a(2). Michigan allowed cross-border delivery from 2009-17. MICH. COMP. L. § 436.1203 (2), (11) (eff. 2009-2017). The District of Columbia allows limited direct shipping under D.C. CODE § 25-772 (2004). Florida allows direct shipping per a court order, see *Bainbridge v. Turner*, 8:99-cv-2681 (Aug. 5, 2005).

12. Opening the market to interstate retail wine shipping has not increased wine consumption in most states. Data on changes in per capita consumption following the enactment of direct-shipping law is available for 13 states. Four saw no increase at all in the five years after retail shipping was legalized (California, Nebraska, Nevada and West Virginia). Four saw slight increases that were less than the average nation-wide increase for that period (Louisiana, North Dakota, Virginia and Wyoming). Seven direct-shipping states had lower rates of increased consumption than New Jersey which prohibits shipping. Only three states saw a rise in consumption following legalization of interstate wine shipping that exceeded the national average (Idaho, New Hampshire, and Oregon). App 206-207 (Per capita wine consumption changes).

13. Direct shipping does not increase consumption by underage persons, which continues to decline. App 200 (Report to Congress); App. 201 (CDC Report); App 198 (Nat'l Survey). States that require adult signature on delivery report few or no problems with shipments to minors. App 100-15 (FTC Report at 4, 12, 26-38); App 128 (Maryland Study at 8). New Jersey state officials admit they have no data to show a correlation between shipping and youth access. App 090 (Resp. to Interrog. 8).

14. States that allow interstate shipping and require shippers to remit taxes report few, if any, problems with tax collection or lost revenue. App 100, 115-16 (FTC Report at 4, 38-40); App 127-28 (Maryland Study at 7-8). New Jersey allows out-of-state wineries to ship and admits it has no evidence of any tax evasion. App 089-90 (Resp. to Interrog. 5).

15. Other states are able to effectively monitor wine shipments and collect taxes through a permit system in which out-of-state shippers consent to jurisdiction, limit sales volume, submit reports and taxes, and use state-approved carriers that verify age on delivery. App 135 (Wark Rep. ¶ 33). It has not been burdensome to monitor those sales because fewer than 200 retailers have actually applied for such permits. App 171-90 (Table and state reports); App 137 (Wark Rep. ¶ 40).

16. New Jersey uses a permit system to regulate direct shipping by in-state retailers, N.J. STAT. 33:1-12(3a), and out-of-state wineries. N.J. STAT. § 33:1-10(2e). It has presented no evidence that this direct shipping has caused any problems. New Jersey also uses permits to regulate dozens of other entities selling and distributing alcoholic beverage in the state.⁹

⁹See List of permits, <https://www.njoag.gov/about/divisions-and-offices/division-of-alcoholic-beverage-control-home/licensing-bureau-applications-and-information/permits/> (viewed 01/12/24).

17. It is irrelevant whether New Jersey could impose harsher punishment on in-state retailers than it could on out-of-state retailers, because increasing the potential severity of punishment does little to deter illegal activity. App 232-33 (Nat'l Inst. of Justice report).

D. Standing

In every case, plaintiffs must satisfy the three elements of standing: (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Where a plaintiff in a constitutional case is the object of the regulation and state officials are defendants, as in this case, “there is ordinarily little question that the [act] has caused him injury, and that a judgment preventing or requiring the action will redress it.” *Id.* at 561-62. Only one plaintiff needs standing to confer jurisdiction. *Mass. v. EPA*, 549 U.S. 497, 518 (2007).

1. *Injury in fact*. The Wine Cellarage has lost sales and the opportunity to grow its business and compete for customers in New Jersey. App 085 (Neubohn Decl. ¶¶ 7-8). “[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014). It is enough that

New Jersey officials say they intend to enforce it. App 088-089 (Def. Admission 2). “The loss of [constitutional rights], for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 373 (1976).

2. *Causation*. The Wine Cellarage cannot ship wine solely because New Jersey law prohibits it. App 085 (Neubohn Decl. ¶¶ 7-8). No independent third party or intervening cause is involved. *Lutter v. JNESO*, 86 F.4th 111, 127 (3d Cir. 2023).

3. *Redressability*. The Wine Cellarage has New Jersey customers and would ship wine to them if the ban were struck down. App 085-86 (Neubohn Decl. ¶¶ 9-10). State officials responsible for enforcing the ban are parties and the court has broad discretion to craft an injunction that would prohibit them from interfering with such shipments. *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 206 (3d Cir, 2014). It is therefore likely a favorable ruling would redress the *injury*. *Lutter v. JNESO*, 86 F.4th at 128.

VII. Summary of argument

New Jersey allows in-state retailers to engage in online sales and home deliveries of wine but prohibits out-of-state retailers from doing so. This

difference in treatment discriminates against out-of-state retailers, protects in-state retailers from competition, and denies consumers access to wine sold in other states.

If the product were anything other than an alcoholic beverage, the law could easily be struck down because each of these effects is a “virtually *per se*” violation of the Commerce Clause. *Tenn. Wine*, 139 S.Ct. at 2471; *Granholm v. Heald*, 544 U.S. at 487. Conversely, if the law were not discriminatory, it could easily be upheld because the Twenty-first Amendment gives states broad power to regulate the sale of alcohol within their borders. *Tenn. Wine*, 139 S.Ct at 2457. But when both conditions are present -- the law is discriminatory and the product is alcohol -- neither provision alone controls the outcome. *Id.* at 2474. “[Both] the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered.” *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 275 (1984).

The Supreme Court set the proper balance between these two provisions in *Tenn. Wine*. When the plaintiffs show that a liquor law is discriminatory in purpose or effect, the burden shifts to the State to show that the difference in treatment of in-state and out-of-state entities is

“reasonably necessary to protect [its] asserted interests.” 139 S.Ct. at 2470. To meet this burden, the State must produce “concrete evidence” that the law “actually promotes public health or safety [and] nondiscriminatory alternatives would be insufficient.” *Id.* at 2474. If the State fails to prove that the predominant effect is the protection of public health or safety, “it is not shielded by § 2.” *Id. Accord, Freeman v. Corzine*, 629 F.3d at 157-58.

The Supreme Court has already held that states may not require an out-of-state firm to have a physical presence in the state in order to compete on equal terms. *Granholm v. Heald*, 544 U.S. at 474-75. A state’s interests in regulatory accountability and maintaining oversight over alcohol distribution are “insufficient” to justify residency and physical-presence requirements, *Tenn. Wine*, 139 S.Ct. at 2475, because “these objectives can also be achieved through the alternative of an evenhanded licensing requirement.” *Granholm v. Heald*, 544 U.S. at 492. Therefore, the State must show with concrete evidence why interstate retailer wine shipping poses a serious threat to public health or safety that could not be minimized by a permit system and must be totally banned. Its purported justification must be given serious scrutiny, *Freeman v. Corzine*, 629 F.3d

at 158-59, because not “every statute enacted ostensibly for the promotion of the public health, the public morals, or the public safety is to be accepted as a legitimate exertion” of state authority. *Tenn. Wine*, 139 S.Ct at 2473

The State has not come close to meeting this burden. The consumption of alcohol in general obviously poses public health concerns and needs to be regulated, but the State has presented no evidence to show why interstate wine shipping must be prohibited altogether rather than regulated. The State presented no evidence that direct wine shipping by out-of-state retailers increases consumption, and data from the National Institutes of Health show that it does not. The State presented no evidence that direct wine shipping increases youth access, and data from federal agencies show that it does not. The State presented no evidence that direct wine shipping causes an increase in drunk driving, aggravated assaults, domestic violence, or any other alcohol-related public health or safety problems, and the data again show that it does not. See Summary of Facts ¶¶ 11-13, *supra* at 16-17.

Other states safely regulate, monitor, and tax direct shipping through a permit system. New Jersey already uses a permit system to safely

regulate direct shipping by in-state retailers, N.J. STAT. 33:1-12(3a), out-of-state wineries, N.J. STAT. § 33:1-10(2e), and dozens of other entities distributing liquor in the state. Summary of Facts ¶¶ 15-16, *supra* at 18. The Supreme Court has endorsed the permit system as a reasonable nondiscriminatory alternative to a total ban on interstate shipping. *Granholm*, 544 U.S. at 491-92. The State has presented no evidence that a permit system would suddenly become ineffective in this one situation. At best, the State has some witnesses who speculate that there *might be* future public health problems the state could not prevent if direct shipping from out-of-state retailers were allowed, but “[s]peculation [and] unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause.” *Tenn. Wine*, 139 S.Ct. at 2474.

VIII. Argument

A. The framework for analyzing the constitutionality of a discriminatory state liquor law

New Jersey treats in-state wine retailers more favorably than out-of-state retailers. It allows in-state retailers to engage in online sales and home deliveries of wine, but prohibits outof-state retailers from doing so. Laws at issue, *supra* at 7-9. This difference in treatment discriminates against out-of-state retailers, protects in-state retailers from competition,

and denies consumers access to wine sold in other states. Each of these effects is a violation of the Commerce Clause. *Tenn. Wine*, 139 S.Ct. at 2471. If the product were anything other than an alcoholic beverage, the law could easily be struck down because each of these effects is a “virtually *per se*” violation of the Commerce Clause. *Granholm v. Heald*, 544 U.S. at 487.

However, because the product in this case is wine, the Commerce Clause alone does not control the outcome. The Twenty-first Amendment is also implicated, but it, too, does not control the outcome. The Amendment gives states power to enact *evenhanded* laws, but “state regulation of alcohol [remains] limited by the nondiscrimination principle of the Commerce Clause.” *Granholm*, 544 U.S. at 487. A liquor law’s “discriminatory character eliminates the immunity afforded by the Twenty-first Amendment.” *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring). The Court “has repeatedly declined to read § 2 as allowing the States to violate the ‘nondiscrimination principle.’” *Tenn. Wine*, 139 S.Ct. at 2470. The Amendment did not “repeal” the Commerce Clause. *Hostetter v. Idlewild Bon Voyage Liq. Corp.*, 377 U.S. 324, 331-332 (1964). This has been the Court’s consistent position for sixty years. Nothing could be clearer.

"[Both] the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered." *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 275. Because two provisions are implicated, the courts "engage in a different inquiry" than they would under either provision alone. *Tenn. Wine*, 139 S.Ct at 2474. The nature of that inquiry has been set out in *Tenn. Wine*. When the plaintiffs show that a liquor law is discriminatory in purpose or effect, the burden shifts to the State to show that the difference in treatment of in-state and out-of-state entities is "reasonably necessary to protect the States' asserted interests" in reducing alcohol-related public health or safety problems. *Tenn. Wine*, 139 S.Ct. at 2470, 2474. This inquiry "require[s] an examination of the actual purpose and effect of a challenged law" because not "every statute enacted ostensibly for the promotion of the public health, the public morals, or the public safety is to be accepted as a legitimate exertion" of state authority. *Id* at 2473, quoting *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (internal quotation marks omitted). If the State fails to prove that the predominant effect of the law is "the protection of public health or safety, it is not shielded by § 2." *Id*.

The Supreme Court has set out four elements to be considered when deciding if a state has shown that a discriminatory law is reasonably necessary to protect public health or safety.

- 1) Has the State shown that the “requirement *actually* promotes public health or safety?” *Tenn. Wine*, 139 S.Ct. at 2474 (emphasis added). This is a question of the actual effect of the law, not just its purpose or potential. *Id.*
- 2) Has the State shown that “nondiscriminatory alternatives would be insufficient to further those interests?” *Id.* Without such proof, the State has not established that discrimination is “reasonably necessary.” *Id.* at 2470.
- 3) “Concrete evidence” is required. “[S]peculation [and] unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause.” *Id.* at 2474.
- 4) The “burden is on the State.” *Granholm v. Heald*, 544 U.S. at 492. It must present enough admissible and persuasive evidence to show that the “*predominant* effect” of the law is the protection of public health or safety, not economic protectionism. *Tenn. Wine*, 139 S.Ct at 2474 (emphasis added). In a case like this one, where the

protectionist effect is strong and definite -- the entire online sales and shipping market is reserved for in-state retailers -- the State's evidence must be equally strong that significant adverse effects would occur if the total ban were lifted that could not be minimized through regulation and oversight. *Id.* at 2474-76.¹⁰

The question in each case is whether the State has justified a specific discriminatory feature of its regulatory system, not whether its overall regulatory scheme is valid. Many states, including New Jersey, have adopted some variation of a three-tier regulatory system,¹¹ and *dictum* in *Granholm* said that “[w]e have previously recognized that the three-tier system itself is ‘unquestionably legitimate.’” 544 U.S. at 489.¹² But the Supreme Court itself has noted that this *dictum* “did not suggest that § 2 sanctions every discriminatory feature that a State may incorporate into

¹⁰This the equivalent of a preponderance of evidence standard. Predominance and preponderance mean the same thing. AM. HERITAGE DICT. 1388 (5th ed. 2011).

