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

REPLY BRIEF OF APPELLANTS IN REPLY TO ALL APPELLEE BRIEFS

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Table of contents

Table of authorities

Cases

Constitutions, statutes and rules

Other authorities

I. Introduction

The Wine Cellarage is challenging 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. It contends that this difference in treatment is unconstitutional under the authority of *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). Those cases struck down similar discriminatory shipping rules, physical-presence rules and residency requirements, after considering both the Commerce Clause and the Twenty-first Amendment, They hold that a state can justify discrimination only if it demonstrates with concrete evidence that the restrictions protect public health or safety and that discrimination is necessary because nondiscriminatory alternatives, such as a permit system, would be ineffective. The State did not meet its burden in those cases and has not done so here.

The State, five wholesalers and three trade associations have filed a total of four briefs in response. They make four arguments:

1. New Jersey's "three-tier system" as a whole assures regulatory accountability and is therefore exempt from challenge.

2. Even if the entire system is not exempt, in-state presence requirements are exempt because they are essential features of a three-tier system.
3. Even if subject to scrutiny, only minimal scrutiny is needed in which the availability of alternatives is irrelevant.
4. Even if given serious scrutiny, the State has sufficiently shown that its ban on interstate retail shipping protects public health and that the alternative of a permit system would be unworkable.

All four argument have been rejected by *Tenn. Wine, Granholm, and Freeman*. Indeed, neither the Supreme Court nor this Circuit has ever upheld a liquor law that discriminated against out-of-state interests. *Tennessee Wine* struck down a residency requirement for a liquor license. 139 S.Ct. at 2457. *Granholm* struck down two laws that banned interstate shipping by wineries. 544 U.S. at 493. Earlier cases had struck down discriminatory taxation of out-of-state liquor, *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 275-76 (1984) and discriminatory price-affirmation rules that applied only to interstate beer distributors. *Healy v. Beer Inst.,* 491 U.S. 324, 340-41 (1989). In this Circuit, *Freeman* struck down discriminatory laws that allowed only in-state wineries to sell directly to

consumers, 629 F.3d at 159, allowed in-state but not out-of-state wineries to sell directly to retailers, *id.* at 159-60, and limited interstate transportation of wine. *Id.* at 160-61.

The only Supreme Court case to directly address interstate wine sales is *Granholm*. It held unambiguously that "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." 544 U.S. at 493. The Appellees contend, however, that *Granholm* has been implicitly modified by *Tenn. Wine*, even though the Court did not say so. The argument should be rejected because when there is a direct precedent, "a lower court should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions ... even if the lower court thinks the precedent is in tension with some other line of decisions." *Mallory v. Norfolk So. Ry Co.*, 600 U.S. 122, 136 (2023). Any argument that *Granholm* is not directly applicable because it concerned retail sales to consumers by wineries and the present case concerns retail sales to consumers from wine stores was explicitly foreclosed in *Tenn. Wine*.

> Although it concedes (as it must under *Granholm*) that § 2 does not give the States the power to discriminate against out-of-state alcohol *products and producers*, [it] presses the argument... that a different rule applies to state laws that regulate in-state alcohol distribution. There is no sound basis for this distinction.

139 S.Ct. at 2470-71.

II. The main issues

A. The "three-tier system" is not exempt from *Granholm/Tenn. Wine* scrutiny

Appellees first argue that New Jersey's "three-tier system" is immune from scrutiny because it serves as an important tool for regulating alcohol distribution. They cite a single phrase of *dictum* from *Granholm,* that "We have previously recognized that the three-tier system itself is "unquestionably legitimate." 544 U.S. at 489.

The argument is irrelevant because New Jersey does not have a three-tier system for wine (the only beverage at issue). A three-tier system separates the functions of producers, wholesalers and retailers, and prohibits anyone from operating in more than one tier. *Tenn. Wine*, 139 S.Ct. at 2471. New Jersey has no such requirement. Wine producers, whether located in or outside New Jersey may operate in all three tiers. They may manufacture wine, operate 15 retail salesrooms, and sell wine directly to retailers and consumers without using a wholesaler. N.J. Stat. § 33:1-10(2a), (2b), (2e). New Jersey probably used to have a three-tier system for wine (many states did), but it no longer does.

