**RECORD NO. 18-1846**

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**

---

## BRIEF OF APPELLANTS

---

**Anthony B. Sanders**
**Lee U. McGrath**
**Jaimie N. Cavanaugh**
**INSTITUTE FOR JUSTICE**
**520 Nicollet Mall, Suite 550**
**Minneapolis, Minnesota 55402**
**(612) 435-3451**

***Counsel for Appellants***

**THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219**
**(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com**

## SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellants are two Minnesota farm wineries. Minnesota's Farm Winery Act allows them to make wine with ingredients that they do not grow on their own farms. But, the Act requires a majority of their ingredients be grown in Minnesota (hereinafter "In-State Mandate"). This requirement violates the U.S. Constitution's dormant Commerce Clause.

Both sides moved for summary judgment on a full record. They briefed and argued both the merits and standing. The district court found that the farm wineries lacked standing, because, although they have an injury in fact, their injury is not "fairly traceable" to the In-State Mandate.

The farm wineries now appeal the district court's conclusion that they lack standing. They also ask this Court to address the merits and conclude that the In-State Mandate is unconstitutional. The constitutionality of the facially discriminatory law is beyond any doubt and was argued below with a full record.

Plaintiff-Appellants request 20 minutes per side for oral argument. The district court's opinion presents a confusing and novel application of the causation prong of the test for Article III standing. Accordingly, adequate time for oral argument is warranted.

## CORPORATE DISCLOSURE STATEMENT

Appellants Alexis Bailly Vineyard, Inc., and The Next Chapter Winery, LLC do not have parent corporations and no publicly held corporation owns any portion of their stock.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**CONSTITUTIONAL PROVISIONS**



**STATUTES**

## JURISDICTIONAL STATEMENT

Plaintiff-Appellants are challenging the constitutionality of a state law as violating the dormant Domestic Commerce Clause and dormant Foreign Commerce Clause under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. § 2201. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 1367.

This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment, entered on April 10, 2018, disposing of all claims, and the order entered on April 9, 2018, granting Defendant-Appellee's motion for summary judgment and denying Plaintiff-Appellants' motion for summary judgment. Plaintiff-Appellants timely filed their notice of appeal on April 18, 2018.

## STATEMENT OF ISSUES

1. Whether the district court erred in concluding that Plaintiff-Appellants do not have standing because their injuries are not "fairly traceable" to the Minnesota Farm Winery Act's mandate that they use a majority of Minnesota-grown or produced products in making wine. *See Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Balogh v. Lombaridi*, 816 F.3d 536 (8th 2016);

*Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); Minn. Stat. § 340A.101, subd. 11; Minn. Stat. § 340A.315.

2. If this Court concludes that Plaintiff-Appellants have standing, whether this Court should address the merits instead of remanding the resolution of the merits to the district court. *See Turner v. City of Memphis*, 369 U.S. 350 (1962); *Beavers v. Lockhart*, 755 F.2d 657 (8th Cir. 1985); *Perkins v. Matthews*, 400 U.S. 379 (1971); U.S. Const. art. I, § 8, cl. 3; Minn. Stat. § 340A.101, subd. 11.

3. If this Court concludes it should address the merits, whether the challenged provisions of the Act are unconstitutional under the dormant Domestic Commerce Clause and dormant Foreign Commerce Clause because they facially discriminate against non-Minnesota products. *See Granholm v. Heald*, 544 U.S. 460 (2005); *Bacchus Imports v. Dias*, 468 U.S. 263 (1984); *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006); *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003); U.S. Const. art. I, § 8, cl. 3; Minn. Stat. § 340A.101, subd. 11.

## STATEMENT OF THE CASE

Plaintiff-Appellants are two Minnesota farm wineries (hereinafter "Farm Wineries"). One is Alexis Bailly Vineyards, Inc. ("Alexis Bailly").

Nan Bailly is the owner and proprietor of Alexis Bailly. Joint Appendix ("JA") 33 (Bailly Dec., ¶ 1). Her father opened the winery in 1973 on a 13-acre farm outside of Hastings, Minnesota. JA 33 (Bailly Dec., ¶¶ 1-2). It is the oldest winery in Minnesota. JA 33 (Bailly Dec., ¶ 1). The business sold its first bottle of wine in 1978. JA 33 (Bailly Dec., ¶ 2). In 1990, Nan took the business over when her father passed away and has run it ever since. JA33 (Bailly Dec., ¶ 3).

The other Farm Winery is The Next Chapter Winery, LLC ("Next Chapter"). Timothy Tulloch and his wife are the owners and proprietors of Next Chapter. JA 38 (Tulloch Dec., ¶ 1). After years of working in the coffee industry, in 2007 they settled down on a six-acre farm outside of New Prague, Minnesota, and planted their first grapevines. JA 38 (Tulloch Dec., ¶¶ 1-3). In 2013 they bottled their first wine, and sold their first vintage in 2014. JA 39 (Tulloch Dec., ¶ 4).

Both Nan and Timothy have learned that although their wineries can make many wines from the grapes they grow at their vineyards, they can make additional types of wine by blending their grapes with grapes and grape juices from elsewhere. JA 34, 39 (Bailly Dec., ¶ 5; Tulloch Dec., ¶ 5). Further, for some of their wines they predominately use grapes and juices

not grown in their vineyards. JA 34, 39 (Bailly Dec., ¶ 8; Tulloch Dec., ¶ 8). Some of their wines are made predominately from "cold weather" varieties that have been developed for cold climates, such as Minnesota's, but some of their wines are made predominately from grapes that can only be grown in warmer climates such as California. JA 35, 40 (Bailly Dec., ¶ 11; Tulloch Dec., ¶ 12).

Alexis Bailly and Next Chapter make wines from grapes grown beyond their vineyards for a couple of reasons. First, they have found they cannot create enough varietals to satisfy consumer demand simply by using the types of grapes grown at their vineyards. JA 33-34, 40-41 (Bailly Dec., ¶ 4; Tulloch Dec., ¶ 14). Second, they have also found they cannot grow a sufficient quantity of grapes in their vineyards to produce enough volume to satisfy demand. *Id.* By bringing in products from outside, the wineries can expand their varietals and their volume, serving their customers better than simply relying on their own acres. JA 34-35, 40-41 (Bailly Dec., ¶ 10; Tulloch Dec., ¶¶ 11, 16).

Nan and Timothy need the flexibility to purchase products grown across the country, and even outside of the country. JA 34-35, 40 (Bailly Dec., ¶ 10; Tulloch Dec., ¶ 11). Nan has used grapes or grape juices from

Arkansas, California, Illinois, and New York, and also from Canada, making her ingredient base international. JA 34 (Bailly Dec., ¶ 5). She also would like to purchase from growers in other countries, including France, in the future. JA 34 (Bailly Dec., ¶ 6). Timothy has used grapes or grape juices from California and Wisconsin. JA 39 (Tulloch Dec., ¶ 5).

Nan and Timothy have purchased and used products grown by other Minnesota growers, but they do not want to depend on them. JA 34, 39 (Bailly Dec., ¶ 6; Tulloch Dec., ¶ 6). At times they have been dissatisfied with the quality. JA 34-35, 40 (Bailly Dec., ¶ 10; Tulloch Dec., ¶ 11). But more importantly, they can purchase out-of-state products for a lower price and more according to both their varietal and quantity needs from the much larger—by definition—national and international markets. JA 34-35, 40 (Bailly Dec., ¶ 10; Tulloch Dec., ¶ 11). This is true for grapes that do not grow well in Minnesota, but also for cold-weather grapes specially cultivated for cold climates. JA 35, 40 (Bailly Dec., ¶¶ 11-12; Tulloch Dec., ¶¶ 12-13). For example, both Nan and Timothy have found they can purchase the Marquette and Frontenac grapes—both cold-weather grapes frequently grown in Minnesota—from growers in states such as Wisconsin and New York. JA 35, 40 (Bailly Dec., ¶ 11; Tulloch Dec., ¶ 12).

But, as detailed below, using out-of-state grapes presents a problem because of the legal limit on how much out-of-state product licensed farm wineries can use in making their wine. *Infra* at 8-9. Specifically, for example, the In-State Mandate prevents Nan from expanding Alexis Bailly's current annual production of between 8,000 and 10,000 gallons to the 25,000—or more—gallons it would like to produce. JA 35-36 (Bailly Dec., ¶ 13-14). It also prevents Timothy from expanding Next Chapter's current annual production of about 4,750 gallons to the approximately 24,000 gallons it would like to eventually produce, and the 9,500 gallons it would like to produce immediately. JA 40-41 (Tulloch Dec., ¶¶ 14-15).

