

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Docket Nos. 08-3268 and 08-3302

ROBERT FREEMAN and JUDY)	
FREEMAN, WALTER HANSEL)	
WINERY, INC., MEYER)	
FRIEDMAN and BEVERLY)	On Appeal From a Final Order of
FRIEDMAN,)	The United States District
)	Court for the District of
Plaintiffs,)	New Jersey, dated June 30, 2008
)	Civil Action No.03cv03140(KSH)
v.)	
)	
JERRY FISCHER, Director)	Sat Below:
of the New Jersey Division)	Hon. Katharine S. Hayden,U.S.D.J.
of Alcoholic Beverage)	
Control,)	
Defendant,)	
)	
and)	
)	
R&R MARKETING LLC, ALLIED)	
BEVERAGE GROUP, LLC and)	
FEDWAY ASSOCIATES, INC.,)	
)	
Intervenor-Defendants.)	

REPLY BRIEF OF DEFENDANT-APPELLANT/CROSS-APPELLEE
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SUMMARY OF ARGUMENT

From the days of the raucous saloon to today's era of boutique wineries, alcoholic beverages have played a unique role in the social and governmental history of the United States. Recognizing this historically tumultuous debate and the failure of Prohibition, Congress enacted the Twenty-first Amendment, specifically referring the regulation of intoxicating liquor to the states. This constitutional referral to the states has generally precluded the development of a comprehensive federal regulatory and enforcement scheme, thus confining regulatory models and enforcement to the territorial limitations of the individual states.

Supreme Court jurisprudence, including Granholm v. Heald, 544 U.S. 460 (2005), continues to recognize the importance of the states' dominant role in regulating and controlling the flow of alcohol across their borders for consumption by their citizens. The Court has specifically acknowledged, even as it defined the role of the Commerce Clause in alcohol related decisions, that the three-tier system at the core of

the regulation of alcohol in the majority of states, including New Jersey, remains not only permissible, but "unquestionably legitimate." Granholm, 544 U.S. at 464. Thus, in the absence of overt and specific discrimination against out-of-state products, the Twenty-first Amendment compels the Court to approve a state's alcoholic beverage regulatory scheme. Furthermore, neither the Commerce Clause nor the Twenty-first Amendment compels a state to waive its regulatory scheme as a means of giving out-of-state producers a remedy for a non-statutorily caused competitive disadvantage.

This case challenges New Jersey's choices as to how to regulate alcoholic beverages within its borders, as part of a nationwide effort to impose direct shipping through litigation in states, such as New Jersey, which have banned it through duly enacted legislation. Director Fischer has established that no actual case or controversy has been presented by Plaintiffs, and they cannot establish the requisite components of constitutional or prudential standing. Plaintiffs'

Step 2 brief fails to refute this. Thus, the record demonstrates that the District Court erred by failing to dismiss this matter based on a lack of standing, and this decision must be reversed by the Third Circuit Court of Appeals.

If this Court finds that the Consumer Plaintiffs have standing, their sole claim, which concerns New Jersey's prohibition on direct shipping, must be rejected. New Jersey's alcoholic beverage law, including the State's ban on direct shipping by all wineries, passes constitutional muster because it evenhandedly regulates the flow of wine to state residents by both in-state and out-of-state wineries. Moreover, the State's statutory ban on direct shipping is neutral, both facially and in effect, and is consistent with the Supreme Court's Commerce Clause decisions.

In their Step 2 brief, Plaintiffs ignore the facially neutral language of the statute and instead claim that New Jersey's law unconstitutionally discriminates against interstate commerce through

"practical effect." Plaintiffs premise this claim on their contention that New Jersey's facially neutral statutory ban on direct shipping discriminates against out-of-state wineries, because the State permits in-state wineries to conduct face-to-face on-premises sales and, according to Plaintiffs, deliver wine to consumers in their own vehicles. Plaintiffs are wrong on both the law and the facts.

Plaintiffs' assertion in their Step 2 brief that wineries can deliver wine to consumers "in their own vehicles" is simply inaccurate. The plain language of New Jersey law and the evidence adduced proves that the only delivery by wineries authorized by New Jersey law is that allowed by all manufacturers, that is, delivery of goods to licensed wholesalers and retailers, not to consumers.

Furthermore, statutes, such as that in New Jersey, which permit in-state wineries to conduct face-to-face on-premises sales are neither protectionist nor discriminatory and do not violate the dormant Commerce Clause. Moreover, Plaintiffs' complaint concerning

access to New Jersey's market is, at its core, attributable to geography and certain wineries' marketing choices, and not to any statutory trade barrier. The Commerce Clause does not require that New Jersey offset geographic remoteness or ensure identical economic opportunities for all potential market participants. On the contrary, the Commerce Clause guarantees an open market, not an unregulated one.

Consequently, if the issue of direct shipping is considered by this Court, it must affirm that portion of the District Court's opinion upholding the constitutionality of New Jersey's statutory ban on direct shipping, and Plaintiffs' challenge to this law must be rejected.

Since Plaintiffs have failed to establish the requisite standing to challenge New Jersey's alcoholic beverage statutes regarding wineries, all of their remaining claims must be dismissed. However, if this Court finds it appropriate to consider the remaining aspects of the District Court's ruling, it must affirm the portions of the opinion upholding the

constitutionality of New Jersey's winery statutes, and reject the District Court's erroneous findings regarding winery salesrooms and wholesale licensing fees.

Although all parties concede that the District Court made several factual mistakes regarding how New Jersey's statutory process works, including erroneously concluding that the wholesaler salesroom in N.J.S.A. 33:1-11 was congruent with the winery outlet salesrooms in N.J.S.A. 33:1-10, the District Court was correct in its holding that New Jersey's on-premises sales statute passes constitutional muster. This is because, in New Jersey, there is no discrimination under the Commerce Clause with regard to on-premises sales by wineries. All wineries, both in and out-of-state, are subject to on-premises sales requirements and cannot deliver or ship wine to a consumer in New Jersey. Since New Jersey's statute permitting on-premises sales for wineries is based on sound constitutional principles, Plaintiffs' challenge to this statute must be rejected, and that portion of the District Court's ruling

upholding the constitutionality of New Jersey's winery statutes must be affirmed.

With regard to the District Court's erroneous findings regarding the wholesale licensing fees statute and the winery salesroom provision, Plaintiffs' Step 2 brief does not dispute that the District Court made these errors. In fact, Plaintiffs agree that the District Court committed several errors in the opinion below regarding these statutory provisions. Because the factual record clearly indicates that the District Court was mistaken in that portion of its ruling regarding New Jersey's wholesale licensing fees and the winery salesroom provision, if this Court considers these issues, it must reverse the District Court's ruling striking down these statutes.

Finally, in the event that this Court finds that any section of New Jersey law violates the Commerce Clause, a remedy other than the injunction ordered by the District Court would be more appropriate. Because the statutes under consideration in this matter deal with the regulation of alcohol, and not with another, less regulated product or service, it is imperative

that, if this Court finds that the provisions at issue violate the dormant Commerce Clause, the Court must grant a stay to allow the Legislature a sufficient period to act. The Court should be mindful that, without time for the Legislature to act, the State's oversight authority of an entire industry, that of the service of intoxicating liquors to the public, is undermined. Based on the unique nature of the regulation of alcoholic beverages, deference to state government, which is empowered directly by the Twenty-first Amendment, warrants consideration by this Court.

Defendant Fischer has shown that Plaintiffs have failed to establish the requisite standing to challenge New Jersey's alcoholic beverage statutes regarding wineries and, therefore, this Court should dismiss this matter in its entirety. If the Court finds it appropriate to consider any aspects of the District Court's ruling, it must affirm those portions of the opinion upholding the constitutionality of New Jersey's winery statutes, and reject the District Court's erroneous findings regarding winery salesrooms and wholesale licensing fees.

