In the United States Court of Appeals
for the Seventh Circuit
-

No. 25-2967

TIMOTHY FREEHAN, JOSEPH GRODY and FULL PULL WINES, LLC,
Plaintiffs - Appellants,

vs.

CYNTHIA BERG, Commissioner and Chairman of the
Illinois Liquor Control Commission, *et. al.*,
Defendants - Appellees,

and

WINE AND SPIRITS DISTRIBUTORS OF ILLINOIS,
Intervening Defendant - Appellee.

On appeal from the United States District Court for the Northern District of Illinois, No. 1:22-cv-04956, Hon. Jeremy C. Daniel, District Judge

Reply Brief of Plaintiffs-Appellants

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Plaintiffs challenge the constitutionality of an Illinois law that prohibits out-of-state retailers from shipping wine to consumers while simultaneously allowing in-state retailers to do so. Under *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S.504, 540 (2019); *Granholm v. Heald,* 544 U.S. 460, 489 (2005); and *Lebamoff Enterpr., Inc. v. Rauner,* 909 F.3d 847, 856 (7th Cir. 2018), a discriminatory liquor law can be upheld only if the State offers concrete evidence to show that the differential treatment is necessitated by permissible Twenty-first Amendment interests. The law was previously held to be discriminatory, *Lebamoff,* 909 F.3d at 856, so the only issues are (1) whether the plaintiffs have standing, (2) whether the State has any concrete evidence that interstate wine shipping poses a threat to public health or safety that could not be addressed with nondiscriminatory alternatives, and (3) what is an appropriate remedy.

I. Plaintiffs have standing

In every case, Plaintiffs must establish standing by showing injury, causation and redressability. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Where a plaintiff is the object of a restrictive regulation and the defendant is the official responsible for its enforcement, as in this case, "there is ordinarily little question" that the plaintiff has standing to challenge that regulation. *Id.* at 561-62; *FDA v. Alliance for Hippocratic Med.,* 602 U.S. 367, 380-81 (2024). There is even less question here because this court has previously held that consumers have standing to challenge a state law that prohibits them from having wine shipped from an out-of-state seller. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849-50 (7th Cir. 2000).

A. The injury is redressable

The State disputes only redressability. It argues that the plaintiffs' injuries are not redressable because Illinois retailers are required to get their wine from Illinois distributors. They argue that this provision would apply to Full Pull Wines, even though it is not an Illinois retailer, and would require it to buy its wine from distributors in Illinois. Because Full Pull gets its wine from distributors in Washington, the State argues that this provision independently prohibits out-of-state wine retailers from shipping wine to Illinois consumers. Br 15. The argument fails for four reasons.

(1) There is no law that actually requires an Illinois retailer to get its wine from an Illinois wholesaler. The main authority cited by the State (Br. at 15) is 235 ILCS 5/6-17.5(a). It requires retailers to purchase their wine from "a distributor," not an Illinois distributor. It is modified by 11 Ill. Admin Code 100.420, which allows retailers to also buy their wine directly from both "in-state *and out-of-state* maker[s] of wine" (emphasis added). Full Pull complies with these rules and gets its wine from distributors and wine makers. Zitarelli Depo. at 20:10-20 (ECF 115-1, PageID 1443).

Nor do any of the other statutes cited by the State (Br. at 15) require a retailer to get its wine from an Illinois distributor.

a. 235 ILCS 10-1(b)(1) addresses importation into the state, not sales that originate outside the state.

b. 235 ILCS 5/5-1(a) provides for manufacturer licenses and says nothing about retailers getting their wine from distributors. If the State meant to cite 235 ILCS 5/5-1(b) that describes Illinois distributors licenses, it allows distributos to sell to retailers but does not require retailers to buy from them.

c. 235 ILCS 5/5-1(k) authorizes foreign importer's licenses and says nothing about where retailers get their stock.

d. 235 ILCS 5/5-1(m) authorizes non-resident dealer's licenses and says nothing about where retailers get their stock.

e. 235 ILCS 5/6-8 merely provides that alcohol sold to a wholesale distributor must come to rest on the distributor's premises. It does not say retailers must buy their wine from that stock.

f. 235 ILCS 5/6-1.5 merely says that Illinois generally uses a three-tier system and says nothing about where retailers get their wine.