Appellees try to save this argument by characterizing the fact that wine producers may sell directly to consumers as an isolated "exception" to the

three-tier system. The argument is nonsense. If an ordinance required all houses to have three stories but included an exception allowing one-story houses, then there is no three-story requirement. Similarly, a three-tier system with an "exception" allowing one-tier direct sales is not a three-tier system.

The premise of the immunity argument is also false. *Granholm* did not hold that the three-tier system was exempt from scrutiny. It applied "exacting scrutiny" to New York's wine shipping laws. 544 U.S. at 493. When the Court said in dictum that "[w]e have previously recognized that the three-tier system itself is "unquestionably legitimate," 544 U.S. at 489, it was not announcing a legal principle. It was paraphrasing an earlier plurality opinion about state regulation of liquor sold on military bases. *No. Dakota v. U.S.,* 495 U.S. 423, 432 (1990). *Granholm* itself cautions against the very interpretation urged by Appellees:

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding ... Discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

544 U.S. at 488. If there had been any doubt, the Court put that to rest in *Tenn. Wine.*

> This argument ... reads far too much into *Granholm's* discussion of the three-tiered model. Although *Granholm* spoke approvingly of that basic model, it did not suggest that § 2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme.

Id. at 2471. It would "lead to absurd results [and mean] that a state law prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex would be immunized from challenge." *Id.* at 2462.

B. An in-state presence requirement is not an "essential element" of a three-tier system which is exempt from scrutiny

Appellees' fallback argument is that even if the entire three-tier system is not immune, its essential elements are, and requiring retailers to be physically present and buy their wine from in-state wholesalers is essential and therefore immune from scrutiny. It fails for the same reasons.

First, the Supreme Court has never said that "essential elements" of a three-tier system are immune from scrutiny. The only time it mentioned "essential elements" was in the negative, that a residency requirement for retail licensees "is *not* an essential feature of a three-tiered scheme." *Tenn. Wine,* 139 S.Ct. at 2471 (emphasis added). Nothing in this phrase suggests that there are any other unidentified elements that might be immune. No issue in the case involved any other element, and it is axiomatic that

matters not ruled upon by the Court are not to be considered as having been decided. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004).

Second, even if there were such a thing as essential elements, a physical-presence requirement would not be one. For one thing, the Supreme Court has twice struck them down. *Granholm,* 544 U.S. at 475 ("States cannot require an out-of-state firm to become a resident in order to compete on equal terms"); *Tenn. Wine.* 139 S.Ct. at 2457 ("residency requirement ... blatantly favors the State's residents [and[is not shielded by § 2"). The Court said the residency requirement was clearly not essential to a state regulatory scheme because"many such schemes do not impose [the] requirements." *Id* at 2472. Forty-five states have no physical-presence requirement for retail shipping by out-of-state wineries, App 132-133 (Wark Rep. ¶ 21), and sixteen have not required it for retail sales and shipping by out-of-state wine stores.[1]

Third, physical-presence cannot possibly be essential when the state

[1]This number varies over time. Appellees assert that Nevada and Idaho have stopped allowing shipping but cite no actual statutes to that effect. Allied Br. at 39 n.9. The statutes cited in the Table, App. 234, are still in effect as of 2024. Alaska and the District of Columbia allow shipping by customary practice, and Florida allows it under a federal injunction entered in *Bainbridge v. Turner*, 8:99-cv-2681-T-27TBM (M.D. Fla. 2005).

itself does not consistently require it. New Jersey does not require physical presence or distribution through in-state wholesaler for out-of-state wineries who may sell and ship wine directly to consumers from their out-of-state premises. N.J. Stat. § 33:1-10(2e). If a state allows others to engage in the same activity it is trying to prevent plaintiffs from doing, it is a tacit concession that the requirement is not truly essential. *Clark v Jeter,* 486 U.S. 456, 464-65 (1988).