***Minnesota's Farm Winery Act and Direct to Consumer Sales.***

The legal limitation on how much wine licensed farm wineries can make that is made from products grown or produced outside Minnesota, the In-State Mandate, is contained in Minnesota's Farm Winery Act.

The Farm Winery Act licenses Minnesota farm wineries. Currently there are about 75 licensed Minnesota farm wineries, including Alexis Bailly and Next Chapter. JA 53-56 (Sanders Dec., Ex. 1 (Answer to Interrogatory No. 11, p. 7-10)). With a license, farm wineries can produce their own wine on their own farms, and also, importantly, sell their wine to

consumers on-site or directly to retailers, and not just to a wholesaler. Minn. Stat. § 340A.315, subd. 2.

The ability to sell directly to consumers and retailers is very important to small wineries such as Plaintiff-Appellants. Both Nan and Timothy have retail shops at their vineyards, as well as tasting rooms, where visitors can taste samples and purchase the wineries' various vintages. The Farm Wineries also sell directly to retailers without using a distributor as the middleman. JA 34, 39, 41 (Bailly Dec., ¶ 9; Tulloch Dec., ¶¶ 10, 16).

Licensees are also subject to a handful of restrictions not at issue in this case, including when the facility may be open to the public, that it be located on agricultural land, how finished wine may be stored and transported, and a cap on the total volume of wine that may be produced annually. *See* Minn. Stat. § 340A.315, subds. 2, 9, 10.[1]

[1] The Act caps the total annual amount of wine a farm winery can sell at 75,000 gallons. Minn. Stat. § 340A.315, subd. 2. This is a separate limit from the limit that is before the Court, concerning how much of a farm winery's production can be made from out-of-state products. Both Farm Wineries currently produce far less than 75,000 gallons. JA 35, 40 (Bailly Dec., ¶ 13; Tulloch Dec., ¶ 14). Neither has any plans to come close to reaching the 75,000 gallon limit, even if successful in this case. JA 37, 42 (Bailly Dec., ¶ 19; Tulloch Dec., ¶ 22). The Farm Wineries have not challenged this limit.

Defendant-Appellee, the Commissioner of Public Safety (hereinafter "Commissioner"), administers the Farm Winery Act, in addition to other Minnesota alcohol laws. Minn. Stat. § 340A.201. The Commissioner further supervises and controls the Minnesota Department of Public Safety. Among other duties related to farm wineries, the Department of Public Safety issues licenses, performs inspections, and ensures licensees follow the Act's requirements. JA 70 (Sanders Dec., Ex. 2 (McManus Dep., p. 9, ln. 12 – p. 11, ln. 10)).

The Act does not mandate that any amount of wine be made from grapes or other products grown or produced by a licensee itself. Minn. Stat. § 340A.315. Therefore, a farm winery can legally produce wine and yet not grow any wine ingredients. *Id.* But, of the products it does use to produce wine, the majority must be grown or produced in Minnesota, whether by the licensee or someone else: "'Farm winery' is a winery operated by the owner of a Minnesota farm and producing table, sparkling, or fortified wines from grapes, grape juice, other fruit bases, or honey *with a majority of the ingredients grown or produced in Minnesota*." Minn. Stat. § 340A.101, subd. 11 (emphasis added). Thus, to have a "farm winery" license a farm winery

must limit its production to a majority of Minnesota grown or produced ingredients.

The Commissioner enforces the laws under her jurisdiction, including the In-State Mandate. If an agent of the Department of Public Safety were to find that a licensed farm winery had violated the In-State Mandate, the Department would have various enforcement tools at its disposal, including the issuing of fines. JA 74 (Sanders Dec., Ex. 2 (McManus Dep., p. 26, ln. 9 – p. 27, ln. 18)).

Legislative history confirms that the purpose of the In-State Mandate was giving a commercial advantage to Minnesota ingredients at the expense of out-of-state ingredients. JA 93 (Sanders Dec., Ex. 5). And, reading the text of the law, it is difficult to imagine a non-protectionist purpose. Indeed, during discovery, the Commissioner was asked to identify the purpose of the law and stated she did not even know what it was. JA 50-51 (Sanders Dec., Ex. 1 (Answer to Interrogatory No. 4, p. 5-6)).

***The Affidavit Exemption.***

The Act allows licensed farm wineries to receive a temporary, one year, exemption from the In-State Mandate, but only if certain conditions and procedures are met. First, a farm winery must file an affidavit with the

Commissioner "[i]f Minnesota-produced or -grown grapes, grape juice, other fruit bases, or honey is not available in quantities sufficient to constitute a majority of the table, sparkling, or fortified wine produced by [the] farm winery . . . ." Minn. Stat. § 340A.315, subd. 4. The Commissioner then must consult with the Commissioner of the Minnesota Department of Agriculture. *Id.* After that, the Commissioner (that is, Defendant-Appellee, not the Commissioner of Agriculture), through the Department of Public Safety, makes the choice of whether to approve or deny the affidavit. JA 71 (Sanders Dec., Ex. 2 (McManus Dep., p. 13, ln. 21 – p. 14, ln. 18)).

In the Department of Public Safety's practice of reviewing affidavits and consulting with the Department of Agriculture, it bases its decisions on Minnesota weather conditions and if those conditions have made it difficult for licensed farm wineries to acquire Minnesota products "in quantities sufficient to constitute a majority of the table, sparkling, or fortified wine produced by a farm winery." Minn. Stat. § 340A.315, subd. 4; JA 71 (Sanders Dec., Ex. 2 (McManus Dep., p. 14, lns. 13-16)). Although there is no instance of a licensed farm winery having an affidavit denied, the record demonstrates that the State takes its responsibility to review affidavits seriously. As one Department of Agriculture employee stated

when consulting the Department of Public Safety regarding an affidavit, "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)). During this particular consultation the state employee questioned whether an affidavit should be granted because it did not provide enough detail about how the weather had made it not possible to purchase sufficient Minnesota-grown or produced goods. *Id.* This resulted in a Department of Public Safety agent visiting the farm winery to collect additional information on crop production. JA 73 (Sanders Dec., Ex. 2 (McManus Dep., p. 21, lns. 6-20)).

***The In-State Mandate Harms the Farm Wineries.***

Alexis Bailly would like to expand its operations and consistently produce more wines of various types with grapes from outside of Minnesota, and consistently produce more wine from non-Minnesota products than those grown in Minnesota. JA 35-36 (Bailly Dec., ¶¶ 13-4). Specifically, it would like to expand its production to at least 25,000 gallons of wine per year, up from its current 8,000 to 10,000 gallons per year. *Id.* But, Alexis Bailly cannot do so because expanding production with non-

Minnesota grapes is forbidden by the In-State Mandate. *Id.* Because of the mandate, Alexis Bailly has had to reinvest its revenue in producing its own grapes to a greater extent than it would have had it not been for the law. *Id.* It would have liked to use that revenue in expanding its out-of-state wine options, and thereby growing its production of wine. *Id.*

Next Chapter would also like to expand its operations through the freedom to produce more wine from non-Minnesota products than those grown in Minnesota. JA 40-41 (Tulloch Dec., ¶ 14). Specifically, it would like to expand from its current production of about 4,750 gallons per year to at some point reach about 24,000 gallons per year. *Id.* It would also like to sell more wines in liquor stores. JA 41 (Tulloch Dec., ¶ 16). However, it cannot make these expansions unless it is able to grow through purchasing much greater quantities of non-Minnesota products on a consistent basis. JA 40-41 (Tulloch Dec., ¶ 14). It is not able to grow the needed extra grapes itself, and it does not make economic sense to purchase many of those extra grapes from Minnesota growers because it can purchase a greater variety of grapes and juices from outside of the state at lower prices. *Id.* Without the In-State Mandate, Next Chapter could plan to make those out-of-state purchases, as it could plan to purchase more quantities of non-Minnesota

products than it grows or purchases from other Minnesota growers, whether Minnesota's climate allows for a temporary waiver or not. JA 40-42 (Tulloch Dec., ¶¶ 14, 20). With the In-State Mandate, however, any such expansion will be very hard, and will be much more incremental and slow. JA 42 (Tulloch Dec., ¶ 20).

