IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ALEXIS BAILLY VINEYARD, INC., a Minnesota Corporation, and THE NEXT CHAPTER WINERY, LLC a Minnesota Limited Liability Company,	)	
Plaintiffs,	)	CIVIL FILE NO. 0:17-CV-00913 (WMW/HB)
v.	)	
MONA DOHMAN, in her official capacity as Commissioner of the Minnesota Department of Public Safety,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The single most important principle underlying the dormant Commerce Clause is that states cannot enact laws that privilege in-state goods over goods from out-of-state. The law challenged in this case does exactly that, without justification. It is therefore unconstitutional.

The State of Minnesota forbids its farm wineries from making and selling wine unless more than half of the ingredients used to make that wine are grown or produced in Minnesota. The purpose of the law is glaringly obvious—protectionism. It benefits Minnesota growers of products used to make wine while harming both competing growers from other states and countries, and

Minnesota wineries who want to make more than half of their wine from products grown outside of Minnesota.

This is a violation of both the Interstate Commerce Clause and the Foreign Commerce Clause of the U.S. Constitution. It is the balkanization of trade across state lines that the Framers assiduously wanted to stop. This Court should grant Plaintiffs' Motion for Summary Judgment, declare unconstitutional this obvious constitutional abridgement, enjoin its enforcement, and free Minnesota's farm wineries to choose their products from "foreign Nations, and among the several States." U.S. Const., Art. I, Sec. 8, cl. 3.

FACTUAL BACKGROUND

The Plaintiffs.

Challenging this barrier to interstate and foreign trade are two Minnesota farm wineries. One is Alexis Bailly Vineyards, Inc. ("Alexis Bailly"). Nan Bailly is the owner and proprietor of Alexis Bailly. Bailly Dec., ¶ 1. Her father opened the winery in 1973 on a 13-acre farm outside of Hastings, Minnesota. Bailly Dec., ¶¶ 1-2 . It is the oldest winery in Minnesota. Bailly Dec., ¶ 1. The business sold its first bottle of wine in 1978. Bailly Dec., ¶ 2. In 1990 Nan took the business over when her father passed away and has run it ever since. Bailly Dec., ¶ 3.

The other Minnesota farm winery is The Next Chapter Winery, LLC ("Next Chapter"). Timothy Tulloch and his wife are the owners and proprietors

of Next Chapter. Tulloch Dec., ¶ 1. After years of working in the coffee industry, in 2007 they settled down on a six-acre farm outside of New Prague, Minnesota, and planted their first grapevines. Tulloch Dec., ¶¶ 1-3. In 2013 they bottled their first wine, and sold their first vintage in 2014. Tulloch Dec., ¶ 4.

Both Nan and Timothy have learned that although their wineries can make many wines from the grapes they grow at their vineyards, they can make additional wines by blending them with grapes and grape juices from elsewhere. Bailly Dec., ¶ 5; Tulloch Dec., ¶ 5. Further, for some of their wines they predominately use grapes and juices not grown in their vineyards. Bailly Dec., ¶ 8; Tulloch Dec., ¶ 8. Some of their wines are made predominately from "cold weather" varieties that have been developed for cold climates, such as Minnesota's, but some of their wines are made predominately from grapes that can only be grown in warmer climates such as California. Bailly Dec., ¶ 11; Tulloch Dec., ¶ 12.

Alexis Bailly and Next Chapter make wines from grapes grown beyond their vineyards for a couple reasons. First, they have found they cannot satisfy consumer demand for their wines simply by using the types of grapes grown at their vineyards. Bailly Dec., ¶ 4; Tulloch Dec., ¶ 14. Second, they have also found they simply cannot grow a sufficient quantity of grapes in their vineyards to satisfy demand. Bailly Dec., ¶ 4; Tulloch Dec., ¶ 14. By bringing in products from

outside, the wineries can expand their volume and varieties, and serve their customers better than simply relying on their own acres. Bailly Dec., ¶ 10; Tulloch Dec., ¶¶ 11, 16.

