UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AD OBSCURA, LLC D/B/A THE OBSCURE, Plaintiff, v. LILY M. FAN, Chair of the New York State Liquor Authority; EDGAR DE LEON, Commissioner of the New York State Liquor Authority; JOHN MAYA, Commissioner of the New York State Liquor Authority, all in their official capacities; and the NEW YORK STATE LIQUOR AUTHORITY, Defendants.	**Civil Action No.** 1:25-cv-3151 (CM) **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

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INTRODUCTION

This case challenges New York's discriminatory treatment of California distilleries in favor of New York distilleries. New York permits in-state craft distilleries to secure a license to ship their products directly to New Yorkers. California craft distilleries, however, are barred. In effect, New York is telling small California distilleries: *You can't sell here because you're not from here.* That's not just bad policy—it's unconstitutional.

Plaintiff Ad Obscura d/b/a The Obscure (The Obscure), a small, family-run craft distillery in California, wants to compete in the New York market on equal footing with New York distilleries. But state law slams the door in its face, not because of what it sells or how it sells it, but solely because of where it is from. The Constitution was designed to prevent exactly this kind of economic protectionism between the states. *See, e.g.*, *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (Laws discriminating against interstate commerce are "virtually per se invalid.").

Defendants seek to dismiss Plaintiff's complaint for lack of standing and failure to state a claim. But The Obscure clearly meets this Court's familiar three-part test for standing and its allegations fall squarely within recent Supreme Court precedent striking down similarly discriminatory alcohol laws under the Interstate Commerce Clause. *See, e.g.*, *Granholm v. Heald*, 544 U.S. 460, 472 (2005); *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 514 (2019); *see also Freeman v. Corzine*, 629 F.3d 146, 161 (3d Cir. 2010). Defendants' Motion to Dismiss should be denied.

BACKGROUND

The Challenged Regulation

The craft distillery industry has grown rapidly during the last two decades. In 2006, there were only 75 craft distilleries in the U.S. As of 2022, there were 2,283. Roger Morris, *How American Whiskey Has Come Back From the Dead – Category Intel*, Global Drinks Intel (May 30, 2023), https://tinyurl.com/mrhb3hdw. Consumers are not only interested in visiting distilleries but also seek to have craft spirits shipped directly to their homes. *See* Sovos ShipCompliant & Am. Craft Spirits Ass'n, *2024 Direct-to-Consumer Spirits Shipping Report*, https://tinyurl.com/3cyfn2af. New York, however, has erected discriminatory barriers to shipping directly to its consumers.

New York regulates alcohol distribution under a three-tiered system: alcohol manufacturers must be separate from both distributors (wholesalers) and retailers (i.e., bars or grocery stores), and distributors must be separate from retailers. *See generally*, New York State Liquor Authority, *Alcoholic Beverage Control Law*, https://tinyurl.com/4de4rmr8. Ordinarily, then, manufacturers would be prohibited from shipping directly to consumers. But New York recently passed a law allowing *in-state* craft distilleries manufacturing up to 75,000 gallons of spirits a year to ship a limited amount of spirits ordered via the internet, over the phone, or in-person directly to New York consumers. N.Y. Alco. Bev. Cont. Law §§ 61, 69.

Out-of-state distilleries are not so lucky. Distilleries that are located out of state and "equivalent in class and/or production capacity" to New York craft distillers may only ship to in-state consumers if their state affords New York distilleries "lawful

means" to ship spirits directly to its residents and "reciprocal shipping privileges." N.Y. Alco. Bev. Cont. Law § 68(1). The result is that distilleries from states that do *not* grant such reciprocal shipping privileges may not secure an out-of-state direct shipper's license. The Obscure is one such distillery.

Plaintiff The Obscure

The Obscure is a craft distillery that manufactures spirits and sells them at its tasting room in downtown Los Angeles. Compl. ¶ 18. It produces less than 75,000 gallons of spirits a year. Compl. ¶ 23. The Obscure maintains a website for California consumers to order its spirits through the internet and to have their orders shipped directly to them. Compl. ¶ 19.

The Obscure would like to ship to New York consumers. New York is an obvious target market for The Obscure given its downtown Los Angeles location, which attracts visitors from New York every year. It also has an even more direct connection to New York. Compl. ¶ 20. The Obscure produces a rye whiskey with tree trimmings harvested from American Chestnut trees from New York. Compl. ¶ 21. The Obscure donates a portion of the proceeds from its rye whiskey to the American Chestnut Foundation, which works to rehabilitate the American Chestnut tree in New York. Compl. ¶ 21. The Obscure has received requests from New York residents for direct shipments of spirits, and it would like to fulfill them. Compl. ¶ 22.