(2) To the extent that the defendants are arguing that they could interpret these statutes as *implicitly* applying to Full Pull, thereby allowing them to continue to prohibit interstate retail shipping even if the court declared the explicit ban on interstate shipping unconstitutional, the argument is without merit. The Supreme Court has cautioned defendants that they may not establish the same discriminatory regime through other means. "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against ... discrimination is "levelled at the thing, not the name." *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard College*, 600 U.S. 181, 230 (2023), *citing Cummings v. Missouri,* 71 U.S. (4 Wall.) 277 (1867). Redressability assumes that government officials will in act in good faith to follow both the letter and spirit of the court's decision and avoid engaging in future conduct that would inflict similar harm. *Massachusetts v. EPA,* 549 U.S. 497, 518 (2007). Defendants cannot argue that an

injury is not redressable because they would find a way to circumvent the judgment.

3. In order for another statute to defeat redressability, the application of that statute must itself be constitutional. *Bridenbaugh v. Freeman-Wilson,* 227 F.3d at 849 ((the other statute must not be "subject to any plausible constitutional challenge"). A common example is the billboard case cited by the State, *Harp Adv. Ill., Inc. v. Village of Chicago Ridge, Ill.*, 9 F.3d 1290, 1291-92 (7th Cir. 1993). Plaintiff had challenged an ordinance prohibiting off-premises signs, alleging that it wanted to erect a 1200 square-foot billboard. A separate ordinance allowed only 200 square-foot signs and would have independently prohibited the billboard under *constitutionally valid* size and height restrictions.

In this case, the distributor-purchase rule would itself simply be another form of unconstitutional discrimination. Its effect would be an "embargo on interstate commerce without hindering intrastate sales, which is treated as the equivalent of a facially discriminatory statute." *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501 (7th Cir. 2017). The Commerce Clause prohibits indirect discrimination as well as direct. *Healy v. Beer Inst.,* 491 U.S. 324, 337 (1989). It would also violate the Clause's extraterritoriality principle. Illinois 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 Illinois. "[N]o State may force an out-of-state merchant to seek [its] regulatory approval" before buying inventory. *Id.* 491 at 336-37 (1989).

4. Even if there were a separate statute that explicitly required out-of-state retailers to purchase their wine from Illinois distributors, the court could simply enjoin

the defendant from enforcing it. An injury becomes non-redressable only if it involves the independent acts of a third party not before the court whose actions cannot be enjoined. *See Murthy v. Missouri,* 603 U.S. 43, 57-58 (2024). In this case, all the relevant statutes are from the same liquor code and enforced by the defendants. When the defendant is the official responsible for enforcing a law, there is "ordinarily little question" that the injury can be redressed by enjoining the defendant from enforcing it. *Lujan v. Defenders of Wildlife,* 504 U.S. at 561-62. An injunction must "be broad enough to be effective," and may even enjoin "otherwise lawful conduct when ... prohibiting only unlawful conduct would not effectively protect the plaintiff's rights against future encroachment. *Russian Media Group, LLC v. Cable America, Inc.*, 598 F.3d 302, 307 (7th Cir. 2010).

B. The State's waiver argument is baseless

Finally, the State argues that plaintiffs have somehow waived the right to an injunction against enforcement of the distributor-purchase law because they did not explicitly challenge it in their complaint; therefore the injury is not redressable. State Br. at 16. The argument is baseless and the law is to the contrary.

The State has no authority for its argument that every potentially relevant code provision needs to be identified in the complaint and the law is to the contrary. Fed.R.Civ.P. 8(a)(2) simply requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although 235 ILCS 5/6-29.1(b) and 11 Ill. Admin Code 100.480 are the primary laws challenged and identified in the complaint, the complaint makes clear that the plaintiffs are more broadly challenging "the laws of the State of Illinois" that prohibit out-of-state retailers from shipping wine to consumers because "this statutory scheme" is discriminatory. Compl. ¶ 38 (ECF 12). They asked for an injunction that includes "requiring [defendants] to allow out-of-state wine retailers to sell, ship and deliver directly to consumers." Compl., Request for Relief (ECF 12). Their grievance is clear.

