In The
United States Court of Appeals
For The Eighth Circuit

ALEXIS BAILLY VINEYARD, INC., a Minnesota Corporation; THE NEXT CHAPTER WINERY, LLC, a Minnesota Limited Liability Company,

***Plaintiffs – Appellants*,**

v.

MONA DOHMAN, in Her Official Capacity as Commissioner of the Minnesota Department of Public Safety,

***Defendant – Appellee*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA AT MINNEAPOLIS

REPLY BRIEF OF APPELLANTS

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In their opening brief, Appellants ("Farm Wineries") explained that they have standing to challenge the Minnesota Farm Winery Act's requirement that wine produced by farm wineries be made from a majority of Minnesota ingredients (hereinafter "In-State Mandate"). Minn. Stat. §§ 340A.101, subd. 11, 340A.315, subd. 4. The Farm Wineries argue they have standing because: (1) their inability to depend on using a majority of out-of-state ingredients in the future, and investing for that future, constitutes an injury in fact; (2) the In-State Mandate is "fairly traceable" to Appellee, the Commissioner of Public Safety ("Commissioner"), because if the Farm Wineries went forward and violated that law she could prosecute them; and (3) the Farm Wineries' injury is redressable through a ruling that the In-State Mandate is unconstitutional. Appellants' Br. at 22-28. As the Farm Wineries detailed, the district court correctly found they satisfy prong (1) of this test for standing, but erred as to prong (2). *Id.* at 29-43. Their opening brief also explained why if this Court concludes that they have standing, then it should address the merits and rule that the In-State Mandate violates the dormant Domestic and Foreign Commerce Clauses of the U.S. Constitution. *Id.* at 43-61.

In response, the Commissioner spends very little time addressing why the district court should be affirmed, and instead simply puts forward the arguments she made to the district court—including arguments the district court rejected—about why the Farm Wineries do not have standing. The Commissioner argues that she and her department have not enforced the In-State Mandate in the past, the Farm Wineries have not suffered concrete economic losses, and their inability to expand their businesses does not constitute a cognizable injury. Appellee's Br. at 7-15. She fails to address the Farm Wineries' argument that if the Court concludes they have standing, then it should reach the merits, but simply states why the claims should fail. *Id.* at 15-17.

The Commissioner's arguments lack merit. The Farm Wineries have suffered an injury in fact, as the district court found. Further, this lawsuit is a proper preenforcement challenge. In addition, the Farm Wineries' injury is fairly traceable to the Commissioner. Finally, the Commissioner's merits argument fails. The facially discriminatory law is unconstitutional beyond any doubt.

I. THE FARM WINERIES HAVE SUFFERED AN INJURY IN FACT.

An injury in fact, sufficient for Article III standing purposes, must be "concrete, particularized, and actual or imminent." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). The district court properly found that the Farm Wineries had a cognizable injury under the Article III test for standing. Joint Appendix ("JA") 129–31. Namely, that injury was the inability to make substantial business investments without knowing whether they would receive future exemptions. *Id.* at 131. The court found that the possibility that the Commissioner may deny a future exemption was a real possibility, and that this fear prevented the Farm Wineries from expanding their businesses.[1] *Id.*

Notwithstanding the district court's reasoning, the Commissioner argues that: (1) the Farm Wineries' inability to expand their businesses is not a cognizable injury, Appellee's Br. at 13–15; and (2) that the Farm Wineries have not satisfied the injury in fact requirement because they

[1] As the Farm Wineries explained in their opening brief, the fact they have to submit an affidavit in order to receive an exemption from the In-State Mandate is itself an injury. Appellants' Br. at 25 n.3.

have not suffered concrete economic losses as a result of the enactment of the In-State Mandate. Appellee's Br. at 9–13.

There is no merit to either of the Commissioner's arguments that the Farm Wineries do not have an injury in fact. First, the Farm Wineries' inability to expand their businesses is a cognizable injury. But for the In-State Mandate, Alexis Bailly would increase its annual output from 8,000–10,000 gallons to 25,000 or more gallons. JA 35–36 (Bailly Dec. ¶¶ 13–14). But for the In-State Mandate, Next Chapter would expand its annual output from 4,750 gallons to approximately 24,000 gallons. JA 40–41 (Tulloch Dec., ¶¶ 14–15). The In-State mandate also prevents Next Chapter from placing its wines in more liquor stores. JA 41 (Tulloch Dec., ¶¶ 16–17).