¹¹A classic three-tier system requires liquor to pass from a producer through an independent wholesaler and retailer to prevent producers (especially of beer) from controlling the market.

¹²*Granholm* was citing *No. Dakota v. U.S.*, 495 U.S. 423, 432 (1990), a plurality opinion in a case not involving the Commerce Clause or a discriminatory law.

its three-tiered scheme.” *Tenn. Wine*, 139 S.Ct at 2471. Courts must “analyze [each] provision on its own.” *Id.* at 2474.

In any event, although the three-tier system name persists as a euphemism for the states’ overall regulatory structure, it is doubtful that New Jersey or most other states still have a three-tier system for wine. Forty-five states have abandoned it and now allow licensed wine producers to operate at all three tiers and sell directly to consumers without going through a separate wholesaler and retailer. App 132-133 (Wark Rep. ¶ 21). This includes New Jersey, which allows wine producers to sell directly to retailers or consumers, N.J. STAT. § 33:1-10(2a), (2e), and operate up to fifteen “tied houses” throughout the state where they control sales. *Id.* § 33:1-10(2a).

The District Court paid lip service to these principles but did not apply them. It gave considerable weight to the Twenty-first Amendment and little to the Commerce Clause. It placed the burden of proof on the plaintiffs to disprove the state’s assertion that direct shipping was a public safety threat rather than requiring the State to prove that it was. It did not seriously scrutinize whether the state had any concrete evidence to show that direct shipping actually posed a public health problem or that

a permit system would be ineffective. It focused on the validity of the entire “New Jersey System,” rather than this particular feature. App 022-031 (Opinion). The district court’s misunderstanding of the Supreme Court’s guidelines may have resulted in part from its decision not to hold oral argument where some of these points could have been discussed.

B. New Jersey’s law allowing in-state, but not out-of-state, retailers to ship wine to consumers is unconstitutional

The Supreme Court has been clear on four key principles:

- 1) “[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.” *Granholm v. Heald*, 544 U.S. at 487. The Court “has repeatedly declined to read § 2 as allowing the States to violate the ‘nondiscrimination principle.’” *Tenn. Wine*, 139 S.Ct. at 2470.
- 2) The Twenty-first Amendment is not a defense. It gives states the power to choose whether or not to allow direct shipping but “does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state” entities. *Granholm v. Heald*, 544 U.S. at 493.
- 3) “If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms,” *id.*, unless it can prove that discrimination is

“reasonably necessary” to protect against alcohol-related public health or safety problems. *Tenn. Wine*, 139 S.Ct. at 2470, 2474.

- 4) To prove reasonable necessity, the State must show that the “requirement actually promotes public health or safety,” *id.* at 2474, and that discrimination is necessary because “nondiscriminatory alternatives would be insufficient to further those interests.” *Id.*

The issues for the court are therefore whether New Jersey’s ban on interstate wine shipping is discriminatory, and if so, whether the state proved that it is reasonably necessary to protect against alcohol-related public health or safety problems.

1. The ban is discriminatory

There is no dispute that New Jersey’s ban on interstate wine shipping discriminates against out-of-state retailers and violates *Granholm’s* holding that if a state chooses to allow direct shipping, it must do so on evenhanded terms.

A restriction on interstate commerce can violate the nondiscrimination principle of the Commerce Clause in any of four ways: (1) when it “directly regulates or discriminates against interstate commerce,” *Tenn. Wine*, 139 S.Ct at 2471; (2) “when its effect is to favor in-state economic interests

over out-of-state interests,” *id.*; (3) when it “deprive[s] citizens of their right to have access to the markets of other States on equal terms,” *id.*; or (4) when it “require[s] an out-of-state firm to become a resident in order to compete on equal terms.” *Granholm v. Heald*, 544 U.S. at 475. The New Jersey law meets all four definitions of discrimination.

First, it directly discriminates against out-of-state retailers. New Jersey issues licenses to in-state retailers that permit them to sell wine online and ship it to consumers’ homes throughout the state, but will not issue similar licenses or give similar shipping privileges to out-of-state retailers. “[D]ifferential treatment between in-state and out-of-state [sellers] constitutes explicit discrimination against interstate commerce.” *Granholm v. Heald*, 544 U.S. at 467.

The district court was concerned that out-of-state retailers might not be similarly situated to in-state retailers because they are not subject to the full panoply of New Jersey regulations and do not get their wine from New Jersey sources. The Supreme Court has resolved this issue, holding that in-state and out-of-state businesses are similarly situated if they sell the same product to the same consumers, regardless of whether they operate in different regulatory environments and obtain their products

through a different supply chain. *Gen. Motors v. Tracy*, 519 U.S. 278, 298-99 (1997); *Best & Co. v. Maxwell*, 311 U.S. 454, 456 (1940). Indeed, in *Granholm v. Heald*, the Court deemed Virginia wineries similarly situated to New York wineries, even though Virginia wineries were not subject to the full panoply of New York regulations and did not get their supplies from New York sources. *Compare* VA. CODE ANN. § 4.1-219 (eff. 2003-08) (winery must use Virginia fruit), *with* N.Y. ALC. BEV. CON. L. 76-a (eff. 1999-2004) (winery must use New York fruit).

Second, the ban favors in-state economic interests and protects them from competition. Internet ordering and home delivery of goods is undeniably an important marketplace. E-commerce constitutes about 20% of all retail sales, amounts to over \$1 trillion per year, and is steadily increasing. U.S. Census Bureau, *Quarterly Retail E-commerce Sales, 3d Quarter 2023* (www.census.gov/retail/ecommerce.html, viewed 12/29/2023). New Jersey gives its own wine retailers exclusive access to it. “[P]rotecting [local businesses] from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits,” *West Lynn Creamery v. Healy*, 512 U.S. 186, 205 (1994). Protectionism “is not shielded by § 2” of the Twenty-first Amendment.

Tenn. Wine, 139 S.Ct. at 2474.

Third, the ban denies New Jersey residents access the markets of other states. Most of the wine distributed in the United States is available only from sellers outside the state. For the 36-month period from July 1, 2018 to July 1, 2021, the federal Alcohol and Tobacco Tax and Trade Bureau approved 349,955 wines for sale in the United States. Only about 20% of them are approved for sale and distributed in New Jersey. Relatively few of them find their way onto the shelves of local retailers, which carry only about 1000-4000 wines. Almost none of the rare, unusual, and older-vintage wines sought by collectors are available at local retailers. They must be obtained from auction houses and specialty wine stores in other states. Summary of Facts ¶¶ 4-8, *supra* at 12-15. Local retailers cannot special-order these unavailable wines because they must obtain their wine from New Jersey wholesalers who carry only current vintages of approved wines. *Id.* ¶ 7. Most are available, however, from a retailer in another state who would be glad to ship the wine, *id.*, but New Jersey prohibits it. “[D]epriv[ing] citizens of their right to have access to the markets of other States” violates the Commerce Clause. *Granholm v. Heald*, 544 U.S. at 473.

Fourth, the ban effectively requires an out-of-state retailer to establish physical premises in the state and buy its wine from a New Jersey wholesaler in order to be eligible for the privilege of direct shipment. The State concedes that a physical presence in New Jersey is a prerequisite for obtaining a retail wine license. App 089-94 (Def. Admission 3, Resp. to Interrogs. 15-17). See *Laws at Issue*, *supra* at 7-9. The district court thought that because residents and nonresidents alike could earn direct shipping privileges by opening a store in New Jersey, the physical presence requirement was not discriminatory. App 029 (Opinion at 25). The Supreme Court has ruled to the contrary, holding that physical-presence requirements for liquor licenses are unconstitutional. An “in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm to become a resident in order to compete on equal terms.” *Granholm v. Heald*, 544 U.S. at 475 (citations omitted). If one state could require it, so could all 50. It would be economically prohibitive for most retailers to set up separate operations in multiple states. *Id.*; App 086 (Neubohn Decl. ¶ 11). It would be impossible for them to comply with multiple state laws, each requiring them to buy their wine only from wholesalers in that state. Like other

kinds of residency laws, a physical-presence requirement protects local retailers from competition and “blatantly favors the State’s residents.” *Tenn. Wine*, 139 S.Ct at 2457. When the effect of a law is protectionist, it violates the Commerce Clause regardless of whether it is discriminatory on its face, *Tenn. Wine*, 139 S.Ct. at 2471, *Granholm v. Heald*, 544 U.S. at 487, and regardless of whether the discriminatory effect was intended. *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 273.

2. The State has not established a Twenty-first Amendment defense

Merely invoking the Twenty-first Amendment is not a defense. The Amendment “gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable” but “is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages.” *Tenn. Wine*, 139 S.Ct at 2457. “[T]he Court has repeatedly declined to read § 2 as allowing the States to violate the ‘nondiscrimination principle’” of the Commerce Clause. *Id.* at 2470. A liquor law's “discriminatory character eliminates the immunity afforded by the Twenty-first Amendment.” *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring).

Indeed, the Amendment has proven fairly impotent over the years. It gave states power to maintain local Prohibition after national Prohibition was repealed but beyond that it “does not license the States to ignore their obligations under other provisions of the Constitution.” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). It does not permit states to violate the First Amendment, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (restricting liquor advertising); the Establishment Clause, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122, n. 5 (1982) (church veto of bar permit); the Equal Protection Clause, *Craig v. Boren*, 429 U.S. 190, 204-09 (1976) (lower drinking age for women); the Import/Export Clause, *Dept. of Rev. v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-46 (1964) (taxing Scotch); or the Due Process Clause. *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (sheriff unilaterally forbidding sales to “drunkards”). Most importantly, it has never prevailed over the Commerce Clause in the Supreme Court. *Tenn. Wine, supra*; *Granholm v Heald, supra*; *Healy v. Beer Inst., supra*; *Bacchius Imports Ltd. v. Dias, supra*; *Hostetter v. Idlewild Bon Voyage Liquor Corp., supra*.

In order for a state to justify a discriminatory liquor law, it cannot simply invoke magic words like “Twenty-first Amendment” or “three-tier

system.” It must prove that the particular discriminatory regulation at issue (the ban on interstate retail wine shipping) is “reasonably necessary” to protect the State’s interests. *Tenn. Wine*, 139 S.Ct at 2470.

The list of legitimate state interests that fall under the Twenty-first Amendment is short. It includes “alcohol-related public health and safety measures,” *Tenn. Wine*, 139 S.Ct. at 2457, 2474, and maybe raising tax revenue. *Id.* at 2470.¹³ But it does not include bureaucratic interests such as facilitating orderly markets, ensuring regulatory accountability, and monitoring financial records and sales, because “these objectives can also be achieved through the alternative of an evenhanded licensing requirement.” *Granholm v. Heald*, 544 U.S. at 492. The State’s desire to maintain oversight over alcohol distribution in general is “insufficient” by itself to justify discriminatory against nonresidents. *Tenn. Wine*, 139 S.Ct. at 2475.

The state’s purported justification requires serious scrutiny by the court because not “every statute enacted ostensibly for the promotion of

¹³Tax revenue is not an issue in this case because cross-border deliveries of wine may be taxed, *S.D. v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018), and bringing new shippers into the system actually increases revenue. App 124 (Maryland Comptroller Rpt.).

the public health, the public morals, or the public safety is to be accepted as a legitimate exertion” of state authority. *Tenn. Wine*, 139 S.Ct at 2473. The State must prove with “concrete evidence” that the particular law is reasonably necessary to achieve these goals. “The burden is on the State,” *Granholm v. Heald*, 544 U.S. at 492, and “speculation’ or ‘unsupported assertions’ are insufficient.” *Tenn. Wine*, 139 S.Ct. at 2464.