Notice pleading "does not require that [plaintiff] identify in his complaint the specific statutes or regulations" at issue. *Cox v. U.S. Dept. of Justice*, 2024 WL4635241 (7th Cir. 2024), citing *Zimmerman v. Bornick*, 25 F.4th 491, 493 (7th Cir. 2022). "A complaint need not ... recite the law; all it has to do is set out a claim for relief." *Hrubec v. National R.R. Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992). If more information is needed, it can be fleshed out in discovery, through a motion for a more definite statement,[1] or in summary judgment briefs. *Id.* That is exactly what happened here. The statutes that might or might not require retailers to buy their wine from Illinois distributors were set out and debated at summary judgment. State MSJ Mem. at 28-30 (ECF 119); Pl. Response Mem. at 1-3 (ECF 124).

The two "waiver" cases cited by the State are not germane. Both held that a standing argument was waived when it "was not directly argued by the plaintiffs in the courts below." *California v. Texas,* 593 U.S. 659, 674 (2021). Accord *Hummel v. St. Joseph Co. Bd. of Com'rs*, 817 F.3d 1010, 1021 (7th Cir. 2016) (the "plaintiffs did not argue this theory of standing in the district court"). Neither case said or implied that failure to name every remotely relevant statute in the pleadings waived the right to a remedy.

[1] FED.R.CIV.P. 12(e).

In any event, a "judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." FED.R.CIV. P. 54(c). A prevailing plaintiff is entitled "to the relief proper to his claim even if he did not request [it;] the circumstances bearing on the feasibility of particular forms of relief often change between the initiation of the suit and the rendition of the final judgment." *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 948 (7th Cir. 2006). Redressability is simply a question of whether the district court has the authority to remedy the injury and Rule 54(c) provides that authority.

II. The shipping ban is unconstitutional

When assessing the constitutionality of a state liquor law, courts employ "a two-step inquiry: (1) does the state law violate the Commerce Clause, and if so (2) does the Twenty-first Amendment save the otherwise impermissible law?" *Lebamoff Enterpr., Inc. v. Rauner*, 909 F.3d at 852. The State disputes both.

A. The shipping ban is discriminatory because it applies only to out-of-state retailers

Defendants argue that step one has not been met because the law is not discriminatory within the meaning of the Commerce Clause for either of two reasons: 1) It does not actually mandate different treatment of in-state and out-of-state retailers because all are equally prohibited from shipping from a location outside the state, State Br. at 29-33, or 2) In-state and out-of-state retailers are not similarly situated because a favorable decision would give out-of-state retailers greater privileges than in-state retailers. State Br. at 33-35. The argument is contrived. This is a textbook example of the kind of discrimination prohibited by the Commerce Clause. Illinois allows only local wine retailers to sell and ship wine.to consumers. Consumers want to be able to buy wine from merchants in other states, but that would take away a sale from an Illinois wine store, so Illinois prohibits it. There is no more fundamental violation of the Commerce Clause than where a state protects its local firms from the rigors of interstate competition. *See West Lynn Creamery v. Healy*, 512 U.S. 186, 205 (1994).

In any event, the argument is foreclosed because the Seventh Circuit has already held that this specific law is discriminatory.

> [T]his is precisely the sort of discrimination against out-of-state economic interests that is typically struck down.... [O]nce the [retail] license allows a store to ship product anywhere within the state, refusing to extend that privilege to out-of-state businesses is facially discriminatory.

Lebamoff, 909 F.3d at 852-53. The State had made these same arguments in *Lebamoff, see* State Br. at 24-28, 2017 WL 6669756, and this court rejected them. 909 F.3d at 852.

When a precedent of this Circuit is clear, the defendant "must present 'a compelling reason to overturn' it. Neither simple disagreement with a rule nor the possibility that a rule is debatable constitutes a compelling reason." *U.S. v. Rivers*, 108 F.4th 973, 979 (7th Cir. 2024) (internal citations omitted). The State disagrees with the *Lebamoff* decision, but offers no compelling reason to overturn it. Their only argument is that one judge in a concurring opinion said that he would not have found Indiana's law restricting home deliveries to be discriminatory. *Chicago Wine Co. v. Braun,* 148 F.4th 530, 533 (7th Cir. 2025) (per curiam) (Easterbrook, J., concurring). It has no precedential weight because the other judge on the panel disagreed. *Id*. at 537-38

(Scudder, J., concurring).[2] Non-majority opinions and conflicting decisions by an equally divided court are not precedential. *Neil v. Biggers,* 409 U.S. 188, 192 (1972);*Internat'l Union of Operating Engineers Local 139 v. Schimel,* 863 F.3d 674, 677 (7th Cir. 2017).