But New York bans The Obscure from shipping spirits directly to New York consumers because California does not extend reciprocity to New York distillers. Cal. Bus. & Prof. Code § 23300. But for New York's discriminatory shipping ban, The

Obscure "is ready, willing, and able to apply for a shipping license, to start shipping to New York residents, and to begin developing its direct-to-consumer spirits business in New York." Compl. ¶ 27. Because it is unwilling to risk fines and penalties, The Obscure does not currently ship to New York and has therefore brought this lawsuit to vindicate its constitutional rights.

ARGUMENT

The Supreme Court has repeatedly held that "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Granholm*, 544 U.S. at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). And it has invalidated multiple state alcohol laws that discriminate against out-of-state businesses. *See, e.g.*, *id.*; *Tenn. Wine & Spirits Retailers Ass'n*, 588 U.S. at 514. Plaintiff has adequately alleged that New York's law is discriminatory, unconstitutional, and is harming The Obscure. Defendants' Motion to Dismiss should be denied.

I. The Obscure Has Plausibly Alleged That It Has Standing

To establish standing, a plaintiff must demonstrate an injury in fact, fairly traceable to the defendants' conduct, which is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). When "a plaintiff is himself an object of the action (or foregone action) at issue there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Grand River Enters. Six Nations, Ltd. v. Boughton*, 988 F.3d 114, 121 (2d Cir. 2021) (quoting *Lujan*, 504 U.S. at 561–

62) (cleaned up). As the object of the regulation, The Obscure has established all three.

The Obscure would like to sell spirits directly to consumers in New York but is prohibited from doing so by the challenged law. Compl. ¶ 26. That conduct is fairly traceable to Defendants because Defendants are responsible for enforcing the challenged regulation. Compl. ¶¶ 8–9. A favorable decision will redress that injury because it will allow Plaintiffs to apply for a license to distribute spirits directly to consumers free of the discriminatory law. Compl. ¶ 13. Each of Defendants' arguments to the contrary fail.

A. Plaintiff Has Plausibly Alleged an Injury in Fact

Defendants claim The Obscure lacks standing because it did not identify a particular New Yorker who wishes to buy its alcohol. Defs.' MTD at 10. But no such allegations are required. The Obscure alleged that it has received requests from New York residents for direct shipment of spirits within the last three years, and because of New York's law, it was prohibited from fulfilling such requests. Compl. ¶ 22. This is the same type of information the Supreme Court relied upon in *Granholm*, 544 U.S. at 468 (noting generally that the plaintiffs has "received requests for its wine from Michigan consumers" and "tourists" from other states but could not fill the orders because of discriminatory direct-shipment bans). The Obscure's identical allegations, which "must [be] accept[ed] as true" on a motion to dismiss are therefore sufficient to establish an Article III injury. *Bonn-Wittingham v. Project OHR, Inc.*, 792 F. App'x 71, 73 (2d Cir. 2019).

More importantly, Defendants misunderstand Plaintiff's injury. The Obscure is injured because the challenged law discriminates against them. Even if no New Yorker wished to purchase its products right now—a fact that Plaintiff contests—it would still have a constitutional right to enter the market and attempt, on even footing with New York distilleries, to persuade consumers to purchase their product. Businesses enjoy a constitutional right to compete regardless of whether they are ultimately successful.

In their opposition, Defendants rely on cases where the plaintiffs' allegations were far more speculative. For example, they cite *Lurenz v. Coca-Cola Co.,* No. 22 CIV. 10941 (NSR), 2024 WL 2943834, at *3–4 (S.D.N.Y. June 10, 2024), an unpublished decision involving New York's Deceptive Trade Practices Act. But there, the plaintiff was asserting a price-premium theory, a fact-intensive claim that requires plaintiffs to show they paid more for a misbranded product than they would have if it were branded properly. The court ruled that the plaintiff did not plausibly allege that any product that he purchased was misbranded. Instead, his "sparse factual allegations" made it "equally plausible" that the products he bought were branded properly. That analysis is wholly inapposite to Plaintiff's straightforward allegations that a law that undoubtedly applies to its business is currently harming it. Compl. ¶ 4. In such a case, the injury is the unconstitutional discrimination, which is apparent from the law's face.

Defendants further claim that The Obscure fails to allege an injury-in-fact because it does not currently ship directly to consumers in any state other than

California. But its business decisions related to other jurisdictions lack any relevance to its standing to challenge New York's law.

