No. 19-1948

United States Court of Appeals For the Eighth Circuit

Sarasota Wine Market, LLC, d/b/a Magnum Wine and Tastings; Heath Cordes; Michael Schlueter; Terrence French

Plaintiffs - Appellants

vs.

Eric Schmitt, Attorney General of Missouri; Dorothy Taylor, State Supervisor of the Missouri Div. of Alcohol and Tobacco Control; Michael L. Parson, Governor of Missouri

Defendants - Appellees

On appeal from the U.S. District Court for the Eastern District of Missouri, 4:17-cv-02792 HEA, Hon Henry E. Autry.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

James A. Tanford (IN16982-53) *attorney of record*
Robert D. Epstein
Epstein Cohen Seif & Porter, LLP
50 S. Meridian St,. #505
Indianapolis IN 46204
tanfordlegal@gmail.com
rdepstein@aol.com
317-639-1326 (firm)
812-332-4966 (tanford direct)

Alan S. Mandel (MO 29137)
MANDEL AND MANDEL, LLP
1108 Olive Street, Fifth Floor
St. Louis, MO 63101
314-621-1701
Email: dsmm001@aol.com

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I. Introduction and summary of issues

Missouri has a liquor license available that authorizes a retailer to take online orders and deliver wine to consumers throughout the state. Am. Compl., ¶¶ 14-16, J.A. 18-19; Mo. Rev. Stat. §§ 311.200(1), 311.300(2). However, it will issue that license only to an applicant who is "a qualified legal voter and a taxpaying citizen" of Missouri. Mo. Rev. Stat. § 311.060(1). Therefore, only in-state retailers may sell and deliver wine to consumers; out-of-state retailers may not. Plaintiffs assert this scheme violates the Commerce Clause and Privileges and Immunities Clause. The State has moved to dismiss the complaint under Fed. R. Civ. P. 12(b) on substantive and standing grounds.

A. Commerce Clause. Plaintiffs assert that the retail licensing law violates the Commerce Clause, U.S. CONST. art I § 8, because it discriminates against out-of-state retailers and protects in-state economic interests. The State contends that this claim should be dismissed for four reasons:

1. The law is not actually discriminatory, either because in-state and out-of-state retailers are not similarly situated, or because a

nonresident could gain the right to sell and deliver wine on the same terms as residents by establishing a physical presence in the state.

2. The nondiscrimination principle does not apply because the retailer licensing law is not facially discriminatory.

3. The licensing law is exempt from the nondiscrimination principle because it is an essential part of the three-tier distribution system.

4. Plaintiffs lack standing, either because Sarasota Wine Market never applied for a Missouri license, or because other provisions in the Liquor Control Code would prohibit it from selling and delivering wine to consumers even if it had a license, so the injury is not redressable.

B. Privileges and Immunities Clause. Plaintiffs assert that the citizens-only provision violates the Privileges and Immunities Clause, U.S. Const., art IV, § 2, because it denies nonresident wine retailers the opportunity to pursue their occupations in the state. The State contends that this claim should be dismissed for three reasons:

1. The Clause has not previously been applied by the courts to invalidate a state liquor law.

2. Selling wine is not a fundamental right and therefore is not a privilege of citizenship protected by the Clause.

3. Plaintiff Cordes lacks standing because his injury is not personal but is entirely derivative of injury to Sarasota Wine Market.

C. Public safety justification. The State (supported by its Amici) also argues that both claims should be dismissed because it has a legitimate justification for discriminating against nonresidents, namely that requiring an in-state presence promotes Missouri's interest in public health and safety. This argument is premature. It is in the nature of an affirmative defense which cannot ordinarily be resolved on a Rule 12(b) motion because it requires evidence. *Jessie v. Potter,* 516 F.3d 709, 713 n.2 (8th Cir. 2008). The burden is on the State to prove with "concrete evidence" that discrimination is necessary because nonresidents pose a unique threat to public safety not posed by residents and less discriminatory measures will not work. *Granholm v. Heald,* 544 U.S. at 490-92 (Commerce Clause); *Hatch v. Hoeven*, 456 F.3d 826, 834 (8th Cir. 2006) (Privileges and Immunities Clause). We have not yet reached the evidentiary phase of this litigation and the defense of justification cannot be established merely by assertion and argument. *Tenn. Wine,* 139 S.Ct 2449, 2474 (2019).