B. The State has not justified the need to ban direct shipping by out-of-state wine retailers when it allows direct shipping by out-of-state wine producers

All three controlling precedents agree that in order to justify a discriminatory state law, the State must present evidence that discrimination is reasonably necessary to protect public health or safety, or advance some other legitimate interest. In order for discrimination to be reasonably necessary, the State must show that "nondiscriminatory alternatives would be insufficient to further those interests." *Tenn Wine,* 588 U.S. at 539-40; *Granholm*, 544 U.S. at 489; *Lebamoff*, 909 F.3d at 854-56. At the summary judgment stage, the State may not rest upon mere assertions, but must come forward with concrete evidence. *Tenn. Wine*, 588 U.S. at 539.

The State has put forward a number of arguments why it needs to prohibit direct shipments of wine from out-of-state retailers. The arguments are implausible from the start for two reasons:

1. Illinois already allows out-of-state wine producers to ship wine to consumers, as do forty-four states. Those shipments have not caused any public health or safety problems, Stmt. of Facts ¶ 25 (Opening Br. at 13), so the State would have to identify a unique health or safety threat when the same wine is shipped

[2]There was no majority opinion because the two panel judges remaining after Judge Kanne died did not agree.

by an out-of-state retailer. It has not.

2. Fourteen states have allowed out-of-state retailers to ship wine directly to consumers over the past fifteen years and there is no evidence it has caused any public health or safety problems. Stmt. of Facts ¶ 26 (Opening Br. at 14). Indeed, data from federal agencies show that states that allow out-of-state retailers to ship to consumers do not have higher rates of consumption. Stmt. of Facts ¶¶ 18-20 (Opening Br. at 11-12).

1. The State has not proved that the shipping ban actually promotes a legitimate state interest

"[E]ach State [has] leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable." *Tenn. Wine*, 588 U.S. at 510. We do not need to guess which interests the Illinois General Assembly has chosen because it sets them out explicitly in 235 ILCS 5/6-29.1(b):

> [T]he General Assembly hereby finds and declares that selling alcoholic liquor from a point outside this State through various direct marketing means, such as catalogs, newspapers, mailers, and the Internet, directly to residents of this State poses a serious threat to the State's efforts to prevent youths from accessing alcoholic liquor; to State revenue collections; and to the economy of this State.

The State does not argue that the ban on retail wine shipping prevents youth access, and helping the economy of the state smacks of protectionism, so we address first whether the State has proved that direct-to-consumer sales by out-of-state retailers poses an actual threat to State revenue collections.

a. Tax collection.

The State asserts that the ban on direct shipping "ensure[s] payment of Illinois's alcohol excise tax." State Br. at 47. It states that "[o]ut-of-state retailers, however, would not pay Illinois' excise tax." Id. at 48. That's all they say on the subject. The defendants identify no evidence, witness testimony, document, or study that shows that out-of-state retailers would not pay taxes. The same tax-collection argument was rejected in *Granholm* for the same reason: the states had presented no evidence as to why they could not simply "collect[] taxes directly from [the shippers]," and no evidence that self-reporting and auditing used for all other taxpayers "will not suffice for direct shipments" to consumers. 544 U.S. at 491. The State has no such evidence here either.

b. Temperance.

The State points out that 235 ILCS 5/6-29.1(a) refers to temperance as an broader interest than just limiting youth access**.** State Br. at 42. The argument does not help them because they presented no concrete evidence that direct shipping by wine retailers would threaten temperance or increase consumption, given that consumers can already buy and consume as much wine as they want as long as they buy it in Illinois. The only evidence in the record concerning the relationship between interstate retail wine shipping and consumption rates shows no correlation.

Fourteen states have allowed out-of-state retailers to ship wine to consumers and data from the National Institutes of Health show that those states do not have higher rates of wine consumption. The defendants conceded in discovery that they have no concrete evidence that direct shipment leads to higher consumption. Their expert Dr. Kerr conceded that he knows of no studies or data that show that direct shipping causes higher consumption. Plaintif'fs' expert, Mr. Wark, confirmed that he knows of no evidence showing a link between direct shipping by retailers and higher consumption rates. Stmt. of Facts ¶¶ 19-20,26-28 (Opening Br. at 11-14).