Appellees argue that at least the in-state wholesaler requirement is *per se* valid because *Granholm* held that the "Twenty-first Amendment ... empowers [a state] to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *E.g.*, Allied Br. at 21. This is false. The phase appears in parentheses describing the concurring opinion of one Justice in an older case not involving interstate commerce:

> We have previously recognized that the three-tier system itself is "unquestionably legitimate." *North Dakota v. United States, 495 U.S., at 432.* See also *id.*, at 447 (Scalia, J., concurring in judgment) ("The Twenty-first Amendment ... empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler").

544 U.S. at 489. It was followed immediately by the disclaimer that this did not apply to discrimination. "[D]iscrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment." *Id.*

Appellees' have no Supreme Court or Third Circuit authority. Instead, they rely on scattered cases from other circuits which they say show a consensus that state laws banning interstate retail wine shipping are *per se* constitutional. They are wrong. All relevant cases from other circuit but one[2] hold that these bans on interstate commerce are subject to the same fact-based judicial scrutiny as any other discriminatory state liquor law. *Anvar v. Dwyer*, 82 F.4th 1, 10-11 (1st Cir. 2023); *Block v. Canepa*, 74 F.4th 400, 413-14 (6th Cir. 2023); *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 224-25 (4th Cir. 2022);[3] *Lebamoff Enter., Inc. v. Rauner,* 909 F.3d 847, 855-56 (7th Cir. 2018). The other cases cited by Appellees to boost their citation list are not germane. Two upheld nondiscriminatory laws that equally prohibited both in-state and out-of-state retailers from shipping wine statewide. *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 812 (5th Cir. 2010); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 188 (2d Cir.

[2]*Sarasota Wine Mkt, LLC v. Schmitt*, 987 1171, 1183 (8th Cir. 2021). It adhered to an 8th Circuit precedent upholding a physical-presence requirement for wholesalers but cautioned that "[t]here are passages in the *Tenn. Wine* opinion that may forecast a future decision that ... physical presence requirements ... are subject to an evidentiary weighing to determine [their] public health and safety benefit."

[3]After considering the facts, the majority decided 2-1 that the State had carried its burden to justify its law.

2009). One was decided before *Granholm*. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000). Two have been superseded by more recent contrary opinions. *Lebamoff Enters., Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), *superseded by Block v. Canepa,* 74 F.4th 400 (6th Cir. 2023); *Bridenbaugh, supra*, *superseded by Lebamoff Enter., Inc. v. Rauner, supra.* One was dismissed for lack of jurisdiction. *Cooper v. Tex. Alco. Bev. Comm.,* 820 F.3d 730 (5th Cir. 2016). One is not even a circuit opinion. *Brooks v. Vassar,* 462 F.3d 341, 361 (4th Cir. 2006) (2 judges did not join that section because issue was moot). Two are district court cases currently on appeal. *Chicago Wine Co. v. Holcomb*, No. 21-2068 (7th Circuit); *Day v. Henry,* No. 23-16148 (9th Circuit).

C. Serious scrutiny is required

Appellees' next fallback argument is that even if the ban on interstate wine sales and shipping is not totally immune, it is subject only to minimal scrutiny and therefore easily upheld. *E.g.*, State Br. at 24-25; Allied Br. at 17-20. This directly contradicts *Granholm*, which held that an "exacting standard" is required, 544 U.S. at 493, and *Freeman*, which characterized the standard as a form of "strict scrutiny." 629 F.3d at 159.

Appellees argue, however, that the Supreme Court reduced the level of scrutiny in *Tenn. Wine* when it said that "a different inquiry" was required. Citing this phrase out of context begs the important questions -- what is this inquiry different from and what are its terms?

It is obvious from the full text of *Tenn. Wine* that the Court does not mean different from *Granholm* and *Freeman,* but different from the rule of virtually *per se* invalidity that applies to discrimination against products other than alcohol. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 392 (1994) (solid waste).

