

**Correction:** The student Note Alana Lenore Joyce, *Wine Online: Fermenting the Role of Third Party Providers from California to New York*, 48 UC DAVIS L. REV. 2035 (2015) incorrectly stated that New York State Senate Bill 5320 became law. In fact, the proposed amendment to the state's alcoholic beverage control law never advanced out of committee during the 2013–14 Legislative Session. The constitutional analysis in Part III.A of the Note thus applies to the proposed amendment, not to New York law as it currently stands. The author and the UC Davis Law Review regret the error.

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## NOTE

# Wine Online: Fermenting the Role of Third Party Providers from California to New York

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## INTRODUCTION

Twenty-first century consumers are online shopping aficionados. More people than ever are purchasing wine online, rather than in liquor stores, and having it shipped to their homes, a process known as direct-to-consumer shipping.<sup>1</sup> Between 2009 and 2011, online search queries for wine increased over 33%, and searches for wine on mobile phones increased tenfold.<sup>2</sup> For 2013, estimates expect annual online wine sales to total nearly \$1.5 billion, up 12% from 2012.<sup>3</sup>

The availability of wine online has facilitated the modern emergence of a new actor in the wine industry: Third Party Providers (“TPPs”). TPPs are independent persons or businesses that operate websites to market and advertise wine for sale from licensed producers and retailers.<sup>4</sup> Currently, TPPs need not obtain a license to maintain websites or provide compliance services.<sup>5</sup> Yet TPPs arguably engage in activities for which a license is mandated: the sale and direct shipment of wine.<sup>6</sup>

TPPs’ growing involvement in online wine sales contributes to already incongruent state regulations governing the interstate shipment of wine. For example, in 2011, California adopted a framework permitting TPPs to facilitate wine sales on the condition

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<sup>1</sup> *Online Wine Sales Are on the Rise*, TODAY (Aug. 27, 2013), <http://www.today.com/video/today/52855255>; see also CAL. DEP’T OF ALCOHOLIC BEVERAGE CONTROL, INDUSTRY ADVISORY: LIMITED OFF-SALE WINE LICENSE 1 (2011), available at <http://www.abc.ca.gov/trade/IA%20Type%2085.pdf> (explaining that online orders for alcoholic beverages have increased over the past decade and that state statutes fail to keep pace with licensees’ desire to sell wine online).

<sup>2</sup> *8 Tips to Increase Online Wine Sales — Lessons from Google*, WINE STARS (May 31, 2011), <http://winestars.wordpress.com/2011/05/31/8-tips-to-increase-online-wine-sales-lessons-from-google> (quoting Google manager Joe Rosenberg).

<sup>3</sup> *Online Wine Sales Are on the Rise*, *supra* note 1.

<sup>4</sup> CAL. DEP’T OF ALCOHOLIC BEVERAGE CONTROL, INDUSTRY ADVISORY: UNLICENSED THIRD PARTY SERVICE PROVIDERS (2009) [hereinafter UNLICENSED THIRD PARTY SERVICE PROVIDERS], available at <http://www.abc.ca.gov/trade/Advisory-Third%20Party.pdf>. TPPs market and advertise on various Internet platforms, including flash and private sales sites and multi-brand company websites. Jeff Carroll, *Third Party Providers Are Here . . . To Stay*, SHIPCOMPLIANT BLOG (Apr. 1, 2012), <http://shipcompliantblog.com/blog/2012/04/01/third-party-providers-are-here-to-stay> [hereinafter *Third Party Providers Are Here*]; see also FED. TRADE COMM’N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 5 (2003) [hereinafter FTC REPORT], available at [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-report-concerning-possible-anticompetitive-barriers-e-commerce-wine/winereport2.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-possible-anticompetitive-barriers-e-commerce-wine/winereport2.pdf).

<sup>5</sup> CAL. DEP’T OF ALCOHOLIC BEVERAGE CONTROL, UNLICENSED THIRD PARTY SERVICE PROVIDERS, *supra* note 4.

<sup>6</sup> *Id.*

that licensees remain liable for TPPs' actions.<sup>7</sup> Conversely, in April 2013, the New York State Liquor Authority ruled that TPPs facilitating online wine sales violated state law.<sup>8</sup> Because of varying state laws, which span far beyond regulating TPPs, the wine industry has failed to keep pace with other industries when it comes to capitalizing from online sales.<sup>9</sup>

This Note argues that New York should adopt California's framework for regulating TPPs. Part I introduces the regulatory history of the wine industry; the U.S. Supreme Court decision *Granholm v. Heald*; the principal state agencies that regulate wine; and modern developments in the wine industry.<sup>10</sup> Part II explores California and New York's differing approaches to regulating TPPs' business relationships with licensees.<sup>11</sup> Part III contends, for several reasons, that New York should adopt the California guidelines to regulate TPPs.<sup>12</sup> First, the New York ruling is unconstitutional because it discriminates against out-of-state third parties.<sup>13</sup> Second, California's advisory ruling is constitutional, offering New York a workable nondiscriminatory alternative.<sup>14</sup> Lastly, California's policy, which allows TPPs, promotes consumer choice, and benefits wineries of all sizes in New York.<sup>15</sup> This Note concludes, to remedy violations of constitutional law and align with policy in favor of both consumers and wine producers, New York should adopt the California regulatory guidelines for TPPs.

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<sup>7</sup> CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, INDUSTRY ADVISORY: THIRD PARTY PROVIDERS (2011) [hereinafter THIRD PARTY PROVIDERS], available at <http://www.abc.ca.gov/trade/IA%20Third%20Party%20Providers.pdf>.

<sup>8</sup> Application of Six88 Solutions, Inc. d/b/a ShipCompliant for a Determination on Legality of Internet Advertising Platform, Declaratory Ruling 2013-01006A, at 6-8 (N.Y. Liquor Auth. April 19, 2013) [hereinafter Declaratory Ruling 01006A], available at [http://www.sla.ny.gov/system/files/2013-01006A\\_-\\_Internet\\_Advertising\\_Platform.pdf](http://www.sla.ny.gov/system/files/2013-01006A_-_Internet_Advertising_Platform.pdf).

<sup>9</sup> Alan E. Wiseman & Jerry Ellig, *Market and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia*, 6 BUS. & POL. 1, 1 (2004) [hereinafter *Market and Nonmarket Barriers*] (explaining that laws and regulations may hamper e-commerce and existing state regulations that govern alcohol sales already provide a barrier limiting the potential development of an online wine market); *Online Wine Sales Are on the Rise*, *supra* note 1.

<sup>10</sup> See discussion *infra* Part I.

<sup>11</sup> See discussion *infra* Part II.

<sup>12</sup> See discussion *infra* Part III.

<sup>13</sup> See discussion *infra* Part III.A.

<sup>14</sup> See discussion *infra* Part III.B.

<sup>15</sup> See discussion *infra* Part III.B.

## I. BACKGROUND

Part I begins by tracing wine's Prohibition history and the emergence of the three-tier distribution system.<sup>16</sup> Next, this Part gives an overview of the U.S. Supreme Court's decision in *Granholm v. Heald* and explains the decision's present and future effects on consumers and wine.<sup>17</sup> Lastly, this Part introduces the state regulatory bodies charged with administering various state wine laws,<sup>18</sup> the emergence of TPPs online, and TPPs' efforts to comply with state rules and regulations.<sup>19</sup>

A. *Prohibition, the Twenty-first Amendment, and the Three-Tier System*

The only commodity subjected to two constitutional amendments is alcohol.<sup>20</sup> In 1919, the U.S. government ratified the Eighteenth Amendment, effectively prohibiting the production, transportation, and sale of alcoholic beverages.<sup>21</sup> Fourteen years later, the ratification of the Twenty-first Amendment ended Prohibition.<sup>22</sup> The intention of ratifying these amendments was to regulate the role of alcohol in both American society and economy.<sup>23</sup>

With the end of Prohibition and the enactment of the Twenty-first Amendment, states regained the power to enact legislation regulating the wine industry.<sup>24</sup> The result was an archaic patchwork of state and federal law because each state, as well as the federal government, developed its own regulatory scheme.<sup>25</sup> However, state laws did reflect

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<sup>16</sup> See discussion *infra* Part I.A.

<sup>17</sup> See discussion *infra* Part I.B.

<sup>18</sup> See discussion *infra* Part I.C.

<sup>19</sup> See discussion *infra* Part I.D.

<sup>20</sup> See U.S. CONST. amend. XXI, § 2; U.S. CONST. amend. XVIII, § 1 (repealed 1933).

<sup>21</sup> U.S. CONST. amend. XVIII, § 1 (repealed 1933).

<sup>22</sup> See U.S. CONST. amend. XXI, § 2.

<sup>23</sup> ANDA LINCOLN & BRAD LINCOLN, 21 QUESTIONS ABOUT OPENING A WINERY IN THE UNITED STATES: A FEDERAL PRIMER 5 (2010).

<sup>24</sup> See CAROL ROBERTSON, THE LITTLE RED BOOK OF WINE LAW 108 (2008).