Nan and Timothy need the flexibility to purchase products grown across the country, and even outside of the country. Bailly Dec., ¶ 10; Tulloch Dec., ¶ 11. Nan has used grapes or grape juices from Arkansas, California, Illinois, and New York, and also from Canada, making her product-base international. Bailly Dec., ¶ 5. She also would like to purchase from growers in other countries, including France, in the future. Bailly Dec., ¶ 6. Timothy has used grapes or grape juices from California and Wisconsin. Tulloch Dec., ¶ 5.

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

grapes—both cold-weather grapes frequently grown in Minnesota—from growers in states such as Wisconsin and New York. Bailly Dec., ¶ 11; Tulloch Dec., ¶ 12.

But, as detailed below, using out-of-state grapes presents a problem because of the legal limit on how much out-of-state product licensed farm wineries can use in making their wine. *Infra* at 6. Specifically, for example, it prevents Nan from expanding Alexis Bailly's current annual production of between 8,000 and 10,000 gallons to the 25,000—or more—gallons it would like to produce. Bailly Dec., ¶ 13-14. It also prevents Timothy from expanding Next Chapter's current annual production of about 4,750 gallons to the approximately 24,000 gallons it would like to eventually produce, and the 9,500 gallons it would like to produce immediately. Tulloch Dec., ¶¶ 14-15.

Minnesota's Farm Winery Act.

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

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

sell their wine to the consumer on-site or directly to retailers. Minn. Stat. § 340A.315, subds. 2. They can also sell wine to a wholesaler. *Id.* Both Nan and Timothy have retail shops at their vineyards, replete with tasting rooms, where visitors can taste samples and purchase the wineries' various vintages. Bailly Dec., ¶ 9; Tulloch Dec., ¶ 10. Licensees are also subject to a handful of restrictions not at issue in this case, including when the facility may be open to the public, that it be located on agricultural land, and how its finished wine may be stored and transported. *See* Minn. Stat. § 340A.315, subds. 2, 9, 10.[1]

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

The Act does not mandate that any amount of wine be made from grapes or other products grown or produced by a licensee itself. Minn. Stat. § 340A.315. Therefore, a farm winery can legally produce wine and yet not grow any wine

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

ingredients. *Id.* But, of the products it does use to produce wine, the majority must be grown or produced in Minnesota, whether by the licensee or someone else: "'Farm winery' is a winery operated by the owner of a Minnesota farm and producing table, sparkling, or fortified wines from grapes, grape juice, other fruit bases, or honey *with a majority of the ingredients grown or produced in Minnesota*." Minn. Stat. § 340A.101, subd. 11 (emphasis added). Thus, to have a "farm winery" license a farm winery must limit its production to a majority of Minnesota grown or produced ingredients.

Plaintiffs hereinafter refer to this "grown in Minnesota" mandate as the "In-State Mandate."

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

The undeniable effect of this law is to give a commercial advantage to Minnesota ingredients at the expense of out-of-state ingredients. Legislative history confirms that this was the purpose of the law. Sanders Dec., Ex. 5. And, reading the text of the law, it is difficult to imagine a non-protectionist purpose. Indeed, during discovery, Defendant was asked to identify the purpose of the

law and stated she did not know what is was. Sanders Dec., Ex. 1 (Answer to Interrogatory No. 4, p. 4-5).

The Affidavit Exemption.

The Act allows licensed farm wineries to receive a temporary, one year, exemption from the In-State Mandate, but only if certain conditions and procedures are met. First, a farm winery must file an affidavit with Defendant "if Minnesota-produced or -grown grapes, grape juice, other fruit bases, or honey is not available in quantities sufficient to constitute a majority of the table, sparkling, or fortified wine produced by [the] farm winery . . . ." Minn. Stat. § 340A.315, subd. 4. Defendant then must consult with the Commissioner of the Minnesota Department of Agriculture. *Id.* After that, Defendant, through her department, makes the choice of whether to approve or deny the affidavit. Sanders Dec., Ex. 2 (McManus Dep., p. 13, ln. 21 – p. 14, ln. 18).