Further, and unsurprisingly, the In-State Mandate limits the activities of farm wineries other than Plaintiff-Appellants. For example, one licensee is part of a growers' cooperative with members on either side of the Minnesota-Wisconsin border, using grapes from the various members. JA 99-100 (Sanders Dec., Ex. 7). The members' grapes are grown within a few miles of each other. *Id.* This leads to complications in tracking whether the licensee will be able to comply with the In-State Mandate in a given year. *Id.*

Plaintiff-Appellants Farm Wineries have applied for, and received, one-year exemptions under Minn. Stat. § 340A.315, subd. 2; JA 36, 41 (Bailly Dec., ¶ 15; Tulloch Dec., ¶ 18). Alexis Bailly received exemptions in 2005, 2007, 2009, 2010, 2014, 2016, and was applying for one in 2017 at the time the record closed, and Next Chapter received exemptions in 2014 and 2016. *Id.* As the statute requires, each time the Farm Wineries have done so

it has been for weather-related reasons, including hard winters and late spring frosts that damage buds on grapevines. JA 36, 41 (Bailly Dec., ¶ 16; Tulloch Dec., ¶ 18).

The Farm Wineries, of course, cannot plan a long-term growth and production schedule that relies on a majority of their wine ingredients coming from outside of Minnesota on the assumption that they will have a bona fide, weather-related justification every year. JA 35-37, 42 (Bailly Dec., ¶¶ 13-14, 17; Tulloch Dec., ¶ 20). For example, they would not purchase the capital equipment they would need to expand, such as extra wine barrels, if they could only use them in future years when the weather happens to be bad and the Commissioner happens to grant an affidavit. JA 42 (Tulloch Dec., ¶ 20). And, in Alexis Bailly's case, it would not reinvest so much of its revenue into growing its own grapes because the use of Minnesota grapes would not determine how much overall product it could produce. JA 35-36 (Bailly Dec., ¶¶ 13-14).

***Farm Wineries Are Different Than Manufacturers And The Farm Wineries Do Not Want To Become Manufacturers.***

As will be explained below, the district court concluded that the inability of the Farm Wineries to grow their businesses was not "fairly

traceable" to the In-State Mandate because an alternative license exists in Minnesota, the wine manufacturers' license. *Infra* at 16-17. Yet, that license would limit both Alexis Bailly and Next Chapter's ability to grow their business in other ways. First, the wine manufacturers' license prohibits licensees from selling directly to consumers if the licensee uses a majority of out-of-state ingredients in making its wine. Minn. Stat. § 340A.301, subd. 10. As detailed above, selling directly to consumers is a practice on which the Farm Wineries depend. *Supra* at 7. Second, the wine manufacturers' license does not allow licensees—whether or not they use a majority of out-of-state ingredients—to sell directly to liquor stores. Next Chapter, for example, sells to 30 liquor stores already. JA 41 (Tulloch Dec., ¶ 16). Third, the fee to maintain a wine manufacturers' license is $500, as opposed to the farm winery license, which is only 10% of that, or $50. *Compare* Minn. Stat. § 340A.301, subd. 6(b) *with* Minn. Stat. § 340A.315, subd. 1.

***The Procedural History of This Case.***

The Farm Wineries filed this case on March 28, 2017, challenging the constitutionality of the In-State Mandate under the dormant Domestic Commerce Clause, dormant Foreign Commerce Clause, and Import-Export

Clause.[2] JA 24. After discovery, the parties filed cross-motions for summary judgment, arguing both the merits and standing. JA 126-28. The district court held oral argument on December 7, 2017, where counsel and the court addressed both issues of the merits and standing. JA 103-25. On April 9, 2018, the district court issued an order, granting the Commissioner's motion for summary judgment and denying the Farm Wineries,' and entered final judgment on April 10, 2018. JA 126, 136.

The district court found the Farm Wineries did have a cognizable injury under the test for Article III standing and found the Commissioner's arguments on *this* point unavailing. JA 129-131. The court concluded that the possibility that an exemption may be denied in the future is a real possibility, and that the Farm Wineries' current decision to not expand their business because of that fear constituted an injury. JA 131.

However, the district court then ruled that, despite having an Article III injury, the Farm Wineries lacked standing because that injury was not caused by the In-State Mandate, that is, that it was not "fairly traceable" to the law. JA 134-35. This is because, explained the district court, the Farm

[2] The Farm Wineries abandoned their Import-Export Clause claim at summary judgment. JA 128.

Wineries could simply obtain a wine manufacturers' license, which would allow them to make and sell wine without a restriction on out-of-state ingredients. JA 134. Yet, a wine manufacturers' license would not allow the Farm Wineries to continue operating their tasting rooms or selling their products directly to the public and other retailers. The district court ignored the fact that obtaining a wine manufacturers' license would force the Farm Wineries to abandon their current business models and engage in a completely different type of business. A wine manufacturers' license is also more expensive than a farm winery license, but the district court ignored these facts, holding that "[t]here is no *right* to sell wine directly to the public, and the state of Minnesota is not required to configure its licensure statutes to allow Plaintiffs to conduct business in any fashion they choose." JA 133 (emphasis in original). *See also* JA 134 n.4 ("[A]s Plaintiffs' injury is the inability to expand their business due to the in-state requirement, fee disparities and other differences are immaterial to the standing injury."). The district court denied the Farm Wineries' motion, and granted the Commissioner's, on standing alone, and did not rule on the merits. JA 135.

## SUMMARY OF ARGUMENT

The Farm Wineries have standing to challenge the restriction on their license that inhibits them from growing their businesses. This is a preenforcement challenge to a discriminatory law. The Farm Wineries should not have to wait to break the law and risk prosecution in order to challenge its constitutionality. Further, the existence of a different license for a different business model is irrelevant. Determining whether the law unconstitutionally limits the Farm Wineries' businesses, including by forcing them to choose between selling directly to the public and using a majority of in-state ingredients, is a question of the merits, not standing. Further, the district court opinion's reasoning could be used to reject almost any challenge to unconstitutional discrimination. If someone's rights are restricted, but they can still exercise them to an extent—just not as well—then under the court's reasoning they do not have standing. This reasoning has dangerous implications that could imperil a wide range of civil-rights challenges and this Court should reject it.

If this Court concludes the Farm Wineries have standing, it should then address the merits. The proper resolution of the case is beyond any doubt; an injustice might result if this Court does not address the merits in

this appeal; and it would serve the interests of judicial economy for this Court to do so. In addition, the merits were argued below on a full record.

On the merits, this Court should rule for the Farm Wineries. The In-State Mandate is facially discriminatory and therefore subject to strict scrutiny. The Commissioner has conceded that she cannot meet that scrutiny. Therefore, the law is unconstitutional under the dormant Domestic Commerce Clause and the dormant Foreign Commerce Clause.

## STANDARD OF REVIEW

This Court "review[s] a district court's grant of summary judgment de novo, and view[s] the record in the light most favorable to the nonmoving party." *Butts v. Cont'l Casualty Co.*, 357 F.3d 835, 837 (8th Cir. 2004). In the context of standing, this Court "examine[s] whether, after viewing all evidence in a light most favorable to the appellants and drawing all reasonable inferences in their favor, there is a genuine issue as to appellants' standing." *Booth v. Hvass*, 302 F.3d 849, 851 (8th Cir. 2002).

## ARGUMENT

The Farm Wineries have standing. First, as correctly recognized by the district court, they are injured by the inability to expand their businesses due to the possibility of enforcement of the In-State Mandate.

Second, the threat of enforcement of the In-State Mandate is traceable to the Commissioner, who oversees the Department charged with enforcing the In-State Mandate. Third, the Farm Wineries' injuries are redressable by a decision holding unlawful and setting aside the In-State Mandate, or otherwise enjoining the Commissioner from enforcing it.

Despite this straightforward analysis, the district court ruled that the Farm Wineries' injury was not "fairly traceable" to the In-State Mandate. In so doing, the district court departed from a conventional standing inquiry and ruled in such a way that it requires the Farm Wineries to violate the law and invite prosecution before they can challenge it. Compounding the problem, the court also imported a merits issue in to what should be simply an inquiry on whether the challenged law caused the injury. Further, in ruling that a party lacks standing because an alternative way of legally operating exists, the district court has created a new loophole, under which government entities may avoid future preenforcement challenges to unconstitutional discrimination simply by providing inferior alternatives to disfavored groups. This Court should reverse the district court and clarify that parties do not lack standing to challenge laws just

because they could change their behavior and do something else that is similar, but inferior, to the action they wish to take.

A person has standing to challenge a law if the law prevents her from doing something she wants to do. Here, the Farm Wineries want to continue their present practice of operating their vineyards, having a tasting room, and selling their wines directly to consumers and stores, while substantially increasing production by using out-of-state and international products. The In-State Mandate prevents them from doing that. If it were struck down, they would be able to conduct their businesses in the way they want. Whether they are "entitled" to conduct their businesses in their preferred manner and whether the In-State Mandate is justified are merits questions. The Farm Wineries plainly have standing.