ARGUMENT

POINT I

PLAINTIFFS DO NOT HAVE STANDING TO MAINTAIN THIS CAUSE OF ACTION.

The core of the doctrine of standing is the requirement that litigation concern an actual case and controversy, brought by a plaintiff who alleges a sufficient personal stake in the outcome to warrant the intervention of the court's remedial powers. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472-73 (1982). The doctrine of standing is comprised of both constitutional and prudential components. Oxford Assocs. v. Waste Sys. Auth. of E. Montgomery County, 271 F.3d 140, 145 (3d Cir. 2001). Plaintiffs' Step 2 brief fails to establish either.

A. PLAINTIFFS HAVE NOT ESTABLISHED CONSTITUTIONAL STANDING.

Constitutional standing principles have been summarized by the Supreme Court in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) and recently reiterated in Summers v. Earth Island Institute, 555

U.S. ___, 129 S.Ct. 1142 (2009). In Summers, the Court reaffirmed that a plaintiff has constitutional standing only if the plaintiff demonstrates 1) an "injury in fact," that is 2) "fairly traceable" to the defendant's "challenged action" and which 3) a "favorable judicial decision" will likely prevent or redress. Summers, 555 U.S. at ___, 129 S.Ct. at 1149. A review of the facts presented in this matter, in light of the Supreme Court's enunciated analysis in Lujan and Summers, shows that Plaintiffs have not established the factual predicate required for standing. Director Fischer refers the Court to pages 32-42 of his Step 1 Brief (ABCb32-42)¹ and pages 25-45 of the Intervenor-Defendants' Step 2 brief (Ib25-45) for a detailed discussion of why Plaintiffs do not meet the criteria

¹Pb refers to the Step 2 brief submitted by Plaintiffs, designated by this Court as Appellee/Cross-Appellant.

ABCb refers to the Step 1 brief submitted by Defendant ABC Director Jerry Fischer, designated by this Court at Appellant/Cross-Appellee.

Ib refers to the Intervenor-Defendants' Step 2 brief.

Ja refers to Joint Appendix.

ABCa refers to attached Supplemental Appendix.

for constitutional standing set out in Lujan and Summers. Because the District Court failed to conduct the requisite standing assessment, its ruling must be reversed.

1. The District Court erred by finding standing with regard to New Jersey's statutory provisions regarding sales by wineries at retail, the number of winery salesrooms, the cost of a limited wholesale license and the personal importation restriction.

By shortcutting the required analysis, the District Court found standing in this case, concluding that a claimed inability to order wine remotely and have it shipped directly to their homes established standing for the Consumer Plaintiffs, not only for New Jersey's ban on direct shipping (which the District Court found was constitutionally sound), but on other unrelated provisions of New Jersey law. These included sales by wineries at retail, the number of winery salesrooms, the cost of a limited wholesale license and the personal importation restriction. Moreover, the District Court completely ignored Defendant Fischer's assertions that the Winery Plaintiff, who specifically

admitted on the record that it had no interest in this lawsuit, did not have standing on any issue.

Looking at the factual record, it is unquestionable that the Consumer Plaintiffs have not established even an "injury in fact" (the first prong of the constitutional standing test set out in Summers) with regard to any of the claims concerning New Jersey's wineries' sales at retail, the number of winery salesrooms, the cost of a limited wholesale license or the personal importation restriction. For example, the Friedmans have made no claim and have asserted no facts proving that they have been thwarted in any attempt to establish or visit a winery salesroom, been negatively affected by wineries' sales to retailers or restaurants, been affected by the cost of obtaining a wholesaler license, or been unable to bring home wine from out-of-state based on New Jersey's personal importation restrictions. Due to their age, the Friedman's only claimed injury is that they cannot remotely order wine for delivery to their doorstep, so that they do not have to leave home (Tavani cert., Ex. F, Interrog. #7; Ja391-392).

Similarly, the Freemans have made no claims or submitted any evidence that they have been injured by New Jersey's statutory provisions regarding sales by wineries at retail, the number of winery salesrooms, the cost of a limited wholesale license or the personal importation restriction. The Freemans have asserted no claim that New Jersey's winery outlet provisions, ability to sell to retailers or restaurants, or wholesaler fees statutes, have in any way infringed on their rights. In addition, the Freemans acknowledge that they have been able to bring back wine from out-of-state without problems, and thus have not established any injury based on New Jersey's personal importation restriction. The Freemans' sole articulated injury is that they are unable to remotely purchase highly allocated, out-of-state wine and have it shipped to their home (Tavani cert., Ex. I, ¶8; Ja416).²

²The Freemans also acknowledge that, pursuant to New Jersey law, they cannot remotely order and have shipped to them any in-state wines. However, they make no complaint about this restriction.

The Winery Plaintiff, Walter Hansel Winery, also cannot establish the requisite injury-in-fact necessary to establish standing to challenge New Jersey's statutes regarding the winery sales to retailers or restaurants, the number of winery salesrooms, the cost of a limited wholesale license or the personal importation restriction. Hansel's owner has testified that his winery has had no trouble obtaining distribution in New Jersey (Tavani cert., Ex. B; Ja351). Furthermore, he testified that his wine has sold out and that he cannot meet the demand for it (Tavani cert., Ex. B, T43,63; Ja355, Ja360). Hansel has stated that it has no interest in setting up winery salesrooms in New Jersey or in obtaining a wholesale license itself in the State (Tavani Cert., Ex. B, Hansel Dep.; Ja360). Moreover, Hansel Winery does not even sell wine at its own premises in California. Thus, Hansel Winery has not proven, or even asserted, a claim regarding New Jersey's personal importation restriction, or any other statutory challenge enumerated by Plaintiffs in this lawsuit.

Plaintiffs' Step 2 brief does not, and indeed cannot, dispute these underlying facts regarding the Plaintiffs in this case (Pb13-17). Instead, Plaintiffs claim that, because they are an out-of-state winery and in-state consumers (ostensibly a seller and buyers of wine), they have the right to challenge state laws regarding interstate commerce, regardless of any specific facts about their particular circumstances (Pb14).³ On the contrary, as demonstrated above, these facts are fundamental to an analysis of standing and starkly reveal no proven, or even asserted, injury-in-fact with regard to New Jersey's statutes, by any of

³Plaintiffs also argue that they have standing by claiming that they are similarly situated to the plaintiffs in Granholm (Pb14). A review of the facts in Granholm shows that this is incorrect. In the Michigan and New York statutes at issue in Granholm some wineries were allowed to ship and/or deliver wine, in contrast to New Jersey's across-the-board ban on shipping and delivery of wine. Thus the plaintiffs in Granholm could demonstrate an injury, unlike Plaintiffs in the instant case. The same distinction occurs with regard to the plaintiffs in Bridenbaugh v. Freeman-Wilson, 227 F. 3d. 848 (7th Cir. 2000), another case cited by Plaintiffs (Pb15), since the statute in Indiana was also markedly different from that in New Jersey.

the Plaintiffs, regarding winery retail sales, the number of winery outlets, wholesaler fees and personal importation of alcohol from out-of-state.

For all of these reasons, the District Court erred in finding the injury-in-fact predicate to establishing the requisite standing for any of the Plaintiffs to challenge New Jersey's statutes relating to winery sales at retail, the number of winery outlets, the fees charged for wholesale licenses or the personal importation restriction. The arguments in Plaintiff's Step 2 brief do nothing to refute this. Plaintiffs simply cannot show that they have suffered an injury-in-fact that is concrete and particularized regarding their challenges to these statutes. Because no standing has been established for any of these claims, the District Court erred in considering them, and the Third Circuit Court of Appeals must reverse this finding and dismiss these claims.