Relying on *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006), the district court properly found that a plaintiff has standing to "challenge the constitutionality of a law that has a direct negative effect on [the plaintiff's] borrowing power, financial strength, and fiscal planning." JA 130 (quoting *Jones*, 470 F.3d at 1267). Even an indirect economic injury may constitute an injury in fact. JA 130 (citing *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cty.*, 115 F.3d 1372, 1379 (8th Cir. 1997)). The district court concluded that it would be:

> [E]conomically imprudent to base substantial business investments on the mere *likelihood* of receiving future exemptions from state law. Although the Commissioner has never denied an exemption request, Plaintiffs would assume considerable financial risk by implementing investment plans or business expansions that depend on the hope of receiving yearly authorization from the Commissioner to use out-of-state components.

JA 131 (emphasis in original).

Ignoring the district court's ruling, the Commissioner argues that even though the In-State Mandate severely limits the Farm Wineries' ability to grow their businesses, this injury is not an injury in fact because the Farm Wineries' "inability to conduct their businesses in the way they want is not a constitutionally cognizable injury." Appellee's Br. at 14.

With all due respect, that is exactly what a constitutional injury is in a case challenging the validity of a law—an inability to do something (make wine with a majority of out-of-state ingredients and sell directly to the public) because the government does not allow it. Even so, the Farm Wineries do not argue that they have an unassailable right to conduct business in any manner they choose. Instead, the Farm Wineries have initiated this lawsuit to vindicate their right to operate farm wineries free from unconstitutional discrimination against interstate and foreign

commerce. The State of Minnesota can regulate their businesses, but it cannot regulate them to explicitly favor Minnesota ingredients over others.

Second, there is no requirement that the Farm Wineries suffer the forms of economic losses that the Commissioner argues are necessary to qualify as an injury in fact. *See* Appellee's Br. at 9–13. The Commissioner argues that the Farm Wineries lack standing because they "did not suddenly lose contracting and economic opportunities" as a result of the In-State Mandate and that they would need to suffer something such as the loss of an actual contract to suffer an injury in fact. *Id*. at 11. But the constitutional requirement for an injury in fact is nowhere near as restrictive as this. "'Concrete' is not, however, necessarily synonymous with 'tangible.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *see also id.* ("[I]ntangible injuries can nevertheless be concrete."). As the Supreme Court ruled in *Spokeo*, and as the Eight Circuit made clear in *Jones*—a case that the Commissioner fails to distinguish—the *risk* of harm can satisfy the requirement of concreteness. *Id*.; *Jones*, 470 F.3d at 1267 (loss of ability to enter into contracts in the future constitutes an injury in fact).

Again, the risk that the In-State Mandate will be enforced against the Farm Wineries is the injury that prevents them from being able to expand

their businesses. *See* Appellants' Br. at 34–35. The risked injury could occur in two ways. It is possible that the Farm Wineries could be denied an exemption. *See* JA 72 (McManus Dep. 18:24–19:11) (describing an instance where the Department of Public Safety had to investigate whether or not to grant an exemption request). Or the Farm Wineries could choose to ignore the In-State Mandate, produce wine with a majority of out-of-state ingredients and then risk prosecution. Both risks make it highly speculative for the Farm Wineries to invest in expanding their businesses. This injury is sufficient for standing purposes. *See also* Warren G. Lavey, *Making and Keeping Regulatory Promises*, 55 Fed. Comm. L. J. 1, 3 (2002) ("Both regulated and unregulated businesses face uncertainties about factors such as market demand, technology changes, supply costs, and competitors' strategies. For businesses in regulated industries, uncertainty about future regulations can add to difficulties of companies in attracting capital and making investments in infrastructure, products, and services. Business plans are developed with long-term assumptions about a wide range of factors, some of which are heavily influenced by regulators."). As such, this Court should rule that that Farm Wineries have suffered an injury in fact.

II. THE FARM WINERIES' PREENFORCEMENT CHALLENGE IS PROPER.

Courts have long recognized that individuals should not be forced to violate a statute before being able to challenge its constitutionality. *See Susan B. Anthony List*, 134 S. Ct. 2334, 2343 (2014) (discussing preenforcement cases in various contexts); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (plaintiffs had standing to challenge a statute even before it became effective); *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1217 (8th Cir. 1998). The Commissioner argues that the Farm Wineries lack standing because her department has never enforced or threatened enforcement of the In-State Mandate. As described more fully below, it is not true that the Commissioner has never enforced or threatened to enforce the In-State Mandate, and she overstates the standard for preenforcement challenges in any case. This Court should rule that the Farm Wineries have standing to challenge the In-State Mandate.