If this Court reverses the district court on standing, it should retain jurisdiction and address the merits of this case. The merits were fully briefed and argued to the district court. The issue is a basic one of constitutional law: does a law that facially singles out out-of-state commerce for disadvantaged treatment discriminate against that commerce? The Commissioner conceded in the district court that if the law is discriminatory then it is unconstitutional. So the entire merits question

comes down to a very straightforward issue where the proper resolution is beyond reasonable doubt. In addition, not addressing the merits now might create an injustice, and doing so now would serve the interests of judicial economy.

On the merits themselves, by requiring Minnesota farm wineries to use a majority of in-state ingredients, the In-State Mandate facially discriminates against out-of-state ingredients, subjecting it to strict scrutiny. The Commissioner agrees she cannot meet this scrutiny. The In-State Mandate is therefore unconstitutional.

## I. THE FARM WINERIES HAVE STANDING.

The test for Article III standing is well-known and straightforward. A plaintiff has standing if its injury is: "[1] concrete, particularized, and actual or imminent; [2] fairly traceable to the challenged action; and [3] redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 140 (2010). A concrete, particularized, actual, or imminent injury is known as an "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Where a plaintiff is "himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or

requiring the action will redress it." *Id*. at 561–62. Here, the Farm Wineries easily meet all three standing requirements.

Because standing is a threshold issue in any appeal, the Farm Wineries first address why they have standing under all three prongs of the test, without examining the district court's opinion. Then, with the basic standing analysis set forth, they address why the district court erred in its analysis of prong two, and why this Court should reject it.

**A. Injury in Fact.**

Proving a sufficient injury is typically the most difficult aspect of proving Article III standing. *See e.g.*, *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006) (after spending four-and-a-half paragraphs addressing injury, summarily finding traceability and redressability in one sentence). Here, the district court correctly pointed out, "[a]n injury in fact may arise from either a direct or indirect economic injury." JA 130 (citing *Ben Oerhleins & Sons & Daughter, Inc. v. Hennepin Cty.*, 115 F.3d 1372, 1379 (8th Cir. 1997)). This Court has recognized that plaintiffs have standing to "challenge the constitutionality of a law that has a direct negative effect on their borrowing power, financial strength, and fiscal planning." *Jones*, 470 F.3d at 1267 (internal quotation omitted). Thus, a law that negatively affects a

business by preventing it from expanding necessarily injures the business owner.

The Farm Wineries would like to expand their businesses and produce additional wines by reliably using a majority of ingredients produced outside of Minnesota. As the district court noted, they have plans to immediately increase their production if they could depend on the In-State Mandate not restricting them in future years. JA 130. Both would eventually like to increase annual production to approximately 25,000 gallons. *Supra* at 6. This would represent a significant expansion from their current annual production and in fact, the Farm Winery Act allows holders of farm winery licenses to produce as much as 75,000 gallons of wine annually. Minn. Stat. § 340A.315, subd. 2. The In-State Mandate, however, prevents the Farm Wineries from expanding because they are not able to purchase sufficient quantities of materials to increase their wine production if they want to use a majority of in-state ingredients. JA 35-36, 40-41 (Bailly Dec., ¶ 13-14; Tulloch Dec., ¶¶ 14-15). Increasing production would also require them to invest in certain infrastructure within their facilities, such as adding extra wine barrels, and neither are able to do so without a guarantee that they can increase their use of out-of-state products. JA 35-36,

42 (Bailly Dec., ¶¶ 13-14, 17; Tulloch Dec., ¶ 20). And, although the annual exemption process exists as a way to avoid the In-State Mandate, it is not a guarantee. As the district court properly stated, "it is economically imprudent to base substantial business investments on the mere *likelihood* of receiving future exemptions from state law. . . . 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.

Thus, the In-State Mandate prevents the Farm Wineries from expanding their businesses. This constitutes a sufficient injury in fact.[3]

**B. Causation.**

After proving an adequate injury, a plaintiff must also demonstrate causation, or "a causal connection between the injury and the conduct complained of …." *Lujan*, 504 U.S. at 560–61. Stated otherwise, the causation prong is satisfied where an injury "can be traced to the

[3] Although not addressed by the district court, the Farm Wineries also contend that forcing them to file an affidavit to avoid the In-State Mandate, in any given year, is itself an injury. It is an act they have to perform to not violate the Farm Winery Act if they want to use a majority of out-of-state ingredients.

challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976). Moreover, a defendant's action need not be "the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

This case is a preenforcement challenge, that is, a challenge to the constitutionality of a law, brought before the law is enforced against the plaintiff.[4] *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2343 (2014) (alleging credible threat of future enforcement, whether administrative or criminal, satisfied injury in fact requirement). Regarding preenforcement challenges, the Eighth Circuit has held that "'when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision.'" *Balogh v. Lombaridi*, 816 F.3d 536, 543 (8th 2016) (quoting *Digital Recognition*

[4] "Preenforcement challenge" is sometimes used to refer to a challenge to a statute that was just passed, and has not been enforced against anyone yet, and sometimes as a challenge to a law that may have already been enforced many times for many years, but is not currently being enforced against the plaintiff. It is in the latter sense that the Farm Wineries use the term here.

*Network, Inc. v. Hutchinson*, 803 F.3d 952, 957-58 (8th Cir. 2015)). Thus, the fairly traceable inquiry seeks to ensure that a plaintiff has sued the correct party.

Here, it is undisputed that it is the duty of the Minnesota Department of Public Safety, as supervised by the Commissioner, to oversee and enforce the In-State Mandate. *See, e.g.*, JA 74 (Sanders Dec., Ex. 2 (McManus Dep., p. 26, ln. 9 – p. 27, ln. 18)) (Department can issue fines for a violation). Thus, there is no question that the Commissioner is a proper defendant. And, as the district court found in concluding the Farm Wineries have an injury, the Farm Wineries are not expanding their businesses because of the In-State Mandate. JA 131 ("Because the in-state requirement directly affects Plaintiffs' fiscal planning . . . Plaintiffs satisfy the injury-in-fact requirement of the standing analysis.") Thus, the injury is fairly traceable to the Commissioner, the person responsible for enforcing the law creating the Farm Wineries' injury. This satisfies the causation prong of the standing test.

That should have been the entire analysis of the causation prong in the district court. What actually happened—and why it was in error—is discussed below in Part II.

### C. Redressability.

Finally, the last prong of the standing inquiry is redressability.[5] To prove redressability, a party must demonstrate that it is "likely, as opposed to merely speculative, that [its] injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotations omitted).

That concern is not in question here. The Farm Wineries have brought this action asking that the In-State Mandate be declared unconstitutional and enjoined. JA 24. Plainly, such relief would redress their injury, which stems from the possibility of enforcement of the In-State Mandate. If the In-State Mandate were held unconstitutional and enjoined, the Farm Wineries would no longer fear its enforcement and could expand their businesses. Their injuries are therefore redressable.

Because the Farm Wineries have sufficiently demonstrated injury in fact, causation, and redressability, they have standing.

[5] The Commissioner has not previously argued that the Farm Wineries do not satisfy the redressability prong of the standing inquiry, but it is addressed here to fully demonstrate that the Farm Wineries have standing.

## II. THE DISTRICT COURT'S DECISION WAS ERRONEOUS IN CONCLUDING THE CHALLENGED LAW IS NOT FAIRLY TRACEABLE TO THE FARM WINERIES' INJURIES.

Despite the straightforward standing inquiry, the district court erred in ruling that the Farm Wineries lack standing. The district court agreed that they satisfied prong one of the standing test, and had a sufficient injury in fact, because "it is economically imprudent to base substantial business investments on the mere *likelihood* of receiving future exemptions from state law." JA 131 (emphasis in original). The court even stated that these injuries were *because* of the In-State Mandate: "Because the in-state requirement directly affects Plaintiffs' fiscal planning . . . Plaintiffs satisfy the injury-in-fact requirement of the standing analysis." JA 131. But then—seemingly rejecting what it had just said about how the In-State Mandate "directly affects" the Farm Wineries' fiscal planning—the district court found that the Farm Wineries failed prong two of the standing test. It reasoned that their inability to expand their businesses is *not* a result of the In-State Mandate after all, but a result of their choice to operate with a farm winery license instead of a wine manufacturers' license.