2. The District Court erred by finding standing with regard to New Jersey's direct shipping ban.

An analysis of standing principles with regard to Plaintiffs' core complaint, that New Jersey's law banning the direct shipping of wine, either by in-state or out-of-state wineries, is unconstitutional, also demonstrates that the District Court erred in finding standing in this case. With regard to the first prong of the standing test, the evidence presented by the Consumer Plaintiffs that they have an injury-in-fact regarding New Jersey's ban on direct shipping is scarce, at best.

For example, Consumer Plaintiffs, the Friedmans, complain that they would like to purchase Kosher wine that they have viewed on the internet (Redish cert., Ex. F, Inter. #8, Ja120). They admit that they have never checked to see if the out-of-state Kosher wines they seek are among the approximately 340 Kosher wines available in New Jersey (Tavani cert., Ex. F, Interrog. #7; Ja391-392 and Fischer cert., ¶32; Ja328). The Friedmans' real complaint is that New Jersey law will

not let them buy wine over the internet and have it delivered, because they do not want to leave their home to shop for it (Tavani cert., Ex. F, Interrog. #7; Ja391-392).

Even if the Court finds that, because New Jersey prohibits direct shipping of all wine (both in-state and out-of-state), somehow the Consumer Plaintiffs' expressed desire to obtain wines by ordering them remotely and having them shipped to their homes, rises to the level of an injury-in-fact, they cannot satisfy the remaining prongs of the Supreme Court's standing test. No facts were presented in this matter evidencing the remaining elements of constitutional standing, that is, that any injury was "fairly traceable" to the defendant's challenged action and which a "favorable judicial decision" will likely prevent or redress. Summers, 555 U.S. at __, 129 S.Ct. at 1149.

Plaintiffs do not demonstrate any causal connection between their claimed inability to purchase Kosher or allocated wines and New Jersey's law, since there is no

unconstitutional preference for in-state wine. The Friedmans' claim that they cannot obtain certain Kosher wines they have viewed on the internet does not prove preferential discriminatory treatment of out-of-state in favor of in-state Kosher wines. There simply are no Kosher wines produced in-state (Fischer cert. ¶6, Ja326). In addition, even if there were, such an in-state Kosher wine producer would not be allowed to sell remotely and ship directly to the Friedmans (which is the remedy they seek), because New Jersey's direct shipping ban is across-the-board.

The Freemans' complaint that they cannot obtain certain out-of-state wine by direct shipping is similarly unrelated to a disparity in treatment between in-state and out-of state wines. New Jersey law bans direct shipping of all wine, both in-state and out-of-state. The Freemans' desire to have wineries engage in remote sales and direct shipping lacks the requisite predicate legal right or privilege insofar as no winery, foreign or domestic, has the right to ship or

otherwise deliver wine to consumers in New Jersey.⁴

Nor can Plaintiffs demonstrate that their challenge to New Jersey's direct shipping ban would be redressable by a change in New Jersey law, the third prong of the constitutional standing analysis set out in Lujan and Summers. They have adduced no evidence that a modification of the statutes at issue will cause more Kosher or highly allocated wines to suddenly become available. Indeed, Plaintiff Hansel Winery, an out-of-state vineyard selling highly sought-after wine typical of that desired by the Consumer Plaintiffs, has testified in this case that it has sold out of wine and cannot meet consumer demand (Tavani Cert., Ex. B, T43, 63). This economic reality is unrelated to New Jersey law.⁵

⁴Clearly, the Consumer Plaintiffs' claim to delivery of alcohol expresses a desire for which no corresponding right exists. The State of New Jersey has the absolute authority to ban delivery, or even the sale of alcohol in its entirety.

⁵Moreover, Plaintiffs are not entitled to create a direct shipping right for out-of-state wineries when none exists for in-state wineries. That is, a judicial decision cannot function as legislation to eliminate New Jersey's duly enacted statutory ban. The Court

Thus, the factual record in this matter proves that none of the Plaintiffs have established the constitutional standing required in Lujan and Summers. The Winery Plaintiff has shown no evidence of any particularized, concrete or redressable injury suffered as a result of any of the state statutes enumerated in Plaintiffs' complaint. If the District Court had considered the Winery Plaintiff's standing, it could only have concluded that this Plaintiff lacks standing.

Similarly, the evidence demonstrated that the Consumer Plaintiffs also cannot meet the burden of proving the three prongs of constitutional standing. Even if this Court finds that an unfulfilled desire to remotely purchase wine constitutes an injury-in-fact, the Consumer Plaintiffs cannot meet the remaining two prongs of the standing test. They simply cannot

cannot rewrite the law altogether to provide for direct shipping. See New England Power Co. v. New Hampshire, 455 U.S. 331, 343 (1982) (Court has no authority to rewrite legislation, but must construe it as written, and as legislative history indicates). See also Beau v. Moore, 2007 U.S. Dist. LEXIS 83659 at 8-9.

establish that their claimed injury was fairly traceable to an unconstitutional preference for in-state wine caused by New Jersey statutes, nor can they prove any redressable injury. For all of these reasons, the Court must reverse the District Court's finding that standing was established, and dismiss this lawsuit in its entirety.

B. PLAINTIFFS HAVE NOT ESTABLISHED PRUDENTIAL STANDING.

Consideration of the prudential components of standing further illustrates Plaintiffs' lack of standing. These components address the need for judicial restraint, thereby constituting a "supplemental aspect of the basic standing analysis." Oxford Assocs., 271 F.3d at 145.

As Director Fischer set out in detail in his Step 1 brief, Plaintiffs have not met any of the prongs of the three-part test for prudential standing (ABCb37-40). Plaintiffs have not proven a personal legal injury, nor can they show a sufficient stake in the controversy to come within the zone of interests intended to be

protected by the statute (prongs one and three of the prudential standing test). As noted above, Plaintiffs cannot demonstrate that they are coming into court based on any substantial personalized injury. Instead, Director Fischer has pointed out (ABCb38) that Plaintiffs are in reality furthering the interests of the nationwide litigation challenging direct shipment bans pursued by their attorneys.

Most importantly, prudential standing principles, especially prong two of the three-part analysis, urge the Court to refrain from adjudicating abstract questions of wide public significance amounting to generalized grievances. As Defendant Fischer argued in his Step 1 brief, this case is the very kind of public debate that is designed for state legislatures. Indeed, the New Jersey Legislature recently spoke on this very issue in 2004, affirming its desire to ban direct shipping. Plaintiffs' attorneys, unhappy with this legislative result, seek to overrule this declaration through litigation. However, as demonstrated above, Plaintiffs are precluded by the

redressability element of standing from asking the judiciary to rewrite the statute by eliminating New Jersey's across-the-board direct shipping ban and creating the opposite statutory privilege, i.e., enabling out-of-state wineries to make remote sales and direct shipments.

In essence, this case challenges New Jersey's choices as to how to regulate alcoholic beverages within its borders, as part of a nationwide effort to impose direct shipping through litigation in states, such as New Jersey, which have banned it through duly enacted legislation. Supreme Court jurisprudence, including Granholm v. Heald, 544 U.S. 460 (2005), continues to recognize the dominance of the states' role in regulating and controlling the flow of alcohol across their borders for consumption by their citizens. In the area of alcoholic beverage law, attorney-manufactured litigation, such as that here before the Court, must not be permitted to trump the voice of the state legislatures.

Plaintiffs bear the burden of establishing the elements of standing, and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof. FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834 (3d Cir. 1996). The facts adduced in this case prove that Plaintiffs cannot establish constitutional or prudential standing.

For all of these reasons, the Third Circuit Court of Appeals must reverse the District Court's ruling granting standing to Plaintiffs and dismiss this matter in its entirety. Even if this Court finds that the Consumer Plaintiffs have standing, their only issue is with New Jersey's prohibition on direct shipping. Therefore, the remainder of this matter must be dismissed, and Judge Hayden's ruling on direct shipping must be affirmed, since it comports with the facts adduced and relies upon well-settled law.