<sup>25</sup> LINCOLN & LINCOLN, *supra* note 23, at 5; RICHARD MENDELSON, WINE IN AMERICA: LAW AND POLICY 13-14 (2011) (explaining that because the Twenty-first Amendment authorized states to control delivery and use of alcoholic beverages within its board, each state had to develop a regulatory scheme, while the federal government retained jurisdiction over interstate commerce, developing its own regulatory scheme); see *Granholm v. Heald*, 544 U.S. 460, 484 (2005) (stating that ratification of the Twenty-first Amendment returned to the states the power to regulate alcohol under the Wilson and Webb-Kenyon Acts); *State Shipping Laws FAQs*, WINE INST., <http://www.wineinstitute.org/initiatives/stateshippinglaws/faqs> (last visited Dec. 22, 2013) (explaining that local business interests and regional political attitudes have

the majority viewpoint at the time, which was that alcohol, including wine, was inherently dangerous and required regulation and control to protect citizens from its deleterious effects.<sup>26</sup> Therefore, state laws attempted to control consumption, collect tax revenue, and eliminate alcohol-related crime.<sup>27</sup> To accomplish this, most states adopted a three-tier distribution system.<sup>28</sup>

The state Alcoholic Beverage Control agency (“ABC”) regulates the three-tier distribution system, and licensing laws enforce the system.<sup>29</sup> Tier one is made up of producers: the wineries.<sup>30</sup> Tier two consists of wholesalers.<sup>31</sup> And tier three is composed of retailers.<sup>32</sup> The system mandates that wine must pass through each tier before reaching the consumer.<sup>33</sup> This means that a licensed winery must distribute its product to a licensed wholesaler, who distributes it to a licensed retailer.<sup>34</sup> Also, no tier may act in the capacity of another, meaning, for example, that a winery could not sell to consumers.<sup>35</sup> Traditionally, the retailer tier was the only level permitted to sell directly to

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had a varied effect on each state’s direct shipment laws, which range from legal to felonious activity). *See generally* Rachel M. Perkins, Note, *Wine Wars: How We Have Painted Ourselves into a Regulatory Corner*, 12 VAND. J. ENT. & TECH. L. 397 (2010) (identifying the roots of wine wars and proposing solutions).

<sup>26</sup> *See* MENDELSON, *supra* note 25, at 10-11.

<sup>27</sup> *See Granholm*, 544 U.S. at 460, 484; LINCOLN & LINCOLN, *supra* note 23, at 5; MENDELSON, *supra* note 25, at 15-19.

<sup>28</sup> MENDELSON, *supra* note 25, at 15-19; Wiseman & Ellig, *Market and Nonmarket Barriers*, *supra* note 9, at 2-3 (noting that by the 1980s almost every state had adopted some form of the three-tier system making the interstate direct shipment of wine generally illegal in the United States — with the exception of Alaska, California, and Rhode Island); Judy Janes, *Wine Online: Wine Sales and the Internet Market*, AM. ASS’N OF L. LIBR. SPECTRUM, July 2010, at 22, 22 available at <http://www.aallnet.org/main-menu/Publications/spectrum/Archives/Vol-14/pubsp1007/pub-sp1007-wine.pdf>.

<sup>29</sup> LINCOLN & LINCOLN, *supra* note 23, at 14; ROBERTSON, *supra* note 24, at 116-18; *see* MENDELSON, *supra* note 25, at 29.

<sup>30</sup> *See* FTC REPORT, *supra* note 4, at 5. Producers must have a permit to make wine from the Alcohol and Tobacco Tax and Trade Bureau in order to sell wine. *See* 27 U.S.C. § 203 (2012).

<sup>31</sup> *See* 27 U.S.C. § 203; FTC REPORT, *supra* note 4, at 5. The wholesalers intervened as a party litigant in *Granholm* and in virtually every *Granholm*-related case since. *See Granholm*, 544 U.S. at 460; *see also* ROBERTSON, *supra* note 24, at 116-18 (wine distributors/wholesalers argue that they play a critical role in protecting the state and its residents by ensuring the collection of taxes, by preventing the sale of alcohol to minors, and by limiting the consumption of alcoholic beverages in general).

<sup>32</sup> *See* LINCOLN & LINCOLN, *supra* note 23, at 6; Janes, *supra* note 28, at 22.

<sup>33</sup> LINCOLN & LINCOLN, *supra* note 23, at 6; Janes, *supra* note 28, at 22.

<sup>34</sup> LINCOLN & LINCOLN, *supra* note 23, at 6; Janes, *supra* note 28, at 22.

<sup>35</sup> *See* LINCOLN & LINCOLN, *supra* note 23, at 6; Janes, *supra* note 28, at 22.

consumers.<sup>36</sup> Thus, the three-tier system has historically forced consumers to travel to the retailer, such as a tavern, grocery store, or liquor store, to purchase wine to bring home.<sup>37</sup>

Despite developments in law and society, many Prohibition-era regulations, including the three-tier system, remain in place today.<sup>38</sup> For example, a Kentuckian who places an online order for a case of California wine and has it shipped to her house will likely do so without knowing she has committed a felony.<sup>39</sup> This example demonstrates how Prohibition-era laws have created a legal conundrum for the wine industry and its regulators in the twenty-first century.<sup>40</sup>

## B. *Granholm v. Heald: A Victory for Out-of-State Wineries*

### 1. The *Granholm* Decision

In 2005, the U.S. Supreme Court decision *Granholm v. Heald* was a small victory for the wine industry.<sup>41</sup> In *Granholm*, in-state consumers and out-of-state wineries challenged Michigan and New York laws regulating the interstate shipment of wine.<sup>42</sup> Both states mandated that wine pass through the three-tier system but permitted in-state

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<sup>36</sup> LINCOLN & LINCOLN, *supra* note 23, at 6; Janes, *supra* note 28, at 22.

<sup>37</sup> See ROBERTSON, *supra* note 24, at 117 (noting, for example, that under the strict three-tier system, wineries or producers could not establish retail shops and retail shops could not obtain a license to make wine).

<sup>38</sup> See Christopher Stipes, *Heard It Through the Grapevine: Chapter 28 Saves California Wine Competitions from Prohibition-Era Law*, 40 MCGEORGE L. REV. 303, 303 (2009) (stating that sharing homemade wine was illegal in California until 2008 because homemade winemaking is not part of the three-tier system or production and distribution); see also Jack S. Blocker, Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. PUB. HEALTH 233, 240 (2006) (noting that Prohibition era laws affect American consumption of alcohol). Prior to the *Granholm* decision in 2005, state wine distribution followed one of two patterns: every drop of wine had to pass through the three-tier system, or the state had allowed in-state wineries to sell directly to in-state consumers but prohibited out-of-state wineries from doing the same. ROBERTSON, *supra* note 24, at 109.

<sup>39</sup> See *generally About Us*, FREE THE GRAPES!, <http://freethegrapes.org/about-us> (last visited Dec. 22, 2013) (illustrating that circumventing the three-tier system is still a felony in some states).

<sup>40</sup> Janes, *supra* note 28, at 22 (predicting new challenges in the wine industry will arise with the use of Internet providers as marketing agents handling online orders of wine through licensed entities).

<sup>41</sup> See *Granholm v. Heald*, 544 U.S. 460, 461 (2005).

<sup>42</sup> *Id.* at 469.



wineries to circumvent the system with a direct shipping license.<sup>43</sup> Thus, in-state wineries could ship directly to residents.<sup>44</sup>

However, the direct shipping license was not equally available to out-of-state wineries.<sup>45</sup> The Michigan statute plainly prohibited out-of-state wineries from acquiring a direct shipping license.<sup>46</sup> The New York statute required out-of-state wineries to have an in-state physical presence, such as an office, as a precondition for a direct shipping license.<sup>47</sup> This meant that out-of-state wineries had to pass their wine through the three-tier system.<sup>48</sup>

The *Granholm* Court held that laws permitting in-state wineries to sell directly to consumers, while prohibiting out-of-state wineries from doing the same, were unconstitutional.<sup>49</sup> The States argued that the Twenty-first Amendment allowed this type of discrimination because it explicitly gave states the power to regulate the sale and distribution of wine.<sup>50</sup> The Court rejected this argument and ruled that state laws cannot discriminate between in-state and out-of-state wineries without violating the Commerce Clause.<sup>51</sup> The Court held that states should treat the interstate movement of alcohol like the interstate movement of any other commodity.<sup>52</sup> Thus, *Granholm* mandated that states regulate in-state and out-of-state wineries evenhandedly.<sup>53</sup>

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<sup>43</sup> *Id.* at 469-70.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 469.

<sup>47</sup> *Id.* at 470.

<sup>48</sup> See ROBERTSON, *supra* note 24, at 117-18 (explaining that alcohol must pass through a producer, distributor and retailer, that no tier may act in the capacity of another, and that a typical wholesaler may mark up wine by 25%).

<sup>49</sup> *Granholm*, 544 U.S. at 465-66.

<sup>50</sup> *Id.* at 469.

<sup>51</sup> *Id.* at 466.

<sup>52</sup> See U.S. CONST. amend. XXI; *Scott v. Donald*, 165 U.S. 58, 93 (1897); *Walling v. Michigan*, 116 U.S. 446, 455 (1886) (“A discriminating tax imposed by a state, operating to the disadvantage of the products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the constitution upon the congress of the United States.”); *Tiernan v. Rinker*, 102 U.S. 123, 127 (1880) (invalidating a law levying a tax on people selling liquors but exempting the sale of liquors manufactured in the state).

<sup>53</sup> *Granholm*, 544 U.S. at 476-77 (citing *Scott*, 165 U.S. at 93; *Walling*, 116 U.S. at 455; *Tiernan*, 102 U.S. at 127).