To establish “reasonableness,” the State must prove that the “requirement *actually* promotes public health or safety.” *Tenn. Wine*, 139 S.Ct at 2474 (emphasis added). If a restriction has only an attenuated or speculative connection to alcohol-related public health issues, it is not shielded by the Twenty-first Amendment. *Id.* The record in this case is overwhelming that banning direct shipping of wine from out-of-state sellers does nothing to promote public health or safety because direct shipping poses no threat to begin with. Thirteen jurisdictions have allowed shipping by out-of-state retailers over the past 15-20 years. They have not experienced any significant alcohol-related public health or safety problems. They do not have higher rates of consumption among adults or minors than states that forbid direct shipping. They do not have higher rates of alcohol-related problems like traffic fatalities, aggravated

assaults, domestic violence, or teen pregnancies. Summary of facts ¶¶ 11-13, *supra* at 16-17. They have not experienced tax evasion. *Id.*, ¶ 14, *supra* at 18. There is not a shred of evidence that any tainted, contaminated, or dangerous product has ever been received by a consumer through direct shipment from an out-of-state retailer. App 136 (Wark Rep. ¶ 37). New Jersey has been allowing out-of-state wineries to ship to consumers for more than a decade and has no evidence that it has caused any problems. Summary of facts ¶¶ 13-14, *supra*.

States that allow out-of-state retailers to make home deliveries regulate them by requiring the shipper to obtain a direct-shipping permit, limit the amount of wine they ship, remit taxes, consent to jurisdiction and audits, label packages as containing alcohol, and use a state-approved carrier who verifies age on delivery. E.g., ARIZ. REV. STAT. § 4-203.04(A)-(G); CONN. GEN. STAT. § 30-18a(2); OR. REV. STAT. § 471.282, LA. REV. STAT. § 26:359(B). None have reported that any public health or safety problems have arisen because of direct-to-consumer shipping. Summary of facts ¶¶ 14-15, *supra* at 18. New Jersey uses permits to regulate wine shipping by in-state retailers and out-of-state wineries and has presented no evidence that any problems have arisen. This is hardly surprising

because wine is among the most heavily regulated products in the country, regulated, inspected and tested by every state, the federal Tax and Trade Bureau, 27 C.F.R. 24.1 et seq. (more than 200 TTB wine regulations), and the Food and Drug Administration. 21 C.F.R. 110.35.

It was the State's burden to prove that direct wine shipping posed such a significant threat to public health or safety that it had to be totally banned instead of regulated. *Granholm v. Heald*, 544 U.S. at 492. They have not presented a shred of concrete evidence and admitted in discovery they have none. Summary of facts ¶¶ 13-14, *supra* at 17-18. Their own expert concedes there are no facts or data to support the claim that direct wine shipping causes alcohol-related public health or safety problems. App 512 (Kerr Rep. ¶ 34). The only "evidence" the State has produced are witnesses who speculate that public health problems *might* occur in the future if direct shipping were allowed, even though they have not happened anywhere else. Speculation about the future without a factual basis is inadmissible under FED.R.EVID. 701-702 and inadequate under *Tenn. Wine*, which unambiguously held that "mere speculation" or "unsupported assertions" are insufficient." 139 S.Ct. at 2464. When "the record is devoid of any 'concrete evidence' showing that the [ban] actually

promotes public health or safety,” the State “has fallen far short of showing that the [law] is valid.” *Tenn. Wine*, 139 S.Ct. at 2474, 2476.

Even if the State had any evidence that direct-to-consumer wine shipping might potentially increase some alcohol-related public health and safety risks, it would not be enough to justify a total ban on such shipments. The State also must prove that “nondiscriminatory alternatives would be insufficient to further those interests” and minimize the risks. *Tenn. Wine*, 139 S.Ct. at 2474-75. New Jersey cannot possibly do so. The Supreme Court has held that requiring a physical presence to facilitate state oversight is not necessary because “[i]n this age of split-second communications by means of computer networks ... there is no shortage of less burdensome, yet still suitable, options.” *Id.* at 2475, quoting *Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994).

Chief among those suitable options is a licensing system requiring out-of-state retailers to get a permit and abide by its regulations. This option was endorsed by the Supreme Court in *Granholm v. Heald*, 544 U.S. at 491-92 (“protecting public health and safety, and ensuring regulatory accountability [can] be achieved through the alternative of an evenhanded licensing requirement”). It has been endorsed by the Federal Trade

Commission. App 099, 117 (FTC Report at 3, 40). Other states use a permit system to safely regulate home deliveries of wine. *E.g.*, CONN. GEN. STAT. § 30-18a(b). See Summary of Facts ¶¶ 10, 15, *supra* at 15, 18. New Jersey already uses a permit system to safely regulate direct shipping by in-state retailers, out-of-state wineries, and all other entities engaged in the distribution of alcohol in the state. Summary of facts ¶ 16, *supra* at 18-19. The State has presented no evidence whatsoever to show that the permit system would suddenly stop being effective in this one situation.¹⁴

New Jersey cannot credibly claim that wine shippers located outside New Jersey are too hard to monitor because it already allows wineries located outside New Jersey to ship directly to consumers. N.J. STAT. § 33:1-10(2e). It cannot credibly claim that it would open the door for thousands of wine shippers to flood the state and overwhelm regulators, since fewer than 200 actually get direct shipping permits in states that authorize them. Summary of facts ¶ 15, *supra* at 18. It cannot claim that direct shipping by retailers would pose a new risk of increased youth access because New Jersey already allows online ordering and direct

¹⁴The district court did not assess this option because it mistakenly thought plaintiffs were asking to be totally exempt from licensing and regulation. App 028-29 (Opinion).

shipping from wineries, N.J. STAT. § 33:1-10(2a), (2e) and in-state retailers. App 089 (Def. Admission 3), App 090-091 (Resp. to Interrog. 9). It cannot claim that FedEx and other common carriers cannot be trusted to verify age on delivery because it already authorizes them to deliver wine. N.J. STAT. §§ 33:1-13; App 089 (Def. Admission 3). It cannot claim that it would be too hard to collect taxes because it already collects taxes from out-of-state wineries that ship directly to consumers. N.J. STAT. § 33:1-10(2e). It cannot use inability to inspect the physical premises of an out-of-state retailer as a justification, because on-site inspections have nothing to do with problems with online orders and home deliveries made miles away from the store, and New Jersey already allows uninspected out-of-state wineries to ship to consumers. N.J. STAT. § 33:1-10(2e).

The absence of evidence is dispositive. Where a state claims that a ban on interstate commerce is the only reasonable way to protect the public, it must prove it by a predominance of evidence. When “the record is devoid of any ‘concrete evidence’ showing that the [law] actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests,” the ban is unconstitutional. *Tenn. Wine*, 139 S.Ct. at 2474.

IX. Remedy

This court usually reviews the remedy awarded by the district court for abuse of discretion. *Anderson v. Davila*, 125 F.3d 148, 159 (3d Cir. 1997). In this case, however, the district court awarded no remedy because it ruled against the plaintiffs. It is therefore appropriate to remand the case so the district court may exercise that discretion.

If this court decides to take up the issue, the following principles apply.

1. *Broad discretion*. The court has considerable discretion in fashioning a remedy and crafting an injunction to correct offenses to the Constitution. *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 887 (3d Cir. 1986).

2. *Relief to the plaintiffs*. The injunction should provide meaningful relief to the plaintiffs. When they have been victims of discrimination, “[t]he district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.” *Gurmankin v. Costanzo*, 626 F.3d 1115, 1120-21 (3d Cir. 1980). The proper remedy is therefore the extension to plaintiffs of the rights they were previously denied. *See Califano v. Westcott*, 443 U.S. 76, 89-90 (1979).

3. *Vindicate the constitutional right.* The remedy should vindicate the core concerns of the Constitution. *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995). For the Commerce Clause, the core concern is furthering a unitary national market with free trade among the states. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949); *Freeman v. Corzine*, 629 F.3d at 157-58. Removing trade barriers that have been interfering with interstate commerce is therefore the presumptive remedy for a Commerce Clause violation so that commerce may increase.

4. *Enjoin the unconstitutional features.* The usual remedy is to enjoin the unconstitutional aspects of a law but leave the rest intact so as to avoid nullifying valid laws. *Ayotte v. Planned Parenthood of No. New Eng.*, 546 U.S. 320, 329 (2006); *Free Speech Coalition, Inc. v. Attorney General*, 974 F.3d 408, 430 (3d Cir. 2020). This may seem obvious, but a few courts have done the opposite. They have removed the discrimination between in-state and out-of-state retailers by taking away the direct-shipping rights of in-state retailers but leaving the trade barrier intact. This is not a viable option. The Supreme Court cautions that courts should not normally nullify a valid portion of a state law because a different portion is invalid. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). Taking away

direct shipping privileges from in-state retailers who are not parties and have had no opportunity to be heard would also be inconsistent with Due Process. See *Heckler v. Mathews*, 465 U.S. 728, 733, 738-40 (1984); *Nguyen v. INS*, 533 U.S. 53, 95-96 (2001) (Scalia J., concurring).

5. *Consider legislative intent.* An important factor for any decision about remedy in a constitutional case is legislative intent. A court must enjoin the unconstitutional part of a law without nullifying any more of the legislature's work than is necessary. Therefore, after finding a law unconstitutional, the court must next ask "Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte v. Planned Parenthood of No. New England*, 546 U.S. at 330. In other words, "what the legislature would have done had it been apprised of the constitutional infirmity." *Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1699 (2017). If the New Jersey legislature had known that it had to either give all retailers shipping privileges or deny those privileges to all, which would it have chosen? We know the answer. It would have extended direct shipping rights to out of state retailers. That is what it did for shipping by wineries. After *Granholm v. Heald* ruled that all wineries had to be treated equally, New Jersey extended shipping privileges to out-of-state

wineries rather than harm its own businesses. N.J. STAT. § 33:1-10(2e). That is what should happen in this parallel situation.

The court does not have to rewrite state legislation to effect this solution. It can declare the ban on direct shipping unconstitutional and enjoin the defendants from enforcing it. This does not undermine licensing rules because New Jersey already authorizes the Director of the ABC to issue special permits for retail sales to consumers, N.J. STAT. § 33:1-85, for transporting alcohol for use by consumers, N.J. STAT. § 33:1-2(a), to impose appropriate conditions on those licenses, N.J. STAT. § 33:1-32, and to make rules to regulate them. N.J. STAT. § 33:1-39. The defendant can do so in this case.

X. Conclusion

For the foregoing reasons, the court should reverse the judgment of the District Court, enter summary judgment in favor the the Plaintiffs, and remand the case for further proceedings and entry of a remedy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(I) because it contains no more than 13,000 words in sections identified by Fed. R. App. P. 32(f). It contains 9908 words, as calculated by the word count program in WordPerfect X9. It complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it was prepared in 14-point Century Schoolbook.

s/ James A. Tanford
James A. Tanford

CERTIFICATE OF COMPLIANCE WITH L.R. 31.1

I certify that the paper copies and electronic copy of the briefs are identical. I further certify that the electronic brief was scanned by Microsoft Defender Antivirus and no virus was found.

s/ James A. Tanford
James A. Tanford

CERTIFICATION OF BAR MEMBERSHIP

I certify that James Tanford, Robert Epstein, Michael Cohen and Gary Reddish are members of the Third Circuit bar.

s/ James A. Tanford
James A. Tanford

CERTIFICATE OF SERVICE

I certify that on February 6, 2024, the foregoing brief was filed and served on all parties through the court's CM/ECF system.

s/ James A. Tanford
James A. Tanford

Addendum

U.S. CONST., art. I, § 8, cl. 3 (Commerce Clause):

The Congress shall have Power ... To regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes.

U.S. CONST., AMEND. XXI:

(1) The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

(2) The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

N.J. Code § 33:1-2(a):

It shall be unlawful to manufacture, sell, possess with intent to sell, transport, warehouse, rectify, blend, treat, fortify, mix, process, bottle or distribute alcoholic beverages in this State, except pursuant to and within the terms of a license, or as otherwise expressly authorized, under this chapter; but any drink actually intended for immediate personal use may be mixed by any person. Except as hereinafter provided, a person may, without limitation, purchase any amount of alcoholic beverages intended in good faith to be used solely for personal use and may personally transport those alcoholic beverages so purchased for personal use in any vehicle from a point within this State. Alcoholic beverages intended in good faith solely for personal use may be transported, by the owner thereof, in a vehicle other than that of the holder of a transportation license, from a point outside this State to the extent of, not exceeding 1/4 barrel or one case containing not in excess of 12 quarts in all, of beer, ale or porter, and one gallon of wine and two quarts of other alcoholic beverages within any consecutive period of 24 hours; provided, however, that except pursuant to and within the terms of a license or permit issued by the director, no person shall transport into this State or receive from without this State into this State, alcoholic beverages where the alcoholic beverages are transported or received from a state which prohibits the transportation into that state of alcoholic beverages purchased or otherwise obtained in the State of New Jersey. If any person or persons desire to transport alcoholic beverages intended only for personal use in quantities in excess of those above-mentioned, an application may be made to the director who may, upon being satisfied of the good faith of the applicant, and upon payment of a fee of \$25.00 issue a special permit limited by such conditions as the director may impose, authorizing the transportation of alcoholic beverages in

quantities in excess of those above-mentioned.