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

denied, the record demonstrates that the State takes its responsibility to review affidavits seriously. As one Department of Agriculture employee stated when consulting Defendant's department regarding an affidavit, "Exemptions are intended to address one-time unforeseeable events so the requesting organization should be providing us with an[]explanation for why they aren't able to source enough grapes from [Minnesota] this year." Sanders Dec., Ex. 3, Bates No. 175 (McManus Dep., Ex. 1). During this consultation the employee questioned whether an affidavit should be granted because it did not provide enough detail about how the weather had made it not possible to purchase sufficient Minnesota-grown or produced goods. *Id.* This resulted in a Department of Public Safety agent visiting the farm winery to collect additional information on crop production. Sanders Dec., Ex. 2 (McManus Dep., p. 21, lns. 6-20).

Plaintiffs Are Harmed by the In-State Mandate.

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

expanding production with non-Minnesota grapes is forbidden by the In-State Mandate. Bailly Dec., ¶ 13. Specifically, because of the mandate, Alexis Bailly has had to reinvest its revenue in producing its own grapes to a greater extent than it would have had it not been for the law. Bailly Dec., ¶ 13. It would have liked to use that revenue in expanding its out-of-state wine options, and thereby growing its production of wine. Bailly Dec., ¶ 13.

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

Minnesota growers, whether Minnesota's climate allows for a temporary waiver or not. Tulloch Dec., ¶¶ 14, 20. With the In-State Mandate, however, any such expansion will be very hard, and will be much more incremental and slow. Tulloch Dec., ¶ 20.

Further, and unsurprisingly, the In-State Mandate limits the activities of farm wineries other than Plaintiffs. For example, one licensee is part of a growers cooperative with members on either side of the Minnesota-Wisconsin border, using grapes from the various members. Sanders Dec., Ex. 7 (Bates Nos. STIP085, 90). The members' grapes are grown within a few miles of each other. Sanders Dec., Ex. 7 (Bates Nos. STIP085, 90). This leads to complications in tracking whether the licensee will be able to comply with the In-State Mandate in a given year. Sanders Dec., Ex. 7 (Bates Nos. STIP085, 90).

Plaintiffs have applied for, and received, one-year exemptions under Minn. Stat. § 340A.315, subd. 4, a few times. Bailly Dec., ¶ 15; Tulloch Dec., ¶ 18. Alexis Bailly has received one in 2005, 2007, 2009, 2010, 2014, 2016, and is applying for one in 2017, and Next Chapter in 2014 and 2016. Bailly Dec., ¶ 15; Tulloch Dec., ¶ 18. As the statute requires, each time Plaintiffs have done so it has been for weather-related reasons, including hard winters and late spring frosts that damage buds on grapevines. Bailly Dec., ¶ 16; Tulloch Dec., ¶ 18.

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

ARGUMENT

For the reasons set forth below, Plaintiffs request that this Court enter summary judgment in their favor by declaring the In-State Mandate unconstitutional under the dormant Interstate Commerce Clause and the dormant Foreign Commerce Clause. Plaintiffs also request this Court issue a permanent injunction, enjoining Defendant from enforcing the In-State Mandate against Plaintiffs and other Minnesota farm wineries.

After setting forth the standard of review in Part I, in Part II Plaintiffs detail how the dormant Interstate Commerce Clause subjects facially

discriminatory statutes like the In-State Mandate to strict scrutiny. Plaintiffs then demonstrate how Defendant cannot overcome that high burden.

In Part III, Plaintiffs demonstrate how the In-State Mandate is unconstitutional under the dormant Foreign Commerce Clause, for almost identical reasons to why it is unconstitutional under the dormant Interstate Commerce Clause. Just as it is unconstitutional for the State of Minnesota to protect Minnesota growers from growers in other states, is it unconstitutional for the State to protect Minnesota growers from growers in other countries.

I. STANDARD OF REVIEW.

"The court shall grant summary judgment" if Plaintiffs show "that there is no genuine dispute as to any material fact" and Plaintiffs are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Jackson v. Riebold*, 815 F.3d 1114, 1119 (8th Cir. 2016). The court reviews the evidence in the light most favorable to the non-moving party. *Wealot v. Brooks*, 865 F.3d 1119, 1124 (8th Cir. 2017).