The State relies on one slender argument -- an opinion by their expert, Dr, Kerr, speculating that higher consumption could *theoretically* result if wine sold and shipped by out-of-state retailers were substantially cheaper than wine sold in Illinois. State Br. at 48-50. The opinion is inadequate for several reasons.

(1) It is based on the false assumption that "[o]ut-of-state retailers, however, would not pay Illinois excise taxes." *Id.* at 48. Illinois law is to the contrary. Out-of-state shippers are required to pay excise taxes and post a bond to assure such payment. 11 Ill. Admin. Code 100.420(f). *See* Marijan declaration ¶¶ 24-25 (ECF No. 115-1, PageID 1483) (describing winery shipping process).

(2) It is based on the unsupported assumption that a consumer could actually get wine cheaper online than locally. The assumption is implausible because wine is available at supermarkets in Illinois for less than $5.00 per bottle. Stmt. of Facts ¶ 17 (Opening Br. at 11).. Dr. Kerr presented no facts to show that wine is available more cheaply in other states. He did not compare the actual cost of wine in Illinois versus other states, or the actual cost of shipping, or have any data as required by Fed. R. Evid. 702. Stmt. of Facts ¶ 27-28 (Opening Br. at 14).

(3) The opinion is speculative, based only on econometric theory. It is not supported by any concrete evidence or data showing that this theory has come true in any state that allows interstate wine shipping. "'[M]ere speculation' or 'unsupported assertions' are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Tenn. Wine*, 588 U.S. at 539, *quoting Granholm*, 544 U.S. at 490. 492.

c. The purported need for an in-state presence

The defendants offer two other related justifications for banning direct shipping by out-of-state wine retailers that are not among the reasons given by the legislature: (1) An in-state presence is required so that officials can conduct on-site inspections, discover violations of the law, and have the ability to put retailers out of business by revoking their licenses. State Br. at 38-44. (2) An in-state presence enables officials to detect, track and recall defective products. *Id.* at 44-47. Neither is germane because the plain language of 235 ILCS 5/6-29.1(b) says this the ban on retail shipping is intended only to reduce youth access and assure tax collection, Under Illinois law, when the language of a statute is plain and clear, courts may not depart from that language by adding additional concepts the legislature did not include. *People v. Seymore*, __ N.E.3d __, 2025 WL 3482895, at ¶ 38 (Ill.. Dec. 4. 2025). Suggestions by the Attorney General encouraging the court to do so are to no effect. *Maddux v. Blagojevich*, 911 N.E.2d 979, 985 (Ill. 2009).

The State asserts that we have waived this argument by not addressing it in the district court. They did not explain their reasoning, other than to cite *Hummel v. St. Joseph Co. Bd. of Com'rs*, 817 F.3d at 1021. *Hummel* holds that a party may not raise an entirely new legal issue on appeal, not that a party is precluded from expanding their arguments and citing additional authority. The limited scope of the General Assembly's interests and citation to the operative language was included in plaintiffs' summary judgment memorandum at 11. ECF No. 109. There has been no waiver.

The defendants' arguments that shipping must be banned because out-of-state wine retailers have no in-state presence that can be inspected and monitored, State Br. at

38-47, are insufficient for two reasons. *First*, the Supreme Court says so. An "in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Granholm*, 544 U.S. at 475. *Second*, the argument is equally true for wine shipped from out-of-state wineries, which the State allows. 235 ILCS 5/6-29. Illinois cannot inspect their premises, check wine labels and inventory, seize defective products (if there ever were any), or put them out of business if they violate Illinois law. It relies on audits and sales reports. 235 ILCS 5/5-1(r) The State has presented no evidence that its concerns are higher for retailer shipping than winery shipping, that the health and safety risks are any different, or that audits and sales reports would be less effective. It has presented no evidence that there is anything unique or different about retailer versus winery shipping in any relevant way. It's the same wine being shipped by the same carrier to the same consumer.