POINT II

THIS COURT MUST AFFIRM THAT PORTION OF THE DISTRICT COURT'S RULING UPHOLDING THE CONSTITUTIONALITY OF NEW JERSEY'S STATUTORY BAN ON DIRECT SHIPPING BY WINERIES, SINCE IT COMPORTS WITH THE FACTS ADDUCED, AND RELIES UPON WELL-SETTLED LAW.

If this Court finds that the Consumer Plaintiffs have standing, their sole claim, which concerns New Jersey's prohibition on direct shipping, must be rejected. As discussed in Defendant Fischer's Step 1 brief (ABCb43-49), New Jersey's alcoholic beverage law, including the State's ban on direct shipping by all wineries, passes constitutional muster because it evenhandedly regulates the flow of wine to state residents by both in-state and out-of-state wineries (ABCb43-49).

In the opinion below, the District Court affirmed the constitutionality of New Jersey's statutory scheme on the direct shipping issue, finding that it meets the standards set out by the Supreme Court in Granholm v. Heald, 544 U.S. 460 (2005), and complies with the

requirements of the dormant Commerce Clause.

Consequently, if this Court decides to consider the direct shipping issue, this portion of Judge Hayden's opinion must be affirmed, since it comports with the facts adduced in the record below and relies upon well-settled law.

A. NEW JERSEY'S STATUTORY BAN ON DIRECT SHIPPING BY WINERIES IS EVENHANDED, FACIALLY NEUTRAL, AND CONSISTENT WITH THE SUPREME COURT'S COMMERCE CLAUSE DECISIONS.

Director Fischer's Step 1 brief (ABCb10-20) and his submitted Certification (Ja318-342) contain a detailed discussion of how New Jersey's statutory scheme operates. As the District Court noted in the opinion below, the evidence presented by Director Fischer unequivocally proves that there is no difference in the treatment of in-state and out-of-state wineries with regard to the ban on direct shipping by wineries (Ja318). Director Fischer unambiguously indicated in his Certification that in-state wineries cannot sell over the internet and may not ship wine to New Jersey consumers. Director Fischer also affirmed that in-

state wineries cannot deliver wine to in-state consumers (Fischer Cert., ¶22; Ja326). Thus, the only delivery by wineries authorized by New Jersey law is that allowed by all manufacturers, that is, delivery of goods to wholesalers and retailers, but not to consumers. See N.J.S.A. 33:1-28.

In addition, Director Fischer has set out in detail the facially neutral language of New Jersey's statutory ban and the legislative history behind it in his Step 1 brief (ABCb14-16). There is no question that this law treats both in-state and out-of-state wineries identically; that is, neither can ship or otherwise deliver wine directly to New Jersey consumers. The District Court agreed.

Plaintiffs' Step 2 brief fails to address the District Court's rejection of their challenge to New Jersey's direct shipping ban (Pb41-44). Plaintiffs ignore the facially neutral language employed in New Jersey's statutory ban of direct shipping and instead cite to a series of Supreme Court dormant Commerce Clause cases regarding statutes which evidenced facial

discrimination, discriminatory effect and economic protectionism, in an effort to convince the Court to view New Jersey's direct shipping ban with strict scrutiny (Pb17-23).⁶ Since these cases involve statutes dissimilar to New Jersey's facially neutral law, this discussion does nothing to further Plaintiffs' argument.

The appropriate inquiry for determining whether state laws violate the Commerce Clause, as the District Court noted in the opinion below, is whether they "mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later." Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon, 511 U.S.

'Director Fischer refers the Court to pages 43 to 49 of his Step 1 brief (ABCb43-49) for a detailed discussion of why New Jersey's law is not subject to strict scrutiny and complies with the principles set out in Granholm v. Heald. Similarly, American Trucking Association v. Whitman, 437 F. 3d 313 (3d Cir. 2006), also cited by Plaintiffs for strict scrutiny principles (Pb11), is inapplicable. In that case, the Court found the regulations at issue to be facially discriminatory, in contrast to the facially neutral statute in the instant case.

93, 99 (1994) (District Court opinion, page 6; Ja14).

The District Court continued, "where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Pike v. Bruce Church, 397 U.S. 137, 142 (1970) (District Court opinion, page 7; Ja15).

Utilizing these principles, the District Court upheld New Jersey's ban on direct shipping by wineries, opining that Plaintiffs' position that New Jersey discriminates against out-of-state wineries with regard to direct shipping was "without merit" (District Court opinion, page 18; Ja26).⁷ In its validation of New Jersey's ban on direct shipping, the District Court

⁷The District Court described the issue in this matter as "whether New Jersey's statutory scheme deprives wineries 'of their right to have access to the market of other States on equal terms,'" paraphrasing the guiding concern expressed by the Supreme Court in Granholm, 544 U.S. at 473 (District Court opinion at page 7; Ja15).

noted that "New Jersey has chosen to exercise its broad power under the Twenty-first Amendment to disallow direct shipment of wine on evenhanded terms, citing its concerns that direct sales undermine the state's three-tier statutory system" (District Court opinion, page 17; Ja25).

In Granholm, the Supreme Court's most recent Commerce Clause case discussing alcoholic beverages, the Court recognized that states have "broad power to regulate liquor under Sec. 2 of the Twenty-first Amendment." Granholm, 544 U.S. at 493. See also California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980). Moreover, in Granholm, the Court made equally clear that the Twenty-first Amendment affords the states plenary authority to regulate the transportation and importation of alcohol through non-discriminatory, even-handed laws. "State policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent." Id. at 489.

The statutory ban on direct shipping in New Jersey is imposed equally on both in-state and out-of-state wineries. Thus, this statute is even-handed, facially neutral, and non-discriminatory. As the District Court found, it complies with all of the standards set out in Granholm, and thus must be affirmed by this Court.

B. NEW JERSEY'S STATUTORY BAN ON DIRECT SHIPPING BY WINERIES IS NOT DISCRIMINATORY IN PRACTICAL EFFECT.

As noted above, because New Jersey's statutory ban on direct shipping by wineries is facially neutral, it passes constitutional muster and is not subject to a strict scrutiny analysis. In their Step 2 brief, Plaintiffs attempt to persuade the Court that New Jersey's statutory ban should be subject to strict (also referred to by Plaintiffs as "heightened") scrutiny. Plaintiffs' claim is that New Jersey's law unconstitutionally discriminates against interstate commerce through "practical effect."

Plaintiffs premise this claim on their contention that New Jersey's facially neutral statutory ban on direct shipping discriminates against out-of-state

wineries, because the State permits in-state wineries to conduct face-to-face on-premises sales and deliver wine to consumers in their own vehicles (Pb34-41).

Plaintiffs are wrong on both the law and the facts.

Plaintiffs assertion in their Step 2 brief that wineries can deliver wine to consumers "in their own vehicles" (Pb35) is simply inaccurate. The plain language of New Jersey law and the evidence adduced proves that the only delivery by wineries authorized by New Jersey law is that allowed by all manufacturers, that is, delivery of goods to wholesalers and retailers. See N.J.S.A. 33:1-28 and Fischer cert. ¶22 (Ja326). Thus, Plaintiffs' claim that New Jersey law discriminates against out-of-state wineries in practical effect, because only in-state wineries can personally deliver wine to consumers "in their own vehicles," is without support in either law or fact and must be rejected.

Plaintiffs' claim that New Jersey's facially neutral statutory ban on direct shipping discriminates against out-of-state wineries in practical effect,

because the State permits in-state wineries to conduct face-to-face on-premises sales, is likewise erroneous. The foundation of this practical effect argument relies upon Plaintiffs' incongruous comparison of sales made remotely and shipped directly with on-premises (over-the-counter) sales. By comparing unrelated rights, instead of discussing direct shipping and on-premises sales in their appropriate context, Plaintiffs attempt to insert into New Jersey law a constitutional infirmity which does not exist, in furtherance of their practical effect argument.⁸ This argument is without merit and must be rejected by this Court.