N.J. Code § 33:1-10(2a):

Plenary winery license. Provided that the holder is engaged in growing and cultivating grapes or fruit used in the production of wine on at least three acres on, or adjacent to, the winery premises, except as otherwise provided in this subsection for certain alternating proprietorship agreements, the holder of this license shall be entitled, subject to rules and regulations, to produce any fermented wines, and to blend, fortify and treat wines, and to sell and distribute his products to wholesalers licensed in accordance with this chapter and to churches for religious purposes, and to sell and distribute without this State to any persons pursuant to the laws of the places of such sale and distribution, and to maintain a warehouse, and to sell his products at retail to consumers on the licensed premises of the winery for consumption on or off the premises and to offer samples for sampling purposes only. The fee for this license shall be \$938. A holder of this license who produces not more than 250,000 gallons per year shall also have the right to sell and distribute his products to retailers licensed in accordance with this chapter, except that the holder of this license shall not use a common carrier for such distribution. The fee for this additional privilege shall be graduated as follows: a licensee who manufactures more than 150,000 gallons, but not in excess of 250,000 gallons per annum, \$1,000; a licensee who manufactures more than 100,000 gallons, but not in excess of 150,000 gallons per annum, \$500; a licensee who manufactures more than 50,000 gallons, but not in excess of 100,000 gallons per annum, \$250; a licensee who manufactures 50,000 gallons or less per annum, \$100. A holder of this license who produces not more than 250,000 gallons per year shall have the right to sell such wine at retail in original packages in 15 salesrooms apart from the winery premises for consumption on or off the premises and for sampling purposes for consumption on the premises, at a fee of \$250 for each salesroom. Licensees shall not jointly control and operate salesrooms. Additionally, the holder of this license who produces not more than 250,000 gallons per year may ship not more than 12 cases of wine per year, subject to regulation, to any person within or without this State over 21 years of age for personal consumption and not for resale. A case of wine shall not exceed a maximum of nine liters. A copy of the original invoice shall be available for inspection by persons authorized to enforce the alcoholic beverage laws of this State for a minimum period of three years at the licensed premises of the winery. For the purposes of this subsection, “sampling” means the selling at a nominal charge or the gratuitous offering of an open container not exceeding one and one-half ounces of any wine.

N.J. Code § 33:1-10(2e):

Out-of-State winery license. Provided that the applicant does not produce more than 250,000 gallons of wine per year, the holder of a valid winery license issued in any other state may make application to the director for this license. The holder of this license shall have the right to sell and distribute his products to wholesalers licensed in accordance with this chapter and to sell such wine at retail in original packages in 16 salesrooms apart from the winery premises for consumption on or off the premises at a fee of \$250 for each salesroom. Licensees shall not jointly control and operate salesrooms. The annual fee for this license shall be \$938. A copy of a current license issued by another state shall accompany the application. The holder of this license also shall have the right to sell and distribute his products to retailers licensed in accordance with this chapter, except that the holder of this license shall not use a common carrier for such distribution. The fee for this additional privilege shall be graduated as follows: a licensee who manufactures more than 150,000 gallons, but not in excess of 250,000 gallons per annum, \$1,000; a licensee who manufactures more than 100,000 gallons, but not in excess of 150,000 gallons per annum, \$500; a licensee who manufactures more than 50,000 gallons, but not in excess of 100,000 gallons per annum, \$250; a licensee who manufactures 50,000 gallons or less per annum, \$100. Additionally, the holder of this license may ship not more than 12 cases of wine per year, subject to regulation, to any person within or without this State over 21 years of age for personal consumption and not for resale. A case of wine shall not exceed a maximum of nine liters. A copy of the original invoice shall be available for inspection by persons authorized to enforce the alcoholic beverage laws of this State for a minimum period of three years at the licensed premises of the winery.

The licensee shall collect from the customer the tax due on the sale pursuant to the “Sales and Use Tax Act,” P.L.1966, c. 30 (C.54:32B-1 et seq.) and shall pay the tax due on the delivery of alcoholic beverages pursuant to the “Alcoholic beverage tax law,” R.S.54:41-1 et seq. The Director of the Division of Taxation in the Department of the Treasury shall promulgate such rules and regulations necessary to effectuate the provisions of this paragraph, and may provide by regulation for the co-administration of the tax due on the delivery of alcoholic beverages pursuant to the “Alcoholic beverage tax law,” R.S.54:41-1 et seq. with the administration of the tax due on the sale pursuant to the “Sales and Use Tax Act,” P.L.1966, c. 30 (C.54:32B-1 et seq.).

N.J. Code § 33:1-12(3a):

Plenary retail distribution license. The holder of this license shall be entitled,

subject to rules and regulations, to sell any alcoholic beverages for consumption off the licensed premises, but only in original containers; except that licensees shall be permitted to conduct consumer wine, beer, and spirits tasting events and samplings on a complimentary basis pursuant to conditions established by rules and regulations of the Division of Alcoholic Beverage Control, provided however, that the holder of this license complies with the terms and conditions set forth in section 3 of P.L.2009, c. 216 (C.33:1-12d).

The governing board or body of each municipality may, by ordinance, enact that this license shall not be issued to permit the sale of alcoholic beverages in or upon any premises in which any other mercantile business is carried on, except that any such ordinance, heretofore or hereafter adopted, shall not prohibit the retail sale of distillers', brewers' and vintners' packaged merchandise prepacked as a unit with other suitable objects as gift items to be sold only as a unit; the sale of novelty wearing apparel identified with the name of the establishment licensed under the provisions of this act; cigars, cigarettes, packaged crackers, chips, nuts and similar snacks, ice, and nonalcoholic beverages as accessory beverages to alcoholic beverages. The fee for this license shall be fixed by the governing board or body of the municipality in which the licensed premises are situated, by ordinance, at not less than \$125 and not more than \$2,500. No ordinance shall be enacted which shall raise or lower the fee to be charged for this license by more than 20% from that charged in the preceding license year or \$500.00, whichever is the lesser. The governing board or body of each municipality may, by ordinance, enact that no plenary retail distribution license shall be granted within its respective municipality.

N.J. Stat. § 33:1-13.

Class D licenses shall be as follows:

Transportation license. The holder of this license shall be entitled, subject to rules and regulations, to transport alcoholic beverages into, out of, through and within the State of New Jersey and to maintain a warehouse. The fee for this license shall be \$625.

N.J. Stat. § 33:1-32:

Subject to rules and regulations, each issuing authority by resolution, first approved by the commissioner, may impose any condition or conditions to the issuance of any license deemed necessary and proper to accomplish the objects of this chapter and secure compliance with the provisions hereof, and all such licenses shall become effective only upon compliance with the conditions so stated and shall be revocable for

subsequent violation thereof

N.J. Stat. § 33:1-39:

The commissioner may make such general rules and regulations and such special rulings and findings as may be necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages and the enforcement of this chapter, in addition thereto, and not inconsistent therewith, and may alter, amend, repeal and publish the same from time to time.

Such rules and regulations may cover the following subjects: Specification of duties of holders of any office, position or employment in the department of alcoholic beverage control; instructions for municipalities and municipal boards; all forms necessary or convenient in the administration of this chapter; tax paid, licensed vehicle and other insignia; inspections, investigations, searches, seizures, findings and such activities as may become necessary from time to time; hours of sale; sales on credit; sales to defectives and habitual drunkards; out-of-door sales; limitation of sales, limitation of the quantity to be sold to a consumer for off-premises consumption, unfair competition; racketeering; prostitution; solicitation; disorderly houses; criminals; disreputable characters; gambling, slot machines and gambling devices; control of signs and other displays on licensed premises; use of screens; identification of licensees and their employees; employment of aliens, minors and females; storage; warehouses; transportation; health and sanitary requirements; standards of cleanliness, orderliness and decency; sampling and analysis of products; standards of purity and labeling; records to be kept by licensees and availability thereof; practices unduly designed to increase consumption of alcoholic beverages; gifts of equipment, products and things of value; and such other matters whatsoever as are or may become necessary in the fair, impartial, stringent and comprehensive administration of this chapter.

N.J. Stat. § 33:1-50(a):

Any person who shall:

a. Manufacture, sell, distribute, bottle, rectify, blend, treat, fortify, mix, process, warehouse or transport any alcoholic beverage in violation of this chapter;

Shall be guilty of a misdemeanor, and punished by a fine of not less

than one hundred dollars and not more than one thousand dollars, or imprisonment for not less than thirty days and not more than three years, or both.

N.J. Stat. § 33:1-85:

No retail licensee shall sell, offer for sale or possess in or upon the licensed premises nor shall any person sell or offer for sale at retail to consumers any alcohol for any purpose, except pursuant to and within the limitations of a special permit issued by the State Commissioner of Alcoholic Beverage Control.

N.J. Admin. Code § 13:2-21.1.

Delivery of alcoholic beverages into or shipment of alcoholic beverages out of New Jersey is prohibited unless the beverages are transported by a licensee pursuant to N.J.A.C. 13:2-20 or in a vehicle bearing or carrying a permit issued in accordance with this subchapter.

N.J. Admin. Code § 13:2-23.12(a):

No retail licensee shall purchase or obtain any alcoholic beverage except from the holder of a New Jersey manufacturer's or wholesaler's license or pursuant to a special permit first obtained from the Director.

In the United States Court of Appeals
For the Third Circuit

No. 23-2922

JEAN-PAUL WEG, LLC, et. al.
Plaintiffs-Appellants

v.

DIRECTOR OF THE NEW JERSEY DIVISION OF ALCOHOLIC
BEVERAGE CONTROL, et al.
Defendants-Appellees.

APPENDIX VOL. 1, pages 001-031

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2. Order appealed from (ECF 158)	App 003
3. Opinion of district court (ECF 157)	App 005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEAN-PAUL WEG., LLC d/b/a THE WINE
CELLARAGE, and LARS NEUBOHN,

Plaintiffs,

v.

JAMES GRAZIANO, Acting Director of the
New Jersey Division of Alcohol Beverage
Control, and GURBIR SINGH GREWAL,
Attorney General of New Jersey,

Defendants,

FEDWAY ASSOC., Inc., ALLIED
BEVERAGE GROUP, Inc., and OPICI
FAMILY DISTRIBUTING,

Intervening Defendants,

Case No. 2:19-cv-14716-JXN-LDW

Civil Action

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Jean-Paul Weg., LLC d/b/a The Wine Cellarage and Lars Neubohn (“Plaintiffs”) hereby appeal to the United States Court of Appeals for the Third Circuit from:

1. the District Court’s Order, dated August 22, 2023, denying Plaintiffs’ motion for summary judgment;
2. the District Court’s Order, dated August 22, 2023, granting the State Defendants’ cross-motion for summary judgment, and dismissing with prejudice Plaintiffs’ Commerce Clause claim (Count One) against the State Defendants;
3. the District Court’s Memorandum Opinion and Order, dated October 13, 2023, *sua sponte* modifying the Court’s prior August 22, 2023 Opinion and Order to state that the Wholesaler Defendants’ cross-motions for summary judgment (*i.e.*, those of

intervenor defendants Fedway Assoc., Inc. and Allied Beverage Group, Inc.) are granted rather than denied as moot;

4. the District Court's Order, dated August 22, 2023, as modified on October 13, 2023, which modified the Court's prior August 22, 2023 Opinion and Order to state that the Wholesaler Defendants' cross-motions are granted rather than mooted;

5. all other interim, preliminary, evidentiary and interlocutory rulings of the District Court in this action leading to the orders set forth herein.

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Dated: October 24, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this date I filed and served a copy of the within Notice of Appeal upon all parties of record via the Court's CM/ECF electronic case filing system.

Dated: October 24, 2023

s/ Michael J. Cohen
Michael J. Cohen

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JEAN-PAUL WEG., LLC, d/b/a THE WINE
CELLARAGE and LARS NEUBOHN,

Plaintiffs,

v.

JAMES GRAZIANO, Director of the
New Jersey Division of Alcoholic Beverage
Control, and MATTHEW J. PLATKIN,
Attorney General of New Jersey,

Defendants,

and

FEDWAY ASSOCIATES, INC., ALLIED
BEVERAGE GROUP, INC., OPICI FAMILY
DISTRIBUTING and NEW JERSEY LIQUOR
STORE ALLIANCE,

Intervenors-Defendants.