It makes sense that The Obscure seeks to enter the U.S. direct shipping market incrementally. Applying for each state's license can be expensive.[1] Even New York's law requires a $150 licensing fee. And each one comes with its own compliance costs and regulatory burdens.[2]

The Obscure's unique connection makes New York a unique place that would make investment profitable. The New York to Los Angeles connection is a well-trodden route, as evidenced by the New York tourists who visit the Obscure every year. Compl. ¶ 20. The Obscure has deepened that tie by producing a rye whiskey with tree trimmings harvested from American Chestnut trees from New York. Compl. ¶ 21. The Obscure, in fact, donates a portion of the proceeds from its rye whiskey to the American Chestnut Foundation, which works to rehabilitate the American Chestnut tree in New York. Compl. ¶ 21. It's no wonder The Obscure has received requests from New York residents for direct shipments of spirits. Compl. ¶ 22. And it wants to meet that unique demand by entering the New York market. Compl. ¶ 27.

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[1] *See, e.g.*, Ky. Rev. Stat. § 243.030(31) ($260 per year for a limited out-of-state distilled spirits and wine supplier's license); N.D. Cent. Code, § 5-01-16.5 (requiring direct shipper to pay a fifty dollar annual fee for a direct shipping license); N.H. Rev. Stat. Ann. § 178:27(V)(a) (requiring direct shippers to pay a fee of eight percent the retail price of each shipment to the commission); Neb. Rev. Stat. §§ 53-124.01 & 53-160 (requiring a $500 licensing fee and a gallonage tax of $3.75 per gallon of liquor sold).

[2] *See, e.g.*, Ky. Rev. Stat. § 243.027(7)(a); N.D. Cent. Code, § 5-01-16.5; N.H. Rev. Stat. Ann. § 178:27 (requiring direct shippers to, among other things, file reports to the commission every month with purchase dates and customer names and addresses and keep a record of every report for three years for the commission to view upon request); Neb. Rev. Stat. § 53-123.15 (requiring direct shippers to submit monthly reports to the commission with records of all sales; permit inspection of the distiller's premises by the commission, and pay the expenses incurred by the commission inspector); N.Y. Alco. Bev. Cont. Law § 68(3)(c)–(k).

The Obscure alleged that it would comply with these fees and requirements for New York. Compl. ¶¶ 27, 31 ("But for the Interstate Shipping Statute's reciprocity requirement, The Obscure is ready, willing, and able to apply for a shipping license, to start shipping to New York residents, and to begin developing its direct-to-consumer spirits business in New York."). This is sufficient to demonstrate that they are injured by the challenged law.

Last, Defendants claim The Obscure lacks "concrete plans" to sell liquor directly to New York consumers. Defs.' MTD at 11. But this Court has "repeatedly described that requirement as a low threshold, which helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) (internal citations omitted). To be sure, the Supreme Court has required these injuries be "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). But Plaintiff meets this "low" bar. The Obscure alleged that it receives requests to ship directly to New York and that it would like to start shipping there but is barred by the current discriminatory regulatory scheme. Compl. ¶ 26. But for these regulations, The Obscure would apply for a license and begin selling its spirits directly to New York Consumers. Compl. ¶ 27.

Defendants cite a variety of cases, all of which are irrelevant.[3] For example, in *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 47–48 (2d Cir.

[3] Among the cases cited by Defendants are two unpublished California district court opinions. Defs.' MTD at 12. In one, the Plaintiff failed to identify any California law which harmed them. *Nothing To It!!! v. Jolly*, No. C06-02653 MJJ, 2006 WL 8460097, at *5 (N.D. Cal. Nov. 3, 2006). In the other, the Plaintiffs failed to allege actions that the Court could determine would violate the challenged law.

2017), the Second Circuit ruled that a casino developer lacked standing to challenge a special pathway for tribes to build casinos on non-tribal land. Citing "previous cases" involving "a plaintiff who challenges a barrier to bidding on public contracts," it ruled that the plaintiff's injury was not imminent because it had no history of bidding and had only pleaded that it was "interested" in exploring development opportunities, but had not alleged any "concrete plans to enter into a development agreement" or "any serious attempts at negotiation." *Id.* Plaintiff is not merely interested in becoming a distillery or shipping to New Yorkers. It is already a distillery that is open to the public, Compl. ¶ 16, that receives visitors and requests from New York, Compl. ¶ 20, and that has a serious intention to ship directly to New York consumers and would do so if not for the challenged laws. Compl. ¶ 27. Those allegations are far more concrete than one plaintiff's subjective desire to build a casino if he were ever to successfully bid on a public contract.