> [T]he residency requirement ... could not be sustained if it applied across the board to all those seeking to operate any retail business ... But because of § 2, we engage in a different inquiry [asking] whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground.

139 S.Ct. at 2474. This is not new; it has always been the standard in Commerce Clause/Twenty-first Amendment cases where "each must be considered." *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 275. Nowhere did the Court suggest it was overturning *Granholm'* exacting standard. To the contrary, it reaffirmed the application of the non-discrimination principle, 139 S.Ct. at 2470, and it ruled against the state because it failed to prove that the restriction "actually promotes public health or safety; nor is there

evidence that non-discriminatory alternatives would be insufficient to further those interests." *Id.* at 2474. The Court cautions against assuming that it has overruled or modified an earlier precedent when it has not said so. "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton.* 521 US 203, 237 (1997).

Even if the Court was retreating somewhat from *Granholm*'s exacting standard, it certainly did not retreat all the way to minimal scrutiny or a deferential standard of review. A deferential standard had been urged by the dissents in *Tenn. Wine*, 139 S.Ct at 2477-78, and the underlying Sixth Circuit case, 139 S.Ct. at 2459, but the majority in rejected it. *Id.* at 2470-71. Instead, the Court relied on long-standing precedent requiring a critical "examination of the actual purpose and effect of a challenged law" because '[i]t does not at all follow that 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 the police powers of the State.'" *Id.* at 2473, *quoting Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

How does a court engage in the critical examination of the actual purpose and effect of a law? Appellees contend the guidelines are vague and require only some minimal evidence that the law serves a public health or safety interest. State Br. at 19; Allied Br. at 18. Appellees concede that the evidence must show that the public health is the "predominant" effect of the law, State Br. at 23; Allied Br. at 17, but do not acknowledge the full extent of the Supreme Court's guidelines for making this determination. *Tennessee Wine* was not a one-sentence opinion. It provides specific guidelines and standards for assessing whether the predominant effect of a law is the protection of public health or safety rather than protectionism.

1) The Twenty-first Amendment "is limited by the non-discrimination principle of the Commerce Clause." *Granholm*, 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. Therefore, in order to justify a discriminatory state liquor law, the State must show that it is "reasonably necessary to protect [its] interests." *Id.* at 2470.

2) The only interest identified by the Court that might justify discrimination is the need "to address alcohol-related public health and safety issues" *id*. at 2474 and "regulat[e] the health and safety risks posed by the alcohol trade." *id*, at 2472. The Court has ruled out other potential interests, such as maintaining oversight over liquor store operators, ensuring responsible sales practices and familiarity with local law, *id* at 2475-76, facilitating orderly market conditions, ensuring regulatory accountability, and monitoring sales and taxes, *Granholm*, 544 U.S. at 491-92,, because these objectives "can also be achieved through the alternative of an evenhanded licensing requirement." *Granholm*, 544 U.S. at 492.
3) The State must present "concrete evidence" that a discriminatory law "*actually* promotes public health or safety." *Tenn. Wine,* 139 S.Ct. at 2474 (emphasis added). This is a question of the effect of the law in real life, not just its purpose or theoretical potential. *Id.*
4) Demonstrating that a discriminatory law promotes public health or safety is not enough. The State must also prove "that non-discriminatory alternatives would be insufficient." *Tenn. Wine,* 139 S.Ct. at 2474; *Granholm*, 544 U.S. at 489.

5) The "burden is on the State to show that 'the discrimination is demonstrably justified,'" *Granholm*, 544 U.S. at 492. Without sufficient evidence, a discriminatory law is invalid. *Tenn. Wine*, 139 S.Ct at 2474, 2476.

6) "Concrete evidence" is required; "speculation [and] unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Id.* at 2474; *Granholm*, 544 U.S. at 490, 492.