II. Commerce Clause violation

For their Commerce Clause claim, Plaintiffs rely primarily on two recent Supreme Court cases. In *Granholm v. Heald,* the Court held that state liquor laws violate the Commerce Clause "if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." 544 U.S. 460, 472 (2005). The Court struck down two state laws that violated this nondiscrimination principle by allowing in-state wineries to sell and deliver wine directly to consumers but prohibiting out-of-state wineries from doing so. It held that "discrimination is neither authorized nor permitted by the Twenty-first Amendment," 544 U.S. at 466, so "[i]f a State chooses to allow direct shipment of wine, it must do so on even-handed terms." 544 U.S. at 493. In *Tenn. Wine & Spirits Retailers Ass'n v. Thomas,* the Court again said that the nondiscrimination principle applies to state liquor laws, 139 S.Ct. at 2469-70, and struck down a residency requirement for obtaining a retail license. 139 S.Ct. at 2476.

The State advances three arguments that the Commerce Clause claim should be dismissed despite *Granholm* and *Tenn. Wine* -- the law is not discriminatory, is exempt from the nondiscrimination principle, and/or plaintiffs lack standing. None has merit.

A. Missouri discriminates against out-of-state retailers

Although it seems obvious that Missouri discriminates against out-of-state wine retailers by denying them licenses and prohibiting them from selling and delivering to consumers, the State asserts two reasons why the different treatment might not violate the nondiscrimination principle of the Commerce Clause in this case.

First, the State argues that Sarasota Wine Market is not similarly situated to in-state retailers because it does not have a Missouri license and unlicensed retailers are not comparable to licensed ones. State Br. at 35-37. The argument is contrary to the complaint, in which Sarasota Wine Market and Heath Cordes clearly allege that they would not engage in unlicensed sales but would obtain Missouri licenses if any were available. Am. Compl. ¶¶ 27, 37, J.A. 20-22; Request for Relief ¶ C, J.A. 23. The argument is also contrary to case law, which holds that in-state and out-of-state retailers are similarly situated for Commerce Clause purposes if they are selling the same product. *Gen. Motors v. Tracy*, 519 U.S. 278, 298-99 (1997) (companies selling the same product are similarly situated); *Exxon Corp. v. Maryland,* 437 U.S. 117, 126 (1978) ("in-state and out-of-state companies in the retail market" are

similarly situated); *Wal-Mart Stores, Inc. v. Texas ABC,* 935 F.3d 362, 376 (5th Cir. 2019) ("in-state and out-of-state companies in the retail market" are similarly situated).[1] Sarasota Wine Market sells the same product as the in-state retailers it wants to compete against, and is similarly situated.

Second, the State argues that its retail licensing laws do not in fact discriminate against out-of-state retailers because everyone who wants to sell wine in Missouri must equally abide by the terms of the Liquor Control Law. State Br. at 32-34. Residents and nonresidents alike must obtain a license and establish physical premises in the state[2] that are owned or operated by a Missouri citizen if they want to sell wine. The State cites no authority for the argument that requiring everyone to comply with the state liquor code somehow obviates the discriminatory effect of individual provisions and renders them unchallengeable. Indeed, the cases hold to the contrary. In *Granholm*, the Court struck

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[1]The State mischaracterizes *Wine Country Gift Baskets.com v. Steen* as holding broadly that out-of-state and in-state retailers are not similarly situated. State Br. at 37. The holding was actually quite narrow -- out-of-state retailers were dissimilar to Texas retailers in that case because Texas retailers were allowed only to deliver locally within their county and the plaintiffs sought state-wide distribution. 612 F.3d 809, 820 (5th Cir. 2010).

[2]The State concedes the physical presence requirement. State Br. at 39.

down a New York law that required residents and nonresidents alike to establish in-state physical premises if they wanted to ship wine to consumers. It said unequivocally that "States cannot require an out-of-state firm to become a resident in order to compete on equal terms." 544 U.S. at 474-75 (collecting cases). In *Tenn. Wine*, the Court struck down a law that required everyone who wanted to open a retail store to establish and maintain a residence in the state. 139 S. Ct. at 2456. It called the residency rule a "discriminatory feature" of the state's liquor code that was fully subject to Commerce Clause scrutiny. 139 S.Ct. at 2472.