⁸This same flaw in Plaintiffs' argument was highlighted by the District Court in Baude v. Heath, 2007 U.S. Dist. LEXIS 64444 (S.D. Ind. 2007). In Baude, the court criticized a similar contention by Plaintiffs' counsel (the same counsel appearing before this Court). The court noted that, by comparing direct mail and over-the-counter sales, Plaintiffs were attempting to magnify any disparate impact caused by the State's regulations, since over-the-counter sales, by their very nature, require a physical presence. The court rejected this comparison, finding that "[d]irect mail sales and on-premises sales are very different operations, employing different marketing methods and, to some extent, aimed at different markets." Baude at 27.

Statutes, such as that in New Jersey, which permit in-state wineries to conduct face-to-face on-premises sales are neither protectionist nor discriminatory and do not violate the dormant Commerce Clause. For example, New Jersey's law does not prevent out-of-state wineries from making on-premises sales to New Jersey consumers at their premises in their home states. In-state and out-of-state wineries have similar on-premises sales rights from the perspective of New Jersey law. Consequently, on-premises laws do not impose any burdens on interstate commerce, much less any burdens that are excessive in relation to a state's legitimate, local public interests. See Brooks v. Vassar, 462 F.3d 341 (4th Cir. 2006) cert. den., 127 S.Ct. 2251 (2007) (Fourth Circuit upheld the Commonwealth of Virginia's import restrictions against a Commerce Clause challenge).⁹

⁹States likewise have legitimate reasons for permitting on-premises retailing by in-state wineries, such as ensuring proper age and lack of intoxication at time of purchase, promoting tourism, and creating a tax base. In fact, the federal government has specifically endorsed state regulation and licensing of the sale of

Moreover, nothing in Granholm or any of the Supreme Court's other dormant Commerce Clause decisions supports the claim that states have an affirmative obligation under the dormant Commerce Clause to create a level economic playing field for all potential market participants, no matter how geographically remote, or to ensure that out-of-state producers have the same economic opportunities as in-state producers. While the Granholm decision prohibits states from enacting discriminatory or protectionist statutory barriers to interstate commerce, it does not place an affirmative obligation on states to ensure that out-of-state wineries, no matter where they are geographically located, have the same economic opportunities as local wineries. See Granholm, 544 U.S. at 472.

The Supreme Court reiterated this principle in a opinion denying a Commerce Clause challenge to two New York county waste flow ordinances, stating that the

alcoholic beverages as being "crucial to preventing illegal access to alcohol by persons under 21 years of age." STOP Act, Pub. L. No. 109-422, Sec. 2(b)(7), 120 Stat. 2890 (2006).

Commerce Clause does not dictate "the particular structure or method of operation of a market." United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 344, 127 S.Ct. 1786, 1796 (2007), citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978).

Other courts have considered the constitutionality of face-to-face sales by in-state wineries and rejected similar Commerce Clause arguments. In Cherry Hill Vineyard v. Baldacci, 505 F. 3d 28, 38 (1st Cir. 2007), the court upheld Maine's across-the-board direct shipping ban and face-to-face sales privileges statutes. The court held that the effects of geography alone do not constitute unconstitutional discrimination, stating, "An effect is not discriminatory, in violation of the dormant Commerce Clause, if it results from natural conditions." Baldacci, 505 F. 3d. at 37. The Arkansas District Court also upheld a state statute allowing the sale of small farm winery wine on the premises of the wineries located in-state. See Beau v. Moore, 2007 U.S. Dist.

LEXIS 83659 (E.D. Ark., November 1, 2007).¹⁰

Even more fatal to Plaintiffs' argument is the fact that these decisions in Maine and Arkansas, which rejected Plaintiffs' challenges to the face-to-face requirements, did so in the context of state law which also banned the direct shipment of wine. In fact, the court in Arkansas chided the plaintiffs in the Beau case for attempting to link their goal of direct shipping with a challenge to the state's on-premises statute, stating:

Even if [the statute permitting on-premises winery sales in the state] were eliminated, Arkansas would continue to prohibit what Plaintiffs seek to gain in this lawsuit - a market for direct-shipment sales to Arkansas consumers.... Arkansas law

¹⁰Several other courts have recently upheld the constitutionality of winery statutes, similar to that of New Jersey, which allow wineries to sell directly to consumer in a face-to-face transaction. Baude v. Heath, 538 F.3d 608 (7th Cir. 2008) (upholding face-to-face sales at wineries in Indiana); Black Star Farms v. Oliver, 544 F. Supp. 2d 913 (D. Ariz. 2008) (upholding in-person requirement in Arizona); but see Cherry Hill Vineyards v. Lilly, 553 F.3d 423 (7th Cir. 2008) (court invalidated Kentucky's in-person purchase requirement; however, that requirement was tied to a direct shipping privilege not present in New Jersey).

contains no provision allowing in-state or out-of-state wineries, large or small, to ship wine to the doorsteps of Arkansas consumers, and this Court has no authority to write such a provision into state law. [Beau v. Moore, 2007 U.S. Dist. LEXIS 83659 at 8-9].

Consequently, as the Supreme Court did in the Oneida-Herkimer case, this Court must reject Plaintiffs' assertion of "strict scrutiny" for evenhanded economic legislation passed under the auspices of a state's police powers. Oneida-Herkimer, 550 U.S. at 347, 127 S.Ct. at 1798. These powers have even greater force in the field of alcohol regulation, where states have unique and plenary authority under the Twenty-first Amendment to regulate the importation and distribution of alcohol, including undisputed authority to ban mail order and internet sales, as New Jersey has done. In fact, the Supreme Court in Oneida-Herkimer specifically deferred to the states and their electorates on the wisdom of their laws, as long as they do not run afoul of constitutional principles. The Court stated that the Commerce Clause "does not

elevate free trade above all other values." Id.

For all of these reasons, if this Court finds that the Consumer Plaintiffs have standing and considers their sole claim, which concerns New Jersey's prohibition on direct shipping, the Court must affirm the analysis set forth by the District Court. This analysis rejected Plaintiffs' strict scrutiny arguments and found that New Jersey's facially neutral, evenhanded statutory ban on direct shipping of wine passes constitutional muster. Consequently, if the issue of direct shipping is considered by the Third Circuit Court of Appeals, this Court must affirm that portion of the District Court's opinion upholding the constitutionality of New Jersey's statutory ban on direct shipping, and Plaintiffs' challenge to this law must be rejected.

POINT III

THIS COURT MUST AFFIRM THE REMAINING PORTIONS OF THE DISTRICT COURT'S RULING UPHOLDING THE CONSTITUTIONALITY OF NEW JERSEY'S WINERY STATUTES, AND REJECT THE DISTRICT COURT'S ERRONEOUS FINDINGS ON WINERY SALESROOMS AND WHOLESALE LICENSING FEES.

As noted above, Plaintiffs have failed to establish the requisite standing to challenge New Jersey's alcoholic beverage statutes regarding wineries.

However, if this Court finds it appropriate to consider the remaining aspects of the District Court's ruling, it must affirm those portions of the opinion upholding the constitutionality of New Jersey's winery statutes, and reject the District Court's erroneous findings regarding winery salesrooms and wholesale licensing fees.

- A. THE DISTRICT COURT'S RULINGS REGARDING ON-PREMISES SALES, WINERY SALES AT RETAIL, AND PERSONAL IMPORTATION CORRECTLY RECOGNIZED NEW JERSEY'S EVENHANDED REGULATION OF THE FLOW OF WINE TO STATE RESIDENTS AND MUST BE AFFIRMED.