In *Granholm,* the Court referred to this as an "exacting standard." 544 U.S. at 493. *Tenn. Wine* did not give it a label. 139 S.Ct. at 2459, 2472. The best interpretation is that neither the strictest scrutiny given to pure Commerce Clause cases, nor the minimal scrutiny given to pure Twenty-first Amendment cases, is appropriate. Both constitutional provisions "must be considered," *Bacchus*, 468 U.S. at 275, so some form of intermediate scrutiny would seem to apply.

The Supreme Court has previously described intermediate scrutiny in terms similar to those used in *Granholm* and *Tenn. Wine.* A discriminatory classification may be upheld if the state demonstrates that it is reasonably necessary to advance a legitimate governmental objective

and less restrictive means would have been ineffective. *See Clark v Jeter,* 486 U.S. at 461; *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 nn. 6-7 (1986). The difference between strict and intermediate scrutiny is the burden of proof. Under strict scrutiny, discrimination is virtually *per se* invalid and will usually be struck down without further inquiry. *Granholm*, 544 U.S. at 476, 487. Under intermediate scrutiny, the question is "whether the challenged laws were *reasonably necessary* to protect the State's asserted interests." 139 S.Ct. at 2470 (emphasis added). The State bears the burden in both situations to prove that the requirement "actually promotes public health or safety [and] that nondiscriminatory alternatives would be insufficient." *id.* at 2474. The difference is that to justify discrimination under strict scrutiny, the State must prove a compelling need to discriminate, but to justify discrimination under intermediate scrutiny requires the State to show a reasonable need for the law. It is similar to the difference between proof beyond a reasonable doubt and proof by a preponderance of evidence. Demonstrating a reasonable need still requires the State to prove both elements of its justification defense -- that the ban actually protects public health and reasonable alternatives would be ineffective.

D. The State must prove both that the ban on retail interstate wine shipping actually promotes public health or safety and that nondiscriminatory alternatives would be insufficient

Appellees focus on the first element -- whether the ban on interstate wine shipping promotes public health and safety. The State argues that it does not need to establish the second element, that nondiscriminatory alternatives would be ineffective, Br. at 26-27, 48, but this extreme view can be easily rejected. The Supreme Court and this Circuit say both elements are important in assessing whether the State has justified the need to discriminate. *Tenn. Wine*, 139 S.Ct. at 2474 (whether there is "evidence that nondiscriminatory alternatives would be insufficient"); *Granholm*, 544 U.S. at 489 (whether it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives'"); *Freeman*, 629 F.3d at 161 ("[t]he burden is on the State to show that "a state's nondiscriminatory alternatives will prove unworkable"). The other Appellees acknowledge that both elements are important but assert that they have proved them.

1. The State has not proved that banning interstate wine shipping has any actual effect on public health

There is no plenty of evidence that alcohol affects public health or safety. There is no evidence that direct wine shipping makes any

difference. At least twelve states have allowed out-of- state retailers to ship to consumers. None has reported any public health or safety problems attributable to wine shipping. It has not caused more youth access. Facts ¶ 13, Opening Br. at 17. It has not increased consumption of wine by adults or the rates of alcohol-related public safety problems such as traffic fatalities, aggravated assaults, or domestic violence. Facts ¶¶ 11-15. The Appellees have no evidence that retailer direct shipping has ever increased the rates of any alcohol-related problems in any state which allows it. If interstate shipping does not increase consumption, how can it possibly pose a unique threat to public health or safety that must be stopped? This is the State's burden of proof.

Appellees' evidence focuses mostly on bureaucratic interests that might have an indirect impact on alcohol-related problems -- keeping the market orderly and monitoring sales. They say an in-state presence facilitates these regulatory activities and therefore serves the general public good. State Br. at 39-40, Allied Br. at 29-31. This is irrelevant because a state's interests in orderly markets, regulatory accountability and oversight are "insufficient" to justify residency and physical-presence requirements. *Tenn. Wine,* 139 S.Ct. at 2475; G*ranholm* 544 U.S. at 492.