Part of the State's argument is based on the erroneous claim that Sarasota Wine Market could qualify for a license to operate an in-state retail store if it hired a Missouri citizen as the store manager. State Br. at 33.[3] The claim is incorrect. The statute clearly says that it must be the *managing officer of the corporation* who is a qualified legal voter and a taxpaying citizen of Missouri, not the store manager. Mo. Rev. Stat. § 311.060(1). Under state law, a managing officer means the CEO

[3]Amici make the same claim, citing no authority whatsoever. Nat'l Beer Whol. Br. at 18-19.

or senior executive of a corporation, not an employee hired to run a particular store. *Southland Corp. v. City of Woodson Terrace*, 599 S.W.2d 529, 532 (Mo. Ct. App. 1980). Sarasota Wine Market probably could not comply with this law anyway because it is an LLC, not a corporation. Am. Comp. ¶¶ 5-6, J.A. 17. In any event, the argument is irrelevant because Sarasota Wine Market is not seeking to open a new store in Missouri, but to engage in interstate commerce from its existing premises in Florida. Am. Compl. ¶¶ 17-25, J.A. 19-20. The ban on interstate commerce violates the Commerce Clause regardless of whether opening a store in Missouri might allow limited in-state commerce. That was the holding in *Granholm*. 544 U.S. at 474-75.

B. The nondiscrimination principle applies to Missouri's wine retailer laws

It seems equally obvious that the nondiscrimination principle of the Commerce Clause applies to state laws regulating wine sales and deliveries. The Supreme Court has said so twice. *Granholm v. Heald*, 544 U.S. at 466 ("grant[ing] in-state wineries a competitive advantage over wineries located beyond the States' borders... discriminate[s] against interstate commerce in violation of the Commerce Clause"); *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. at 2469-70

("the Court has repeatedly declined to ... allow[] the States to violate the nondiscrimination principle" when regulating liquor). Nevertheless, the State makes two arguments why it might not apply to the present case.

First, the State argues that the nondiscrimination principle only applies to laws that are facially discriminatory, which it contends this one is not. Brief at 30-31. The State is wrong on both points. The nondiscrimination principle prohibits laws that are facially discriminatory and also laws that have the "practical effect" of favoring in-state over out-of-state interests. *U & I Sanitation v. City of Columbus,* 205 F.3d 1063, 1067 (8th Cir. 2000); *Granholm,* 544 U.S. at 487. In any event, Mo. Rev. Stat. § 311.060(1) is in fact facially discriminatory. It provides that a retail license will only be given to "a qualified legal voter and a taxpaying citizen" of Missouri. The Supreme Court held in *Tenn. Wine* that state alcoholic beverage laws may not restrict retail licenses based on residency, 139 S.Ct. at 2456, 2474, and in *Granholm* that "States cannot require an out-of-state firm to become a resident in order to compete on equal terms." 544 U.S. at 474-75.

Second, the State argues that even if its retail licensing scheme discriminates against out-of-state retailers, it is immune from constitutional scrutiny because *Granholm* "held" that the three-tier system was "unquestionably legitimate." 544 U.S. at 489. See State Br. at 31. The State is wrong. The passage is dictum, not a holding, and elsewhere in the opinion the Court rejects the premise that a challenge to an individual statute would be foreclosed because it was part of a three-tier system. 544 U.S. at 488-89. It held that all "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," 544 U.S. at 487, and struck down discriminatory wine-shipping laws that were part of three-tier systems. In *Tenn. Wine,* the Court reiterated that its endorsement of the three-tier system in general does not immunize from scrutiny "every discriminatory feature that a State may incorporate into its three-tiered scheme." 139 S.Ct. at 2472. Indeed, if state regulations of retailer licensing requirements were unquestionably legitimate and immune from challenge as the State contends, *Tenn. Wine* would have come out the other way.