Director Fischer refers the Court to pages 49-55 of his Step 1 brief for a detailed analysis of the

District Court's rulings regarding on-premises sales, winery sales at retail, and the State's personal importation statute (ABCb49-55). As indicated by Director Fischer, the District Court's opinion ruled that, with some exceptions, New Jersey's law passes constitutional muster and thus denied Plaintiffs' request that it mandate direct shipping.

In their Step 2 brief, Plaintiffs do not dispute that "the District Court got the basic principle right," that is, "if a state statute discriminates against out-of-state wineries and gives favorable treatment to in-state wineries, it violates the Commerce Clause" (Pb41). Plaintiffs disagree, however, with the District Court's rulings regarding on-premises sales, winery sales at retail, and New Jersey's personal importation statute, claiming that the District Court erred by upholding the constitutionality of these statutes. Plaintiffs' arguments are without merit.

With regard to New Jersey's statute permitting on-premises sales and winery sales at retail, the District

Court discounted Plaintiffs' assertion that New Jersey's winery licensing provisions authorize in-state wineries to sell wine directly to New Jersey consumers, while out-of-state wineries must route their products through a separate wholesaler. Instead, the District Court held that New Jersey's statutes survived Plaintiffs' challenge.

Although all parties concede that the District Court made several factual mistakes regarding the operation of New Jersey's regulatory process (ABCb48-61, Pb41-43 and Ib48-54), including erroneously concluding that the wholesaler salesroom in N.J.S.A. 33:1-11 was congruent with the winery outlet salesrooms in N.J.S.A. 33:1-10,¹¹ the District Court was correct in its holding that New Jersey's on-premises sales statute passes constitutional muster. This is because, in New Jersey, there is no discrimination under the Commerce Clause with regard to on-premises sales by wineries.

¹¹See Director Fischer's Step 1 brief, pages 56-61, for a detailed discussion of the District Court's error (ABCb56-61).

All wineries, both in and out-of-state, are subject to on-premises sales requirements and cannot deliver or ship wine in New Jersey to a consumer (Fischer cert., ¶25; Ja327). The facts adduced in this matter demonstrate that New Jersey's winery salesrooms are, in effect, remote extensions of the plenary and farm winery premises. They are merely outlets, where a winery is licensed to make face-to-face on-premises sales, but not to ship or otherwise deliver any of the wine sold (Fischer cert., ¶20; Ja326). Out-of-state wineries, such as Plaintiff Hansel Winery, are also permitted to open and operate their own on-premises locations in their home states. See, for example, CA Bus. & Prof. Code, Sec. 23358, with regard to Hansel Winery. Thus, out-of-state wineries are free to sell wines to consumers who visit their wineries, just as New Jersey wineries are allowed to do.¹²

¹²In their Step 2 brief, Plaintiffs erroneously assert that New Jersey prohibits an entity "from holding licenses in both the wholesale and retail tiers" (Pb6). This is incorrect. An out-of-state winery who is licensed to sell at retail from its premises, is not prohibited from holding a license in its home state and a New Jersey Limited Wholesale License (Fischer cert., ¶16; Ja324).

As explained in detail in Point II above, since New Jersey's statute permitting on-premises sales for wineries is based on sound constitutional principles, Plaintiffs' challenge to this statute must be rejected, and that portion of the District Court's ruling upholding on-premises sales, must be affirmed.

In their Step 2 brief, Plaintiffs also dispute the District Court's ruling that New Jersey's personal importation statute, N.J.S.A. 33:1-2, is constitutional (Pb42). Plaintiffs contend that the reciprocity provision in N.J.S.A. 33:1-2 invalidates the statute. Furthermore, Plaintiffs object to the District Court's reliance on Director Fischer's statement that New Jersey does not prevent personal importation from states that have not enacted reciprocity statutes (Fischer cert., ¶6; Ja321). They argue that the District Court's consideration of Director Fischer's factual submission on this point is contrary to law, citing Conchatta v. Miller, 458 F. 3d 258 (3d Cir. 2006). Plaintiffs' reliance on Conchatta is misplaced for several reasons.

First, Conchatta was a case involving First Amendment rights, not the dormant Commerce Clause. In Conchatta, Pennsylvania asserted that it does not enforce its statute prohibiting lewd activities in liquor licensed venues against legitimate theatrical or concert performances. The Third Circuit stated in that instance that “[p]ast practice does not constitute a narrowing construction because it does not bind the enforcement agency, which could, at some time in the future, decide to target a broader range of establishments.” Conchatta, 458 F. 3d at 265. The Third Circuit noted that it based this reasoning on a First Amendment consideration, that is, the possibility that expanded enforcement creates a chilling effect, citing Virginia v. Hicks, 539 U.S. 113, 119 (2003).¹³

¹³Moreover, this interpretation of Hicks in Conchatta appears to be in direct conflict with the Supreme Court’s longstanding decision regarding reliance on past agency practice in City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 770, 108 S.Ct. 2138, 2151, 100 L.Ed. 2d 771, 791 (1988). In Lakewood, the Supreme Court found that a well-established practice is one where “a well understood and uniformly applied practice has developed that has virtually the force of a judicial construction.” The difference in

As explained below, the facts in the record here do not demonstrate the possibility of a chilling effect, but instead, prove its opposite.

The evidence presented in this case shows that the Consumer Plaintiffs have made no claim that they have been prevented from purchasing wine from out-of-state based on New Jersey's personal importation statute (see Point I, *infra* page 10). On the contrary, the Freemans clearly state that they have been able to purchase and bring home bottles of wine from various out-of-state wineries without any problems (Tavani cert., Ex. I, ¶8; Ja416). The Friedmans have not tried to do so. Moreover, Hansel Winery has made no claim that N.J.S.A. 33:1-2 has prevented his customers from bringing wine into New Jersey. Thus, there has been no allegation that New Jersey's personal importation statute, or its unenforced reciprocity provision, has in any way harmed

interpretation may be explained by distinguishing the type of case involved. Hicks and Conchatta were First Amendment overbreath cases, where there is a fear of a potential chilling effect. In contrast, Lakewood dealt with a prior restraint issue, more akin to the instant matter.

or injured any of the Plaintiffs in this matter.

Moreover, there is no question that New Jersey has never enforced the reciprocity provision in N.J.S.A. 33:1-2, and does not intend to do so (Fischer cert., ¶6; Ja326). Indeed, as the Supreme Court has pointed out in Granholm, such laws may be questionable from a Commerce Clause standpoint. Granholm, 544 U.S. at 473. Historically, the New Jersey Division of Alcoholic Beverage Control has not enforced regulations deemed to be unconstitutional. For example, A.B.C. Bull. 2447, Item 1, October 20, 1986, announced to the industry that an opinion from the Attorney General declared that the State's Price Affirmation regulation was deemed unconstitutional and thus would not be enforced (ABCa1). This is in harmony with the Third Circuit's decision in Woodland Private Study Group v. NJ DEP, 846 F. 2d. 921 (1988), where the Court affirmed "judicial surgery" by the New Jersey Supreme regarding an unconstitutional provision in New Jersey's Spill Act. See also In re Kimber Petroleum, 110 N.J. 69 (1988) (In appropriate cases, a court has the power to engage in

"judicial surgery" or the narrow construction of a statute to free it from constitutional doubt or defect). Thus, it is logical that the State would not enforce a questionable reciprocity statute. Indeed, the evidence presented by Director Fischer proves this.

Finally, even if this Court agrees that New Jersey's reciprocity provision in N.J.S.A. 33:1-2 is unconstitutional, the correct procedure would be to order that this isolated provision be stricken, not to subject the entire statutory scheme to a strict scrutiny analysis, as Plaintiffs suggest.