Civil Action No. 19-14716 (JXN) (LDW)

ORDER

NEALS, District Judge:

This matter comes before the Court on four motions for summary judgment filed pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1: (1) Plaintiffs Jean-Paul Weg., LLC, d/b/a The Wine Cellarage and Lars Neubohn’s (collectively, “Plaintiffs”) motion for summary judgment (ECF No. 102); (2) Intervenor-Defendants Allied Beverage, Group, Inc. and Opici Family Distributing’s (together, the “Allied Defendants”) opposition to Plaintiffs’ motion for summary judgment and cross-motion for summary judgment (ECF Nos. 110-11); (3) Intervenor-Defendant Fedway Associates, Inc.’s (“Fedway’s”) opposition to Plaintiffs’ motion for summary judgment and cross-motion for summary judgment (ECF No. 112); and (4) Defendants James Graziano and Matthew J. Platkin’s (together, the

“State Defendants”) opposition to Plaintiffs’ motion for summary judgment and cross-motion for summary judgment (ECF No. 114). Intervenor-Defendant New Jersey Liquor Store Alliance filed opposition to Plaintiffs’ motion for summary judgment and joined in the State Defendants’ cross-motion, as well as Allied Defendants’ and Fedway’s cross-motions for summary judgment (ECF No. 113). Plaintiffs filed a combined response/reply brief (ECF No. 121). The State Defendants and Wholesaler Defendants filed replies (ECF Nos. 131-33). Jurisdiction is proper pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3). Venue is proper pursuant to 28 U.S.C. § 1391.

The Court has carefully considered the parties’ submissions and decides the matter without oral argument under Federal Rule of Civil Procedure 78(b) and Local Civil Rule 78.1(b). For the reasons stated in the accompanying Opinion;

IT IS on this 22nd day of August, 2023,

ORDERED that Plaintiffs’ motion for summary judgment (ECF No. 102) is **DENIED**; it is further

ORDERED that Allied Defendants’ cross-motion for summary judgment (ECF Nos. 110-11) is

GRANTED

~~**DENIED as moot**~~; it is further

GRANTED

ORDERED that Fedway’s cross-motion for summary judgment (ECF No. 112) is ~~**DENIED as**~~

~~**moot**~~; it is further

ORDERED that the State Defendants’ cross-motion for summary judgment (ECF No. 114) is

GRANTED, and Plaintiffs’ Commerce Clause claim (Count One) against the State Defendants is

DISMISSED with prejudice; it is further

ORDERED that no costs, expenses, or attorneys’ fees are awarded to any party; it is further

ORDERED that the Clerk of Court shall mark this matter as **CLOSED**.

s/ Julien Xavier Neals
JULIEN XAVIER NEALS
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JEAN-PAUL WEG., LLC, d/b/a THE WINE
CELLARAGE and LARS NEUBOHN,

Plaintiffs,

v.

JAMES GRAZIANO, Director of the
New Jersey Division of Alcoholic Beverage
Control, and MATTHEW J. PLATKIN,
Attorney General of New Jersey,

Defendants,

and

FEDWAY ASSOCIATES, INC., ALLIED
BEVERAGE GROUP, INC., OPICI FAMILY
DISTRIBUTING and NEW JERSEY LIQUOR
STORE ALLIANCE,

Intervenors-Defendants.

Civil Action No. 19-14716 (JXN) (LDW)

OPINION

NEALS, District Judge:

This matter comes before the Court on four motions for summary judgment filed pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1: (1) Plaintiffs Jean-Paul Weg., LLC, d/b/a The Wine Cellarage (“The Wine Cellarage”) and Lars Neubohn’s (“Neubohn”) (collectively, “Plaintiffs”) motion for summary judgment (ECF No. 102); (2) Intervenor-Defendants Allied Beverage, Group, Inc. (“Allied”) and Opici Family Distributing’s (collectively, the “Allied Defendants”) opposition to Plaintiffs’ motion for summary judgment and cross-motion for summary judgment (ECF Nos. 110-11); (3) Intervenor-Defendant Fedway Associates, Inc.’s (“Fedway”) opposition to Plaintiffs’ motion for summary judgment and cross-motion for summary judgment (ECF No. 112); and (4) Defendants James Graziano

and Matthew J. Platkin's (together, the "State Defendants") opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment (ECF No. 114). Intervenor-Defendant New Jersey Liquor Store Alliance ("New Jersey Liquor") filed opposition to Plaintiffs' motion for summary judgment and joined in the State Defendants' cross-motion, as well as Allied Defendants' and Fedway's (together, the "Wholesaler Defendants") cross-motions for summary judgment (ECF No. 113). Plaintiffs filed a combined response/reply brief (ECF No. 121). The State Defendants and Wholesaler Defendants (together, the "Defendants") filed replies (ECF Nos. 131-33). Jurisdiction is proper pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3). Venue is proper pursuant to 28 U.S.C. § 1391.

The Court has carefully considered the parties' submissions and decides the matter without oral argument under Federal Rule of Civil Procedure 78(b) and Local Civil Rule 78.1(b). For the reasons set forth below, Plaintiffs' motion for summary judgment (ECF No. 102) is **DENIED**, Allied Defendants' cross-motion for summary judgment (ECF Nos. 110-11) is **DENIED as moot**, Fedway's cross-motion for summary judgment (ECF No. 112) is **DENIED as moot**, the State Defendants' cross-motion for summary judgment (ECF No. 114) is **GRANTED**, and Plaintiffs' Commerce Clause claim (Count One) against the State Defendants is **DISMISSED with prejudice**. The Court does not award costs, expenses, or attorneys' fees to any party.

I. BACKGROUND AND PROCEDURAL HISTORY¹

This is a 42 U.S.C. § 1983 civil rights action. Plaintiffs allege that New Jersey's statutes and regulations governing the sale and distribution of alcoholic beverages commonly referred to as New Jersey's three-tier system (the "New Jersey System"), is unconstitutional because it "discriminates against wine retailers located outside New Jersey who are engaged in interstate commerce[.]" Plaintiffs' Third

¹ For the sake of brevity, all citations to the parties' Rule 56.1 statements incorporate the evidentiary citations contained therein.

Amended Complaint (ECF No. 83) (the “Amended Complaint”), at p. 2. In Count One² of the Amended Complaint, Plaintiffs allege that the New Jersey System “and related rules, practices, and regulations as applied[,] . . . prohibit out-of-state wine retailer[s] like The Wine Cellarage from taking telephone and internet wine orders from New Jersey consumers” and “sell[ing], ship[ping], and deliver[ing] wine” directly to consumers “from their premises located out of the state.” Am. Compl., at pp. 1-2. Plaintiffs seek a declaratory judgment that the New Jersey System is “unconstitutional as a violation of the Commerce Clause of the United States Constitution[,]” and an injunction prohibiting the State Defendants from enforcing the New Jersey System against out-of-state wine retailers like Plaintiffs, among other relief. *Id.* at pp. 7-8. New Jersey Liquor and Defendants claim that the New Jersey System is both constitutional and enforceable. *See, gen.*, N.J. Liquor’s Br.; Defs.’ Brs. The relevant facts follow.

Plaintiff Neubohn is “the president of Vindemia, Inc. [(“Vindemia”)], which is the sole member of” The Wine Cellarage. State Defendants’ Responsive Statement of Undisputed Material Facts and Counterstatement of Undisputed Material Facts (ECF No. 114-2) (the “SDRSOF”)³ ¶ 1; Plaintiffs’ Responsive Statement of Undisputed Material Facts to State Defendants (ECF No. 121-2) (the “PRSOFSF”) ¶ 1. Vindemia “holds a warehouse permit from the New York State Liquor Authority” that “allows Vindemia to operate a warehouse for the storage of alcoholic beverages in New York.” SDRSOF ¶ 2; PRSOFSF ¶ 2. The Wine Cellarage “holds a package store license from the New York State Liquor Authority” that grants The Wine Cellarage “the right to sell alcoholic beverages direct to consumers for off-site consumption.” SDRSOF ¶ 3; PRSOFSF ¶ 3.

The Wine Cellarage “is a New York limited liability company that operates a wine retail store in Bronx, New York, that is owned and operated by” Neubohn. Plaintiffs’ Statement of Undisputed Material

² Plaintiffs “are no longer pursuing” their Privileges and Immunities claim (Count Two) and “will not do so in the future regardless of the outcome of their Commerce Clause claim.” Pls.’ Mem. of Law, at 2.

³ State Defendants’ Responsive Statement of Undisputed Material Facts at pp. 1-21 and Counterstatement of Undisputed Material Facts at pp. 21-34.

Facts (ECF No. 102-2) (the “PSOF”) ¶ 1; Wholesaler Defendants’ Responsive Statement of Undisputed Facts (ECF No. 112-5) (the “WDRSOF”) ¶ 1; New Jersey Liquor’s Responsive Statement of Undisputed Material Facts (ECF No. 113-1) (the “NJLRSOF”) ¶ 1; SDRSOF ¶ 1. The “Wine Cellarage has a brick-and-mortar store in Bronx, New York, where customers can go to purchase wine.” SDRSOF ¶ 4; PRSOFSD ¶ 4. The “Wine Cellarage does not have any stores outside of New York.” SDRSOF ¶ 4; PRSOFSD ¶ 4. The “Wine Cellarage is required to have a premises in New York for licensure.” SDRSOF ¶ 5; Ex. B of Kimberley M. Wilson’s December 6, 2021, Certification (ECF No. 114-3) (the “Wilson Decl.”), Neubohn’s Feb. 23, 2021, deposition transcript as Corporate Designee of The Wine Cellarage (ECF No. 114-5) (the “Neubohn Dep.”), at T40:13-17. About 20% of The Wine Cellarage’s wine inventory is “purchase[d] from private wine collections” and 80% from New York licensed wholesalers. SDRSOF ¶¶ 9-11; PRSOFSD ¶¶ 9-11.

The Wine Cellarage “engages in internet wine sales and has customers” throughout the United States, including at least one from New Jersey. PSOF ¶ 2; WDRSOF ¶ 2; NJLRSOF ¶ 2; SDRSOF ¶ 2. In New Jersey, customers “either pick up their wine purchases at The Wine Cellarage or the wine purchases are shipped to the customer through an intermediary shipper” called 24/7. SDRSOF ¶¶ 18-19, 21; PRSOFSD ¶¶ 18-19, 21. The Wine Cellarage’s “use of an intermediary shipper” is described as a “work around” when “shipping wine across state lines.” SDRSOF ¶ 20; PRSOFSD ¶ 20 (internal quotations omitted). Neither The Wine Cellarage nor Vindemia pay New Jersey sales taxes, or “New Jersey alcohol beverage tax on wine sales delivered via an intermediary shipper.” SDRSOF ¶¶ 22, 25; PRSOFSD ¶¶ 22, 25. Additionally, neither pay “use tax[es]” on wine sales delivered by intermediary shippers. SDRSOF ¶¶ 23-24; PRSOFSD ¶¶ 23-24.

To prevent selling alcohol to minors, The Wine Cellarage “(i) ask[s] customers to represent at sign-up what their age is . . . and (ii) any shipment that The Wine Cellarage sends out by common carrier

‘goes out as an adult signature.’” SDRSOF ¶ 32; PRSOFSD ¶ 32. If customers appear in person and “look to be of age,” Plaintiffs do not “card them” or ask the customer to provide identification. SDRSOF ¶ 34; Neubohn Dep., at T91:4-8, T100:24-T101:11. Indeed, The Wine Cellarage’s employees do “not ask for identification” when a “customer looks well into their adult age[.]” SDRSOF ¶ 35; PRSOFSD ¶ 35. According to Neubohn, The Wine Cellarage “sell[s] a pretty expensive product . . . so [minors attempting to purchase alcohol] hasn’t been a problem . . . because kids aren’t buying what we’re selling.” Neubohn Dep., at T101:12-18.

Reportedly, “[f]orty-five states allow some form of direct-to-consumer wine shipping.” PSOF ¶ 26; WDRSOF ¶ 26; NJLRSOF ¶ 26; SDRSOF ¶ 26. At least 14 jurisdictions allow retailers to ship directly to consumers. PSOF ¶ 26; WDRSOF ¶ 26; NJLRSOF ¶ 26; SDRSOF ¶ 26. “Most regulate those shipments by requiring the shipper to obtain a direct-shipping permit, limit the amount of wine they ship, remit taxes, consent to jurisdiction and audits, label packages as containing alcohol, and use a state-approved carrier who verified age on delivery.” PSOF ¶ 26; WDRSOF ¶ 26; NJLRSOF ¶ 26; SDRSOF ¶ 26.