The State argues that there are four relevant differences: (1) wineries register their products with the State but retailers do not, (2) winery sales are limited but retail sales are not, (3) there are fewer wineries than retailers, and (4) wineries have federal permits and retailers have state permits. State Br. at 46. ny of these differences The first two are specious. Illinois can require out-of-state retailers to register their products and limit their sales just like wineries. The third misstates the evidence. The "large" number of out-of-state retailers consists mostly of convenience stores, supermarkets, neighborhood liquor stores and restaurants that do not sell online. Only a few hundred sell online and would ship to Illinois. Stmt. of Facts ¶ 3 (Opening Br. at 7). As to the fourth (federal v. state permits), the State presents no evidence that this matters, i.e., that holders of federal permits are more likely to obey Illinois laws than holders of state permits. Indeed, Illinois touts the fear of losing a state license as a powerful incentive to comply with the law. State Br. at 40-41.

It is important to remember that the State has the burden of proving that interstate wine shipping would cause public health or safety problems that justify banning them. *Granholm*, 544 U.S. at 492; *Tenn. Wine,* 588 U.S. at 540; *Lebamoff* , 909 F.3d at 856. The State quibbles with some of plaintiffs' evidence, Br. at 51-53, but that is not enough. The State has the burden and has not presented concrete evidence that direct shipping by retailers poses an actual threat to the state's interests that could not be ameliorated the way other direct shipments are regulated, that shipping by retailers is more problematic than shipping by wineries, or that retailer shipping has been difficult to regulate in the states that allow it.

The State's concerns are also legally insufficient. They are primarily administrative – ensuring orderly market conditions, regulatory accountability, and proper record-keeping. Such administrative interests have been ruled out by the Supreme Court because "facilitating orderly market conditions [and] ensuring regulatory accountability ... can also be achieved through the alternative of an evenhanded licensing requirement." *Granholm*, 544 U.S. at 492. The only kind of state interests that can justify discrimination are those that address "the health and safety risks posed by the alcohol trade." *Tenn. Wine*, 588 U.S. at 535.

2. Illinois has a reasonable nondiscriminatory alternative – the permit system it uses for direct shipping from wineries

All three controlling precedents hold that the court must consider the evidence of the feasibility of reasonable nondiscriminatory alternatives. *Tenn Wine,* 588 U.S. at 539-40; *Granholm*, 544 U.S. at 489; *Lebamoff*, 909 F.3d at 854-56. The State argues that this court should depart from those guidelines and not consider whether there were reasonable nondiscriminatory alternatives, citing the opinions of some other circuits and a concurring opinion in *Chicago Wine*. The argument is unavailing. Although these other opinions have been inconsistent on the extent to which the availability of nondiscriminatory alternatives matters, they agree that it is at least "relevant." *Chicago Wine*, 148 F.4th at 543-44 (Scudder, J., concurring). At a minimum, when a state has an obvious alternative that it uses in analogous situations, must explain why it cannot use the same alternative in this case.

The State argues that *Tenn. Wine* implicitly overruled *Granholm,* abandoned this requirement, and adopted a "different inquiry" that only required proof that a law promoted public health and safety. It relies not on *Tenn. Wine* itself, but on cases from other circuits and the concurring opinion in *Chicago Wine*. State Br. at 25-29. The argument is untenable because *Tenn. Wine* said the exact opposite.

> The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety. During the course of this litigation, the Association relied almost entirely on the argument that Tennessee's residency requirements are simply "not subject to Commerce Clause challenge," 259 F.Supp.3d at 796, and the State itself mounted no independent defense. As a result, the record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; *nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests.*

Tenn. Wine, 588 U.S. at 540. The Court then applied the nondiscriminatory alternative inquiry, concluding that the evidence "does not explain why this objective[3] could not easily be achieved by ready alternatives," *id.*, why the state could not use alternative methods to conduct background checks, *id.* at 540-41, why sales activities could not be monitored electronically, *id.* at 541, and why the threat of revoking its license would not be a sufficient motivation for complying with state law. *Id.* at 541-42. It concluded by saying:

> Not only is the 2-year residency requirement ill suited to promote responsible sales and consumption practices, but there are obvious alternatives that better serve that goal without discriminating against nonresidents. State law empowers the relevant authorities to limit both the number of retail licenses and the amount of alcohol that may be sold to an individual. The State could also mandate more extensive training for managers and employees and could even demand that they demonstrate an adequate connection with and knowledge of the local community.