Consequently, Plaintiffs' arguments that New Jersey's personal importation statute is unconstitutional, because it contains an unenforced reciprocity provision, and that such an infirmity should subject New Jersey's alcoholic beverage laws to strict scrutiny, are without merit.

For all of these reasons, as well as those already submitted in Director Fischer's Step 1 brief, if considered by this Court, the District Court's rulings regarding on-premises sales, winery sales at retail and

personal importation, correctly recognize New Jersey's evenhanded regulation of the flow of wine to state residents and must be affirmed.

B. THE DISTRICT COURT'S DECISION TO STRIKE DOWN NEW JERSEY'S WHOLESALE LICENSE FEE STRUCTURE AND WINERY SALESROOM PRIVILEGE WAS FLAWED AND MUST BE REVERSED.

Director Fischer refers the Court to pages 49-55 of his Step 1 brief for a detailed analysis of the District Court's rulings regarding New Jersey's wholesale license fee structure and winery salesroom privilege (ABCb49-55). As Director Fischer pointed out, the District Court found that New Jersey's statutory provisions authorizing appropriately licensed wineries to sell at wholesale directly to restaurants and other state licensed retailers confer the same rights and privileges to in-state and out-of-state wineries (District Court opinion, page 9; Ja17).¹⁴

¹⁴In their Step 2 brief, Plaintiffs continue to erroneously assert that a New Jersey Limited Wholesale licensee is required to have a "separate wholesaling business" (Pb6) or a "wholesaler operation" (Pb2) in New Jersey. As Director Fischer stated in his Certification, no warehouse or other facility is required to obtain a Limited Wholesale License in New

Although recognizing this, the District Court erroneously compared the cost of the limited wholesaling privileges afforded to in-state plenary and farm winery licensees against the cost of the expansive privileges encompassed in the State's wholesaler licenses, concluding that the State charged in-state wineries a lower fee for wholesaling privileges (\$938 for a plenary winery license vs. \$1,875 for a limited wholesale license) (District Court opinion, page 11; Ja19). This reading of the statute is incorrect and does not create a valid constitutional comparison. In addition, the District Court struck down the entirety of New Jersey's wholesale licensing fee structure, invalidating fees which had no connection to the controversy before it.

Plaintiffs' Step 2 brief does not dispute that the District Court made this error. In fact, Plaintiffs agree that the District Court committed several errors in the opinion below (Pb41). Because the factual

Jersey (Fischer cert., ¶16; Ja324). Thus, there is no additional requirement for out-of-state wineries which obtain a Limited Wholesale License to maintain a physical presence in New Jersey.

record clearly indicates that the District Court was mistaken in that portion of its ruling regarding New Jersey's wholesale licensing fees, if the Court considers this issue, it must reverse the District Court ruling striking down N.J.S.A. 33:1-11(1), N.J.S.A. 33:1-11(2a), N.J.S.A. 33:1-11(2b) and N.J.S.A. 33:1-11(2c).

In addition, as Director Fischer explains in his Step 1 brief, the District Court's invalidation of N.J.S.A. 33:1-10(2a), the State's law which authorizes a plenary or farm winery licensee to open up to six salesrooms, was also in error. Again, Plaintiffs' Step 2 brief does not dispute this. As noted by Director Fischer, a review of the mechanics of New Jersey's licensing system, in light of the constitutional requirements of the dormant Commerce Clause, demonstrates that the District Court erred and the State's winery salesrooms provision is constitutional (ABCb56-61). Consequently, if the Court considers this issue, it must reverse the District Court's invalidation of N.J.S.A. 33:1-10(2a).

POINT IV

IF THIS COURT FINDS ANY STATUTORY INFIRMITY, IT SHOULD ALLOW THE NEW JERSEY LEGISLATURE TO FASHION AN APPROPRIATE REMEDY.

Plaintiffs have failed to establish the requisite standing to challenge New Jersey's alcoholic beverage statutes regarding wineries, and therefore, this Court should dismiss this matter in its entirety. If the Court finds it appropriate to consider any aspects of the District Court's ruling, it must affirm the portions of the opinion upholding the constitutionality of New Jersey's winery statutes, and reject the District Court's erroneous findings regarding winery salesrooms and wholesale licensing fees.

However, in the event that this Court finds that any section of New Jersey law violates the Commerce Clause, a remedy other than the injunction ordered by the District Court would be more appropriate. Director Fischer refers the Court to pages 62-67 of his Step 1 brief for a detailed discussion demonstrating why allowing the New Jersey Legislature an appropriate

interval to address the problem is the proper remedy if any section of New Jersey's alcoholic beverage law is declared unconstitutional (ABCb62-67).

As Director Fischer indicated (ABCb50-56), the District Court declared unconstitutional and permanently enjoined several sections of New Jersey's Alcoholic Beverage Control Act: N.J.S.A. 33:1-10(2a); N.J.S.A. 33:1-11(1); N.J.S.A. 33:1-11(2a); N.J.S.A. 33:1-11(2b) and N.J.S.A. 33:1-11(2c). These sections regulate the collection of fees for all wholesale alcoholic beverage licenses in the State of New Jersey and authorize the operation of outlet salesrooms for New Jersey's plenary winery licensees.¹⁵

With regard to the sections concerning New Jersey's wholesale alcoholic beverage license fees, Plaintiffs correctly point out that all parties agree that in the opinion below, Judge Hayden was mistaken in her understanding of the statute (Pb44). Nevertheless,

¹⁵At this time, enforcement of the Court's injunction has been stayed pending appeal (Order Granting Stay; Ja574).

Plaintiffs suggest that if the District Court's opinion is affirmed, this Court should also affirm the District Court's erroneous remedy. Plaintiffs conclude that, since Judge Hayden enjoined the enforcement of statutes she thought were unconstitutional, this is obviously a proper remedy (Pb45). However, since the District Court's invalidation of the entirety of New Jersey's alcoholic beverage wholesale license fees was overbroad and based on a mistaken understanding of the mechanics of New Jersey's alcoholic beverage licensing system, Plaintiffs' suggestion is illogical, and this Court must not affirm this erroneous remedy.

As Director Fischer explained in his Step 1 brief (ABCb50-56), the District Court's invalidation of the State's wholesale licensing fee provisions was premised on an incorrect comparison of the abbreviated wholesaling rights granted to plenary and farm winery licensees with the expansive rights included with a limited wholesale license. Moreover, the District Court struck down the entirety of New Jersey's wholesale licensing fee structure, invalidating fees

which had no connection to the controversy before it. Specifically, the District Court struck all of the wholesaling fees for the entire alcoholic beverage industry, including those related to the sale of beer (State Beverage Distributor License) and spirits (Plenary Wholesale License) (District Court opinion, page 19; Ja27). Neither of these licenses was ever discussed in the context of Plaintiffs' Complaint, or even mentioned in any of the documents filed with the District Court.