Defendants' reliance on *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, is equally unpersuasive. Importantly, that decision came at the merits stage on a full factual record, rather than a motion to dismiss that only looks at the pleadings. No. 01-CV-556A, 2008 WL 781865, at *3 (W.D.N.Y. Feb. 25, 2008). The court observed that it could not rely on the allegations in the complaint but rather had to determine what the plaintiff could actually prove. *Id.* at *5. Discovery revealed that the plaintiff

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Dwinell, LLC v. McCullough, No. 2:23-CV-10029-SB-KS, 2024 WL 3009300, at *4 (C.D. Cal. May 17, 2024). In both cases, the courts questioned whether California actually enforced the challenged provision. *Id.* at *5; *Nothing to It!!!*, 2006 WL 8460097, at *5. Here, New York does not argue that it doesn't enforce the challenged regulation. Nor does it argue that The Obscure's desire to ship directly New York consumers wouldn't violate its regulations.

needed to build a billboard before the challenged regulations even applied to him, and plaintiff had made no concrete plans to build such a billboard—he merely had the subjective intent to do so in his mind—and there was no property available in the town for such a development. *Id.* at *10, 13. Under such circumstances, the plaintiff could not prove that his injury was actual or imminent.

Here, The Obscure is open to the public, sells its products legally in California, has a website, has the capacity to ship, has received requests to do so, and is only lacking the requisite regulatory approval that it can pursue once New York ends its unconstitutional ban. Taking these allegations as true, The Obscure satisfies the injury in fact requirement.

B. Plaintiff Has Plausibly Alleged That Its Injury Is Redressable

Defendants also argue that The Obscure has failed to allege a harm that could be redressed by favorable decision from this Court, first, because it claims that Plaintiff's injuries are too hypothetical, so other obstacles to its ultimate goals may remain even after a favorable decision, and second, because it claims that The Obscure has not pleaded that it would be eligible for a license even absent the unconstitutional reciprocity requirement. Defs.' MTD at 13–14. Both arguments fail.

To establish redressability, The Obscure need not show that a favorable decision will remove every obstacle to their ultimate goal. Instead, it may seek redress even if the challenged law is one of multiple obstacles to the desired action. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260–64 (1977) (injury was redressable though additional obstacles would remain to plaintiff's ultimate goal

after relief was granted); *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 285 (4th Cir. 2018) ("The removal of even one obstacle to the exercise of one's rights, even if other barriers remain, is sufficient to show redressability.").

Here, Plaintiff is injured because the challenged law places it at a disadvantage vis a vis New York craft distillers. There is no dispute that The Obscure is prohibited from receiving a shipping license because it operates in a state that does not have reciprocity for New York craft distilleries. An injunction against that bar would redress that injury by removing the unconstitutional barrier.

Defendants also claim that Plaintiff's injury is not redressable because it never pleaded that it is eligible for New York's out-of-state direct shipper's license even absent the unconstitutional discrimination. Defs.' MTD at 13–14. That's wrong. Plaintiff specifically pleaded that it "is equivalent in production capacity to the New York microdistilleries that may ship directly to New York consumers because it produces more than 50 gallons and less than 75,000 gallons of spirits a year." Compl. ¶ 23. This is less than New York's cap for distillers that are permitted to ship directly to consumers. N.Y. Alco. Bev. Cont. Law §§ 61(1-a), 69. That plausible allegation cannot be defeated by Defendants' unsupported speculation that it *might* not grant California craft distillers a shipping license because California's production cap is higher, even if the craft distiller in question is equivalent in production capacity to New York craft distillers.

Importantly, Defendants do not actually argue that California licensees would be categorically ineligible for a direct shipper's license absent the reciprocity

agreement. And, in fact, they suggest in a footnote that Plaintiff may very well be eligible. Defs.' MTD at 13 n.5. Instead, they say Plaintiff never pleaded that it was eligible. That's untrue. And in any event, if Defendants were to suggest that other states must enact identical microdistillery licensing laws in order for their distilleries to be able to ship to New York, that would raise its own dormant commerce clause and due process clause concerns. *See Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). The government cannot avoid one constitutional failing by relying on a different constitutional failing.