Third, the State makes a narrower argument that even if some components of a three-tier system were subject to constitutional

challenge, retailer licensing requirements would still be immune because the regulation of retailers is a fundamental part of its three-tier system. The Court foreclosed this argument in *Tenn. Wine,* ruling that Tennessee's residency requirement for a retailer license "is not an essential feature of a three-tiered scheme," 139 S.Ct. at 2472, and declared it unconstitutionally discriminatory. 139 S.Ct. at 2474-75.

C. Plaintiffs have standing

Plaintiffs also would appear to have standing. This Circuit holds that when a commercial transaction is disrupted by state law, both the seller and buyer have standing to bring a Commerce Clause challenge. *S. D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003).[4] The complaint contains detailed allegations from an out-of-state wine retailer and in-state consumers describing how they have been unable to complete online wine transactions because Missouri law makes direct-to-consumer deliveries from out-of-state retailers unlawful. Am. Compl. ¶¶ 17-26, J.A. 19-20. See Opening Br. at 10-12. On a motion to

[4] Other circuits have applied this principle to find standing when the interrupted commercial transaction was interstate wine shipping. *Freeman v. Corzine,* 629 F.3d 146, 153-54 (3d Cir. 2010); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849-50 (7th Cir. 2000).

dismiss, the courts accept as true the movants' allegations supporting standing unless the pleading are a sham. *Liddell v. Special Admin. Bd. Of Transitional Sch. Dist.*, 894 F.3d 959, 965 (8th Cir. 2018). The State advances two reasons why plaintiffs light lack standing despite the plain language in *Hazeltine.*

First, the State suggests that Sarasota Wine Market lacks standing because it never applied for a Missouri license. State Br. at 19-22. Even if this principle were applicable in the present case, there is a well-known exception -- no license application is required if it would be futile to do so. *Pucket v. Hot Springs School Dist. No. 23-2*, 526 F.3d 1151, 1162 (8th Cir. 2008). Plaintiffs have alleged futility. No license is available that would allow Sarasota Wine Market to sell and deliver wine into Missouri from its location in Florida. Am. Comp. ¶¶ 17-18, 25, J.A. 17, 19-10. Under Mo. Rev. Stat. § 311.060(1), retail licenses may only be granted if the applicant or its managing officer is a "qualified legal voter and a taxpaying citizen" of Missouri, which neither Sarasota Wine Market nor Heath Cordes is. Am. Compl. ¶¶ 5-6, J.A. 17. Contrary to assertions by the State, the plaintiffs could not have become eligible for a license simply by hiring a Missouri citizen to be its

store manager. State Br. at 20, 33. The statute provides that the *managing officer of the corporation* must be a citizen, not the store manager. Mo. Rev. Stat. § 311.060(1). Under Missouri law, a "managing officer" is the president or chief executive, not an employee hired to run a particular store. *Southland Corp. v. City of Woodson Terrace*, 599 S.W.2d at 532.

Second, the State contends that plaintiffs' injuries are not redressable because other statutes might prevent out-of-state retailers from delivering wine to Missouri consumers even if Mo. Rev. Stat. § 311.060(1) were struck down. Its argument focuses primarily on Mo. Rev. Stat. § 311.280(1), which requires Missouri retailers to purchase their inventory from a licensed Missouri wholesaler. State Br. at 22-25.[5] The State does not explain why the District Court could not also enjoin the application of the Missouri-wholesaler rule to out-of-state retailers. The same defendants are responsible for the enforcement of both laws, and courts typically invoke the independent-rule exception only when the person responsible for its enforcement is not a party and

[5]The State also speculates that Sarasota might not have the qualifying non-liquor inventory to meet the eligibility requirement of Mo. Rev. Stat. § 311.200(1), but that is a factual question that cannot be decided on a motion to dismiss.

would not be bound by the injunction. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 569 (1992). If the responsible official is a party, the district court has considerable discretion to craft an injunction to broadly enough to grant meaningful relief and stop unlawful conduct. *U.S. v. Dinwiddie*, 885 F.Supp. 2d 1286, 1295 (W.D. Mo. 1995) (collecting cases). The court may even enjoin otherwise lawful conduct if necessary to make its injunction effective. *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 906 (8th Cir. 2012) (citing cases).[6] An injury is redressable when, as in this case, "the named defendants ... possess the authority to enforce the complained-of provision" and can be enjoined from doing so. *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 777-79 (8th Cir. 2019).