The district court did not think it was relevant that forcing the Farm Wineries to get a wine manufacturers' license would change the very

nature of their businesses, prohibiting them from selling their products directly to consumers and retailers. JA 133-34. Essentially the district court said, "Plaintiffs can go into a different business; therefore they are not harmed by the law preventing them from expanding their current business."

The district court's conclusion regarding the "fairly traceable" prong was error for three reasons.

First, and most fundamentally, under the district court's reasoning the Farm Wineries are denied a federal forum to challenge a violation of their federal constitutional rights. This is error. This case is a preenforcement challenge. The Farm Wineries are present holders of farm winery licenses that could be prosecuted for violating the In-State Mandate. They would want to violate the In-State Mandate if the Commissioner denies a waiver request, which the Commissioner might very well do. They want to challenge the constitutionality of the law, however, without having to break it and be prosecuted. The Supreme Court has long recognized they can do this. They therefore have standing to challenge that law.

Second, the existence of the wine manufacturers' license is irrelevant to the question of standing. In focusing on the alternative license, the district court's opinion confused standing with the merits. Whether the State of Minnesota can forbid the Farm Wineries from operating a certain business model is a merits question, not one of standing.

Third, the district court's holding could open the door to denying many other civil rights plaintiffs the ability to challenge discriminatory laws if there is an alternative, but inferior, way to operate. In this case, the record demonstrates that the Farm Wineries would have difficulty expanding their businesses by changing their business models and applying for a wine manufacturers' license. They might still generate income, but their businesses would not be what they currently are, and would not be businesses that the Farm Wineries wish to run. To say that they do not have standing in the face of that establishes a precedent that would allow the government to avoid challenges to all kinds of other potentially unconstitutional restrictions on activity.

### A. The Farm Wineries' Injuries are Fairly Traceable to the In-State Mandate Because They Face Prosecution If They Violate the In-State Mandate.

The Farm Wineries' injury of not being able to expand their businesses is a direct result of the possibility of enforcement of the In-State Mandate. Because of that fact alone the In-State Mandate is "fairly traceable" to their injury. This can be shown by imagining what would occur if there were a prosecution for a violation of the In-State Mandate.

Suppose for a moment that the Farm Wineries had not brought this lawsuit, but had instead boldly ignored the In-State Mandate, expanded their businesses through annual purchases of large amounts of out-of-state grapes and capital investments, and gambled everything on being able to challenge the law in a future prosecution if they were denied an exemption or decided not to apply for one. In such a prosecution they would, of course, have an injury—the prosecution and threatened penalty, resulting from their choice to use a majority of out-of-state ingredients in their wine. And in such a prosecution the Farm Wineries believe they would have a winning defense—to wit, that under the dormant Commerce Clause the state cannot sanction them for buying too many out-of-state ingredients when it would not sanction them if those ingredients are from Minnesota.

All the Farm Wineries are doing is bringing that same claim as a preenforcement challenge instead of as a defense to a prosecution. Preenforcement challenges exist because 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. at 2343 (discussing preenforcement cases in various contexts). This is especially true in Section 1983 challenges, like this one, because 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."); *see also Dennis v. Higgins*, 498 U.S. 439 (1991) (recognizing Section 1983 as granting a cause of cation 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.

This case is simply a preenforcement challenge to the Commissioner's ability to prosecute the In-State Mandate. There is no question that the Commissioner has the power to prosecute the Farm

Wineries if they violated the In-State Mandate. Therefore, the Farm Wineries have standing.

In its standing analysis, the district court primarily relied on *McConnell v. FEC*, 540 U.S. 93 (2003). But, that case actually helps illustrate why the district court erred. In *McConnell*, the Court found political candidates who declined to solicit or accept contributions over a certain amount did not have standing to challenge the law raising contribution limits to above that amount. *Id.* at 228. The candidate-plaintiffs argued that the law raising contribution limits injured them by making it harder to compete in elections. *Id.* The Court found the candidate-plaintiffs lacked standing because their "alleged injury" was not "fairly traceable" to the higher contribution limits, but instead to their own personal choice not to solicit or accept larger contributions. *Id.*

This reasoning in *McConnell* makes sense, but has no application to this case. Under the statute challenged in *McConnell*, the candidate-plaintiffs were lawfully permitted to raise more money. They just chose not to do so and objected that their opponents did so choose. They were not in any risk of being prosecuted for this choice. In this case, however, the Farm Wineries *can* be prosecuted because of the choice they want to make. Their "personal

choice" is not an objection to what others are doing, but a choice that could subject them to prosecution. Their injury of not being able to expand their business is therefore "fairly traceable" to the law that they could be prosecuted under. For this reason the district court should be reversed.

### B. The Availability of a Different Wine-Making License May be Relevant to the Merits, But it is Irrelevant to Standing.

Whether or not the Farm Wineries could obtain a different license to operate a different type of business is entirely irrelevant to whether their injuries are "fairly traceable" to the In-State Mandate. In stating that this alternative license meant that the Farm Wineries lack standing the district court confused standing with the merits.

Standing concerns whether individual litigants have an Article III "case or controversy," while the merits concern whether the plaintiffs should prevail on their claims. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Our threshold inquiry into standing 'in no way depends on the merits of the [petitioner's] contention that particular conduct is illegal.'" (citation omitted)); *Davis v. United States*, 564 U.S. 229, 249 n.10 (2011) (discussing difference between standing and the merits). The Farm Wineries' claims that the In-State Mandate violates the Constitution are the

merits of this case. Whether or not they have a right to do what they want to do is part of a merits analysis.

But the district court's opinion puts that cart before the horse. The court stated "There is no *right* to sell wine directly to the public, and the state of Minnesota is not required to configure its licensure statutes to allow Plaintiffs to conduct business in any fashion they choose." JA 133 (emphasis in original). This may be true, but it is not a standing analysis. It is a *merits* analysis. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 159, 176 (1970) (Brennan, J., concurring and dissenting) ("[I]n my view alleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk obscuring what is at issue in a given case, and thus to risk uninformed, poorly reasoned decisions that may result in injustice.").[6]

[6] The district court opinion's citation to a case in its discussion of the fairly traceable prong of the standing test, *Freeman v. Corzine*, 629 F.3d 146 (3d Cir. 2010), also highlights this standing vs. merits confusion. The section of *Freeman* that the district court quoted, *see* JA 133 n.3 (quoting *Freeman*, 629 F.3d at 162-63), was a merits analysis of the plaintiffs' claims, not a standing/fairly traceable analysis.

The Farm Wineries are arguing that if they are allowed to sell wine to the public with a majority of Minnesota ingredients, they also must be allowed to sell to the public if they use a majority of out-of-state ingredients. Whether Minnesota is required to configure its licensure statutes to allow the Farm Wineries to conduct business in their chosen fashion has nothing to do with whether they have standing. They could have claimed that there is a constitutional right to sell alcohol without any regulation whatsoever (something they are not arguing, of course). They similarly would have had standing to make that claim, even though they would have lost on the merits, and even though there are a number of licenses in Minnesota that would allow them to sell alcohol in some way. *See generally* Minn. Stat. Ch. 340A (licensing brew pubs, distilleries, and farm wineries, all of which allow for sales to consumers if certain requirements are followed). In either case standing is evident: they are not allowed to do what they want to do, and are going to court so that they can do what they want to do. In tying the Farm Wineries' standing to whether

an alternative license exists to allow them to do *some* of what they want to do, the district court's opinion confused these two issues.[7]

### C. The District Court's Reasoning Could Undercut Many Constitutional Challenges By Not Even Allowing Them to Proceed to the Merits.

The Farm Wineries' case is a challenge to a form of discrimination. They argue that the government treats people differently under criteria that the Constitution does not allow. The district court's ruling should be reversed because its logical extension would render impossible nearly all challenges to unconstitutional discrimination, whether discrimination against interstate commerce, against religion, against a political viewpoint, or anything else. Any plaintiff would lack standing if there exists an (inferior) alternative to what they are claiming a right to pursue. That is contrary to existing law and should be reversed.

A wine manufacturers' license would not allow the Farm Wineries to expand their business as the district court's opinion claimed. It might allow

[7] The existence of alternatives and whether those alternatives are adequate is a common feature of constitutional merits analyses. *See, e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-99 (1984). For example, although alternative locations may exist for a protest, the Court has never held a party lacks standing because it could go protest somewhere else.

an expansion of a business, but it would be a *different* business, not the business they want to run.