None of Appellees' evidence about the benefits of on-site inspections has anything to do with online ordering and the delivery of wine to a consumer miles away from the store. Appellees tout decoy operations that can discover *on-site* sales to minors, State Br. at 39; Fedway Br. at 13, but this case concerns online sales and shipping where the purchaser is not present at the store. Appellees point to discovering improper financial interests, incomplete records, large sums of cash, and bars that substitute cheap liquor for premium brands, State Br. at 40, but none of these are "alcohol-related public health or safety issues." Appellees speculate that if there ever were any unsafe wine being sold to the public they could easily track and recall it if the seller were in-state, but no evidence that there have ever been any such incidents,[4] nor why they would have any difficulty tracking interstate shipments. Shippers like FedEx keep extensive records of what was shipped to whom.

Appellees try to plug this evidentiary hole by citing the opinions of three experts (William Kerr, Pamela Erickson, and Patrick Maroney) and a lay witness (Andrew Sapolnick) that alcohol is a dangerous product that

[4]There is only one-- a wine recalled by the manufacturer for quality reasons. State Br. at 41. Nothing suggests the wine was unsafe, posed a danger to public health, or that the manufacturer only notified New Jersey sellers and not sellers in other states.

should be regulated, that excessive consumption is a public health and safety problem, and that an in-state presence facilitates some kinds of regulatory activities. None of these witnesses says that New Jersey does anything unique in its inspections and enforcement activities that other states do not. None presents any data, study, or report showing that licensed interstate wine shipping by retailers poses any particular threat to public health or safety or increases consumption or youth access. None claims to have reviewed (or even be familiar with) the published data from NIH, CDC, Substance Abuse and Mental Health Services Administration, FBI, and Domestic Violence Coalition that collect data on alcohol-related issues. App. 199-231. None claims any personal experience working in a jurisdiction that had problems arise because of direct shipping. They merely speculate that New Jersey's ban on interstate wine shipping is an important public safety measure because it *might* prevent hypothetical problems that *might* arise in the future (but have not happened elsewhere). This falls way short of the kind of concrete, non-speculative evidence the Supreme Court requires to sustain a discriminatory law. *Tenn. Wine*. 139 S.Ct. at 2474. Opinions without a factual basis are also inadmissible under Fed.R.Evid. 701-702.

Appellee Fedway also tries to insert some hearsay evidence culled from scattered articles on interstate wine shipping to show that some minors can obtain alcohol by direct shipping. Br. at 16 n.4. Even if they were admissible, the articles would be worthless because they do not distinguish shipping by out-of-state retailers from local shipping, or shipping under a license from purely illegal shipping.

2. The State has not proved that direct shipping could not be monitored effectively by a permit system

Appellees basically argue that throwing the door wide open to all out-of-state retailers to ship wine to consumers could substantially increase public health and safety risks. Even if they had any concrete evidence to support this fear, that would not be enough to justify a total ban on such shipments. The State must also prove with concrete evidence that it could not minimize such risks through nondiscriminatory regulatory alternatives. *E.g., Granholm*, 544 U.S. at 489-90, 492-93. New Jersey has not done so.

There is an obvious alternative -- a permit system like the one New Jersey uses for out-of-state wineries. N.J. Stat. § 33:1-10(2e). Other states also use a permit system to safely monitor interstate wine shipping and protect the public through regulations that limit quantities and require

the shipper to report sales, remit taxes, and verify the age of the recipient. Wark Report ¶ 33, App. 135. The Supreme Court says this is a reasonable alternative to a total ban. *Granholm,* 544 U.S. at 491-92; *Tenn. Wine,* 139 S. Ct. at 2475-76. It has been endorsed by other circuits, e.*g.*, *Bainbridge v. Turner,* 311 F.3d 1104, 1110 (11th Cir. 2002), and by a Task Force of the National Conference of State Legislatures.[5] *See Granholm*, 544 U.S. at 491 (citing model bill).