## 2. The *Granholm* Commerce Clause Test

In so ruling, the *Granholm* Court applied a two-part test to determine whether state laws affecting the interstate movement of wine complied with the Commerce Clause.<sup>54</sup> The Court first asked if the law was discriminatory.<sup>55</sup> A law was discriminatory if it imposed disparate treatment upon an entity.<sup>56</sup> For example, if a law provided in-state entities a benefit that it denied to out-of-state entities, the law was discriminatory.<sup>57</sup> Second, if the law proved discriminatory, the Court asked if the law advanced a legitimate local purpose that states could not adequately address by other reasonable nondiscriminatory alternatives.<sup>58</sup> The later question placed a heavy burden on the state: strict scrutiny.<sup>59</sup> Under strict scrutiny, the state must first demonstrate that the challenged law promoted at least one local purpose.<sup>60</sup> Next, the state must use concrete evidence to explain why other nondiscriminatory laws could not advance that purpose.<sup>61</sup>

In *Granholm*, the Court found that the laws in question were discriminatory because in-state wineries were eligible for direct shipping licenses, while out-of-state wineries were not.<sup>62</sup> The Court then found that Michigan and New York failed to meet the burden of the second prong.<sup>63</sup> The states argued that their statutes promoted several legitimate local purposes, including regulatory accountability, facilitating tax collection, and keeping alcohol out of minors' hands.<sup>64</sup> The Court acknowledged the states' interests as legitimate but concluded that both states had nondiscriminatory alternatives to achieve the same interests rather than the discriminatory laws in place.<sup>65</sup>

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<sup>54</sup> *Id.* at 488-93; *Bacchus Imp., Ltd. v. Dias*, 468 U.S. 263, 274-76 (1984) (establishing a standard for determining when a discriminatory state liquor regulation is permissible under the Twenty-first Amendment).

<sup>55</sup> *Granholm*, 544 U.S. at 488-93.

<sup>56</sup> *Id.* at 473-76.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 489.

<sup>59</sup> Strict scrutiny under the dormant Commerce Clause is distinct from the strict scrutiny test that applies to the Fourteenth Amendment. See *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008).

<sup>60</sup> *Granholm*, 544 U.S. at 488-93.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 490-93.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* Courts have recognized the promotion of temperance and establishing orderly market conditions as legitimate local purposes. See *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

### 3. *Granholm* Effects

Post-*Granholm*, states may no longer use the Twenty-first Amendment to defend protectionist laws that discriminate against out-of-state wineries in interstate commerce.<sup>66</sup> Some courts have held that *Granholm*'s holding should be limited to the first tier only.<sup>67</sup> This is because *Granholm* explicitly considered direct shipment from wineries in its analysis and holding.<sup>68</sup> However, other courts have found that *Granholm*'s logic should apply to every tier of distribution.<sup>69</sup> This is because the language and history of the Twenty-first Amendment seem to support a broader interpretation.<sup>70</sup> How the Supreme Court

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<sup>66</sup> *North Dakota*, 495 U.S. at 466.

<sup>67</sup> The issue of whether *Granholm*'s holding applies to wholesalers and retailers is beyond the scope of this Note but remains a controversial issue. The U.S. Courts of Appeals for the Second and Fifth Circuits have held that a state's uneven regulation of retailers is a proper constitutional exercise of power. *Siesta Vill. Mkt. LLC v. Steen*, 595 F.3d 249, 261 (5th Cir. 2010) (regarding appellants challenging the constitutionality of a Texas law that prohibited out-of-state retailers from direct shipping to consumers but permitted local retailers to deliver within their counties); *Arnold's Wines v. Boyle*, 571 F.3d 185, 191-92 (2d Cir. 2009) (regarding appellants challenging a law prohibiting out-of-state retailers from selling and delivering wine directly to New York consumers but permitting in-state retailers to do the same). The U.S. District Court for the Eastern District of Michigan held that states do not have the power to pass non-uniform laws to discriminate against out-of-state retailers. *Siesta Vill. Mkt. LLC v. Granholm*, 596 F. Supp. 2d 1035, 1039 (E.D. Mich. 2008) (regarding plaintiffs, a Florida-based retailer and Michigan resident, challenging a Michigan statute prohibiting out-of-state retailers from shipping directly to Michigan consumers unless physically present in the state — a violation of the dormant Commerce Clause).

<sup>68</sup> *Granholm*, 544 U.S. at 465-66 (framing the issue as a law discriminating against wineries).

<sup>69</sup> See *Granholm*, 544 U.S. at 478-82 (interpreting the Wilson Act and Webb-Kenyon Act to prevent discrimination); *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1039 (applying *Granholm*'s logic to the third tier retailers); CAROLE L. JURKIEWICZ & MURPHY J. PAINTER, *SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY* 44 (2008).

<sup>70</sup> See U.S. CONST. amend. XXI, § 2; *Granholm*, 544 U.S. at 478-82 (interpreting the Wilson Act and Webb-Kenyon Act to prevent discrimination). Prior to Prohibition, states regulated alcohol under two federal acts: the Wilson Act and the Webb-Kenyon Act. MENDELSON, *supra* note 25, at 7. The Wilson Act treated all alcoholic beverages as though they were produced in the state in which they were physically present. JURKIEWICZ & PAINTER, *supra* note 69, at 44; see Wilson Act, 27 U.S.C. § 121 (2012). The result was that all alcohol was subject to the same alcoholic rules and regulations within that state. MENDELSON, *supra* note 25, at 7. This included alcohol passing through interstate commerce. JURKIEWICZ & PAINTER, *supra* note 69, at 44. Thus, the Wilson Act mandated evenhanded regulation for in- and out-of-state producers. See *id.* The Wilson Act also did not prevent direct shipping of alcohol to consumers. See *id.* Wineries directly shipped wine and other alcohol into dry states for peoples' personal use. See *id.*

will resolve this issue is beyond the scope of this Note, but it will be an important issue for judicial resolution in the future.

The *Granholm* Court also recognized that “the three-tier system . . . is ‘unquestionably legitimate.’”<sup>71</sup> However, the effect of the Court’s express affirmation of one regulatory distribution system does not necessarily prohibit the operation of other models.<sup>72</sup> Direct shipping, which is a form of distribution expressly affirmed in *Granholm*, circumvents the second and third tiers and breaks the mold of the traditional three-tier system.<sup>73</sup> Thus, the *Granholm* Court suggests that any regulatory model that treats interstate actors evenhandedly would be appropriate.<sup>74</sup>

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In 1898, the Supreme Court held that the Wilson Act only applied to alcohol sold for commercial use. See *Rhodes v. Iowa*, 170 U.S. 412, 425-26 (1898). The states were still permitted to regulate out-of-state producers selling alcohol directly to consumers for personal consumption. See *id.*

However, regulating shipment does not equate to preventing direct shipping. See MENDELSON, *supra* note 25, at 7. The *Granholm* Court also interpreted the Wilson Act as forbidding discrimination. *Granholm*, 544 U.S. at 462. In 1913, Congress passed the Webb-Kenyon Act. JURKIEWICZ & PAINTER, *supra* note 69, at 44. The Webb-Kenyon Act was passed in response to the growing direct shipment industry. See MENDELSON, *supra* note 25, at 7. The Act granted states the power to regulate all imported alcohol, no matter if its use was personal or commercial. JURKIEWICZ & PAINTER, *supra* note 69, at 44; see Webb-Kenyon Act, 27 U.S.C. § 122 (2012). In *Granholm*, the majority held that the Wilson Act was not repealed. JURKIEWICZ & PAINTER, *supra* note 69, at 44; see *Granholm*, 544 U.S. at 462.

Instead, the two acts must be construed to exist simultaneously because the Webb-Kenyon Act did not expressly reject the anti-discriminatory essence of the Wilson Act. JURKIEWICZ & PAINTER, *supra* note 69, at 44; see *Granholm*, 544 U.S. at 482-83.

<sup>71</sup> *Granholm*, 544 U.S. at 489-90 (quoting *North Dakota*, 495 U.S. at 432) (explaining that the Twenty-first Amendment empowers North Dakota to require that all liquor sold for use in the State, be purchased from a licensed in-state wholesaler); *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1038 (applying *Granholm* holding to direct shipping from out-of-state retailers).

<sup>72</sup> See *Arnold’s Wines*, 571 F.3d at 190-91 (explaining that appellant’s argument is therefore directly foreclosed by the *Granholm* Court’s express affirmation of the legality of the three-tier system); *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1041-42 (permitting wine retailers to direct ship to consumers, which is a different system than the three-tier). Some states have liquor monopolies, which limit consumer choice to monopolies stores run by the state. David J. Hanson, *Alcoholic Beverage Control (ABC) or Monopoly States*, ALCOHOL PROBLEMS & SOLUTIONS, <http://www2.potsdam.edu/hansondj/Controversies/1127524611.html> (last visited Jan. 14, 2014) (listing eighteen monopoly states in the United States).

<sup>73</sup> See *Granholm*, 544 U.S. at 476-77 (citing *Scott v. Donald*, 165 U.S. 58, 103 (1897); *Walling v. Michigan*, 116 U.S. 446, 455 (1886)); see also *Arnold’s Wines*, 571 F.3d at 190-91.

<sup>74</sup> See *Granholm*, 544 U.S. at 492; *Arnold’s Wines*, 571 F.3d at 190-91.

*C. State Agencies that Regulate Wine Law*

Recent advances in wine law, to adapt to the age of the Internet, have come, in part, from state agencies issuing regulations on behalf of the wine industry.<sup>75</sup> The chief function of the ABC, which exists under various names in every state, is the issuance of licenses and enforcement of ABC regulations and rules.<sup>76</sup> For example, New York's agency is the State Liquor Authority ("SLA"), which regulates and controls the sale and distribution of wine.<sup>77</sup> The SLA issues administrative decisions, known as declaratory rulings, on the proper application of state wine laws.<sup>78</sup> The rulings can bind any person, property, or set of facts in New York.<sup>79</sup> In California, the ABC is the regulatory equivalent of the SLA.<sup>80</sup> The California ABC issues licenses and regulates the sale and distribution of wine in California.<sup>81</sup> The California ABC issues administrative decisions, called industry advisories, to clarify relevant issues of law and interpret various regulations.<sup>82</sup>

New York and California also have equivalent licensing laws.<sup>83</sup> Section 23300 of the California Business and Professions Code ("CBP") prohibits an individual from exercising license privileges unless the individual is licensed.<sup>84</sup> Moreover, CBP section 23355

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<sup>75</sup> See also Declaratory Ruling 01006A, *supra* note 8, at 1.