The New Jersey System encompasses a wide-ranging licensing regime related to the sale, consumption, and distribution of alcoholic beverages, which does not allow an unlicensed out-of-state wine retailer to sell or deliver wine directly to New Jersey consumers. SDRSOF ¶ 60; PRSOFSD ¶ 60. The New Jersey System requires that potential licensees obtain : (1) a “plenary retail consumption license” that permits retailers to sell alcoholic beverages “by the glass” on “a licensed premise” and “sell alcoholic beverages in original containers for consumption off the licensed premises[;]” or (2) a “plenary retail distribution license” that is intended for “a package or retail liquor store” to sell alcoholic beverages “in original containers for ‘off-premises consumption.’” SDRSOF ¶¶ 47, 49; Ex. F of Wilson Decl., Tia Johnson’s June 8, 2021, deposition transcript (ECF No. 114-7) (the “Johnson Dep.”), at T7:11-14, T7:18-

21, T7:25-8:1. Plenary retail distribution licenses also allow licensees to sell alcoholic beverages online and “ship it by common carrier . . . without the customer appearing in person at the store.” PSOF ¶ 6; WDRSOF ¶ 6; NJLRSOF ¶ 6; SDRSOF ¶ 6. “Plenary retail licenses” are commonly referred to as “Class C” licenses. SDRSOF ¶ 50; PRSOFSD ¶ 50; Andrew R. Sapolnick’s December 6, 2021, Declaration (ECF No. 114-13) (the “Sapolnick Decl.”), at ¶ 8.

The Division of Alcoholic Beverage Control or “ABC” and “municipal issuing authorities employ a comprehensive review and screening process for retail-license applicants . . .” Wholesaler Defendants’ Statement of Undisputed Material Facts (ECF No. 111-3) (the “WDSOF”) ¶ 49; Plaintiffs Responsive Statement of Undisputed Material Facts to Wholesaler Defendants (ECF No. 121-3) (the “PRSOFWD”) ¶ 49. Potential licensees are fingerprinted and undergo background checks. WDSOF ¶ 49; PRSOFWD ¶ 49. As a condition of licensure, licensees are also “on notice that” licensed premises are “subjected to” searches. SDRSOF ¶ 75; PRSOFSD ¶ 75; WDSOF ¶ 52; PRSOFWD ¶ 52; Ex. G of Wilson Decl., Andrew Sapolnick’s June 8, 2021, deposition transcript (ECF No. 114-8) (the “Sapolnick Dep.”), at T12:2-T14:13. Once submitted, the municipality forwards a copy of the application to the “State[,]” where the application undergoes an additional review. SDRSOF ¶ 52; Johnson Dep., at T6:18-23. The municipality completes an on-site inspection of the premises and, if satisfactory, “approves the application by resolution.” SDRSOF ¶¶ 52-53; Johnson Dep., at T6:18-23. The ABC then provides the municipality a “license certificate for the licensee.” SDRSOF ¶ 56; PRSOFSD ¶ 56.

In addition to obtaining a plenary retail license, licensees agree to purchase alcoholic beverages from licensed New Jersey wholesalers and be “physically located” in New Jersey. SDRSOF ¶ 65; Johnson Dep., at T8:21-23; Sapolnick Decl., at ¶ 8; PSOF ¶ 6; WDRSOF ¶ 6; NJLRSOF ¶ 6; SDRSOF ¶ 6. If an alcoholic beverage is not “sourced” from a state wholesaler, the licensee cannot sell it because all alcoholic beverages “sold in New Jersey must be brand registered with the” ABC. SDRSOF ¶¶ 41, 45; Sapolnick

Decl., at ¶¶ 8, 41. Certain alcoholic beverages, however, are “banned,” such as “alcohol-infused energy drinks” and “powdered or crystalline alcohol.” SDRSOF ¶¶ 42-43; Sapolnick Decl., at ¶ 15. Having a physical presence means that unless an out-of-state retailer “open[s] a store in New Jersey[,]” it cannot sell and deliver wine directly to New Jersey consumers. SDRSOF ¶ 67; PRSOFSD ¶ 67.

While a physical presence “is required to obtain a Class C” or plenary retail license, there is no residency requirement to obtain such a license. NJLRSOF ¶ 6; SDRSOF ¶¶ 6⁴, 58; Johnson Dep., at T9:24-10:1; Sapolnick Dep., at T17:7-9. To be sure, New Jersey “do[es] not deny retail licenses based on the residency of applicants.” WDRSOF ¶ 4; NJLRSOF ¶ 4; SDRSOF ¶ 4⁵. The purpose of requiring a physical presence is to allow the ABC to “efficiently provide regulatory oversight of New Jersey’s licensees” by managing alcohol use in the State. SDRSOF ¶ 72; PRSOFSD ¶ 72. Reportedly, excessive alcohol use “accounts for 1 of 10 deaths among work-age adults” and “95,000 deaths” annually nationwide. WDSOF ¶¶ 43-44; PRSOFWD ¶¶ 43-44.

The State of New Jersey, through the ABC and related agencies, screen potential licensees, perform on-site inspections, and refer and/or assist in the prosecutions of licensing violations. “ABC investigators work undercover, watching how a licensee operates without announcing their presence.” SDRSOF ¶ 82; PRSOFSD ¶ 82. “[I]nvestigators assess whether the licensee is selling alcohol to intoxicated people[,]” or to minors. SDRSOF ¶ 82; PRSOFSD ¶ 82. Investigators also “visit retail licensees to conduct ‘decoy’ operations involving minors who, under ABC supervision, attempt to purchase alcohol.” WDSOF ¶ 53; PRSOFWD ¶ 53. ABC investigations have “uncovered undisclosed

⁴ While the State Defendants’ and New Jersey Liquor’s responses read Plaintiffs’ statement of material fact is “[d]isputed in part, to the extent an in-state business presence is required[,]” the defendants qualify their responses by stating “but there is no residency requirement.”

⁵ Defendants cite Ex. 2 of James A. Tanford’s Nov. 4, 2021, Certification, State Defs.’ Resp. to Plaintiffs’ First Request for Admission No. 2 (ECF No. 102-5), which reads in relevant part that “Defendants do not deny retail licenses based on the residency of applicants.”

interests” in licensed premises, including interests from organized crime. SDRSOF ¶¶ 85-86; PRSOFSD ¶¶ 85-86.

Plaintiffs, more specifically The Wine Cellarage, cannot legally sell or deliver wine in New Jersey because it: (i) does not possess a plenary retail license; (ii) purchases wine from private wine collections and New York licensed wholesalers; and (iii) has no intention of opening a store in New Jersey. SDRSOF ¶¶ 9-11, 13, 69; PRSOFSD ¶¶ 9-11, 13, 69. Plaintiffs seek to sell and deliver wine that was neither purchased from a licensed New Jersey wholesaler nor flows through the New Jersey System (*see* WDSOF ¶ 7; PRSOFWD ¶ 7), and through this action seek a declaratory judgment that the New Jersey System is unconstitutional under the Commerce Clause and an injunction against enforcement of the New Jersey System. Am. Compl., at pp. 2, 7-8.

II. LEGAL STANDARD

Summary judgment is appropriate where the Court is satisfied that “there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996). A factual dispute is genuine only if there is “a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party,” and it is material only if it can “affect the outcome of the suit under governing law.” *Kaucher v. County of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Disputes over “irrelevant or unnecessary” facts will not preclude a grant of summary judgment. *Anderson*, 477 U.S. at 248 (citation omitted). “In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party’s evidence is to be believed and all justifiable inferences are to be drawn in his favor.” *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004) (citation and internal quotations omitted).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 322 (citations omitted). If the movant satisfies its initial burden, the nonmoving party cannot rest upon mere allegations in the pleadings to withstand summary judgment; rather, the nonmoving party “must counter with specific facts which demonstrate that there exists a genuine issue for trial.” *Orson, Inc.*, 79 F.3d at 1366 (citation omitted). Specifically, the nonmoving party “must make a showing sufficient to establish the existence of each element of his case on which he will bear the burden of proof at trial.” *Huang v. BP Amoco Corp.*, 271 F.3d 560, 564 (3d Cir. 2001) (citation omitted). Thus, “a mere ‘scintilla of evidence’ in the nonmovant’s favor” is insufficient to “create a genuine issue of fact.” *Ramara, Inc. v. Westfield Ins. Co.*, 814 F.3d 660, 666 (3d Cir. 2016) (citation omitted). Ultimately, it is not the Court’s role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. *See Brooks v. Kyler*, 204 F.3d 102, 105 n.5 (3d Cir. 2000) (citations omitted).

III. DISCUSSION

Whether the New Jersey System discriminates against interstate commerce and, if so, whether the State is justified in so doing are legal issues for the Court to decide. Because there does not appear to be an issue as to any material fact, the Court therefore decides the parties’ entitlement to summary judgment as a matter of law.⁶ *See Chin v. Max One Retail LLC*, No. 20-2928, 2023 WL 2207393, at *2 (D.N.J. Feb. 23, 2023) (Deciding judgment as a matter of law issue after finding there were no material facts in dispute). Plaintiffs contend that the New Jersey System, and the provisions therein, violate the Commerce Clause because they are not valid exercises of the State’s power under the Twenty-first Amendment. The Court disagrees.

⁶ Defendants do not dispute that Plaintiffs have standing to bring this action. Pls.’ Mem. of Law, at 4-5.

Preliminarily, the parties disagree on the appropriate test to apply when analyzing whether New Jersey’s alcoholic beverage laws violate the Commerce Clause. *See, gen.*, Pls.’ Mem. of Law; N.J. Liquor’s Br.; Defs.’ Brs. Accordingly, the Court will provide clarification.

A. Challenges to State Laws Under the Dormant Commerce Clause

The United States Constitution provides that “Congress shall have Power . . . To regulate Commerce . . . among the several States” U.S. CONST. art. I, § 8, cl. 3. To “prevent a State from retreating into the economic isolation . . . that had plagued relations among the . . . States” (*see Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008)), courts “have interpreted the Commerce Clause to contain a ‘negative’ aspect.” *American Marine Rail NJ, LLC v. City of Bayonne*, 289 F.Supp.2d 569, 578 (D.N.J. 2003). “This doctrine, referred to as the dormant Commerce Clause, limits a state’s power to regulate interstate commerce in the absence of authority from the Congress.” *Id.* at 578. First mentioned in *Gibbons v. Ogden*, 22 U.S. 1 (1824), the dormant Commerce Clause is “deeply rooted in our case law.” *Tenn. Wine and Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2460 (2019). Because the “Commerce Clause by its own force restricts state protectionism” (*see Tenn. Wine*, 139 S. Ct. at 2461), the dormant Commerce Clause ensures that states do not protect in-state businesses from out-of-state competition. *Davis*, 553 U.S. at 337-38.

To establish a dormant Commerce Clause violation, a plaintiff must prove that the “challenged law discriminates against interstate commerce.” *Id.* at 338 (citations omitted). Discrimination in this context “means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 331 (2007) (citations omitted). A “discriminatory law is virtually *per se* invalid” and “will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives” *Davis*, 553 U.S. at 338 (citations and internal quotations omitted).

While this analysis is generally appropriate in most cases, § 2 of the Twenty-first Amendment to the U.S. Constitution requires that courts “engage in a different inquiry” when facing challenges to a state’s alcoholic beverage laws. *Tenn. Wine*, 139 S. Ct. at 2474.

B. Challenges to State Alcoholic Beverage Laws under the Dormant Commerce Clause since the Twenty-first Amendment

For a time, and beginning in 1920, alcoholic beverages were prohibited in the United States. *See* U.S. CONST. amend. XVIII, § 1 (“After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”); *see also State of Rhode Island v. Palmer*, 253 U.S. 350, 385 (1920). Following Prohibition, the Twenty-first Amendment repealed the Eighteenth Amendment (*see* U.S. CONST. amend. XXI, § 1) and, thus, gave the states the power to regulate alcoholic beverages within their borders. *See id.* at § 2 (The “transportation or importation into any State . . . or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”). Under the Twenty-first Amendment, states have “virtually complete control over the importation and sale of liquor and the structure of the liquor distribution system.” *North Dakota v. United States*, 495 U.S. 423, 431 (1990) (citations and internal quotations omitted).