II. THE IN-STATE MANDATE IS A DISCRIMINATORY LAW THAT VIOLATES THE DORMANT INTERSTATE COMMERCE CLAUSE.

The In-State Mandate discriminates against interstate commerce, and therefore is subject to strict scrutiny. Furthermore, Defendant fails to overcome that extremely high standard. Indeed, Defendant does not even know of a reason

to justify the law under that standard, let alone a sufficient reason. Therefore, the In-State Mandate is unconstitutional.

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

"Though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys. v. Dept. of Envtl. Quality*, 511 U.S. 93, 98 (1994). Thus, this "dormant Commerce Clause" forbids discrimination against out-of-state goods. *See SDDS, Inc. v. South Dakota*, 47 F.3d 263, 267 (8th Cir. 1995). "Discrimination" in this context is defined as "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003) (quoting *Oregon Waste Sys.*, 511 U.S. at 99). Discrimination can manifest itself in three forms: (1) a law that "facially discriminates against out-of-state articles"; (2) a law that does not discriminate on its face but nevertheless is born of a discriminatory purpose; and (3) a law that does not necessarily spring from discriminatory motives but nevertheless has an effect that discriminates against interstate commerce. *SDDS,* 47 F.3d at 267; *Hazeltine*, 340 F.3d at 593.

Further, the burden is on the government to justify a discriminatory law: "Our commerce clause cases demand more than mere speculation to support discrimination against out-of-state goods. The burden is on the State to show that the *discrimination* is demonstrably justified." *Granholm v. Heald*, 544 U.S. 460, 492 (2005) (citations and quotations omitted) (emphasis in original). The standard against interstate discrimination is so high that the Supreme Court has repeatedly said a discriminatory law is a "virtually *per se* rule of invalidity." *Oregon Waste Sys.*, 511 U.S. at 100; *see also Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (describing standard as the "strictest scrutiny").

The dormant Interstate Commerce Clause has particular force in the area of agriculture. There are many Supreme Court cases striking down discriminatory agricultural restrictions. *See, e.g.*, *Granholm*, 544 U.S. at 492 (striking down bar on shipments of wine by out-of-state wineries); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 354 (1977) (striking down discriminatory law that burdened out-of-state apples); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (striking down facial discrimination against non-Madison, Wisconsin milk). The Eighth Circuit has also struck down discriminatory agricultural laws. *See, e.g.*, *Jones v. Gale*, 470 F.3d 1261, 1270 (8th Cir. 2006) (discrimination against out-of-state corporations owning farms); *Hazeltine*, 340 F.3d at 593 (same). The law at issue in this case is the latest in a

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

Plaintiffs demonstrate below that Minnesota's In-State Mandate impermissibly discriminates against interstate commerce because it (1) facially discriminates against interstate commerce by limiting the purchase of non-Minnesota products used to make wine to the benefit of Minnesota products; (2) purposely discriminates against interstate commerce because the text and legislative history of the statute evidences a protectionist intent; and (3) discriminates against interstate commerce in effect. A finding that the In-State Mandate is discriminatory on any of these three grounds is sufficient for this Court to conclude that the law is subject to strict scrutiny. *See Hazeltine*, 340 F.3d at 593 ("[W]e rest our conclusion on the evidence in the record of a discriminatory purpose underlying Amendment E. As a result, we do not consider the other two tests.").

1. The In-State Mandate facially discriminates against interstate commerce because it explicitly limits the use of interstate products but not Minnesota products.

Minnesota's In-State Mandate facially discriminates against non-Minnesota products used to make wine. The Farm Winery Act explicitly

discriminates against interstate products by forbidding licensed farm wineries from using non-Minnesota products for half or more of their wine production. Minn. Stat. § 340A.101, subd. 11.

If Alexis Bailly uses out-of-state products for half or more of its wine in any given year because it thinks those out-of-state products will make its business more profitable, it violates the In-State Mandate. If Next Chapter Winery uses more out-of-state products for its wine than those grown in Minnesota because it believes they better cater to its customers' palates, it violates the In-State Mandate. Both businesses want to do exactly that. *See supra*, at 4 . There is no question here: This restriction is facially discriminatory, period.