II. Plaintiff Has Pleaded a Valid Interstate Commerce Clause Claim

Article I, Section 8 of the U.S. Constitution gives Congress the power to regulate "commerce . . . among the several States." It is well-established that the authority given to Congress under the Interstate Commerce Clause implies a negative, or "dormant" constraint on the power of the States to enact legislation that discriminates against or unduly burdens interstate commerce. *Tenn. Wine & Spirits Retailers Ass'n*, 588 U.S. at 514, aff'd 139 S. Ct. 2449 (2019). "[I]n all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm*, 544 U.S. at 461 (quoting *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.,* 511 U.S. 93, 99 (1994)).

This interpretation of the dormant Commerce Clause is based on text, logic, and history. One of the major difficulties for the United States under the Articles of Confederation was trade barriers that began popping up between States. *Tenn. Wine*

& Spirits Retailers Ass'n, 588 U.S. at 515. For example, New York placed tariffs on all ships heading to or from New Jersey to encourage shipping to take place in New York. Arnold H. Lubasch, *Tax Quarrels Among States Go Back a Long Way*, N.Y. Times (May 7, 1989), https://tinyurl.com/435tpsj8. New Jersey then retaliated with its own taxes on New York. *Id.* Such protectionism led James Madison to remark that these laws were "adverse to the spirit of the Union, and tends to beget retaliating regulations, not less expensive and vexatious in themselves than they are destructive of the general harmony." James Madison, *Vices of the Political System of the United States* (Apr. 30, 1787), https://tinyurl.com/wxkfs862.

This led to the calling for the Annapolis Convention, which met "to take into consideration the trade and commerce of the United States, to consider how far a uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony." *Annapolis Convention Resolution, Proceedings of the Commissioners to Remedy Defects of the Federal Government* (Sept. 14, 1786), https://tinyurl.com/mw8h434s. Since only five states sent delegates, the Convention produced a resolution for the States to convene a constitutional convention in Philadelphia beginning in May of 1787. *Id.* That convention ultimately scrapped the Articles of Convention for a new Constitution. At the center of that new Constitution was a federal government empowered to regulate commerce among the several states. U.S. Const. art. I, § 8, cl. 3.

As the Supreme Court recently noted, "the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law."

Tenn. Wine & Spirits Retailers Ass'n, 588 U.S. at 515. In particular, "[t]he rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests." *Granholm*, 544 U.S. at 472. "Allowing States to discriminate against out-of-state [sellers] 'invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'" *Id.* at 473 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

Discriminatory laws are virtually "per se" unconstitutional. *Granholm*, 544 U.S. at 476 (quoting *Philadelphia*, 437 U.S. at 624). Once a plaintiff demonstrates that a law discriminates on its face or in effect, the burden shifts to the government to justify the law based on public health, safety, or some other "legitimate nonprotectionist ground." *Tenn. Wine & Spirits Retailers Ass'n*, 588 U.S. at 539. Plaintiff has plausibly alleged that New York's reciprocity requirement fails this test.

A. The Obscure Has Plausibly Alleged That New York's Reciprocity Requirement Discriminates Against California Distilleries

A law discriminates against interstate commerce when it treats in-state and out-of-state businesses differently. *See, e.g.*, *Granholm*, 544 U.S. at 473; *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 381 (1976); *Corzine*, 629 F.3d at 161. Here, the challenged regulations allow in-state distilleries to ship to New York consumers, while only allowing out-of-state distilleries to ship to New York consumers if their state offers reciprocity. That's

discriminatory. *Granholm*, 544 U.S. at 493 (law requiring "out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers" was discriminatory); *see also Corzine*, 629 F.3d at 152, 161–62 (reciprocity provision for direct-to-consumer wine sales was facially discriminatory and unsupported by any legitimate local interest). *Id.* at 161–62; *Great Atl. & Pac. Tea Co.*, 424 U.S. at 368. (Mississippi law allowing milk produced in other states to be sold in Mississippi only if the state's offered reciprocity was discriminatory and unconstitutional); *see also New Energy Co. of Ind.*, 486 U.S. at 274 (invalidating a reciprocity provision as discriminatory even though it wasn't a total ban and only put the out-of-state product "at a substantial commercial disadvantage through discriminatory tax treatment."); *Corzine*, 629 F.3d at 161 (invalidating a reciprocity provision for importing wine across state lines as discriminatory and unconstitutional).