Most importantly, the District Court's remedy invalidating the collection of all alcoholic beverage license fees, if affirmed by this Court, would cause costly consequences for the Division of Alcoholic Beverage Control. As Director Fischer explained in his Step 1 brief (ABCb64), the Division collects wholesale license fees in the amount of approximately \$1.4 million annually (Certification of Director Jerry Fischer in Support of Motion for Stay, ¶6; Ja572). The loss of this revenue will have a dramatic effect on the agency's ability to operate and enforce the directives

of Title 33. For all of these reasons, this Court must not act on Plaintiffs' suggestion that it affirm the District Court's order enjoining the enforcement of New Jersey's alcoholic beverage wholesale licensing fees.¹⁶

As an alternative to their recommendation that this Court affirm the District Court's ruling enjoining New Jersey's statutes, Plaintiffs suggest that this Court vacate the District Court's opinion and instead invalidate different sections of New Jersey law (Pb45-46). The provisions targeted by Plaintiffs are

¹⁶ Although Plaintiffs do not address the section of the Court's order which enjoins N.J.S.A. 33:1-10(2a) in their Step 2 brief, the same reasoning applies. This section, which provides for retail salesrooms operated by New Jersey's wineries, was incorrectly interpreted, and subsequently enjoined, by the District Court. If the District Court's order is not reversed, all of these retail salesrooms will be required to close immediately, without the benefit of any orderly shut-down plan or procedure. New Jersey's wineries are small businesses that predominantly rely upon face-to-face sales at these salesrooms as an integral part of their revenue to maintain their wineries and farming operations (Fischer stay cert., ¶4; Ja571). The absence of these sales will cause untold losses, not only to the State's wineries, but to New Jersey agriculture and the State's tax revenues.

described as (1) the restriction in N.J.S.A. 33:1-10 (2a-2b) requiring winery licensees to own land, or use fruit grown in New Jersey; (2) the restrictions in New Jersey's personal importation section statute, N.J.S.A. 33:1-2; and (3) New Jersey's requirements that alcoholic beverages be transported within the terms of a license, including the transportation of wine by licensees only "in their own vehicles" in N.J.S.A. 33:1-28 (this would be replaced with a provision allowing delivery by common carrier). Plaintiffs do not specifically explain the reasoning behind these suggested statutory changes, and this is a remedy never specifically articulated by Plaintiffs in their previous filings, but it appears that the changes are an attempt to indirectly allow direct shipping by out-of-state wineries. This would be accomplished by allowing both in-state and out-of-state wineries to obtain a New Jersey winery license and to permit all wineries to use common carriers for delivery.

Plaintiffs' newly suggested remedy fails for two reasons. First, since New Jersey's statutory ban on

direct shipping for all wineries, both in-state and out-of-state is constitutionally sound, Plaintiffs' attempt to create a backdoor exception to this ban cannot succeed. Second, Plaintiffs premise this remedy on their erroneous assertion that in-state wineries can deliver wine to customers in New Jersey; thus, they suggest a change to allow all wineries to use common carriers for deliveries.

As explained in detail in every submission by Director Fischer in this litigation, no winery in the State is permitted to deliver wine to consumers (See e.g., Fischer Cert., ¶22; Ja326). The delivery referred to in N.J.S.A. 33:1-28 allows wineries to transport goods to wholesalers and retailers, and to the wineries' own salesrooms. Despite Director Fischer's repeated correction, Plaintiffs continue to make the assertion that in-state wineries can deliver wine to consumers and premise their suggested remedy on this falsehood. They are wrong. Thus, Plaintiffs' alternative suggested remedy, as described in their Step 2 brief, accomplishes nothing and must be rejected by this Court.

Finally, Plaintiffs contest Director Fischer's suggested remedy, which requests that this Court stay any judgment so that the State Legislature may address an unconstitutional infirmity, if the Court determines that any exists. Plaintiffs argue that this remedy is foreclosed by the Third Circuit's decision in Atlantic Coast Demolition & Recycling v. Bd. of Chosen Freeholders of Atlantic County, 112 F. 3d 652, 669-70 (3d Cir. 1997). A review of the Third Circuit's decision in Atlantic Coast Demolition, however, reveals that the situation in that matter was markedly different than the instant case.

In Atlantic Coast Demolition, the Third Circuit overruled a two-year, post-appeal stay issued by the District Court in a controversy revolving around New Jersey's waste flow laws. The Third Circuit noted that the District Court entered this stay without developing a record, ostensibly on the theories advanced by the governmental defendants, which the Third Circuit found were in actuality grounded on the defendants' fear of financial impact. Atlantic Coast Demolition, 112 F. 3d

at 671. The Court denied the stay, dismissing the financial expense arguments offered by the governmental defendants. The reasons for a stay in the instant case, which concerns the regulation of alcoholic beverages, extend far greater than just an economic impact (although such an impact would be severe, as noted above).

Because the statutes under consideration in this matter deal with alcohol, a product subject to pervasive state regulation by virtue of a constitutional delegation of authority, it is imperative that, if this Court finds that the provisions at issue violate the dormant Commerce Clause, the Court must grant a stay to allow the Legislature a sufficient period to act. The Court should be mindful that, without time for the Legislature to act, the State's oversight authority of an entire industry, that of the service of intoxicating liquors to the public, is undermined. As Director Fischer stated in his Step 1 brief (ABCb67), the public interest in ensuring that the State can continue to

enforce its alcoholic beverage laws is clear. See Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (an injunction prohibiting state enforcement activities "seriously impairs the State's interest in enforcing its laws"). Based on the unique nature of the regulation of alcoholic beverages, deference to State government, which is empowered directly by the Twenty-first Amendment, warrants consideration from this Court.

For all of these reasons, the arguments presented by Plaintiffs that the Court should affirm the District Court's remedy enjoining sections of New Jersey's alcoholic beverage law, or in the alternative, create a newly described remedy, must fail. This Court must recognize that, if there is any infirmity within New Jersey's alcoholic beverage law, it should stay any judgment to give the State Legislature an appropriate interval to address the problem.

CONCLUSION

Based on the arguments set forth in his Step 1 brief and this Step 3 brief, Defendant Fischer urges this Court to reverse the District Court's ruling granting standing to Plaintiffs and dismiss this matter in its entirety. If this Court finds that the Consumer Plaintiffs have standing, since their only issue is with New Jersey's prohibition on direct shipping, Director Fischer urges this Court to affirm Judge Hayden's ruling on direct shipping, and dismiss the remainder of the Complaint.

If this Court does not dismiss the remainder of Plaintiffs' case for lack of standing, Director Fischer urges this Court to affirm that part of the District Court's decision upholding the constitutionality of New Jersey's ban on direct shipping and finding that the remainder of New Jersey's laws survive Plaintiffs' challenge, and to reverse that part of the District Court's decision invalidating the State's wholesaling licensing fees and winery salesroom provisions, because a correct interpretation of these provisions

demonstrates that New Jersey law passes constitutional muster. Finally, if the Court finds any infirmity within New Jersey's alcoholic beverage law, it should stay any injunctive judgment to give the State Legislature an appropriate interval to address the problem.

Respectfully submitted,

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

/s/

By: _____
Lisa Hibner Tavani
Deputy Attorney General

Dated: May 21, 2009

STATEMENT OF BAR MEMBERSHIP

I certify that I am a member in good standing of the Bar of the United States District Court of Appeals for the Third Circuit.

By: /s/ Lisa Hibner Tavani
Deputy Attorney General

DATED: May 21, 2009

CERTIFICATION OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

I certify that this brief complies with F.R.A.P. 32(a)(7)(B) in that the principal portions of the brief contain 10,466 words, according to the software program used by the Office of the Attorney General.

By: /s/ Lisa Hibner Tavani
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DATED: May 21, 2009

CERTIFICATION OF COMPLIANCE WITH L.A.R. 31.1(c)

I certify that this brief complies with L.A.R. 31.1(c), in that the text of the paper copies of this brief and the text of the PDF version of this brief filed electronically with the Court today are identical.

By: /s/ Lisa Hibner Tavani
Deputy Attorney General

DATED: May 21, 2009

CERTIFICATION OF COMPLIANCE WITH L.A.R. 31.1(c)

I certify that this brief complies with L.A.R. 31.1(c), in that prior to it being e-mailed to the Court today, the PDF file was scanned and found to be free from computer viruses. The virus software that was used in Computer Associates eTrust InnoculateIT 6:0.96.

By: /s/ Lisa Hibner Tavani
Deputy Attorney General

DATED: May 21, 2009

CERTIFICATION OF SERVICE

In addition to filing electronically, I certify that an original and ten paper copies of this reply brief with Supplemental Appendix were sent to the Court today for filing, by UPS overnight delivery in an envelope addressed as follows:

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