<sup>76</sup> See MENDELSON, *supra* note 25, at 15 n.49; see also CAL. BUS. & PROF. CODE §§ 23300, 23355 (West 2015); *Mission Statement*, CAL DEP'T OF ALCOHOLIC BEVERAGE CONTROL, <http://www.abc.ca.gov/mission.html> (last visited Nov. 22, 2013). The authority of the Department of Alcoholic Beverage Control is granted by the state constitution and the legislature. See, e.g., CAL. CONST. art. XX, § 22 (granting power to the California ABC).

<sup>77</sup> *Agency Mission Statement*, N.Y. STATE LIQUOR AUTH., <http://www.sla.ny.gov/agency-mission-statement> (last visited Nov. 22, 2013) (authorizing the SLA, by statute, to increase or decrease the number of licensed sellers in New York).

<sup>78</sup> Declaratory Ruling 01006A, *supra* note 8, at 1.

<sup>79</sup> *Id.*

<sup>80</sup> See *Mission Statement*, *supra* note 76.

<sup>81</sup> *Id.*

<sup>82</sup> See CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7.

<sup>83</sup> Compare CAL. BUS. & PROF. CODE §§ 23300, 23355 (West 2015) (prohibiting the exercise of liquor license privileges unless licensed; authorizing the exercise of license privileges is limited to the person and premises licensed), with N.Y. ALCO. BEV. CONT. LAW §§ 100, 111 (McKinney 2014) (prohibiting the sale of alcohol within the state unless licensed and making licenses to sell alcohol non-transferable to any other person or any other premises).

<sup>84</sup> CAL. BUS. & PROF. § 23300. The ABC can limit the number of licenses any single person holds. MENDELSON, *supra* note 25, at 16.

authorizes the exercise of license privileges to the person or entity actually licensed, and at the specific premises licensed.<sup>85</sup> Similarly, section 111 of New York's ABC law indistinguishably confines a license to sell wine to the person and premises licensed.<sup>86</sup> New York ABC law section 100 also prohibits the sale of alcohol within the state unless the entity is appropriately licensed.<sup>87</sup> The New York SLA and the California ABC are also responsible for revoking licenses for violations of ABC laws, misrepresentations in licensing applications, or any convictions involving moral turpitude.<sup>88</sup> These agencies also have the power to impose limits on the permissible uses of a license.<sup>89</sup>

#### D. Modern Developments in the Wine Industry

##### 1. California Puts Pressure on the Traditional Regulatory Landscape

In 1986, the legal landscape of direct shipment and the three-tier system abruptly changed.<sup>90</sup> California passed legislation that prohibited direct shipment of wine from other states to California residents, unless the exporting states allowed their residents to receive direct shipments from California wineries.<sup>91</sup> Because California is, by far, the largest and most prominent producer of wine in the United States, this legislation paved the way for reciprocity agreements that allowed direct shipping between producers and retailers to consumers.<sup>92</sup>

##### 2. Direct-to-Consumer Marketing

Following *Granholtm* and the reciprocity restriction in California, direct-to-consumer marketing and shipping has become increasingly popular because states had to eliminate direct shipping barriers.<sup>93</sup>

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<sup>85</sup> CAL. BUS. & PROF. § 23355.

<sup>86</sup> N.Y. ALCO. BEV. CONT. LAW § 111 (making licenses to sell alcohol non-transferable to any other person or any other premises).

<sup>87</sup> *Id.* § 100.

<sup>88</sup> CAL. BUS. & PROF. § 23001 (West 2015); N.Y. ALCO. BEV. CONT. LAW § 100; see also MENDELSON, *supra* note 25, at 16.

<sup>89</sup> CAL. BUS. & PROF. § 23001; N.Y. ALCO. BEV. CONT. LAW §§ 100, 111.

<sup>90</sup> See Wiseman & Ellig, *Market and Nonmarket Barriers*, *supra* note 9, at 3.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (explaining that reciprocity agreements allowed direct shipment but in limited quantities).

<sup>93</sup> See *Issue Summary*, FREE THE GRAPES!, <http://freethegrapes.org/issue-summary>

Direct shipping also eliminates geographic barriers, allowing consumers to purchase and ship wines from wineries all across the United States.<sup>94</sup> In turn, direct marketing enables wineries to cultivate customers near and far and gives consumers the ease of online ordering.<sup>95</sup>

TPPs facilitate direct-to-consumer marketing and shipping through flash sales, e-mail campaigns, or placing wine products on a multi-brand websites.<sup>96</sup> During the 2008 recession, the wine industry fully realized the value of TPPs.<sup>97</sup> As demand for wine declined, TPPs used the Internet to move and sell distressed inventory.<sup>98</sup> As the recession waned, TPPs continued giving suppliers a direct path to consumers, introducing new brands and attracting new customers.<sup>99</sup>

## II. GETTING TO THE BOTTOM OF THE BARREL: THIRD PARTY PROVIDERS IN CALIFORNIA AND NEW YORK

California and New York exemplify how states have started to respond to the growth of TPPs in the wine industry.<sup>100</sup> This section will first examine a New York SLA's declaratory ruling, which held that TPPs violated state law by improperly using sellers' licenses.<sup>101</sup> Next, this section will discuss the California ABC's industry advisory on TPPs.<sup>102</sup> The advisory held that TPPs could have legally compliant business relations with licensed sellers and provided guidelines on proper business conduct for TPPs in California.<sup>103</sup>

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(last visited Jan. 9, 2014); Andrew Kamphuis, *Interview with Direct-to-Consumer Marketing Rock Star — Chris Oggenfuss*, VIN65 BLOG (May 3, 2010), <http://www.vin65.com/blog/Interview-with-Direct-to-Consumer-Marketing-Rock-Star-Chris-Oggenfuss>.

<sup>94</sup> See *Issue Summary*, *supra* note 93.

<sup>95</sup> Elizabeth Hansen, *Formalization of Wine's 'Fifth Column': Third-party Marketers*, SHIPCOMPLIANT BLOG (May 14, 2012), <http://shipcompliantblog.com/blog/2012/05/14/formalization-of-wines-fifth-column-third-party-marketers>.

<sup>96</sup> Carroll, *Third Party Providers Are Here*, *supra* note 4; Hansen, *supra* 95.

<sup>97</sup> Carroll, *Third Party Providers Are Here*, *supra* note 4.

<sup>98</sup> Hansen, *supra* note 95.

<sup>99</sup> *Id.*

<sup>100</sup> See discussion *supra* Part II.

<sup>101</sup> See discussion *supra* Part II.A.

<sup>102</sup> See discussion *supra* Part II.B.

<sup>103</sup> CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7.

A. *New York State Liquor Authority: Declaratory Ruling 01006A*

The New York SLA provides that any person may request a ruling on the application of certain facts to an ABC law or SLA rule.<sup>104</sup> On December 14, 2012, ShipCompliant, an unlicensed TPP from Boulder, Colorado, submitted a request to ascertain whether its business model and compliance system violated New York ABC laws or SLA rules.<sup>105</sup> Approximately 60% of the wine-shipping market in the United States uses ShipCompliant's software as a compliance mechanism.<sup>106</sup>

ShipCompliant enables wine sales through its online platform called MarketPlace.<sup>107</sup> MarketPlace provides services to both in-state and out-of-state wineries that have a direct-shipper license with New York.<sup>108</sup> Its primary function is to facilitate wine sales on behalf of licensees to consumers through its online advertising platforms.<sup>109</sup> These platforms consist of online marketplaces, flash sale websites, wine clubs, and collective tasting rooms.<sup>110</sup> One of MarketPlace's main selling points is that it provides compliance services.<sup>111</sup> For example, MarketPlace ensures that wine shipped to New York complies with all New York shipping laws and ends up in the hands of consumers who are at least twenty-one years old.<sup>112</sup> ShipCompliant specifically designed the MarketPlace business model to comply with New York regulations,<sup>113</sup>

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<sup>104</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 98.1(b) (2015).

<sup>105</sup> Declaratory Ruling 01006A, *supra* note 8, at 2.

<sup>106</sup> See SHIPCOMPLIANT, INC., MARKETPLACE (2012), available at [http://ww1.prweb.com/prfiles/2012/01/18/9119635/MarketPlace\\_ProductSheet.pdf](http://ww1.prweb.com/prfiles/2012/01/18/9119635/MarketPlace_ProductSheet.pdf).

<sup>107</sup> Declaratory Ruling 01006A, *supra* note 8, at 2.

<sup>108</sup> SHIPCOMPLIANT, INC., *supra* note 106; see also N.Y. ALCO. BEV. CONT. LAW § 79-c (McKinney 2014); Declaratory Ruling 01006A, *supra* note 8, at 2.

<sup>109</sup> SHIPCOMPLIANT, INC., *supra* note 106; see also § 79-c; Declaratory Ruling 01006A, *supra* note 8, at 2.

<sup>110</sup> Declaratory Ruling 01006A, *supra* note 8, at 2 (noting that in New York, sellers utilizing the service of Internet advertising platforms could include licensed package and wine stores, licensed wineries and farm wineries, and out-of-state wineries that hold a direct shipping license); SHIPCOMPLIANT, INC., *supra* note 106 (connecting online wine marketers and consumers).

<sup>111</sup> *ShipCompliant Launches New "MarketPlace" Platform for Wineries and Online Wine Marketers*, PRWEB (Jan. 18, 2012), <http://www.prweb.com/releases/2012/1/prweb9119635.htm> [hereinafter *ShipCompliant Launches New "MarketPlace" Platform*].