A winery that does not sell to individual consumers and retailers, and only to wholesalers, is not the same business as one that does. Visiting farm wineries is a memorable experience. The Farm Wineries both sit on acres of farmland in the Minnesota countryside. Individuals visit their rural locations and enjoy sampling their vintages in their tasting rooms. Visitors are able to buy bottles and cases on site, or they can wait until they get home and purchase wine directly online. Further, the Farm Wineries also can sell directly to liquor stores without having to sell at a discounted rate to a wine distributor. Next Chapter, for example, directly sells to about 30 liquor stores. JA 41 (Tulloch Dec., ¶ 16).

This connection between consumers and the producer is not the same as the relationship between a wine consumer and a winery that only sells to wholesalers. If the Farm Wineries changed to that model, there would be no visitors to their vineyards who could buy anything, no direct shipping via online sales, and no sales directly to the local liquor store, or any other non-wholesaler business, such as a restaurant. That is, there would be no direct sales keeping prices low, cutting out the middleman, and adding the

personal farm-to-consumer touch. The Farm Wineries would no longer be able to operate their tasting rooms and would lose direct contact with their customers. *Perhaps* the Farm Wineries could make money at such a business, if they wanted to run a purely manufacturing business, but it actually would not be the *same* business.

The district court's opinion stated that the Farm Wineries do not have standing because they could grow by switching to this other business model. The opinion did not set forth any facts supporting this contention, and the Commissioner did not offer any. For example, what wholesalers charge versus the Farm Wineries' current prices, the loss of direct customers versus the ability to find new customers via advertising, the cost of hiring additional staff experienced with wholesale markets, the cost of changing their facilities, including removing their tasting rooms, or whether the Farm Wineries would even enjoy an impersonal manufacturing business, etc. The opinion just stated they could expand even though they would lose several advantages that come with the farm winery license.

This reasoning—that because a plaintiff can do something similar to what is forbidden by a law, even though it is not what the plaintiff wants to

do, the plaintiff lacks standing to challenge a law—could undercut all kinds of constitutional challenges to discrimination. It is not how courts address standing now and should not become how they do so.

For example, in the *Jones* case, this Court determined that a Nebraska farm owner, who did not live on or work on his farm, had standing to challenge a Nebraska rule against corporate farm ownership because he wanted to transfer ownership to a corporation. 470 F.3d at 1266. This Court then went on to find the rule unconstitutional under the dormant Commerce Clause. *Id.* at 1270. The farm owner had standing even though if he had actually lived on, or at least worked on, his farm he could have transferred ownership to a family farm corporation, an exception in the law. *Id.* at 1266. Yet, under the district court's reasoning in this case, not living or working on the farm was simply a "personal choice" that the farmer made and this Court would have been wrong to conclude he had standing. JA 133.

There are many cases outside of the dormant Commerce Clause context where the merits might not be reached under the district court's approach. To pick just one example, in the context of the Free Exercise Clause, the district court's reasoning would have endangered a recent

Supreme Court case, *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017). There, a church challenged a Missouri law barring it from applying for a grant to resurface its preschool's playground equipment because of its religious status. *Id.* at 2017. There was no assertion that if it did not receive the grant it could not obtain the funds from another source or that it would cease operating. As the Chief Justice wrote, the denial of the grant resulted in, at most, "a few extra scraped knees." *Id.* at 2025. But even so, the Church's standing was not questioned in the majority opinion, concurrences, or dissent. *See id.* 2017-41.

Another example is discrimination in public employment. An individual has no fundamental right to a government job, and could obtain a job in the private sector, so why would someone discriminated against in their public employment have standing to sue? This, of course, is completely contrary to modern law on the constitutional rights of public employees. *See, e.g.*, *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716–17 (1996).

The list of examples could go on and on. As in the few cases discussed here, many constitutional challenges involve an activity that a plaintiff could pursue in a different and less desirable way and in spite of

the unconstitutional discrimination it is challenging. That does not mean the plaintiff lacks standing. Just as the plaintiffs in *Jones* and *Trinity Lutheran*, and a host of other civil rights cases, had standing, the Farm Wineries do as well. The district court erred in holding that their injury was not fairly traceable to the In-State Mandate.

## III. THIS COURT SHOULD CONSIDER THE MERITS BECAUSE THE PROPER RESOLUTION OF THIS CASE IS BEYOND ANY DOUBT AND DOING SO WOULD BE IN THE INTEREST OF JUSTICE AND JUDICIAL ECONOMY.

Appellate courts typically do not resolve issues that the trial court failed to address; however, "there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citing *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962)). Moreover, "'where injustice might otherwise result,'" appellate courts have discretion to consider issues not decided by the court below. *Beavers v. Lockhart*, 755 F.2d 657, 662 (8th Cir. 1985) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)); *Ryder v. Morris*, 752 F.2d 327, 332 (8th Cir. 1985); *United States v. Glass*, 720 F.2d 21, 23 (8th Cir. 1983). Considerations of judicial economy also justify appellate courts sometimes

deciding issues not resolved below. *Perkins v. Matthews*, 400 U.S. 379, 386–87 (1971); *cf. Judd v. Haley*, 250 F.3d 1308, 1319 (11th Cir. 2001) ("Remand for a consideration of the claim by the district court would amount to a waste of judicial resources in the face of such an ample record."); *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996) ("In the interest of judicial economy, and because we review orders granting summary judgement *de novo*, we will not remand the case," but will decide the merits based on newly introduced evidence.).

This Court should now consider the merits of this case for these three reasons: the merits are beyond any doubt, injustice might otherwise result, and judicial economy justifies a review of the merits.

### A. The Merits of this Challenge to a Facially Discriminatory Law Are Beyond Any Doubt.

The proper resolution of the merits of the instant action is beyond any doubt. The In-State Mandate is a facially discriminatory law. The Commissioner has resisted this characterization, but it is inescapable that the law treats businesses differently depending on the volume of out-of-state, but *not* in-state, ingredients. The distinction appears plainly in the text of the Act: "'Farm winery' is a winery operated by the owner of a

Minnesota farm and producing table, sparkling, or fortified wines from grapes, grape juice, other fruit bases, or honey *with a majority of the ingredients grown or produced in Minnesota*." Minn. Stat. § 340A.101, subd. 11 (emphasis added).

As a discriminatory law, and as explained in detail in Part IV, *infra*, it is subject not just to strict scrutiny, but to the "strictest scrutiny." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). And, the Commissioner has conceded that if that scrutiny applies then the law is unconstitutional. JA 119 (admitting the government has put forward no evidence that would satisfy strict scrutiny). The In-State Mandate is therefore flagrantly unconstitutional.

The Supreme Court addressed a similar situation in *Turner v. City of Memphis*, 369 U.S. 350 (1962). There, the plaintiff-appellant initiated a civil rights action challenging a restaurant's decision to refuse nonsegregated service. *Id.* at 351. The lessee of the restaurant was the City of Memphis. *Id.* The city argued that it was required by state statute to offer only segregated service. *Id*. That case came to the U.S. Supreme Court on an appeal over a procedural issue—namely, whether the case should have been heard by a single district court judge or a three-judge panel. *Id*. at 352.

The Supreme Court held that "a three-judge court was not required" and further, that there was "no reason why disposition of the case should await decision of the appeal by the Court of Appeals. On the merits, no issue remains to be resolved. This is clear under prior decisions and the undisputed facts of the case." *Id*. at 353. There was no question that the state statute was facially unconstitutional under the Fourteenth Amendment; thus, the Supreme Court properly exercised its discretion and decided the merits of the case.

Similarly, this case presents a straightforward question of law regarding whether the In-State Mandate runs afoul of the dormant Commerce Clause. It is beyond doubt that laws that give preference to in-state commerce at the expense of out-of-state commerce, such as the In-State Mandate, violate the dormant Commerce Clause. *See* Section IV, *infra*. Moreover, the constitutionality of the In-State Mandate does not depend on a factual dispute. Therefore, this Court should decide the merits of this case.

### B. An Injustice Might Otherwise Result if This Court Does Not Address the Merits.

Appellate courts have discretion to consider issues not decided below "where injustice might otherwise result." *Beavers*, 755 F.2d at 662 (internal

quotation omitted). In the instant action, the record is complete and there would be nothing to gain from remanding this case to the district court for a decision on the merits. This Court should decide the merits of the Farm Wineries' claims to avoid the injustice of forcing them to continue to litigate the issue for many months or possibly years. *Cf. Clark v. United States*, 691 F.2d 837, 841 (7th Cir. 1982) ("Since both parties briefed and argued the merits of this case in a prior appeal to this Court, and since the justiciable part of the case requires resolution solely of a question of law, we shall dispose of the merits here rather than cause unnecessary delay by a remand to the district court.") (footnote and citation omitted).