In 2005, the United States Supreme Court in *Granholm v. Heald* considered whether the Twenty-first Amendment protected state laws that regulated the sale and delivery of alcoholic beverages from constitutional challenge under the dormant Commerce Clause. 544 U.S. 460, 488 (2005). In finding that such laws must pass constitutional muster, the court in *Granholm* enunciated the test referred herein as the “*Granholm* Test,” that courts apply when analyzing challenges to state alcoholic beverage laws.

In *Granholm*, the court reviewed Michigan’s and New York’s “regulatory schemes” on the limited question of whether a “State’s regulatory scheme that permits in-state wineries directly to ship alcohol to

consumers but restricts the ability of out-of-state wineries to do so[,] violates the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment” *Granholm*, 544 U.S. at 465, 66, 71. The court found that New York’s in-state physical presence requirements that out-of-state wineries “open a branch office and warehouse in New York” were “additional steps that drive up the cost of their wine[,]” and were therefore, discriminatory. *Granholm*, 544 U.S. at 474-75. The court further noted that New York’s in-state presence requirement “runs contrary to our admonition that States cannot require an out-of-state firm to become a resident in order to compete on equal terms.” *Id.* at 475 (citations and internal quotations omitted). The New York law further provided that even after the out-of-state winery “establish[ed] the requisite branch office and warehouse in New York[,]” they were “still ineligible for a ‘farm winery’ license,” which “provides the most direct means of shipping to New York consumers.” *Ibid.* (citations omitted). Out-of-state wineries could only “apply for a commercial winery license[,]” which requires a “separate certificate from the state liquor authority authorizing direct shipments to consumers[,]” and for out-of-state wineries, there is the “additional requirement of maintaining a distribution operation in New York.” *Id.* (citations omitted).

In explaining the *Granholm* Test, the Court provided that once a state alcoholic beverage law is found to discriminate against interstate commerce, the court then considers whether the state law “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Id.* at 489 (citations omitted). Such discrimination is only “justif[ied]” by “concrete evidence[,]” which requires the “clearest showing” because “Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods.” *Id.* at 490, 92 (citations and internal quotations omitted). Indeed, courts uphold state alcoholic beverage laws that discriminate against interstate commerce “only after finding, based on concrete evidence, that a State’s nondiscriminatory alternatives will prove unworkable.” *Id.* at 492-93.

The Third Circuit has once applied the *Granholm* Test in a case involving a challenge to a state’s alcoholic beverage laws—*Freeman v. Corzine*, 629 F.3d 146, 151 (2010).⁷ In *Freeman*, plaintiffs sued the State of New Jersey under 42 U.S.C. § 1983, alleging that “several aspects of” the New Jersey system contravened the *Granholm* Test’s nondiscrimination principle in violation of the dormant Commerce Clause. *Freeman*, 629 F.3d at 151.⁸ Because *Freeman* is the only Third Circuit case to apply the *Granholm* Test in an analogous case, the Court will accordingly discuss the relevant facts here.

In *Freeman*, “[t]he first two statutory provisions at issue involve[d] privileges relating to the sale of wine to consumers and retailers that are afforded to wineries that obtain New Jersey plenary or farm winery licenses, but not to wineries lacking such licenses.” *Id.* at 151-52.⁹ Further, “[h]olders of either type of license (in-state wineries) may sell their wines at retail to consumers at the winery and at six salesrooms apart from the winery premises.” *Id.* at 152 (citations and internal quotations omitted). “In-state wineries are also permitted to sell their wines to wholesalers and retailers.” *Ibid.* (citations and internal quotations omitted). “Wineries that do not hold either a plenary or a farm winery license (out-of-state wineries), by contrast, must funnel their wines through the three-tier system by selling to wholesalers.”¹⁰ *Ibid.*

⁷ In *Freeman v. McGreevey*, No. 3-3140, 2006 WL 8423004, at *1-2 (D.N.J. June 26, 2006), the district court denied motions to dismiss and for judgment on the pleadings “as premature” to give *Granholm*, as well as New Jersey’s “recently amended statutory scheme” time to take effect.

⁸ Like here, Allied and Fedway intervened on behalf of the State of New Jersey defendants.

⁹ The plaintiffs “also challeng[ed] two aspects of New Jersey’s rules regarding the personal importation of wine . . . both the one-gallon cap on importation and the reciprocity provision prohibiting importation of wine from states that bar the entry of New Jersey wine.” *Freeman*, 629 F.3d at 152 (citing N.J.S.A. 33:1–2(a)). Additionally, Plaintiffs sought to “invalidate New Jersey’s ban on direct shipments of wine from wineries to consumers via common carrier.” *Ibid.* Having reviewed the rules, the court noted that “[w]hen plaintiffs filed suit in 2003,” the Alcoholic Beverage Control Act of 1933, L. 1933, c.436 (codified at N.J.S.A. §§ 33:1 to 33:43) (the “ABC Law”), “allowed in-state, but not out-of-state, wineries to make such shipments. *Ibid.* “[I]n anticipation of *Granholm*, which invalidated similar” laws in Michigan and New York, the Legislature “rescinded this privilege, resulting in a ban on all direct shipments of wine from producers to New Jersey residents.” *Id.* at 152–53.

¹⁰ “Plenary licenses may be obtained by producers that grow and cultivate grapes . . . on at least three acres on, or adjacent to, the winery premises, but only if the wine is produced, blended, fortified, or treated by the licensee on its licensed premises situated in the State of New Jersey.” *Id.* at 152 (quoting N.J.S.A. 33:1–10(2a)) (internal quotations and brackets omitted). “Farm winery licenses, meanwhile, are available to wineries which produce less than 50,000 gallons of wine per year and which, for the first five years of the operation of the winery, produce wine that is from at least 51% grapes or fruit grown in the State of New Jersey.” *Id.* at 152 (quoting N.J.S.A. 33:1–10(2b)) (internal quotations omitted).

There, the court pronounced that “any statute that discriminates against interstate commerce on its face or in effect is . . . subject to heightened scrutiny.” *Id.* at 158 (citations and internal quotations omitted). Though worded slightly differently, “heightened scrutiny” essentially refers to the *Granholm* Test. Compare *Granholm*, 544 U.S. at 489 (Once the plaintiff shows that the state law is discriminatory, courts consider whether the law “*advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.*”) (citations omitted) (emphasis added); *Freeman*, 629 F.3d at 158 (Once the plaintiff shows that the state law is discriminatory, the state “must demonstrate[:] (1) that the statute *serves a legitimate local interest*, and (2) *that this purpose could not be served as well by available nondiscriminatory means.*”) (citations omitted) (emphasis added).¹¹ If the plaintiff fails to show that the state law is discriminatory, courts “instead use the balancing test set forth in” *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (holding where state statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits). *Id.* at 158 (internal brackets omitted). If the plaintiff meets its burden, however, then the court considers whether the State has shown that “the discrimination is demonstrably justified[.]” *Ibid.* (citations and internal quotations omitted).

Relying on *Granholm*, the court in *Freeman* reiterated that “state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Id.* at 158 (quoting *Granholm*, 544 U.S. at 472 (citations omitted)). Further, that § 2 of the Twenty-first Amendment “does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers . . . and that straightforward attempts to

¹¹ The court also noted that discriminatory state laws are “subject to strict scrutiny[.]” *Id.* at 159-60, 62. As applied in *Freeman*, strict scrutiny does not refer to the strict scrutiny test utilized in Fourteenth Amendment cases (*see Doe ex rel. Doe v. Lower Merion School Dist.*, 665 F.3d 524 (2011)), but rather the *Granholm* Test.

discriminate in favor of local producers are not saved by the Twenty-first Amendment[.]” *Id.* at 158 (citations and internal quotations omitted). Additionally, that “the mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.” *Ibid.* (citation and internal brackets omitted). “In particular, when all out-of-state wine, but not all instate wine, must pass through an in-state wholesaler and retailer before reaching consumers, the discriminatory character of a system is obvious.” *Id.* at 159 (citation and internal quotations and brackets omitted). “Thus, direct and indirect methods of subjecting out-of-state wineries, but not local ones, to the three-tier system contravene the dormant Commerce Clause.” *Id.* at 159 (citation and internal quotations omitted).

Relevant here, the court found the statutory provisions “facially discriminatory against interstate commerce,” (*see id.* at 160), which allowed only in-state wineries to sell directly to retailers and consumers, thereby “skip[ping] the first two tiers—wholesalers and retailers—while out-of-state wineries must involve both of these tiers in order for their wine to reach consumers.” *Id.* at 159. Also, that licensing could not adequately address the facial discrimination because an out-of-state winery would still be subject to two additional tiers of the three-tier system that in-state wineries are not. *Ibid.* Ultimately, the court determined that the pertinent issue was whether the New Jersey's statutory scheme deprives wineries “of their right to have access to the markets of other States on equal terms.” *Granholm*, 544 U.S. at 473.

Post *Freeman*, the United States Supreme Court revisited the *Granholm* Test in *Tennessee Wine and Spirits Retailers Association*, wherein, the Court considered whether a state law “impos[ing] demanding durational-residency requirements on all individuals and businesses seeking to obtain or renew a license to operate a liquor store” violated the Commerce Clause. 139 S. Ct. 2449, 2456 (2019).¹² The Court clarified its analysis in *Granholm*, holding that “a state law that discriminates against out-of-state

¹² The three Third Circuit cases that applied *Tennessee Wine* did so in connection to state laws unrelated to alcoholic beverages. *See Owner Operator Indep. Drivers Ass’n, Inc. v. Pa. Tpk. Comm’n*, 934 F.3d 283 (3d Cir. 2019); *Mech. Contractors Ass’n of N.J., Inc. v. State of New Jersey*, 541 F.Supp.3d 477 (D.N.J. 2021); *N.J. Staffing Alliance v. Fais*, No. 23-2494, 2023 WL 4760464 (D.N.J. July 26, 2023).

2022 WL 4552047, at *2. The Court may consider *Anvar* as persuasive authority, however, it did not apply *Anvar* to its decision here.

Third, and finally, Plaintiffs inform the Court of proposed “new pertinent authority from the Supreme Court of the United States, *Nat’l Pork Producers Council v. Ross*, 598 U.S. ____, 143 S. Ct. 1142 (May 11, 2023).” (ECF No. 148, at 1).¹⁶ The decision in *Nat’l Pork Producers Council* concerned a California law that barred the sale of whole pork meat from breeding pigs, but neither considered a challenge to California’s alcoholic beverage laws nor applied the *Granholm* Test. *See, gen.*, 143 S. Ct. 1142. Thus, *Nat’l Pork Producers Council* is not controlling precedent given the distinguishable facts and test applied.

As the Court has articulated the relevant test to be applied, which remains unchanged after review of additional caselaw proposed by the parties, it therefore moves to address the parties’ substantive arguments.

C. **The New Jersey System is a Valid Exercise of the State’s Power under the Twenty-first Amendment and is Justified by the Legitimate Nonprotectionist Ground of Promoting Health and Safety that Cannot Be Adequately Served by Reasonable Nondiscriminatory Alternatives**

The State of New Jersey, “ha[s] broad power to regulate liquor under § 2 of the Twenty-first Amendment[,]” which includes creating and enforcing a three-tier system. *Granholm*, 544 U.S. at 493. Indeed, the New Jersey System supports Congress’ intent of allowing states to decide how to administer alcohol distribution within their borders. *See Granholm*, 544 U.S. at 484 (“The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use.”). Accordingly, the Court finds for the reasons more fully set forth below, that the New Jersey System, and the challenged provisions therein, are valid

¹⁶ The State Defendants argue that *Nat’l Pork Producers Council* does not apply. (ECF No. 150), at 1. On June 27, 2023, the Wholesaler Defendants filed a letter generally supporting the State Defendants’ arguments. (ECF No. 152).

unsupported by concrete evidence of a legitimate local purpose, and without reasonable nondiscriminatory alternatives, it will be upheld.

“Any statute that discriminates against interstate commerce on its face or in effect is thus subject to heightened scrutiny.” *Freeman*, 629 F.3d at 158 (citations and internal quotations omitted). “The party challenging the statute has the burden of proving that the statute is discriminatory . . . but if the plaintiff meets that burden, the State must demonstrate (1) that the statute serves a legitimate local interest, and (2) that this purpose could not be served as well by available nondiscriminatory means[.]” *Ibid.* (citations omitted). “If the plaintiff does not meet its burden of showing that the statute is discriminatory, we instead use the balancing test set forth in *Pike v. Bruce Church, Inc.*” to “determine whether the burdens on interstate commerce substantially outweigh[] the putative local benefits.” *Ibid.* (citations omitted).