<sup>112</sup> See *id.*

<sup>113</sup> Declaratory Ruling 01006A, *supra* note 8, at 2. ShipCompliant is a technological compliance service for wineries and retailers. It manages an up-to-date database of state and federal regulations to provide a legally compliant direct shipping platform. Licensed wineries and retailers have used ShipCompliant services for over eleven years. See *ShipCompliant Launches New "MarketPlace" Platform*, *supra* note 111.



which have remained substantially the same since the repeal of Prohibition.<sup>114</sup>

In January of 2013, the SLA decided to conduct a special full board meeting to fully discuss whether ShipCompliant's MarketPlace violated New York law.<sup>115</sup> The issue before the SLA was whether the licensed seller, in using MarketPlace, was making its license available to an unlicensed entity, thus allowing MarketPlace to sell wine unlicensed.<sup>116</sup> On April 9, 2013, the SLA issued a declaratory ruling ("Ruling 01006A"), finding that because ShipCompliant's business model placed the licensed seller in a passive role, MarketPlace violated sections 100 and 111 of the New York ABC law.<sup>117</sup> The SLA found that section 100 prohibited ShipCompliant from selling wine without a license.<sup>118</sup> Moreover, section 111 prohibited licensed sellers from making their licenses available to unlicensed entities — here, ShipCompliant, the unlicensed TPP.<sup>119</sup> The SLA declined to address how unlicensed parties could comply with the law, but highlighted the importance of restricting unlicensed companies from the actual sale of wine.<sup>120</sup> Thus, the SLA ruled that TPPs violated state law, and effectively barred TPP activity in New York because the SLA failed to offer advice for compliance.<sup>121</sup>

#### B. *California Alcoholic Beverage Control: An Industry Advisory on TPPs*

Although California and New York have virtually indistinguishable laws governing the scope and transferability of a license to sell wine, California took the opposite position on the relationship between TPPs and licensees.<sup>122</sup> Following a 2009 industry advisory on TPPs, the California ABC began to receive frequent requests from TPPs for approval of marketing plans.<sup>123</sup> The requests stemmed from

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<sup>114</sup> MENDELSON, *supra* note 25, at 65.

<sup>115</sup> Declaratory Ruling 01006A, *supra* note 8, at 3.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 3, 5-7.

<sup>118</sup> *Id.* at 5.

<sup>119</sup> *Id.* at 5-7.

<sup>120</sup> *Id.* at 5.

<sup>121</sup> *See id.* at 7.

<sup>122</sup> CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7.

<sup>123</sup> James M. Seff, Jerry R. Jolly & Carrie L. Bonnington, *California Sets the Table for Regulation of Third-Party Wine Providers*, ADVISORY 1 (Pillsbury Winthrop Shaw Pittman LLP, Cal.), Nov. 21, 2011, at 1, available at [http://www.pillsburylaw.com/siteFiles/Publications/RFBWineSpiritsAdvisoryCaliforniaSetstheTableforThirdPartyWineProviders12111\\_final.pdf](http://www.pillsburylaw.com/siteFiles/Publications/RFBWineSpiritsAdvisoryCaliforniaSetstheTableforThirdPartyWineProviders12111_final.pdf).

ambiguities in California law regarding TPPs.<sup>124</sup> In March 2011, ABC Director Jacob Appelsmith gathered industry stakeholders to request advice on the issue.<sup>125</sup> Appelsmith wanted to know how to regulate such a fast-growing section.<sup>126</sup>

The result of these discussions was the October 2011 industry advisory, entitled “Third Party Providers.”<sup>127</sup> The advisory expressed the California ABC’s continued concern that TPPs engage in some activities that may violate California law.<sup>128</sup> However, the ABC found that licensees and TPPs may form beneficial business relationships that facilitate the lawful sale of alcohol and wine over the Internet.<sup>129</sup> The 2011 advisory also issued specific guidelines for TPPs and licensees, acknowledging the difficulty TPPs would have in complying with both federal and state regulations.<sup>130</sup> The guidelines assisted TPPs in complying with California law.<sup>131</sup>

According to the advisory guidelines, TPPs do not need a license as long as the licensed producer or retailer maintains control over the transaction.<sup>132</sup> Maintaining control demands that the licensed seller must maintain a degree of active control over the transaction and the decision-making process.<sup>133</sup> For example, TPPs must transmit orders they receive to licensees, who accept and ship the order from a licensed premise.<sup>134</sup> TPPs may charge a consumer’s credit card, acting as an agent of the licensee, and set aside the sale amount for the licensee.<sup>135</sup> Later, the licensee pays the TPP commission for the sale.<sup>136</sup> The guidelines suggest that one viable financial arrangement, among

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 2 (noting industry stakeholders comprised mostly of industry lawyers).

<sup>126</sup> *Id.*

<sup>127</sup> CAL. DEP’T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* The New York SLA also recognized the difficulty in coming up with a regulatory model but has not offered any solution to TPPs and licensees. Keven Danow & Arielle Albert, *Know the Law: The Online Conundrum*, BEVERAGE MEDIA GRP. (June 3, 2013), <http://www.beveragemedia.com/index.php/2013/06/know-the-law-the-online-conundrum/>.

<sup>131</sup> CAL. DEP’T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7.

<sup>132</sup> *Id.*; Seff, Jolly & Bonnington, *supra* note 123, at 2.

<sup>133</sup> CAL. DEP’T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; Seff, Jolly & Bonnington, *supra* note 123, at 2.

<sup>134</sup> CAL. DEP’T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; Seff, Jolly & Bonnington, *supra* note 123, at 2.

<sup>135</sup> CAL. DEP’T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7.

<sup>136</sup> *Id.*; Seff, Jolly & Bonnington, *supra* note 123, at 2.

others, could be an escrow account controlled by the seller.<sup>137</sup> The ABC recognized that financial transfers between TPPs and licensees often occur instantaneously, making it virtually impossible for the agency to monitor compliance with these rules.<sup>138</sup>

The most significant principle of the California guidelines is that a licensed seller — the winery or retailer — is ultimately liable for actions of the TPPs it hires.<sup>139</sup> This motivates licensed sellers to work actively with TPPs to ensure they comply with California law.<sup>140</sup> If not, they may be subject to fines or worse, loss of license privileges.<sup>141</sup> Beyond the guidelines, TPPs must also comply with all California licensing and wine laws.<sup>142</sup> Therefore, even though California allows TPPs to form business relationships with licensees, these relationships are highly regulated by the guidelines and all other California wine laws.<sup>143</sup>

### III. UNCORKING THE PROBLEM OF THIRD PARTY PROVIDERS: AN ARGUMENT FOR NEW YORK TO ADOPT THE CALIFORNIA GUIDELINES ON THIRD PARTY PROVIDERS

In regulating TPPs' role in the wine industry, New York and California have taken contrasting regulatory positions.<sup>144</sup> This Part will first argue that New York Ruling 01006A is unconstitutional because it impermissibly discriminates against out-of-state unlicensed

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<sup>137</sup> Jeff Carroll, *Understanding the California's ABC's New Advisory for Wineries and Third Party Providers*, SHIPCOMPLIANT BLOG (Nov. 1, 2011), <http://www.shipcompliant.com/blog/2011/11/01/understanding-the-california-abcs-new-advisory-for-wineries-and-third-party-providers/> [hereinafter *Understanding the California ABC's New Advisory*].

<sup>138</sup> See CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; Seff, Jolly & Bonnington, *supra* note 123, at 2.

<sup>139</sup> CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137.

<sup>140</sup> Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137; see CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7.

<sup>141</sup> Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137; see also Ann Reynolds, *Give Napa Valley Credit or Lose Your License*, WINE COMPLIANCE ALLIANCE (Mar. 25, 2015), <http://winecompliancealliance.com/give-napa-valley-credit-or-lose-your-license> (noting that a violation of California laws could lead to the ABC suspending or revoking a retailer's license to sell wine).

<sup>142</sup> Seff, Jolly & Bonnington, *supra* note 123, at 2.

<sup>143</sup> See Seff, Jolly & Bonnington, *supra* note 123, at 2.

<sup>144</sup> See CAL. BUS. & PROF. CODE §§ 23001, 23300, 23355 (West 2015); N.Y. ALCO. BEV. CONT. LAW §§ 100, 111 (McKinney 2014); see also Office of the Governor, N.Y. State, *Governor Cuomo Signs Legislation Allowing Wine to Be Sold at Farmer's Markets and Designating New Wine Trails Along State Roadways* (Sept. 30, 2013), <http://www.governor.ny.gov/press/09302013-wine-legislation>.

TPPs.<sup>145</sup> Next, this Part argues that the California guidelines are constitutional and provide New York a nondiscriminatory alternative to banning TPPs.<sup>146</sup> Lastly, this Part argues that New York should adopt California's guidelines because, beyond constitutional considerations, the guidelines promote consumer choice and benefits wineries of all sizes.<sup>147</sup>

A. *The New York SLA's Declaratory Ruling Is Unconstitutional Because It Fails the Granholm Two-Part Test*

States must regulate in-state and out-of state wineries evenhandedly unless they pass *Granholm's* two-part test, which determines whether state laws comply with the Commerce Clause.<sup>148</sup> Initially, Ruling 01006A was constitutional under *Granholm* because its effect applied evenhandedly to in-state and out-of-state TPPs.<sup>149</sup> However, changes to New York law modified the Ruling's application and effect.<sup>150</sup> Arguably, a recent New York statute caused Ruling 01006A to have a discriminatory effect on out-of-state TPPs.<sup>151</sup> This newly discriminatory ruling does not survive the *Granholm* test and therefore is unconstitutional under the Commerce Clause.

1. A Change in New York Law: Senate Bill 5320

On May 16, 2013, New York Senate Bill 5320 ("Bill 5320") amended section 111 of the New York ABC law, which confines a license to sell alcohol to the licensed premises and no other.<sup>152</sup> The amendment allows unlicensed entertainment venues to negotiate payments with vendors located on their premises, in return for proceeds from the vendors' sale of alcohol.<sup>153</sup> For this licensing exception to apply, the amendment requires that the venue must be located on New York

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<sup>145</sup> See discussion *infra* Part III.A.