The State's argument omits a crucial part of the "independent-rule" doctrine. It is not enough that another statute exists that might restrict plaintiffs' proposed actions; the other statute must be constitutionally

[6]The State suggests that the judge could not enjoin this statute as applied to plaintiff because it is not specifically challenged in the complaint. The case law is contrary. If a court has standing to hear one challenge, it has standing to address other related barriers, otherwise we would have piecemeal compliance and waste judicial resources, which would be "inefficient and impractical." *Steger v. Franco, Inc.*, 228 F.3d 889, 894 (8th Cir. 2000).

valid and "entirely lawful." 13A CHARLES A. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 3531.5 (3d ed. 2019) (cited in State Br. at 24). *See also Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848, 849 (7th Cir. 2000) (the other statute must not be "subject to any plausible constitutional challenge"). A common example are the billboard cases cited by the State (Br. at 23-24) in which plaintiffs lacked standing to bring a First Amendment challenge to content-based restrictions because their billboards would have been prohibited anyway under *constitutionally valid* size and height restrictions. *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 800-02 (8th Cir. 2006); *Midwest Media Prop. LLC v. Symmes Twp.*, 503 F.3d 456, 462 (6th Cir. 2007).

The local-wholesaler requirement could not be applied to it without violating the Commerce Clause.

1. It would obviously discriminate on its face against out-of-state wholesalers. *Granholm* held that "States cannot require an out-of-state firm to become a resident in order to compete." 544 U.S. at 474-75.

2. It would also discriminate in practical effect against out-of-state retailers whose inventory does not come from Missouri wholesalers, and would therefore remain closed out of the Missouri marketplace.

The Commerce Clause prohibits indirect discrimination as well as direct and looks primarily at the overall effect of the law on interstate commerce. *Healy v. Beer Inst.,* 491 U.S. 324, 337 (1989).

3. It would violate the local-processing rule. *Granholm* held that a State cannot require an out-of-state firm to perform its "business operations [in that state] that could more efficiently be performed elsewhere." 544 U.S. at 475.

4. It would violate the extraterritoriality principle. Missouri may not project its regulations into sister states and dictate how retailers in those other states must acquire their inventory. This "exceeds the enacting state's authority and is invalid" even if the commerce will have effects in Missouri. "[N]o State may force an out-of-state merchant to seek [its] regulatory approval" before buying inventory. *Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989).[7]

5. It would violate *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d at 779, which held that a liquor license cannot require the licensee to purchase material from in-state sources only (license required winery to buy grapes from in-state growers only).

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[7]The State tangentially suggests other possible standing issues in footnotes, State Br. at 20, 22, but issues raised in footnotes are not considered by appellate courts. *Equipment Mfrs. Inst. v. Janklow,* 300 F.3d 842, 848 n.2 (8th Cir. 2002).

III. Privileges and Immunities violation

There is no dispute that Missouri will issue a liquor license only to an applicant who is "a qualified legal voter and a taxpaying citizen" of Missouri, Mo. Rev. Stat. § 311.060(1), which Heath Cordes is not. Am. Compl. ¶ 30, J.A. 21. Whether this residency restriction violates the Privileges and Immunities Clause requires a two-part inquiry: (1) Is the opportunity to obtain a wine retailer license a privilege protected by the Clause, and if so, (2) Does sufficient justification exist for the discrimination? *Hatch v. Hoeven,* 456 F.3d at 834, *citing United Bldg. & Const. Trades Council v. City of Camden*, 465 U.S. 208, 218-19 (1984). The State advances four reasons this claim could be dismissed.