588 U.S. at 542-43 (parenthetical phrases omitted). The Court's "different inquiry" is an evidence-based balancing test assessing whether the state has proved that a discriminatory is "necessitated by permissible Twenty-first Amendment interests." Lebamoff, 909 F.3d at 856, instead of the strict scrutiny used in pure Commerce Clause cases.[4] Whether nondiscriminatory alternative are available is obviously relevant to this balancing.

The State next argues that "every court of appeals" has declined to consider whether there were nondiscriminatory alternatives. This is patently false. The most recent interstate wine shipping case, *Block v. Canepa,* 175 F.4th 642, 656-57 (6th Cir.

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[3] The objective was making the owner subject to state court jurisdiction.

[4] Under traditional Commerce Clause analysis, "[w]hen a state statute ... discriminates against interstate commerce ... we have generally struck down the statute without further inquiry." *Granholm*, 544 U.S. at 487 (citations omitted).

2026), placed emphasis on the existence of nondiscriminatory alternatives. It held that the fact that Ohio allowed out-of-state wineries to ship to consumers pursuant to a nondiscriminatory permit system undermined its assertion that it needed to totally ban out-of-state retailers from shipping to consumers. In *Anvar v. Dwyer,* 82 F.4th 1, 8 (1st Cir. 2023), the First Circuit also held that the court "must then determine whether the law 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" It cautioned, however, that although "the existence of alternatives [is] relevant," the mere existence of hypothetical alternatives "does not ... necessarily invalidate a challenged law." *Id.* at 11. The alternatives must be reasonable, which is best illustrated by considering whether the state actually uses them in analogous situations. Once a state allows some direct shipping, it has agreed that an in-state presence is not required. *See Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008) (winery shipping)..

This court should decline the defendants' invitation to abandon the nondiscriminatory-alternative inquiry. Courts of appeals are supposed to follow Supreme Court precedent until the Supreme Court explicitly says otherwiset, *U.S. v. McClinton*, 23 F.4th 732, 735 (7th Cir. 2022)*, citing Cross v. U.S.*, 892 F.3d 288, 303 (7th Cir. 2018), even if an older precedent appears "out of sync" with an intervening decision. *Zaragoza v. Garland,* 52 F.4th 1006, 1012-13 (7th Cir. 2022). It is doubtful in any event that the Court in *Tenn. Wine* meant to overturn *Granholm* because it involved an issue of the ownership of in-state liquor stores, not interstate sales and shipping, and the Court does not decide issue not presented in the case before it. *U.S. v. Neifert-White Co.*, 390 U.S. 228, 231 (1968). Lower courts should not assume that the

Supreme Court announced a new rule without saying so explicitly. *Lebamoff v. Rauner*, 909 F.3d at 854.

No one is asking Illinois to adopt some hypothetical nondiscriminatory alternative without knowing if it would work. Illinois has been allowing out-of-state wineries to ship directly to consumers, subject to licensing and reporting restrictions, and has presented no evidence that this has been ineffective or caused any health, safety or tax collection problems. Stmt. of Facts ¶¶ 22, 25, 30 (Opening Br. at 12-15). It has no evidence showing any situation in which this permit system would not work for shipping by retailers. The State has not jstified its ban under the *Granholm/Tenn. Wine* standards, and is unconstitutional.

III. Remedy

The parties agree that if this Court enters summary judgment for the plaintiffs, the best course is to remand the case to the district court to fashion the remedy. It can take evidence and/or give the parties time to work out how the Liquor Control Commission will implement an injunction. However, if this court decides to address the question of remedy, plaintiffs assert that it should eliminate the discrimination by extending shipping privileges to out-of-state wine retailers, consistent with *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979). The State argues the court should take away shipping privileges from in-state retailers who are not represented here, which is inconsistent with *Cook, Inc. v. Boston Scientific Corp.*, 333 F.3d 737, 744 (7th Cir. 2003). The arguments of both parties are set out in their briefs and do not need to be repeated here.

Conclusion

The decision of the district court should be reversed and summary judgment granted to the plaintiffs.

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Certification of Word Count

I certify that this brief, including footnotes and the statement of issues, but excluding tables and certificates, contains 5466 words according to the word-count function of WordPerfect, the program used to prepare this brief.

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