In fact, this Court has gone even further by considering issues on appeal not even *raised* before the trial court. *See Beavers*, 755 F.2d at 662; *Ryder*, 752 F.2d at 332; *Glass*, 720 F.2d at 23. Here, the Farm Wineries are not raising new issues or presenting new arguments for the first time. Thus, this Court would be well within its discretion to decide the merits of this case. Nor is there any danger of prejudice to the Commissioner. *See Beavers*, 755 F.2d at 662 ("There is no danger here of rendering a final decision in this court on a ground upon which the parties have not presented evidence in the district court." (citing *Hormel*, 312 U.S. at 556)).

Again, the Parties have already engaged in discovery, briefed the merits, and argued the merits. Now, the Farm Wineries are merely requesting that this Court decide the merits of their case to avoid the injustice of the delay that would result from a remand back to the district court for a determination of the merits.[8]

### C. Judicial Economy Counsels for This Court Addressing the Merits in This Appeal.

Finally, this Court should decide the merits of this case to further the interest of judicial economy. In *Perkins v. Matthews*, 400 U.S. 379, 386–87 (1971), the Supreme Court decided the merits of a challenge to the results of an election brought pursuant to the Voting Rights Act of 1965. The district court erred in its application of the Act, failing to analyze the question of whether the case should be submitted to the Attorney General or a district court for preapproval. *Id.* at 385-86. This rendered the decision below irrelevant. Nevertheless, the Court held that instead of remanding it

[8] There is also nothing to be gained from a remand to the district court for a decision on the merits of the Parties' motions for summary judgment because a future appeal of the district court's merits decision would be de novo. *Dallas v. American General Life and Accident Ins. Co.*, 709 F.3d 734, 736 (8th Cir. 2013) (appellate courts review decisions on motions for summary judgment de novo); *see Computer Prof'ls for Soc. Responsibility*, 72 F.3d at 903.

would address the merits of the case "in the interest of judicial economy." *Id.* at 386. The Court further clarified that "we shall not remand to the District Court for the making of a properly limited inquiry. The record is adequate to enable us to decide whether [the Act governs the challenged election], and we shall, therefore, decide that question." *Id.* at 386–87; *see Turner*, 369 U.S. at 353 ("[T]he litigation should be disposed of as expeditiously as is consistent with proper judicial administration."). Likewise, appellate courts have recognized that remand to a district court often constitutes a waste of judicial resources. *E.g.*, *Judd v. Haley*, 250 F.3d 1308, 1319 (11th Cir. 2001) ("Remand for a consideration of the claim by the district court would amount to a waste of judicial resources in the face of such an ample record."); *Reynolds v. Chapman*, 253 F.3d 1337, 1347 (11th Cir. 2001) ("Remand would waste judicial resources given the sufficiency of this record."). To prevent such a waste of judicial resources, this Court should decide the merits of the Farm Wineries' claims.

## IV. THE IN-STATE MANDATE IS UNCONSTITUTIONAL.

The In-State Mandate requires all farm wineries to produce wines using a majority of "ingredients grown or produced in Minnesota." Minn.

Stat. § 340A.101, subd. 11. This requirement blatantly discriminates against interstate commerce, and therefore is subject to strict scrutiny.

Furthermore, the Commissioner has admitted she fails to overcome that extremely high standard. Indeed, she does not even know of a reason to justify the law under that standard, let alone a sufficient reason. Therefore, the In-State Mandate is unconstitutional under the dormant Domestic Commerce Clause.

And, for similar reasons the In-State Mandate also is unconstitutional under the parallel dormant Foreign Commerce Clause.

### A. The In-State Mandate Facially Discriminates Against Interstate Commerce.

"Though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 98 (1994). Thus, this "dormant [C]ommerce [C]lause" forbids discrimination against out-of-state goods. *See SDDS, Inc. v. South Dakota*, 47 F.3d 263, 267 (8th Cir. 1995).

"Discrimination" in this context is defined as "'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). Discrimination can manifest itself in three forms: (1) a law that "facially discriminates against out-of-state articles"; (2) a law that does not discriminate on its face but nevertheless is born of a discriminatory purpose; and (3) a law that does not necessarily spring from discriminatory motives but nevertheless has an effect that discriminates against interstate commerce. *SDDS*, 47 F.3d at 267; *Hazeltine*, 340 F.3d at 593. The Farm Wineries ask this Court to decide the merits of their facial discrimination claim. Although the Farm Wineries argued below that the In-State Mandate discriminates in all three ways, and still contend the same, in the interests of simplicity they only address facial discrimination here.[9]

[9] Should this Court decide that the In-State Mandate does not discriminate against out-of-state goods on its face, then this case should be remanded to allow the district court to decide whether the In-State Mandate was born of a discriminatory purpose, or has an effect that discriminates against interstate commerce.

Almost no justification can support a law that discriminates against interstate commerce, no matter the size or scope. "[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994). Simply put, there is no "de minimis" defense under the dormant Domestic Commerce Clause. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 n.3 (1996). The Farm Winery Act explicitly discriminates against interstate products by forbidding licensed farm wineries from using non-Minnesota products for half or more of their wine production. Minn. Stat. § 340A.101, subd. 11. Because the Farm Wineries are limited in their use of interstate products, but are not similarly limited in their use of Minnesota products, the In-State Mandate facially discriminates against interstate commerce.[10]

[10] The Farm Wineries contend the In-State Mandate has a discriminatory, and therefore, illegitimate, purpose. However, even if it were enacted from completely honorable motives, the law is still facially discriminatory. *See Philadelphia v. New Jersey*, 437 U.S. 617, at 626-27 (1978) (But whatever New Jersey's ultimate purpose, "it may not be accomplished by discriminating against articles of commerce coming from outside the State").

If Alexis Bailly uses out-of-state products for half or more of its wine in any given year because it thinks those out-of-state products will make its business more profitable, it violates the In-State Mandate. If Next Chapter Winery uses more out-of-state products for its wine than those grown in Minnesota because it believes they better cater to its customers' palates, it violates the In-State Mandate. Both businesses want to do exactly that. *See supra*, at 3-6. There is no question here: This restriction is facially discriminatory, period.

The dormant Domestic Commerce Clause has particular force in the area of agriculture. There are many Supreme Court cases striking down discriminatory agricultural restrictions. *See, e.g.*, *Granholm v. Heald*, 544 U.S. 460, 492 (2005) (striking down bar on shipments of wine by out-of-state wineries); *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 354 (1977) (striking down discriminatory law that burdened out-of-state apples); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (striking down facial discrimination against non-Madison, Wisconsin milk). This Court has also struck down discriminatory agricultural laws. *See, e.g.*, *Jones*, 470 F.3d at 1270 (discrimination against out-of-state corporations owning farms); *Hazeltine*, 340 F.3d at 593 (same). The law at issue in this

case is the latest in a long line of unconstitutional localism seeking to benefit in-state agricultural interests, on the one hand, at the expense of out-of-state growers and products, in-state purchasers of those out-of-state products, and consumers themselves, on the other.

Although the implications of this caselaw are crystal-clear in this context, for illustrative purposes it is worth considering the similarities to *Granholm*. 544 U.S. at 475. There, the Court considered whether state laws, from Michigan and New York, that banned *out-of-state* wineries from shipping wine directly to Michigan or New York consumers, but did not ban *in-state* wineries from doing the same thing, discriminated against interstate commerce, and therefore were subject to strict scrutiny.[11] The Court held that the laws discriminated on their face by allowing more favorable treatment of in-state economic interests than those from out-of-state. *Id.* at 475-76.

This case is similar to *Granholm*. Just as the laws at issue in *Granholm* discriminated on their face against out-of-state wine, the In-State Mandate discriminates on its face against out-of-state wine ingredients. The

[11] The Court also struck the law down for failing strict scrutiny, which the Farm Wineries discuss *infra* in Part IV.B.

discrimination is just as facial, and therefore just as subject to strict scrutiny.

### B. The Commissioner Admits the In-State Mandate Cannot Overcome Strict Scrutiny.

Because the Farm Wineries have demonstrated that the In-State Mandate discriminates against interstate commerce, the Commissioner now bears an almost impossible burden of showing that the law, nevertheless, does not violate the dormant Domestic Commerce Clause. And, it is likely because of that burden that counsel for the Commissioner conceded below that if the law is discriminatory, then it cannot meet that burden and the law is unconstitutional.