A. The Standard in *Clapper* Is Not Applicable.

The Commissioner disputes that the Farm Wineries are injured by the "possibility of enforcement" of the In-State Mandate. Appellee's Br. at 7. As a preliminary matter, the Commissioner's reliance on *Clapper v. Amnesty*

Int'l USA, 568 U.S. 398 (2013) is misplaced. Typically, in preenforcement challenges, courts consider whether there is a "substantial risk" that the complained of injury will occur. *See, e.g.*, *Monsanto Co.*, 561 U.S. at 153–54. Appellee, however, relies on *Clapper* for the proposition that a stricter standard applies. In *Clapper*, the Court ruled that the threat of enforcement in a preenforcement suit must be "certainly impending." *Id.* at 410. But the Court also explained that even the "certainly impending" standard "do[es] not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." *Id.* at 415 n.5.

More importantly, the term after *Clapper* was decided, the Court clarified that a party has properly alleged an injury if it "is 'certainly impending,' *or* there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. at 2341 (emphasis added). Likewise, this Circuit has recognized that under *Susan B. Anthony List* either standard is sufficient. *In re SuperValu, Inc.*, 870 F.3d 763, 769 (8th Cir. 2017) ("The question here is whether the complaint adequately alleges that plaintiffs face a 'certainly impending' or 'substantial risk' of identity theft as a result of the data breaches purportedly caused by defendants' deficient security practices."). Thus, this Court need only find that there is a substantial risk

that the In-State Mandate could be enforced in order to conclude the Farm Wineries have an injury in fact.

B. A History of Enforcement or Threatened Enforcement Is Not a Prerequisite for a Preenforcement Challenge.

The Commissioner argues that the Farm Wineries lack standing because she and her department have never enforced or threatened to enforce the In-State Mandate. Appellee's Br. at 7–9. She espouses a bright line rule that preenforcement challenges are only proper where there is: (1) a history of enforcement of the challenged statute; or (2) where there is an express threat of enforcement "against the plaintiff." Appellee's Br. at 7. This is simply not the law. Further, the assertions that she and her department have not enforced the law in the past are not the facts. The Commissioner and her department *do* enforce the law.

First, a history of enforcement of a statute is hardly a prerequisite for all preenforcement challenges. Indeed, "where 'plaintiffs allege an intention to engage in a course of conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge the statute, *even absent a specific threat of enforcement*.'" *Russell v. Burris*, 146 F.3d 563, 566–67 (8th Cir. 1998)

(emphasis added) (quoting *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir. 1988)); *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988) (a plaintiff has standing to bring a preenforcement challenge to a regulatory ordinance whenever the party is "subject to the terms" of the law itself); *Krantz*, 160 F.3d at 1217 (finding standing in preenforcement challenge because defendant "had vigorously defended the [challenged] ordinance and has never suggested it would refrain from enforcement.").

Recognition of standing, even without a history of enforcement, is especially important in Section 1983 challenges like this one. Congress has affirmatively created a federal remedy to challenge unconstitutional state laws in federal court. *Patsy v. Bd. of Regents*, 457 U.S. 496, 504 (1982) ("Congress intended . . . 'to throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights." (citation omitted)); *see also Dennis v. Higgins*, 498 U.S. 439, 451 (1991) (recognizing Section 1983 as granting a cause of action to enforce the dormant Commerce Clause). Forcing an individual to wait for an actual prosecution (litigated in state court, of course) would render Congress's actions in enacting Section 1983 a nullity.

Second, the Commissioner makes much of the fact that her department has never denied an exemption request from a licensed farm winery. Appellee's Br. at 8. But this is, at least in part, because the Farm Wineries have complied with the Farm Winery Act to their own detriment. Over the years, the Farm Wineries have voluntarily sought exemptions when the weather would permit. JA 36 (Bailly Dec., ¶¶ 15–16). In other years, when the weather was not as bad, the Farm Wineries were forced to abstain from seeking exemptions. *Id*. (Bailly Dec., ¶ 16) (testifying that the farm winery could not "obtain an exemption simply because we want to offer our customers more choices or because we want to make more money."). Far from not enforcing the In-State Mandate, the Commissioner has accepted exemption requests from that mandate, processed them, and then informed applicants that they only have an exemption for the limited one-year period. *See, e.g.*, JA 99 (stating in letter allowing an exemption "Please be advised, that each year if you anticipate that your wine production will not meet the 51% minimum Minnesota grapes, you should ask permission from the commissioner . . .").