Almost no justification can support a law that discriminates against interstate commerce, no matter the size or scope. "[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." *Assoc. Indus. of Mo. v. Lohman*, 511 U.S at 641 650 (1994). Simply put, there is no "de minimis" defense under the dormant Interstate Commerce Clause. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 n.3 (1996). Because Plaintiffs are limited in their use of interstate products, but are not similarly limited in their use of Minnesota products, the In-State Mandate facially discriminates against interstate commerce.

Although the implications of this caselaw are crystal-clear for this case without analogizing to a specific opinion, for illustrative purposes it is worth considering a similar case, *Granholm v. Heald*, 544 U.S. 460 (2005). There, the Court considered whether state laws, from Michigan and New York, that banned *out-of-state* wineries from shipping wine directly to Michigan or New York consumers, but did not ban *in-state* wineries from doing the same thing, discriminated against interstate commerce, and therefore were subject to strict scrutiny.[2] The Court held that the laws discriminated on their face by allowing more favorable treatment of in-state economic interests than those from out-of-state. *Id.* at 475-76.

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

Plaintiffs contend the In-State Mandate has a discriminatory, and therefore, illegitimate, purpose. *See infra* Part II.A.2. However, even if it were enacted from completely honorable motives, the law is still facially discriminatory. *See Philadelphia v. New Jersey*, 437 U.S. 617, at 626-27 (1978) ("But

[2] The Court also struck the law down for failing strict scrutiny, which Plaintiffs discuss *infra* in Part II.B.

whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State").

2. The purpose of the In-State Mandate is to protect producers of Minnesota products from out-of-state competition.

Again, if this Court concludes that the In-State Mandate is discriminatory on its face, then the law is subject to strict scrutiny and the purpose or in effect analyses do not apply. *See Hazeltine*, 340 F.3d at 593. If this Court does address whether the In-State Mandate purposely discriminates against interstate commerce, however, the evidence shows that it does.

A court "look[s] to direct and indirect evidence to determine whether a state adopted a statute with a discriminatory purpose." *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir. 2004). The use of facially discriminatory language in a law is, of course, itself evidence of discriminatory intent. *See Dean Milk Co.*, 340 U.S. at 354 (referring to when states "artlessly disclose an avowed purpose to discriminate").

In addition to the language of the statute, a law's legislative history can demonstrate a discriminatory intent. One case on point is *Hazeltine*. There, the Eighth Circuit concluded that the state of South Dakota acted with a discriminatory intent in passing an anti-corporate farming law. The court inquired into whether protecting family farmers from poverty was truly a motivation for the law that the voters of South Dakota had enacted. *Hazeltine*,

340 F.3d at 593-94. The court concluded that the lack of a study or forecast on whether the law actually would advance that interest by the law's proponents was evidence that poverty alleviation was not the actual motivation. *Id.* at 595.

Unlike in *Hazeltine*, where the state at least tried to claim a legitimate-sounding purpose, here Defendant claims to not even know what the purpose of the In-State Mandate is. Sanders Dec., Ex. 1 (Answer to Interrogatory No. 4, p. 4-5). Yet, the purpose is glaringly obvious here, and not from the mere lack of a study, as in *Hazeltine*. Not only is there the text of the law, which, again, displays a discriminatory intent, but there also is the legislative history. According to the director of the Minnesota House of Representative's Research Department "The original intent [of the Farm Winery Act] was to foster a Minnesota industry, and that meant Minnesota grown crops (this was the genesis of the 50 percent Minnesota-grown language)." Sanders Dec., Ex. 5 (Cincotta Dep., Ex. 2). Thus, the purpose of the In-State Mandate was to exclude interstate growers to the benefit of Minnesota growers so they would grow more products that could be used to make wine.

The In-State Mandate is consistent only with this illegitimate purpose of protectionism and not any other motivation. It therefore discriminates against interstate commerce under the dormant Interstate Commerce Clause and is thus subject to strict scrutiny. *See Jones*, 470 F.3d at 1270.