A. Just because this is a matter of first impression does not justify dismissal.

The State argues that the Privileges and Immunities claim should be dismissed because plaintiffs have failed to cite any prior cases in which the Clause had been used to invalidate a residency requirement in a state liquor law. State Br. at 38. The State also has cited no case in which such an argument was rejected. There are no cases either way because this is a matter of first impression. Plaintiffs are required to cite authority for their claim, but it does not have to be case law. They

have cited a statute, a constitutional provision and analogous cases applying the Clause to state restrictions on nonresidents obtaining other kinds of licenses. Opening Br. at 23-25. The absence of controlling precedent does not require that the complaint be dismissed nor deprive the court of its ability to decide the issue as a matter of first impression. *See U. S. v. O'Laughlin*, 934 F.3d 840, 841 (8th Cir. 2019); *Calzone v. Summers,* 909 F.3d 940, 948 (8th Cir. 2018), *vacated on other grounds,* 942 F.3d 415 (8th Cir. 2019)(*en banc*).

B. The opportunity to engage in a profession is a fundamental privilege protected by the clause

The State argues that the Privileges and Immunities claim should be dismissed because earning a living as a wine merchant is not a fundamental privilege, so the Clause does not apply. State Br. at 40-41. The argument is implausible. Plaintiffs' counsel has not found a single case that has ever found that a lawful profession was not fundamental.

The State supports its claim that selling wine is not a fundamental occupational privilege by citing one case -- *Steamers Serv. Co. v. Wright*, 505 S.W.2d 65, 68 (Mo. 1974). It is not relevant. It held that a citizen of Missouri did not have a natural right to engage in an *unlawful*

occupation -- selling liquor on a steamship which business was not authorized by state law. The case did not involve any nonresidents being denied a license to engage in an occupation that was lawful for residents. The State also misleadingly implies that *Hatch v. Hoeven*, 456 F.3d at 834, held that selling alcohol was not a fundamental privilege. State Br. at 41. *Hatch* concerned hunting regulations and had nothing to do with liquor laws or earning a livelihood. Finally, the State cites *United Bldg. & Constr. Trades Council v. City of Camden*, 465 U.S. 208 (1984) but does not explain what relevance it has. State Br. at 41. That case, like *Toomer v. Witsell*, 334 U.S. 385 (1948), and others cited by the plaintiffs in their opening brief at 23, establish that the Clause protects the right of nonresidents to pursue any lawful occupation in another state.

C. The citizens-only provision is protectionist on its face

The State argues that even if the retailer shipping laws discriminated against nonresidents, they would not violate the Privileges and Immunities Clause because the plaintiffs have not shown the protectionist purpose supposedly required by *McBurney v. Young*, 569 U.S. 221, 227 (2013). State Br. at 42-43. Even if this were a

correct statement of the law it would be meritless because Plaintiffs have alleged protectionism, which is adequate at the pleading stage. Am. Compl. ¶¶ 28-29, J.A. 21. Missouri's citizens-only rule is a prima facie violation of the holding in *McBurney* that a state may not "exclude non-residents and thereby create a commercial monopoly for ... residents," 569 U.S. at 227, nor may it "provide a competitive economic advantage for ... citizens." 569 U.S. at 228. That is exactly what Missouri does by restricting the issuance of licenses to citizens of Missouri. Mo. Rev. Stat. § 311.060(1). The complaint therefore adequately alleges a constitutional violation that can survive a motion to dismiss

D. Heath Cordes has standing

The complaint alleges that Heath Cordes is a nonresident who wants to practice his profession in Missouri but is prohibited from obtaining the necessary Missouri wine retailer license. Am. Compl. ¶¶ 30-36, J.A. 21-22. When a nonresident is barred from obtaining a license to practice a profession, which license is available to residents, the nonresident has suffered an injury that supports standing to bring a Privileges and Immunities Clause claim. *See N.H. Sup. Ct. v. Piper,*

470 U.S. at 275-76. See Opening Br. at 12-13.

The State argues that Cordes nevertheless lacks standing because his injury is purely derivative of the economic losses incurred by a corporation, citing *Chase Mgmt., Inc. v. S.D.,* 97 F.3d 1107, 1115 (8th Cir.1996).[8] The argument mischaracterizes the complaint. First, Sarasota Wine Market is not a corporation; it is an LLC. Am. Comp. ¶ 5, J.A. 17. LLCs are more like sole proprietorships than corporations. Profits pass through the LLC and go directly to Mr. Cordes as income. *See Littriello v. U.S.*, 484 F.3d 372, 378 (6th Cir. 2007) (LLC profits are taxed to the individual). In other jurisdictional contexts, this Circuit treats LLCs and corporations differently, classifying LLCs as citizens of the state where their members live. *GMAC Commercial Credit LLC v. Dillard Dept. Stores, Inc.*, 357 F.3d 827, 828-29 (8th Cir. 2004). Second, this is not a situation where a corporation runs the business and individual stockholders are economically affected only by the rise and fall of dividends or the value of the stock. Cordes has alleged personal