<sup>146</sup> See discussion *infra* Part III.B.

<sup>147</sup> See discussion *infra* Part III.C.

<sup>148</sup> *Granholm v. Heald*, 544 U.S. 460, 487 (2005).

<sup>149</sup> See *id.* at 476-77 (2005); *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 99 (1994) (holding that state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefit the former and burden the later). For an explanation of why Ruling 01006A became unconstitutional, see discussion *infra* Part III.A.

<sup>150</sup> See discussion *infra* Part III.A.2.a.

<sup>151</sup> See discussion *infra* Part III.A.2.a.

<sup>152</sup> See S. 5320, 2013 Gen. Assemb., Reg. Sess. (N.Y. 2013).

<sup>153</sup> See *id.*

owned land, or a political subdivision, and have a seating capacity of over 5,000.<sup>154</sup> New York justified the amendment because, nationwide, most sports and entertainment venues are owned and controlled by entities other than the holder of the license to sell alcohol.<sup>155</sup> The law essentially allows venue owners to profit from alcohol sales without a license to sell.<sup>156</sup>

To illustrate the effect of the amendment, take the example of Yankee Stadium, which seats 50,287 people,<sup>157</sup> and assume the stadium sits on New York–owned land. The stadium owner does not have a license to sell alcohol.<sup>158</sup> Instead, the stadium sells through vendors licensed to operate concession stands.<sup>159</sup> The amendment allows the owner to take a portion of the vendors' alcohol sales, even though the stadium does not have a license to sell alcohol.<sup>160</sup>

Before the amendment, this example would result in a clear violation of New York ABC laws in two ways.<sup>161</sup> First, the stadium owner would violate ABC section 111 because it is transferring the privileges of the vendor's license to a premise — Yankee Stadium — not registered to the vendor's license.<sup>162</sup> Second, the stadium would violate ABC section 100 prohibiting unlicensed sales.<sup>163</sup> This is because the stadium owner is unlicensed to sell alcohol but still directly profits from the sale of alcohol.<sup>164</sup> The vendor also improperly transfers its privilege to sell alcohol because the owner profits without a license.<sup>165</sup> Therefore, because of Bill 5320, the unlicensed owner may legally profit from the vendor's sale of alcohol.

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<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*

<sup>157</sup> See *Stadium Comparison*, N.Y. YANKEES, [http://newyork.yankees.mlb.com/nyy/ballpark/new\\_stadium\\_comparison.jsp](http://newyork.yankees.mlb.com/nyy/ballpark/new_stadium_comparison.jsp) (last visited Nov. 6, 2013).

<sup>158</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 100, 111 (McKinney 2014); N.Y. S. 5320.

<sup>159</sup> See §§ 100, 111; N.Y. S. 5320; *Stadium Comparison*, *supra* note 157.

<sup>160</sup> See §§ 100, 111; N.Y. S. 5320; *Stadium Comparison*, *supra* note 157.

<sup>161</sup> See §§ 100, 111; N.Y. S. 5320; *Stadium Comparison*, *supra* note 157.

<sup>162</sup> See N.Y. S. 5320.

<sup>163</sup> See § 100.

<sup>164</sup> See *id.*

<sup>165</sup> See *id.*

2. Applying the *Granholm* Standard of Review to Ruling 01006A After Bill 5320

Since the enactment of Bill 5320, Ruling 01006A has become unconstitutional because it fails the two-part *Granholm* test.<sup>166</sup> The first part asks if the law is discriminatory.<sup>167</sup> If a law imposes disparate treatment between in-state and out-of-state actors, which benefits the former and burdens the latter, it is discriminatory.<sup>168</sup> If the answer to the first part is yes, the second part asks if the law advances a legitimate local purpose that states' cannot adequately address by other reasonable nondiscriminatory alternatives.<sup>169</sup>

a. *Granholm Part 1: Is the Law Discriminatory?*

Applying the first part of the *Granholm* test, Ruling 01006A is discriminatory because it favors unlicensed in-state third parties over unlicensed out-of-state third parties, or TPPs.<sup>170</sup> Unlicensed in-state third parties, covered by Bill 5320, are comparable to TPPs, governed by Rule 01006A, because both are unlicensed third parties that participate in the sale of wine through licensees.<sup>171</sup> However, Bill 5320 creates an exception for unlicensed in-state venue owners.<sup>172</sup> This exception permits specified unlicensed in-state third parties to participate in the sale of wine.<sup>173</sup> Conversely, Ruling 01006A prohibits unlicensed TPPs, which are mostly out-of-state entities, from enjoying the same privilege.<sup>174</sup> Therefore, in light of Bill 5320's exception, Ruling 01006A discriminates because it permits in-state third parties

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<sup>166</sup> See *Granholm v. Heald*, 544 U.S. 460, 488-93 (2005).

<sup>167</sup> See *id.* at 488-93.

<sup>168</sup> *Id.*; *Bacchus Imp., Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (holding that a tax exception for certain types of wines violate the Commerce Clause because it had the purpose and effect of discriminating in favor of local products); *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 379 (6th Cir. 2013); see also Casey J. Jennings, *To Form a More Perfect Union: Taxation, Economic Efficiency, and the Dormant Commerce Clause in Department of Revenue v. Davis*, 88 N.C. L. REV. 311, 317 (2009).

<sup>169</sup> See *Granholm*, 544 U.S. at 488-93.

<sup>170</sup> See S. 5320, 2013 Gen. Assemb., Reg. Sess. (N.Y. 2013).

<sup>171</sup> See *id.*

<sup>172</sup> See *id.*

<sup>173</sup> See *id.*

<sup>174</sup> See *id.* One of the largest TPPs, ShipCompliant, is located in Boulder, Colorado. *Get in Touch*, SHIPCOMPLAINT, <https://www.shipcompliant.com/contact-us/> (last visited Apr. 11, 2015).

to profit from licensed sales, but prohibits out-of-state third parties from profiting from licensed Internet sales.<sup>175</sup>

*b. Granholm Part 2: Does the Law Advance a Legitimate Local Purpose that Other Nondiscriminatory Alternatives Cannot Address?*

Generally, when a challenged law discriminates against interstate commerce, it is virtually per se invalid.<sup>176</sup> However, the law may survive if it satisfies the second part of the *Granholm* test, which asks if the law advances a legitimate local purpose that other reasonable nondiscriminatory alternatives cannot adequately address.<sup>177</sup> This part imposes a high burden on the state — strict scrutiny — that New York will most likely not meet.<sup>178</sup> New York must first demonstrate that the challenged law clearly advances at least one legitimate local purpose.<sup>179</sup> Requiring more than mere speculation, this involves a showing of hard evidence to demonstrably justify discrimination.<sup>180</sup> Even if the state demonstrates that the law advances a legitimate local purpose, the state must also demonstrate that other nondiscriminatory laws could not advance the same local purpose.<sup>181</sup> Thus, New York would then have to show there is no proven, workable, nondiscriminatory alternative that continues to advance the state's legitimate interests.<sup>182</sup>

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<sup>175</sup> See *Granholm v. Heald*, 544 U.S. 460, 488-93 (2005); Declaratory Ruling 01006A, *supra* note 8, at 6-7.

<sup>176</sup> See *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008); *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978); *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 9 (1st Cir. 2010).

<sup>177</sup> *Dep't of Revenue*, 553 U.S. at 338; *Granholm*, 544 U.S. at 488-93; *Family Winemakers*, 592 F.3d at 9.

<sup>178</sup> See *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (explaining that the burden is so heavy that once a state tax is found to discriminate against out-of-state commerce, it is generally struck down without further inquiry). Strict scrutiny under the dormant Commerce Clause is distinct from the strict scrutiny test that applies to the Fourteenth Amendment. See *Dep't of Revenue*, 553 U.S. at 338.

<sup>179</sup> See *Granholm*, 544 U.S. at 488-93; *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); see also *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986) (holding that a state's public health interest in keeping diseased fish out of its waters was a rare example of a legitimate local purpose that could not be adequately served by nondiscriminatory means).

<sup>180</sup> See *Granholm*, 544 U.S. at 492; *Chem. Waste Mgmt.*, 504 U.S. at 344; see *Taylor*, 477 U.S. at 141-44.

<sup>181</sup> See *Granholm*, 544 U.S. at 488-93; *New Energy*, 486 U.S. at 278; see also *Taylor*, 477 U.S. at 151-52.

<sup>182</sup> See *Granholm*, 544 U.S. at 492-93; *Taylor*, 477 U.S. at 141-44; *Family*

According to *Granholm*, New York must first demonstrate that Ruling 01006A advances a legitimate local purpose, or state interest.<sup>183</sup> The Supreme Court has repeatedly recognized the protection of citizens' health, safety, and welfare as legitimate local interests because they are areas of traditional local government falling under the states' police powers.<sup>184</sup> Most relevant to wine law, the Supreme Court has recognized regulatory accountability, the facilitation of tax collection, and preventing minors from obtaining alcohol as legitimate local interests.<sup>185</sup> If New York was going to argue that Ruling 01006A promoted legitimate local interests in court, the state would likely argue three main interests it previously proffered in *Granholm*: promoting regulatory accountability, facilitating tax collection, and preventing minors from obtaining alcohol.<sup>186</sup>

First, New York Ruling 01006A likely promotes regulatory accountability because it clarifies that selling wine requires a

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*Winemakers*, 592 F.3d at 17.

<sup>183</sup> See *Granholm*, 544 U.S. at 488-93; *New Energy*, 486 U.S. at 278; see also *Taylor*, 477 U.S. at 151-52.