3. The In-State Mandate discriminates against interstate commerce in effect.

In addition to discriminating on its face and in its purpose, the In-State Mandate discriminates in effect. When a law restricts an interstate market, but does not have the same effect on the *intra*state market in the same product, it discriminates in effect against interstate commerce. *SDDS, Inc.*, 47 F.3d at 270-271 (interstate garbage market). This is true even if there is no purpose to discriminate. "[E]ven if a state law responds to legitimate local concerns and is not discriminatory either in its purpose or on its face, the law could discriminate arbitrarily against interstate commerce, that is, it could have a discriminatory effect." *Hazeltine*, 340 F.3d at 593 (citing *Maine v. Taylor*, 477 U.S. 131, 148 n.19 (1986)).

Both Plaintiffs limit their purchases of non-Minnesota products because of the law. Bailly Dec., ¶ 14; Tulloch Dec., ¶ 15. This is true for other growers as well. Sanders Dec., Ex. 7 (Bates Nos. STIP085, 90) (farm winery careful to segregate grapes grown on either side of the Minnesota-Wisconsin border). Minnesota products, of course, are not similarly restricted. These facts demonstrate the law discriminates against interstate commerce in effect. *See Hunt*, 432 U.S. at 351-52 (effect of apple labeling law discriminated against out-of-state apples); *SDDS, Inc.*, 47 F.3d at 270-71 (effect discriminated against interstate garbage); *Bergmann v. City of Lake Elmo*, No. 10-2074, 2010 U.S. Dist.

LEXIS 112564 (D. Minn., Aug. 19, 2010; Noel, M.J.) (effect of facially neutral law requiring products sold from farms be grown at the farm where they were sold discriminated against out-of-state agricultural products).

B. Defendant Cannot Overcome the "Strictest Scrutiny" That Applies to the In-State Mandate.

Because Plaintiffs have demonstrated that the In-State Mandate discriminates against interstate commerce, Defendant now bears an almost impossible burden of showing that the law, nevertheless, does not violate the dormant Interstate Commerce Clause. Again, discriminatory laws are subject to the "strictest scrutiny." *Hughes*, 441 U.S. at 337. In fact, "The only way that discriminatory state action can withstand this level of scrutiny is if the state demonstrates that the out-of-state articles are more dangerous than are in-state articles." *SDDS, Inc.*, 47 F.3d at 268 n.8. In this case, Defendant does not even know of *any* purpose for the law, let alone a purpose under which Defendant might submit sufficient evidence justifying the law to be constitutional. Sanders Dec., Ex. 1 (Answer to Interrogatory No. 4, p. 4-5).

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

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

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

Further, the fact that this case concerns alcohol does not alter the analysis. The Supreme Court squarely ruled in *Granholm* that a state's power under the Twenty-First Amendment to regulate alcoholic products does not trump the protections of free trade guaranteed by the dormant Interstate Commerce Clause. *Granholm*, 544 U.S. at 476. The Court also said the same thing in *Bacchus Imports v. Dias*, 468 U.S. 263, 276 (1984), where it invalidated a difference in alcohol

taxation, whose purpose was "'to promote a local industry.'" *Id.* (quoting government's brief). *Granhold* and *Bacchus Imports* tell us that unless a state is regulating to effectuate the core purpose of the Twenty-First Amendment—temperance—it is not entitled to immunity from the dormant Interstate Commerce Clause. And, of course, when a state is allowing one type of alcohol to the exclusion of others it is hardly fostering temperance. Therefore, the out-of-state discrimination in *Granholm* and *Bacchus* failed strict scrutiny, and so should the discrimination in Minnesota's Farm Winery Act.