Here, the New Jersey System is arguably not “facially discriminatory” because it requires that in-state and out-of-state wine retailers sell and deliver wine through the New Jersey System. *See Freeman*, 629 F.3d at 160 (Statutes were “facially discriminatory against interstate commerce” because they allowed only in-state wineries to sell directly to retailers and consumers, thereby “skip[ping]the first two tiers—wholesalers and retailers—while out-of-state wineries must involve both of these tiers in order for their wine to reach consumers.”) (internal quotations omitted). Accordingly, the New Jersey System is not facially discriminatory. In respect to Plaintiffs, however, the New Jersey System, is arguably discriminatory in effect because it sets certain conditions precedent to selling wine directly to New Jersey consumers.

To operate under the New Jersey System, Plaintiffs must purchase their wine from licensed New Jersey wholesalers, and choose one of the following to obtain a plenary retail license: (1) open a store in New Jersey and sell its products there; or (2) open a store in New Jersey and sell its products from The Wine Cellarage’s New York facility online and “ship it by common carrier” from the New York store to

New Jersey consumers. SDRSOF ¶¶ 47, 49; PRSOFSD ¶¶ 47, 49; PSOF ¶ 6; WDRSOF ¶ 6; NJLRSOF ¶ 6; SDRSOF ¶ 6. These requirements are “additional steps that drive up the cost” of Plaintiffs’ wine and may be discriminatory. *Granholm*, 544 U.S. at 474-75. To invalidate the New Jersey System and/or parts therein, Plaintiffs claim that the discriminatory effect of the New Jersey System is not “justified as a public health or safety measure” and that the State Defendants cannot provide “concrete evidence” that the New Jersey System “actually promotes public health or safety[.]” *Tenn. Wine*, 139 S. Ct. at 2474 (citations omitted). The Court disagrees.

Plaintiffs concede that the Twenty-first Amendment “gives states wide latitude to decide which methods of selling and delivering alcohol it will permit and which methods it will prohibit because they pose a risk to public health and safety.” Pls.’ Mem. of Law, at 1. Plaintiffs further concede that the Twenty-first Amendment protects the State Defendants’ interest of “protecting public health and safety” and “raising revenue.” Pls.’ Mem. of Law, at 10. To counter Defendants’ arguments in support of the New Jersey System, Plaintiffs posit that “[f]orty-five states allow some form of direct-to-consumer wine shipping” and that at least 14 “jurisdictions allow” retailers to ship directly to consumers. PSOF ¶ 26; WDRSOF ¶ 26; NJLRSOF ¶ 26; SDRSOF ¶ 26. Plaintiffs further posit that alcohol usage among minors has not increased in other states, neither has consumption of wine among adults, nor has there been an occurrence of “higher rates of alcohol-related public safety problems such as traffic fatalities, . . . aggravated assaults, . . . or domestic violence.” Pls. Mem. of Law, at 11. Further, that states saw no issues with tax collection for remittance of taxes. *Ibid*. These factors are not persuasive, however, as to the constitutionality of the New Jersey System.¹⁷

¹⁷ Plaintiffs also contend that the Court should exclude the State Defendants’ expert reports. Pls.’ Resp./Reply Br., at pp. 28-33. Because Plaintiffs did not file a motion to bar pursuant to Federal Rule of Civil Procedure 702, the Court does not opine on Plaintiffs’ request here. Regardless, the Court did not rely on the subject expert reports in rendering its decision here.

cash[,]” unlawful acquisition of beverage alcohol from prohibited sources, specifically other than a New Jersey licensed wholesaler[,]” and have led to numerous prosecutions for related violations. *Id.*, at ¶¶ 22-23. Fedway further supports this assertion by describing instances in 2017 and 2018, where “State officials” performed on-site inspections of its warehouse and corporate offices, as well as “trucks and sales personnel when they are on the road.” Robert D. Sansone’s December 2, 2021, Declaration (ECF No. 112-2).

Second, Mr. Sapolnick states that in requiring out-of-state wine retailers to purchase wine “through an authorized distribution network[,]” the State Defendants may then “identify the source of contamination,” should such authority be needed, and “facilitate product recalls and . . . take other prompt action.” Sapolnick Decl., at ¶ 13; *see also* Robert Harmelin’s December 6, 2021, Declaration (ECF No. 110-2) (the “Harmelin Decl.”), at ¶ 12. In 2020 for example, Allied “was asked by [its] supplier to place Kim Crawford in case (Rose and Sauvignon Blanc) with identified production dates on hold because of quality issues; [and,] as requested, Allied segregated its existing inventory of the product within its warehouse and provided specific counts to the supplier . . .” Harmelin Decl., at ¶ 13.

The record before the Court establishes that the State Defendants’ goal of protecting health and safety through these provisions as outlined, cannot be achieved “by reasonable nondiscriminatory alternatives” (*see Granholm*, 544 U.S. at 489), because the ABC’s “jurisdiction is limited to New Jersey, [and] it has no practical means by which to conduct warrantless searches and seizures of evidence and property located outside of New Jersey.” Sapolnick Decl., at ¶ 24. Indeed, the State Defendants would need to overcome “several obstacles” in working with agencies outside its borders to investigate out-of-state entities selling alcoholic beverages to New Jersey consumers, including “whether specific out-of-state agencies have legislative approval to assist in enforcing New Jersey’s alcoholic beverage laws” and whether out-of-state agencies are “able to conduct adequate investigations under the ABC Act[.]” *Ibid.*

This is particularly relevant here because the New York State Liquor Authority (the “NYSLA”), which oversees The Wine Cellarage in New York State, has in the past “refused to assist ABC in regulatory oversight of its licensees.” *Id.*, at ¶ 26. In 2018, the NYSLA declined the ABC’s request to “obtain the investigation reports, specifications of charges” and “settlement agreement” related to the NYSLA’s fine of Wegmans to determine whether the State Defendants “should conduct a similar investigation of Wegmans” in-state. *Ibid.* As a result, exempting Plaintiffs from the New Jersey System “would render it beyond New Jersey’s regulatory purview.” *Id.*, at ¶ 25.

Plaintiffs contend that the validity of the New Jersey System is not at issue here. *See* Pls.’ Resp./Reply Br. at 2 (“This case presents one issue -- the constitutionality of a discriminatory feature of New Jersey’s liquor code that prohibits out-of-state retailers from shipping wine to consumers . . . [t]he issue is not the validity of the entire three-tier system . . .”). Plaintiffs’ contention is unavailing given the relief that they seek. *See* Am. Compl. at 7 (Requesting a declaratory judgment that “New Jersey law, practices[,] and regulations that prohibit out-of-state wine retailers from selling, shipping, and delivering wine directly to a New Jersey consumer unconstitutional as a violation of the Commerce Clause” and an “injunction prohibiting Defendants from enforcing those rules and regulations and requiring them to allow out-of-state wine retailers to obtain licenses and to sell, ship, and deliver wine directly to customers in New Jersey.”). Veritably, Plaintiffs request to be treated differently—not the same—to in-state wine retailers by seeking to invalidate the licensing, physical presence, and wholesaler wine purchase requirements; and to prohibit the New Jersey System from applying to Plaintiffs. WDSOF ¶ 7; PRSOFWD ¶ 7; SDRSOF ¶ 45; PRSOFSD ¶ 45; Sapolnick Decl., at ¶ 8. The licensing, physical presence, and wholesaler wine purchase requirements go the root of the New Jersey System. Were the Court to grant the relief sought, it would greatly favor out-of-state wine retailers to the disadvantage of in-state wine

retailers who must adhere to New Jersey's three-tier regulations. This is clearly not what the court in *Granholm* intended.

As stated herein, the New Jersey System does not have different licenses for in-state vs out-of-state wine retailers. Both are eligible for plenary retail licenses. Indeed, all potential licensees must satisfy the same requirements, obtain the same licenses, and be subject to the same inspections, audits, and investigations. In-state wine retailers are not provided special treatment or exemptions from certain aspects of the New Jersey System. Therefore, the State of New Jersey's goal of "protecting public health and safety" is indeed "achieved through the alternative of an evenhanded licensing requirement" because both in-state and out-of-state wine retailers are subject to the same procedures and requirements to sell wine to New Jersey consumers. *Granholm*, 544 U.S. at 492. Accordingly, the "predominant effect" of the challenged provisions is not "protectionism," but "the protection of public health or safety," which, is "shielded by § 2." *Tenn. Wine*, 139 S. Ct. at 2474.

Moreover, the "reasonable nondiscriminatory alternatives" discussed in *Granholm* would prove "unworkable" here. *Granholm*, 544 U.S. at 489, 92-93. In *Granholm*, the court noted that "improvements in technology have eased the burden of monitoring out-of-state wineries" because "[b]ackground checks can be done electronically[,] [f]inancial records and sales data can be mailed, faxed, or submitted via e-mail." *Granholm*, 544 U.S. at 492. While true, technology improvements do not address the State of New Jersey's goal of performing unannounced on-site inspections and investigations. Indeed, the electronic transmission of materials do not tell the entire story without on-site inspections, unannounced visits, and ABC-led investigations. And absent the authority to perform such visits in the State of New York, reviewing electronic materials sent from Plaintiffs can neither replace nor substitute the New Jersey System's challenged requirements. The Court, therefore, finds that the State Defendants have

demonstrated at summary judgment, “based on [the] concrete record evidence,” that the State’s “nondiscriminatory alternatives will prove unworkable.” *Granholm*, 544 U.S. at 492-93.

The Court recognizes that as raised by Plaintiffs, New Jersey provides an out-of-state winery license that allows direct sales to consumers under certain circumstances. N.J.S.A. 33:1-10(2e); *see also* Pls.’ Resp./Reply Br. at 20-21. However, because a license is available to an out-of-state entity that is involved in the wine business (wine production), which differs from Plaintiffs’ wine business (wine sales and distribution), does not mean that New Jersey must provide similar licenses to out-of-state wine retailers, or that this Court should invalidate the New Jersey System. Indeed, in raising this provision, Plaintiffs do not argue that the New Jersey System treats in-state wine retailers differently than out-of-state wine retailers, but rather that the New Jersey System treats out-of-state wine producers differently than out-of-state wine retailers. This, however, does not offend the dormant Commerce Clause. *See Davis*, 553 U.S. at 337-38 (“The modern law of . . . the dormant Commerce Clause is driven by concern about economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” (citation and internal quotations omitted); *Freeman*, 629 F.3d at 157-58 (The dormant Commerce Clause “prohibits a state from impeding free market forces to shield in-state businesses from out-of-state competition.”) (citations omitted). Because the Court must decide whether the New Jersey System treats in-state and out-of-state wine retailers the same and not whether the New Jersey System treats out-of-state wine producers and out-of-state wine retailers the same, N.J.S.A. 33:1-10(2e) does not trigger a dormant Commerce Clause violation.

At its core, the New Jersey System requires in-state and out-of-state wine retailers to play by the same rules. While the New Jersey System arguably discriminates against Plaintiffs in effect because they must open a New Jersey store, purchase wine from licensed New Jersey wholesalers, and obtain a plenary retail license, the State Defendants have shown by “concrete evidence” that this discrimination is justified

because it advances the legitimate local purpose of promoting public health and safety. Thus, the Court finds that the challenged provisions are “narrowly tailored” to advance the State’s goal of promoting public health and safety pursuant to the Twenty-first Amendment, and “actually” does so under the New Jersey System. *Tenn. Wine*, 139 S. Ct. at 2461, 71. And because the basis for the challenged provisions is not to protect in-state wine retailers from competition from Plaintiffs (*see id.* at 2474), the specific provisions are upheld. Accordingly, the New Jersey System, on this record, is valid and upheld. And thus, the State Defendants are entitled to judgment as a matter of law on their cross-motion on this issue.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs’ motion for summary judgment (ECF No. 102) is **DENIED**, Allied Defendants’ cross-motion for summary judgment (ECF Nos. 110-11) is **DENIED as moot**, Fedway’s cross-motion for summary judgment (ECF No. 112) is **DENIED as moot**, the State Defendants’ cross-motion for summary judgment (ECF No. 114) is **GRANTED**, and Plaintiffs’ Commerce Clause claim (Count One) against the State Defendants is **DISMISSED with prejudice**. The Court does not award costs, expenses, or attorneys’ fees to any party.

An appropriate Order accompanies this Opinion.

DATED: 8/22/2023

s/ Julien Xavier Neals
JULIEN XAVIER NEALS
United States District Judge