<sup>184</sup> See *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 340 (2008); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007); *Chem. Waste Mgmt.*, 504 U.S. at 342; *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 188-89 (2d Cir. 2009) (listing certain core state interests: promoting temperance, ensuring orderly market conditions, and raising revenue); see also *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 808 (8th Cir. 2013) (finding that a residency requirement for wholesalers of wine, which prevents monopolization of out-of-state wholesalers and encourages the use of in-state wholesalers, is a legitimate state interest that promotes social responsibility, public accountability, and facilitation of law enforcement).

<sup>185</sup> *Granholm*, 544 U.S. at 488-93; see *Siesta Vill. Mkt. LLC v. Steen*, 595 F.3d 249, 254 (5th Cir. 2010) (claiming prevention of underage drinking and need for taxes as a state legitimate interest); *Arnold's Wines*, 571, F.3d at 188-89; see also ROBERTSON, *supra* note 24, at 116-18. One important exception to the Commerce Clause is the market participant exemption. *White v. Mass. Council of Constr. Emp'rs, Inc.* 460 U.S. 204, 217 (1983) (Blackmun, J., dissenting). The exception immunizes a state acting as a market participant, buying and selling goods in the market rather than regulating a good, from Commerce Clause violations. *Id.* at 218. The market participant exception is not at issue in this case but is a notable exception. *Id.* at 217-18 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)); see also *New Energy*, 486 U.S. at 277 (noting that market participant exception applies when a locality acts as a buyer or seller rather than in its distinct governmental capacity); Katerina Deaver, *Municipal Economic Boycotts as a Form of Political Opposition: Why Boycotts of Arizona Companies in Response to Arizona SB 1070 Run Afoul of the Dormant Commerce Clause of the U.S. Constitution*, 43 MCGEORGE L. REV. 403, 416 (2012).

<sup>186</sup> *Granholm*, 544 U.S. at 488-93; *Arnold's Wines*, 571, F.3d at 188-89; *Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 411 (S.D.N.Y. 2007).



license.<sup>187</sup> A winery or retailer seeking a license must submit an application, undergo an investigation, and meet state and federal eligibility requirements.<sup>188</sup> For example, the New York SLA might deny, or refuse to reissue, a winery a direct-shipper license if it has a propensity to ship without verifying a customer's age.<sup>189</sup> New York might argue that TPPs are the type of entity that could interfere with the state's regulatory licensing scheme, which could arguably frustrate state policing of ABC law violations.<sup>190</sup>

New York also has no way to monitor what TPPs are acting in New York or in connection with New York licensees because they are unlicensed.<sup>191</sup> New York, which issues nearly 70,000 licenses a year, would have a less transparent environment to monitor direct shipping if it allowed TPPs to form unregulated business relationships with licensees.<sup>192</sup> Effective licensing allows New York to monitor licensees,

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<sup>187</sup> See *Licensing Information*, N.Y. STATE LIQUOR AUTH., <http://www.sla.ny.gov/licensing-information-0> (last visited Jan. 15, 2014). See generally ANDREW M. CUOMO, DENNIS ROSEN & JEANIQUE GREENE, N.Y. STATE LIQUOR AUTH., *HANDBOOK FOR RETAIL LICENSES* (2013), available at <http://www.sla.ny.gov/system/files/StateLiquorAuthority-RetailLicenseesHandbook.pdf> (discussing what retailers need to know to sell alcoholic beverages in New York); *Online Permit Applications*, N.Y. STATE LIQUOR AUTH., <http://www.sla.ny.gov/online-permit-applications> (last visited Jan. 15, 2014) (listing online permit applications).

<sup>188</sup> See *Licensing Information*, *supra* note 187; see also *Granholm*, 544 U.S. at 491-92. See generally *Online Permit Applications*, *supra* note 187 (listing online permit applications).

<sup>189</sup> STATE OF NEW YORK LIQUOR AUTH., APPLICATION FOR A NEW YORK STATE OUT-OF-STATE DIRECT SHIPPER'S LICENSE 4-5, <https://www.sla.ny.gov/system/files/Direct-Shipper-040813.pdf>; see also N.Y. ALCO. BEV. CONT. LAW § 130 (McKinney 2014) (describing penalties for violations of license requirements). For additional information on reporting violations and general information on licenses, see DIV. OF ALCOHOLIC BEVERAGE CONTROL, EXEC. DEP'T, STATE OF N.Y., POLICE REFERRAL FORM (2014), available at <http://www.sla.ny.gov/system/files/PDR-nyc-010214.pdf> (allowing officers and agencies to report violations of ABC law and/or SLA rules); *Licensing Information*, *supra* note 187. For a similar example in Massachusetts, see Nick Fauchald & Dana Nigro, *Massachusetts Sues Four Online Wine Retailers for Illegal Sales and Shipping*, WINE SPECTATOR (June 9, 2004), [http://www.winespectator.com/webfeature/show/id/Massachusetts-Sues-Four-Online-Wine-Retailers-for-Illegal-Sales-and-Shipping\\_22035](http://www.winespectator.com/webfeature/show/id/Massachusetts-Sues-Four-Online-Wine-Retailers-for-Illegal-Sales-and-Shipping_22035).

<sup>190</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 100, 111 (McKinney 2014) (listing person and premises, but not TPPs); *id.* § 3(28) (McKinney 2014) (defining "sale"); Declaratory Ruling 01006A, *supra* note 8, at 4-5 (interpreting sale broadly in New York).

<sup>191</sup> See §§ 100, 111 (listing person and premises, but not TPPs); *id.* § 3(28) (defining "sale"); Declaratory Ruling 01006A, *supra* note 8, at 6.

<sup>192</sup> See *Licensing Information*, *supra* note 187 (requiring all permits and licenses to be renewed yearly to ensure eligibility requirements are met). See generally *Granholm*, 544 U.S. at 488-93 (discussing less restrictive means to promoting local interests).

collect taxes on direct shipping, and exercise its policing power for violations of ABC laws, which altogether increases regulatory accountability.<sup>193</sup> New York should be able to police licensing in the state because issuing licenses has been a function of state governments since the repeal of Prohibition.<sup>194</sup> Therefore, Ruling 01006A likely promotes regulatory accountability in New York because it contributes to effective licensing.<sup>195</sup>

Second, New York will likely argue that Ruling 01006A promotes a legitimate state interest because it prevents minors from obtaining alcohol, which in turn promotes public health and safety.<sup>196</sup> Ruling 01006A prevents minors from obtaining alcohol because it prevents TPPs from facilitating wine sales in New York.<sup>197</sup> This makes it harder for minors to place Internet orders as a means of obtaining alcohol illegally.<sup>198</sup> Additionally, while state licensees have incentives not to ship to minors, because they could lose their license, unlicensed TPPs lack incentives to comply with state law.<sup>199</sup> Ruling 01006A further

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<sup>193</sup> See N.Y. ALCO. BEV. CONT. LAW § 76 (McKinney 2014) (detailing winery license applications); *Granholm*, 544 U.S. at 488-93; see also Noah J. Stanzione, *Granholm v. Heald: Wine in, Wit out*, 17 WIDENER L. REV. 95, 109 (2011) (arguing that monitoring out-of-state wineries is an inappropriate argument against direct shipping).

<sup>194</sup> See U.S. CONST. amend. XXI, § 2; N.Y. ALCO. BEV. CONT. LAW § 2 (McKinney 2014) (enacting the alcoholic beverage control laws in New York); *Historical Overview*, N.Y. STATE LIQUOR AUTH., <http://www.sla.ny.gov/historical-overview> (last visited Jan. 15, 2014) (establishing chapter 478 and the ABC Law, and creating the SLA in 1934 following the repeal of Prohibition).

<sup>195</sup> See *Granholm*, 544 U.S. at 491-92; *Licensing Information*, *supra* note 187. Compare Declaratory Ruling 01006A, *supra* note 8 (concerning licensing issues with TPPs is a violation of state law), with CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7 (concerning licensing issues with TPPs comply with state law).

<sup>196</sup> See *Granholm*, 544 U.S. at 488-93; *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 34 (1st Cir. 2007). But see *Walling v. Michigan*, 116 U.S. 446, 460 (1886) (rejecting the argument that a discriminatory tax was merely an exercise of Michigan's police power for the discouragement of the use of intoxicating liquors and the preservation of health and morals of people).

<sup>197</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 100, 111 (McKinney 2014); Declaratory Ruling 01006A, *supra* note 8, at 6-7; see also Robert Taylor, *New York Faces New Wine Sales Restrictions*, WINE SPECTATOR (Apr. 25, 2013), <http://www.winespectator.com/webfeature/show/id/48346> [hereinafter *New York Faces*]. See generally N.Y. ALCO. BEV. CONT. LAW § 3(28) (McKinney 2014) (defining sale of wine).

<sup>198</sup> See *Granholm*, 544 U.S. at 489-91; see, e.g., Fauchald & Nigro, *supra* note 189 (noting suits against four online wine retailers — none of which were licensed to sell alcohol in Massachusetts — for selling to minors online).

<sup>199</sup> See *Granholm*, 544 U.S. at 489-91; Fauchald & Nigro, *supra* note 189 (documenting suits against online retailers for selling to minors online); Taylor, *New York Faces*, *supra* note 197; see also Carroll, *Third Party Providers Are Here*, *supra* note

promotes public health and safety because it prevents underage drinking and protects minors from death or injuries caused by inebriation.<sup>200</sup>

Third, New York will likely argue that Ruling 01006A facilitates the tax collection, protecting public welfare and thus furthering another legitimate local purpose.<sup>201</sup> TPPs facilitate, and thereby increase, online wine sales through marketing and advertising.<sup>202</sup> Increased direct shipment of any commodity has the potential to cause tax evasion.<sup>203</sup> Furthermore, wine is a highly taxed commodity that states rely on for revenue to fund programs such as Medicaid, pensions, and public schools.<sup>204</sup> Therefore, Ruling 01006A likely promotes a legitimate state interest because barring TPPs in New York may facilitate tax collection and support public welfare through funding.<sup>205</sup>

Ruling 01006A seemingly protects at least three legitimate local interests in New York: regulatory accountability, tax collection, and preventing minors from obtaining alcohol.<sup>206</sup> However, the inquiry does not end here.<sup>207</sup> New York must further demonstrate that no proven, workable, nondiscriminatory alternative, which functions to further the same state interests, exists.<sup>208</sup>

Even if New York could prove it had a legitimate local interest, the state must still explain why other nondiscriminatory laws could not

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4; *Issue Summary*, *supra* note 93.