Defendants are correct when they emphasize that courts have not held reciprocity agreements to be per se unconstitutional. Defs.' MTD at 17. But courts have deemed them per se discriminatory. And the cases that Defendants cite demonstrate just that. Defendants do not cite a single case where courts have found that a reciprocity requirement is non-discriminatory.[4]

Defendants contend that since the regulations do not discriminate against ***all*** out-of-state distillers, their law is not discriminatory. But the case law does not allow

[4] Defendants raise valid critiques of California's discriminatory regulations. Defs.' MTD at 23. But its recourse is a lawsuit against California, not unconstitutional discrimination against California distillers.

for even a "low-level trade war." *Granholm*, 544 U.S. at 473. It is undisputed that New York will deny every direct shipping license application from a California distillery, while allowing New York distilleries to receive that exact same license. This is precisely the type of different treatment of in-state and out-of-state businesses that the dormant commerce clause prohibits. *Granholm*, 544 U.S. at 473.

Defendants further argue that the purpose behind the challenged regulation isn't protectionism, but rather to "open the market," "allow for more commerce" or create a "fair and level playing field," Defs.' MTD at 20. But that argument goes to whether the law can meet constitutional scrutiny, not whether the law discriminates against out of state businesses in the first place. Thus, the argument is misplaced.

B. Defendants Do Not Provide Any Nonprotectionist Justifications for the Reciprocity Requirement

Once Plaintiffs show that the law discriminates against interstate commerce, the burden shifts to the government to prove that the discrimination is justified based on public health, safety, or some other "legitimate nonprotectionist ground." *Tenn. Wine & Spirits Retailers Ass'n*, 588 U.S. at 539. This is a high burden, and states may not rely on "mere speculation" or "unsupported assertions" to justify laws that discriminate against interstate commerce. *Id.*

Plaintiffs have plausibly alleged that there is no legitimate nonproteciotnist ground for the challenged laws, and Defendants have not defeated those claims in the Motion to Dismiss. Compl. ¶ 39. They do not provide a single justification for the ban. They do not argue that the law protects public health or safety or somehow relates to the qualifications of licensees. Instead, they argue their protectionism is good because

it expanded the number of states whose distillers could ship directly to consumers in New York, even if it discriminates against others. Defs.' MTD at 23–24. They further say the law was "enacted with a condition that promotes fairness between shippers in New York and other states." Defs.' MTD at 24. But that is always the argument of those seeking to establish protectionist trade regimes. *Great Atl. & Pac. Tea Co.* 424 U.S. at 379 (rejecting the argument that a reciprocity agreement was "a legitimate means" of leveling the playing field). Far from disclaiming New York's protectionist purpose in having a reciprocity requirement, Defendants admit to it.

III. Defendants Are the Proper Parties to This Suit

Finally, the Motion to Dismiss is rife with insinuations that it is California and not New York that should be the target of Plaintiff's lawsuit. Defs.' MTD at 3, 7, 23. But it is undisputed that it is New York, not California, that controls the importation of alcohol into its state. N.Y. Alco. Bev. Cont. Law § 69. It is New York, not California that would have to approve The Obscure's application to sell directly to consumers. N.Y. Alco. Bev. Cont. Law § 68. It is New York, not California, that would be able to prosecute The Obscure if it were to sell directly to a New York resident. N.Y. Alco. Bev. Cont. Law §§ 130, 152. And it is Defendants who are the individuals and agency charged with the enforcement of the challenged regulations. N.Y. Alco. Bev. Cont. Law § 17 (Establishing Liquor Authority as the New York state agency that regulates the manufacturing, transportation, and sale of alcohol in New York). Defendants are therefore the proper defendants in this case.

Indeed, the Supreme Court rejected this same argument when dealing with a reciprocity requirement in *Great Atl. & Pac. Tea Co.*, 424 U.S. at 380–81. First, it said that, to the extent that another state was creating unfair trade barriers, Defendants could bring their own challenge to the regulation in state or federal court under the Commerce Clause. *Id.* Second. the Court left open that the offending state could provide its own justifications that were different than the Defendants' justifications. Both are true in this case. Whatever legal arguments Plaintiff may have against California—whether current or future—are inapposite to its claims against New York.

CONCLUSION

For the foregoing reasons, The Obscure respectfully requests that this Court deny Defendants' motion to dismiss.

Dated: July 11, 2025. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Local Civil Rule 7.1, I hereby certify that this opposition contains 4,935 words, exclusive of cover page, table of contents, table of authorities, certification and signature block, as established using the word count function of Microsoft Word, and complies with the formatting rules set forth in Rule V(D) of the Court's Individual Practice Rules.

/s/ Christian Townsend
Christian Townsend*

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2025, I filed the foregoing with the Court via CM/ECF. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Christian Townsend
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