[8]The State also argues that Sarasota Wine Market itself lacks standing because it is a corporation, and corporations are not entitled to the protection of the Privileges and Immunities Clause. State Br. at 25-26. The contention is irrelevant because it is Heath Cordes, not Sarasota Wine Market, that is making the claim. Am. Comp. ¶¶ 30-40, J.A. 21-22.

involvement in the wine trade and personal economic loss. Am. Compl. ¶¶ 31-35, J.A. 21-22.[9] Nothing precludes both Sarasota Wine Market and Heath Cordes from being injured by the same prohibitory rule. *See Internat'l Ass'n of Firefighters of St. Louis v. City of Ferguson*, 283 F.3d 969, 972 (8th Cir. 2002) (for standing purposes, firefighter and his wife were both injured by rule prohibiting firefighters from posting political signs). The State's argument asks the court to go beyond the face of the complaint and conclude that Cordes will ultimately be unable to prove that he has suffered any personal injury. He has pled to the contrary, so that issue will have to wait until the evidence stage.

IV. The State's purported public safety justification cannot be resolved in a motion to dismiss the complaint.

A discriminatory law is "virtually per se" invalid, unless the state can show that it serves an important interest other than protectionism, which cannot be advanced by less discriminatory alternatives. *Granholm,* 544 U.S. at 476, 490-92; *Tenn. Wine,* 139 S.Ct at 2470-71. The State and its Amici contend that the complaint should be dismissed

[9]The allegation is not entirely clear, but in deciding a motion to dismiss, all reasonable inferences should be made in favor of the plaintiff. *Usenko v. MEMC, LLC*, 926 F.3d 468, 472 (8th Cir. 2019).

even if the law is found to be discriminatory, because it has the primary effect of promoting public health and safety, not of economic protectionism. State Br. at 31-32, 37-38, 42-43; Wine & Spirits Whol. of Am. Br. at 8-28; Nat'l Beer Whol. Ass'n Br. at 4-15. The eventual outcome of this case will probably turn on whether the State can show that nonresidents pose some unique threat to public health and safety that can only be prevented by excluding them from participating in the marketplace. However, the argument is premature at this stage, because the State must prove its supposed justification by "concrete evidence." *Granholm v. Heald,* 544 U.S. at 490-92; *Tenn. Wine,* 139 S.Ct at 2474. This is a motion to dismiss, so no evidence has yet been introduced. The question of justification will have to wait until the evidentiary phase. *Hatch v. Hoeven,* 456 F.3d at 834, *citing United Bldg. & Const. Trades Council v. City of Camden*, 465 U.S. at 218-19.

IV. Conclusion

For the foregoing reasons, the decision of the District Court should be reversed, the motion to dismiss denied, and the case remanded for further proceedings.

Respectfully submitted,
Attorneys for plaintiffs:

s/ James A. Tanford
James A. Tanford, *counsel of record*
Robert D. Epstein
Epstein Cohen Seif & Porter, LLP
50 S. Meridian St., Ste 505
Indianapolis IN 46204
Tel. 812-332-4966
Fax. 317-638-9891
tanfordlegal@gmail.com

Alan S. Mandel (MO 29137)
Mandel & Mandel, LLP
1108 Olive St., 5th Floor
St. Louis MO 63101
877-893-1256
dsmm001 @aol.com

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The brief has been scanned for viruses and is virus-free.

s/ James A. Tanford
James A. Tanford

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the type-volume limitations of Rule 32(a)(7). It has been prepared using Wordperfect X7 in 14-point Century Schoolbook type and contains 4793 words, excluding sections exempt under Rule 32(f).

s/ James A. Tanford
James A. Tanford

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2019, I filed this brief through the CM/ECF system which will serve a copy on the attorney for appellees.

s/ James A. Tanford
James A. Tanford