The Appellees' evidence focuses heavily on the fact that New Jersey currently relies, at least in part, on inspections and investigations that take place on the premises of a retailer which it could not do when the retailer is located in another state. The argument is nonsense. Of course state officials can inspect the premises of out-of-state retailers. The Wine Cellarage is only 7 miles from New Jersey. If they incur extra costs to inspect more distant retailers, the Supreme Court says they can pass on those costs to the shipper. *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 355 (1951). A retailer with a New Jersey shipping permit could not refuse access because New Jersey law requires that anyone with a permit must allow inspections and produce records. N.J. Stat. § 33:1-35. Plus, it's not

[5]A copy of the model bill can be found at https://freethegrapes.org/model-direct-shipping-bill/ (viewed 04/29/24).

like these inspections occur very often. There are over 10,000 retail licensees, Sapolnick Decl. ¶ 6, App. 476, and the state conducts fewer than 2500 inspections per year. *Id.* ¶¶ 17-18, App. 480.

The argument is also contrived. New Jersey allows out-of-state wineries whose premises are difficult to physically inspect to ship wine. N.J. STAT. § 33:1-10(2e). It presents no evidence that wine shipped from a retailer poses any greater threat than the same wine shipped directly from the winery. "If one is inherently harmful, so is the other," so the State must show that some "unique threat is posed" to justify banning only one of two similar activities. *Chemical Waste Mgt., Inc. v. Hunt*, 504 U.S. 334, 348 (1992).

The State allows direct shipping by wineries, N.J. Stat. § 33:1-10(2a, 2b, 2e), and in-state retailers, under a system of permits and regulations. N.J. Stat. §§ 33:1-13, 33:1-35; Def. Admission 3 & Interrog. 9, App. 089-91. It has no evidence that the permit system would not work equally well for deliveries from out-of-state retailers who would be delivering the same product and using the same package delivery services. The State's own evidence shows that most monitoring of wine distribution is done on paper or online. Sapolnick Decl. ¶¶ 11-23, 33, 38, App. 478-89. The one potential

difference asserted by Appellees is that out-of-state wineries and in-state distributors are required to register their products so state officials know what is being sold. N.J.A.C. 13:2-33.1. *See* Allied Br. at 44-45. They can require retailers to do the same.

Appellees offers four arguments why a permit system might not be workable. None has merit.

First, the State says that there are 400,000 retailers around the country and claims (without evidence) that so many of them would want to ship to New Jersey that regulation would be impossible. Br. at 42. The actual evidence shows that this fear is unfounded. In states that issue permits allowing interstate shipping, fewer than 200 retailers have actually gotten them. State reports, App. 171-90; Wark Report ¶ 40, App. 137. Besides, if the State has too many permit applications, it has a reasonable nondiscriminatory alternative -- imposing a quota on the number licenses. It already uses a quota system to limit in-state retail licenses. N.J. Stat. § 33:1-12. If regulating additional licensees stretches their resources, they can pass on the cost of inspections, *Dean Milk Co. v. City of Madison,* 340 U.S. at 355, or charge license fees to increase revenue to pay for the additional regulatory costs. That is what Maryland

did and the new revenue exceeded the additional enforcement costs. Comptroller Report, App. 120-28.

Second, the State asserts it would lack legal jurisdiction over out-of-state shippers. Br. at 11. The argument seems contrived because it allows out-of-state wineries to ship. It also has an easy solution. Require shippers to consent to jurisdiction as a condition for obtaining a permit. That is what other states do. Wark Report § 33, App. 135.

Third, Appellees argue that it would be hard for the state to trace back and recall a defective wine product shipped by out-of-state retailers even if they had permits. Fedway Br. at 4-5; Allied Br. at 34. The argument is nonsense. All the State needs is a paper trail and New Jersey can require out-of-state shippers to submit reports or invoices of all wines shipped into the state. Indeed, wine shipped into the state by FedEx would be easier to trace than wine purchased by an anonymous walk-in customer at a store. In any event, the argument is contrived. Product safety recalls are initiated by the federal government and the manufacturer/importer, not the New Jersey ABC or the local wholesalers. Recall notices would go to the out-of-state sellers as well. See recall notices, App. 492-96; Harmelin Decl. ¶¶ 13-14, App. 242-43; Sansone Decl. ¶ 6, App. 247-48.