For the sake of completeness, the following explains what the burden is for a discriminatory law to nevertheless be constitutional. However, given that the Commissioner has conceded this point, it should be a brief consideration of this Court's on its way to determining the In-State Mandate to be unconstitutional.

The burden is on the government to justify a discriminatory law: "Our commerce clause cases demand more than mere speculation to support discrimination against out-of-state goods. The burden is on the

State to show that the *discrimination* is demonstrably justified." *Granholm*, 544 U.S. at 492 (citations and quotations omitted) (emphasis in original). The standard against interstate discrimination is so high that the Supreme Court has repeatedly said a discriminatory law is a "virtually *per se* rule of invalidity." *Oregon Waste Sys.*, 511 U.S. at 100; *see also Hughes*, 441 U.S. at 337 (describing standard as the "strictest scrutiny").

In fact, "The only way that discriminatory state action can withstand this level of scrutiny is if the state demonstrates that the out-of-state articles are more dangerous than are in-state articles." *SDDS, Inc.*, 47 F.3d at 268 n.8. In this case, the Commissioner does not even know of *any* purpose for the law, let alone a purpose under which she might submit sufficient evidence justifying the law to be constitutional. JA 50-51 (Sanders Dec., Ex. 1 (Answer to Interrogatory No. 4, p. 4-5)).

The *only* case where the Supreme Court has *ever* found the government to overcome this "strictest scrutiny" was *Maine v. Taylor*, 477 U.S. 131, 140-51 (1986), where the Court examined extensive expert testimony substantiating the State of Maine's argument that it had to forbid the importation of out-of-state bait fish because the imported fish would carry parasites, or be invasive species, that would damage the State's

ecology. But, unlike in *Maine v. Taylor*, there has never been any suggestion here that out-of-state grapes, fruit, or other products used to make wine are dangerous to Minnesota's ecology. Indeed, it would be farcical for the Commissioner to argue as much, given that it is legal to use these products as long as they do not consist of a majority of a farm winery's production.

States cannot discriminate against interstate commerce simply to keep the outside world from intruding into local affairs. For example, in *Jones* this Court warned that simply proclaiming that the law helped protect "the social and economic culture of rural Nebraska" was too vague to constitute a legitimate governmental interest. *Jones*, 470 F.3d at 1270. "Indeed," continued the court, "it is that kind of xenophobia that the dormant [C]ommerce [C]lause sets its face against." *Id.* Forbidding Minnesota farm wineries from using interstate products for a majority of their wine, springs from the same protectionist interests.

Further, the fact that this case concerns alcohol does not alter the analysis. The Supreme Court squarely ruled in *Granholm* that a state's power under the Twenty-First Amendment to regulate alcoholic products does not override the protections of free trade guaranteed by the dormant

Domestic Commerce Clause. *Granholm*, 544 U.S. at 476. The Court also said the same thing in *Bacchus Imports v. Dias*, 468 U.S. 263, 276 (1984), where it invalidated a difference in alcohol taxation, whose purpose was "'to promote a local industry.'" *Id.* (quoting government's brief). *Granholm* and *Bacchus Imports* tell us that unless a state is regulating to effectuate the core purpose of the Twenty-First Amendment—temperance—it is not entitled to immunity from the dormant Domestic Commerce Clause. And, of course, when a state is allowing one type of alcohol to the exclusion of others it is hardly fostering temperance. Therefore, the out-of-state discrimination in *Granholm* and *Bacchus* failed strict scrutiny, and so should the discrimination in Minnesota's Farm Winery Act.

The Commissioner fails to offer a compelling state interest, let alone a lack of alternative means in achieving an interest. And this is likely why at oral argument below, Defendant's counsel stated this regarding strict scrutiny: "What we are conceding is that if you find it facially discriminatory, that high burden, we haven't – we're not challenging that. We're not saying we have evidence that meets that high burden. We haven't put that into the record." JA 119.

The In-State Mandate therefore fails strict scrutiny and is unconstitutional.

### C. The In-State Mandate Is a Discriminatory Law That Violates the Dormant Foreign Commerce Clause.

The dormant Domestic Commerce Clause discussed above is not the only "dormant commerce clause." As with commerce "among the several states," Article I, Section 8, clause 3 of the Constitution gives Congress the power to "regulate Commerce with foreign nations." And, just as with Congress's domestic commerce power, the courts have interpreted this language to provide for a "dormant Foreign Commerce Clause" that limits the power of the states to regulate trade across U.S. borders. *See Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 8 (1986) (discussing both the domestic and foreign dormant commerce clauses); *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 749 (5th Cir. 2006) ("This negative aspect of the Commerce Clause applies both to the Foreign Commerce Clause . . . and to the Interstate Commerce Clause.").

The analysis of a dormant Foreign Commerce Clause claim is very similar to a dormant Domestic Commerce Clause claim. *See Kraft Gen. Foods v. Iowa Dep't of Revenue & Finance*, 505 U.S. 71, 81 (1992) ("Absent a

compelling justification . . . a State may not advance its legitimate goals by means that facially discriminate against foreign commerce."). The two depart only in ways that make a dormant Foreign Commerce Clause analysis even stricter than the already very strict standard discussed above. *See Piazza's Seafood World, LLC*, 448 F.3d at 750 (discussing additional foreign policy considerations not present in dormant Domestic Commerce Clause analysis that make the already high standard even stronger). This is because of the power Congress holds—to the exclusion of the states—over our relations with the rest of the world: "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Id.* at 749 (citing *Wardair Canada, Inc.*, 477 U.S. at 8) (internal quotations and citations omitted).

Minnesota's In-State Mandate applies just as much to foreign commerce as to domestic, interstate commerce. In the past, Alexis Bailly has imported products from Canada to make its wine. *Supra* at 4-5. It would like to import products from elsewhere in the world, including France. *Id.* Yet, the same legal inhibition on importing more products from

farms across the St. Croix and Mississippi rivers also applies to importing more products from across the Great Lakes or the Atlantic Ocean.

Because the same analysis under the dormant Domestic Commerce Clause applies to the dormant Foreign Commerce Clause, the Farm Wineries do not repeat those arguments here, and incorporate Part IV.A-B by reference. The In-State Mandate is unconstitutional under the Foreign Commerce Clause for the same reasons.

## CONCLUSION

The Farm Wineries want to sell wine, directly to consumers and retailers, with a majority of non-Minnesota ingredients. They may only do so by asking for permission based on the weather every year. Wondering whether that permission will continually be granted prevents the Farm Wineries from expanding their businesses. The Act plainly states that the Commissioner may deny permission and may impose fines should the Farm Wineries be denied an exemption and nevertheless produce wine with a majority of out-of-state ingredients. The Farm Wineries should not have to risk prosecution just to challenge this unlawful requirement. They therefore have standing. The fact that they could convert their existing facilities, purchase different equipment, and stop selling to their current

individual and retail customers with a different, more expensive, license, does not change this conclusion.

Because the Farm Wineries have standing, this Court should address the merits. The conclusion is beyond any doubt. The In-State Mandate is a facially discriminatory law subject to strict scrutiny and the Commissioner has, wisely, conceded that she cannot overcome that scrutiny. This Court should determine that the In-State Mandate is unconstitutional under the dormant Domestic Commerce Clause and dormant Foreign Commerce Clause, reverse the district court's grant of the Commissioner's motion for summary judgment, and remand for the district court to grant the Farm Wineries' motion for summary judgment and enter judgment in the Farm Wineries' favor.

Dated: June 11, 2018

Respectfully submitted,

/s/ Anthony B. Sanders
Anthony B. Sanders (MN Bar No. 0387307)
Lee U. McGrath (MN Bar No. 0341502)
Jaimie N. Cavanaugh (CO Bar No. 44639)
INSTITUTE FOR JUSTICE
520 Nicollet Mall, Suite 550
Minneapolis, MN 55402
Tel: (612) 435-3451
Fax: (612) 435-5875
Email: asanders@ij.org, lmcgrath@ij.org, jcavanaugh@ij.org

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I certify that this Brief of Appellant is proportionately spaced and contains 12,853 words excluding parts of the document exempted by Rule 32(f).

/s/ Anthony B. Sanders
Anthony B. Sanders

## CERTIFICATE OF SERVICE

I hereby certify that this 11th day of June, 2018, a true and correct copy of the foregoing was served via the Court's electronic filings system upon:

Jason Marisam
OFFICE OF THE ATTORNEY GENERAL
445 Minnesota Street, Suite 1100
Saint Paul, Minnesota 55101
(651) 757-1275

*Counsel for Appellee*

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

/s/ Anthony B. Sanders
Anthony B. Sanders