And just because the Commissioner has not denied an exemption request in the past does not mean that she blindly grants them. As the

Farm Wineries explained in their opening brief, Appellants' Br. at 10-11, one wineries' exemption almost was denied because, as a state employee explained, "Exemptions are intended to address one-time unforeseeable events so the requesting organization should be providing us with an []explanation for why they aren't able to source enough grapes from [Minnesota] this year." JA 82 (Sanders Dec., Ex. 3 (McManus Dep., Ex. 1)). The Commissioner fails to address this evidence in her brief.

Additionally, and tellingly, throughout the past 16 months of litigation, the Commissioner has never suggested that she or her department will not enforce the In-State Mandate. *See American Booksellers Ass'n*, 484 U.S. at 393 (recognizing preenforcement standing where the state "has not suggested that the [challenged] law will not be enforced, and we see no reason to assume otherwise."); *Krantz*, 160 F.3d at 1217 (same). Nor have the Farm Wineries ever been told that seeking an annual exemption is unnecessary. Instead, the Commissioner merely argues that "no licensed farm winery has ever been denied an exemption request," Appellee Br. at 8, and that seeking an exemption "is not cumbersome or onerous." *Id*. at 18. Thus, the Commissioner expects the Farm Wineries to limit their business plans to 12 months at a time, instead of being able to make long-term plans

for production and growth. *See* JA 131 ("The state's assertion that the Commissioner is *unlikely* to deny exemption requests from farm wineries is not compelling.") (emphasis in original). The assertion that the Commissioner has never denied an exemption does not dissolve the real and consequential threat of enforcement of the In-State Mandate.

The Farm Wineries should not be forced to brazenly ignore the In-State Mandate and the exemption process and risk prosecution just to challenge a law that is directly at odds with the Constitution. The Commissioner wrongly asks the Farm Wineries to gamble their businesses on the government not following the law. This the Commissioner cannot do. The existence of the In-State Mandate and the work that the Commissioner and her department go through to enforce the In-State Mandate vis-à-vis the exemption process demonstrate that the Farm Wineries face a legitimate threat of enforcement sufficient for Article III standing purposes.

III. THE FARM WINERIES' INJURIES ARE FAIRLY TRACEABLE TO THE COMMISSIONER.

The Commissioner argues that the Farm Wineries lack standing because their personal choice to obtain farm winery licenses and operate farm wineries renders their injuries untraceable to her administration of the Farm Winery Act. Appellee Br. at 12–13. She states that the Farm Wineries "could have obtained manufacturing licenses, but they elected not to do so." *Id.* at 12. Under the Commissioner's reasoning, the Farm Wineries should be forced to comply with an unconstitutional law because of their desire to open and run farm wineries where they depend on selling their products directly to the public and directly to retailers. But just because the Farm Wineries chose to go into a particular business does not mean they, and all farm wineries statewide, should be left without recourse to challenge an obviously unconstitutional law.

To support her argument, the Commissioner relies on the same case the district court invoked, *McConnell v. FEC*, 540 U.S. 93 (2003). Appellee's Br. at 12-13; JA at 132. As the Farm Wineries explained in their opening brief, Appellants' Br. at 34-35, in *McConnell* political-candidate plaintiffs challenged an amendment to the Federal Election Campaign Act that

increased political contribution limits. *McConnell*, 540 U.S. at 228. The candidate-plaintiffs made the personal decision not to solicit or accept increased donations, as allowed by the amendment. *Id.* Although they could have sought increased donations themselves, the candidate-plaintiffs chose not to do so. Instead, they sued the FEC, complaining that the raising of contribution limits injured them by making it harder for them to compete in elections. *Id.* The Supreme Court ruled that the candidate-plaintiffs lacked standing because their alleged injury—their disadvantage in elections—was not fairly traceable to the law permitting larger contributions. *Id*. The Court held that the candidate-plaintiffs' injuries stemmed from their personal choice not to accept larger contributions. *Id*.