Fourth, they argue that New Jersey cannot impose the "death penalty" on an out-of-state retailer, putting it totally out of business. They could only stop it from doing business in New Jersey. Fedway Br. at 13-14. The argument is nonsense. It is well known that increasing the severity of the penalty does little to deter violations. Five Things About Deterrence, App. 232. Indeed, it has apparently not worked well in New Jersey where 2983 in-state licensees were prosecuted for violations of state laws from 2017-20 despite the prospect of being put totally out of business. Sapolnick Decl. ¶¶ 17-19, 23, App. 480-82. Most importantly, the same thing is true for in-state retailers who violate the law. New Jersey cannot prevent them from doing business in other states. Total Wine sells liquor in New Jersey. App. 168. It has 266 stores in 28 states.[6] Shop-Rite sells liquor in New Jersey. App. 169. It has other stores in Delaware, Pennsylvania, New York and Maryland.[7] Costco sells liquor in New Jersey. Sapolnick Decl. ¶ 9, App. 477. It has over 200 stores in 47 states.[8] Revoking a New Jersey license

[6]https://www.totalwine.com/about-us/our-company (viewed 04/29/2024).

[7]https://www.shoprite.com/sm/pickup/rsid/3000/store(viewed 04/29/2024).

[8]https://www.costco.com/WarehouseListByStateDisplayView (viewed 5/01/24)

would not put them out of business either. Appellees have presented no evidence that the lack of ability to put an out-of-state shipper out of business has caused noncompliance in the states that allow interstate shipping. They forget that it is their burden to prove that permits would not be effective.

E. The different treatment of in-state and out-of-state wine retailers discriminates against interstate commerce

Granholm/Tenn. Wine scrutiny is required only if a law is discriminatory. There is no dispute about New Jersey's ban on wine shipping by out-of-state retailers. It allows only in-state retailers to do so, which discriminates against interstate commerce and protects in-state retailers from competition. "[P]rotecting [local businesses] from the rigors of interstate competition is the hallmark of the economic protectionism," *West Lynn Creamery v. Healy*, 512 U.S. 186, 205 (1994), and protectionism "is not shielded by § 2" of the Twenty-first Amendment. *Tenn. Wine,* 139 S.Ct. at 2474.

The State argues briefly that there is no discrimination because an out-of-state retailer can gain direct shipping rights simply by moving to New Jersey. The argument is specious. The complaint is about the infringement of the Wine Cellarage's right to engage in interstate

commerce, not in-state commerce. In any event, this argument was made and rejected in *Granholm* where the Court had "no difficulty" concluding that the in-state presence requirement was discriminatory. "States cannot require an out-of-state firm to become a resident in order to compete on equal terms." 544 U.S. at 474-75.[9]

Fedway argues that in-state and out-of-state retailers are not similarly situated, Br. at 44-47, but cites no authority. The argument is foreclosed by *GMC v. Tracy*, 519 U.S. 278, 298-99 (1997), which says that companies selling the same product are similarly situated, and by *Freeman*, 629 F.3d at 158-59, and *Granholm*, 544 U.S. at 474-75, both of which held that denying out-of-state wine sellers the same privileges as in-state sellers constitutes discrimination. Neither case cited by Fedway is germane. In *Wine Country Gift Baskets.com v. Steen,* 612 F.3d at 812, there was no discrimination because neither in-state nor out-of-state retailers were allowed to ship statewide. The part of *Brooks v. Vassar* cited is the opinion of one judge only and not the court – the other two judges declined to join that section because the issue was moot. 462 F.3d at 344.

[9]The State's assertion that "physical presence restrictions have been consistently *upheld*" is inexplicable. Br. at 36.

III. Conclusion

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

Respectfully submitted,

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I certify that on May 1, 2024, the foregoing brief was filed and served on all parties through the court's CM/ECF system.

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