Defendant fails to offer a compelling state interest, let alone a lack of alternative means in achieving that interest. As such, this case is not at all similar to *Maine v. Taylor*, the one—and only—exception to the virtual per se rule against discrimination under the dormant Interstate Commerce Clause. The In-State Mandate therefore fails strict scrutiny and is unconstitutional.[3]

[3] Even though Defendant has conceded she does not know what the purpose of the In-State Mandate is, Sanders Dec., Ex. 1 (Answer to Interrogatory No. 4, p. 4-5), she may now argue that ensuring against consumer confusion on the origin of wine ingredients is a compelling interest, and that somehow the In-State Mandate is the only way to satisfy that interest. The Supreme Court has never identified this as a compelling interest under the dormant Interstate Commerce Clause, but even if it had, this concern is already addressed by federal law. In addition to the various requirements of the Act, Minnesota farm wineries are also subject to a complex set of federal regulations. One area of federal regulation is labeling laws. These ensure that consumers are not confused on the origin of their wines. *See* 27 C.F.R. § 4.1. For example, federal law requires that when the contents of a bottle of wine are less than 75% from one wine region, the bottler cannot claim it comes from a certain region. 27 C.F.R. § 4.25(b). Thus, for any

III. THE IN-STATE MANDATE IS A DISCRIMINATORY LAW THAT VIOLATES THE DORMANT FOREIGN COMMERCE CLAUSE.

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

The analysis of a dormant Foreign Commerce Clause claim is very similar to a dormant Interstate Commerce Clause claim. *See Kraft Gen. Foods v. Iowa Dep't of Revenue & Finance*, 505 U.S. 71, 81 (1992) ("Absent a compelling justification . . . a State may not advance its legitimate goals by means that facially discriminate against foreign commerce."). The two depart only in ways that make a dormant

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bottle that Alexis Bailly or Next Chapter produces that is made from less than 75% Minnesota-grown products, federal law prohibits them from labeling it "Minnesota wine." Both Plaintiffs follow these federal requirements. Bailly Dec., ¶ 20; Tulloch Dec., ¶ 23. Therefore, even without Defendant's concession, this would not save the In-State Mandate's constitutionality.

Foreign Commerce Clause analysis even stricter than the already very strict standard discussed in Part II. *See Piazza's Seafood World, LLC*, 448 F.3d at 750 (discussing additional foreign policy considerations not present in dormant Interstate Commerce Clause analysis that make the already high standard even stronger). This is because of the power Congress holds—to the exclusion of the states—over our relations with the rest of the world: "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Id.* at 749 (citing *Wardair Canada, Inc.*, 477 U.S. at 8) (internal quotations and citations omitted).

Minnesota's In-State Mandate applies just as much to foreign commerce as to domestic, interstate commerce. In the past, Alexis Bailly has imported products from Canada to make its wine. *Supra* at 3. It would like to import products from elsewhere in the world, including famous wine-making places like France. *Supra* at 3. Yet, the same legal inhibition on importing more products from farms across the St. Croix and Mississippi rivers also applies to importing more products from across the Great Lakes or the Atlantic Ocean.

Because the same analysis under the dormant Interstate Commerce Clause applies to the dormant Foreign Commerce Clause, Plaintiffs do not repeat those

arguments here, and incorporate Part II by reference. The In-State Mandate is unconstitutional under the Foreign Commerce Clause for the same reasons.

However, given the international scope of Minnesota's restriction, Plaintiffs additionally add that national unity in trade policy is not served if a state limits the ability of its farm wineries to trade with the international community, while protecting its own products. Congress has not prohibited Alexis Bailly and Next Chapter from trading with grape growers from around the world. Given Congress's choice here, and Congress's preeminence in international affairs, the State of Minnesota cannot constitutionally restrict these ties of international friendship through commerce, and thus balkanize international trade, in an effort to protect Minnesota's competing products. This Court should declare the In-State Mandate unconstitutional under the Foreign Commerce Clause.

CONCLUSION

This Court has before it a textbook violation of both the dormant Interstate Commerce Clause and the dormant Foreign Commerce Clause. The law explicitly limits businesses to where they can source their goods based on whether those goods come from inside or outside of the state. Further, its purpose is to protect Minnesota growers at the expense of out-of-state growers and Minnesota wine producers, such as Alexis Bailly and Next Chapter. It

therefore discriminates against both interstate and foreign commerce. That subjects it to the "strictest scrutiny," a standard Defendant cannot meet. This Court should grant Plaintiffs' Motion for Summary Judgment, declare the In-State Mandate unconstitutional, and permanently enjoin its enforcement.

Dated: September 29, 2017

Respectfully submitted,

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