It strains logic to attempt to apply *McConnell* to the facts at hand. The district court erred in doing so, and so does the Commissioner. In the instant action, the Farm Wineries' alleged injury is fairly traceable to the Commissioner as the enforcer and administrator of the In-State Mandate. *See* Appellants' Br. at 29–43. In *McConnell*, the candidate-plaintiffs could have evened the playing field by doing what the law permitted and soliciting and accepting larger campaign donations. Importantly, the

candidate-plaintiffs faced no risk of prosecution for their personal choice not to accept larger campaign donations.

In stark comparison, the Farm Wineries face a real threat of prosecution if they ignore the In-State Mandate and produce wine with a majority of out-of-state ingredients. The threat of prosecution renders the In-State Mandate fairly traceable to the Commissioner. Throughout this litigation, the Commissioner has never disavowed enforcement of the In-State Mandate. *See American Booksellers Ass'n*, 484 U.S. at 393 (recognizing preenforcement standing where state failed to disavow enforcement of the challenged law). And even if the Commissioner stopped enforcing the In-State Mandate, there is no guarantee that any future successor would do the same. Unlike the candidate-plaintiffs in *McConnell*, the Farm Wineries are faced with two equally unfavorable choices: (1) continue complying with an unconstitutional law; or (2) ignore the law and risk prosecution. The candidate-plaintiffs faced no such conundrum. Thus, *McConnell* is inapplicable here.

This Court should rule that the In-State Mandate is fairly traceable to the Commissioner and the Farm Wineries have standing to challenge the In-State Mandate.

IV. THE IN-STATE MANDATE IS A FACIALLY DISCRIMINATORY LAW THAT VIOLATES THE CONSTITUTION.

This Court should consider the merits of this case. Appellants' Br. at 43–49. In fact, the Commissioner does not dispute that this Court should decide the merits of this case if it concludes the Farm Wineries have standing. Appellee's Br. at 15 (waiving the argument that if this Court finds standing then the case should be remanded to the district court for a consideration of the merits). The issue—whether the In-State Mandate impermissibly discriminates against out-of-state and foreign commerce—is a straightforward question of law that can be easily resolved. *See* Appellants' Br. at 49–61.

The dormant Commerce Clause "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against of burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 98 (1994). Discrimination in this context is the "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003) (quoting *Oregon Waste Sys.*, 511 U.S. at 99). Laws that are facially

discriminatory are subject to strict scrutiny review. *See SDDS, Inc. v. South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995).

The Commissioner argues that strict scrutiny does not apply because the In-State Mandate does not "overtly discriminate." Appellee Br. at 16–17; *see also* Appellants' Br. at 58 (Commissioner conceding in the district court that she cannot win under strict scrutiny analysis). Instead, she argues, the appropriate standard of review is whether the burden imposed by the In-State Mandate "'is clearly excessive in relation to its putative local benefit.'" *Id*. (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). This argument is devoid of merit.

First, the In-State Mandate overtly discriminates against out-of-state commerce by forcing farm wineries to produce wine with a majority of in-state ingredients. The Commissioner suggests that the In-State Mandate "does not favor Minnesotan farm wineries over other states' wineries" because "nothing in the law makes it costlier for a Minnesotan wine drinker to choose a trip to a Wisconsin winery over a Minnesotan one." Appellee Br. at 17. This argument is irrelevant as it fails to address whether the In-State Mandate discriminates against out-of-state products. It clearly does. That a Minnesotan is free to drive across the border to Wisconsin to

purchase wine is immaterial and demonstrates the weakness of the Commissioner's position.

Second, the level of review the Commissioner suggests is improper. *See* Appellants' Br. at 51. It involves an entirely different kind of dormant Commerce Clause challenge, under the *Pike* case, which the Farm Wineries are not even making.

CONCLUSION

The Farm Wineries are suffering from actual, concrete, particularized injuries. The Farm Wineries' injuries constitute injury in fact for standing purposes. These injuries are fairly traceable to the Commissioner as the administrator of the Farm Winery Act. The Farm Wineries, thus, have Article III standing. Additionally, this Court should reach the merits of the Farm Wineries' claims and declare the In-State Mandate unconstitutional.

Dated: July 25, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I certify that this Reply Brief of Appellants is proportionately spaced and contains 3,962 words excluding parts of the document exempted by Rule 32(f).

/s/ Anthony B. Sanders
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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 2018, a true and correct copy of the foregoing was served via the Court's electronic filings system upon:

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I further certify that the Reply Brief of Appellants has been scanned for viruses using Webroot Endpoint Protection, Version 9.0.20.31, and according to the program is free of viruses.

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