<sup>200</sup> See *Davis v. Billy's Con-Teena, Inc.*, 587 P.2d 75, 77-78 (Or. 1978); see also *Bryant v. Jax Liquors*, 352 So. 2d 542, 544 (Fla. Dist. Ct. App. 1977) (documenting sales of rum to minors under eighteen resulted in intoxication that caused one minor to sustain severe injuries resulting in permanent paralysis); *Brookins v. Round Table, Inc.*, 624 S.W.2d 547, 549-50 (Tenn. 1981).

<sup>201</sup> See *Granholm*, 544 U.S. at 492; FTC REPORT, *supra* note 4, at 1; Susan Lorde Martin, *Wine Wars — Direct Shipment of Wine: The Twenty-First Amendment, the Commerce Clause, and Consumers' Rights*, 38 AM. BUS. L.J. 1, 3-10 (2000).

<sup>202</sup> See Declaratory Ruling 01006A, *supra* note 8, at 2; see also *Granholm*, 544 U.S. at 492; FTC REPORT, *supra* note 4, at 1; Martin, *supra* note 201, at 3-10.

<sup>203</sup> *Granholm*, 544 U.S. at 491; FTC REPORT, *supra* note 4, at 1; see Martin, *supra* note 201, at 3-10.

<sup>204</sup> See *Granholm*, 544 U.S. at 490-91; ANDREW M. CUOMO & ROBERT L. MEGNA, N.Y. STATE, ECONOMIC, REVENUE, AND SPENDING METHODOLOGIES 182-223 (2014), available at <http://www.budget.ny.gov/pubs/supporting/MethodologyBook.pdf>.

<sup>205</sup> See *Granholm*, 544 U.S. at 490-91; CUOMO & MEGNA, *supra* note 204, at 109.

<sup>206</sup> See discussion *supra* notes 177-205.

<sup>207</sup> See *Granholm*, 544 U.S. at 491; *Maine v. Taylor*, 477 U.S. 131, 141-44 (1986); *Hughes v. Oklahoma*, 441 U.S. 322, 337-38 (1979).

<sup>208</sup> See *Granholm*, 544 U.S. at 491; *Taylor*, 477 U.S. at 141-44; *Hughes*, 441 U.S. at 336-38.

advance the same purpose.<sup>209</sup> To satisfy its burden, New York would have to prove that all nondiscriminatory alternatives were unworkable.<sup>210</sup> New York will not be able to prove this because, as discussed below,<sup>211</sup> the California regulatory model advances all of New York's possible legitimate local interests. Therefore, New York's Ruling 01006A, as applied in conjunction with Bill 5320, is unconstitutional.<sup>212</sup>

### B. California's Nondiscriminatory Model for Regulating TPPs and Licensees

Since 2011, California has permitted TPPs to market and advertise wine online on behalf of licensed producers and retailers.<sup>213</sup> This Subpart discusses the California guidelines on TPPs and demonstrates that the guidelines are constitutional under *Granholm*.<sup>214</sup> Furthermore, this Subpart argues that the California guidelines are a nondiscriminatory alternative to Ruling 01006A.<sup>215</sup>

#### 1. California's Guidelines Comply with *Granholm*'s Holding

California law regulating the business relationship between TPPs and licensees, unlike New York law, passes the two-part Commerce Clause test set forth in *Granholm*.<sup>216</sup> To reiterate, the first part asks whether the law is discriminatory.<sup>217</sup> The *Granholm* Court reasoned

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<sup>209</sup> See *Granholm*, 544 U.S. at 489-94; *Hughes*, 441 U.S. at 336-38; see, e.g., *Taylor*, 477 U.S. at 141-44 (upholding state regulations that discriminate against interstate commerce only when the record demonstrates that nondiscriminatory alternatives are unworkable).

<sup>210</sup> See *Granholm*, 544 U.S. at 492-93; *Taylor*, 477 U.S. at 141-44.

<sup>211</sup> See discussion *infra* Part III.B.

<sup>212</sup> See *Granholm*, 544 U.S. at 492-93; S. 5320, 2013 Gen. Assemb., Reg. Sess. (N.Y. 2013). See generally Declaratory Ruling 01006A, *supra* note 8 (discussing ShipCompliant's actions and the unconstitutionality of permitting in-state TPPs, while disallowing out-of-state TPPs).

<sup>213</sup> CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; see also CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, UNLICENSED THIRD PARTY SERVICE PROVIDERS, *supra* note 4; *ShipCompliant Launches New "MarketPlace" Platform*, *supra* note 111.

<sup>214</sup> See discussion *infra* Part III.B.1.

<sup>215</sup> See discussion *infra* Part III.B.2.

<sup>216</sup> *Granholm*, 544 U.S. at 488-93; see discussion *supra* Part III.B.1-2; see also *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 18-19 (1st Cir. 2010) (applying *Granholm*).

<sup>217</sup> *Granholm*, 544 U.S. at 488-93; see discussion *supra* Part III.B.1-2; see also *Family Winemakers*, 592 F.3d at 19-20.

that laws giving preferential treatment to in-state entities, but prohibiting the same treatment for out-of-state entities, constituted discrimination and violated the Commerce Clause.<sup>218</sup> If a law does not discriminate, no further analysis is necessary because the law is valid.<sup>219</sup>

In applying the first part of *Granholm*, California guidelines do not discriminate because they do not create preferable treatment for in-state TPPs at the expense of out-of-state TPPs.<sup>220</sup> As long as unlicensed third parties comply with the California guidelines, they receive evenhanded treatment regardless of whether they are located in- or out-of-state.<sup>221</sup> Since the guidelines do not have a discriminatory effect, no further analysis is necessary to conclude that the California guidelines are constitutional under *Granholm*.<sup>222</sup> This nondiscriminatory model presents a workable alternative to New York's discriminatory regulations.<sup>223</sup>

## 2. California Offers New York a Nondiscriminatory Alternative to Ruling 01006A

According to *Granholm*, a nondiscriminatory alternative should be based on concrete evidence, be workable, and advance the state's local interests.<sup>224</sup> The existence of a nondiscriminatory alternative prevents a state from discriminating against interstate commerce.<sup>225</sup> California's nondiscriminatory guidelines provide a workable, proven alternative

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<sup>218</sup> *Granholm*, 544 U.S. at 465-66; see discussion *supra* Part I.B.1; see also *Family Winemakers*, 592 F.3d at 18-19.

<sup>219</sup> See *Granholm*, 544 U.S. at 488-93; discussion *supra* Part I.B.2; see also *Family Winemakers*, 592 F.3d at 18-19.

<sup>220</sup> See CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137; see also discussion *supra* Part III.B.1-2.

<sup>221</sup> See *Granholm*, 544 U.S. at 473; Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137. State laws discriminating against out-of-state direct wine shippers in fact violate the Commerce Clause. See, e.g., *Siesta Vill. Mkt. v. Granholm*, 596 F. Supp. 2d, 1035, 1044-45 (E.D. Mich. 2008) (holding a Michigan regulatory scheme invalid for permitting in-state retailers to ship directly to in-state consumers while prohibiting the same for out-of-state retailers).

<sup>222</sup> See *Granholm*, 544 U.S. at 488-93.

<sup>223</sup> See discussion *infra* Part III.B.2.

<sup>224</sup> See *Granholm*, 544 U.S. at 489, 492-93; see, e.g., *Maine v. Taylor*, 477 U.S. 131, 141-44, 147 (1986).

<sup>225</sup> See *Granholm*, 544 U.S. at 492-93; *Taylor*, 477 U.S. at 141-44.

to Ruling 01006A and ensures protection of New York's local interests.<sup>226</sup>

a. *The California Guidelines Are a Workable Alternative that Would Promote New York's Interests*

Rarely has the Supreme Court held that there is no workable alternative to a discriminatory law.<sup>227</sup> A workable alternative is one that is viable, functions to support (or not endanger) the same state interests as the discriminatory law, and does not facially or effectively discriminate.<sup>228</sup> The Supreme Court and U.S. Courts of Appeals have held that when at least one viable nondiscriminatory alternative exists and that alternative would function to promote state interests, the state should adopt it.<sup>229</sup> In *Granholm*, the workable alternative permitted out-of-state wineries to direct ship because licensing ensured protection of tax facilitation and prevented minors from obtaining alcohol.<sup>230</sup> In a case from the U.S. Court of Appeals for the First Circuit, which applied *Granholm*, out-of-state wineries challenged a Massachusetts law giving large wineries the option to distribute with a wholesaler or direct-to-consumer shipping.<sup>231</sup> The court found the law discriminatory in effect and purpose because it deprived large wineries, which produce 98% of all U.S. wine, of the benefits of combining distribution methods — an advantage it

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<sup>226</sup> See discussion *infra* Part III.B.2.

<sup>227</sup> Two rare examples are *Maine v. Taylor* and *Sporhase v. Nebraska ex rel. Douglas*. In *Taylor*, the Supreme Court upheld a ban on out-of-state baitfish based on expert testimony that imported baitfish could introduce non-native parasites that could harm Maine fish and that there was no known way to prevent it other than a total ban. *Taylor*, 477 U.S. at 147-52. In *Sporhase*, the Supreme Court upheld an embargo against exporting ground water to other states based on evidence that there was only enough water for the state's own citizens because of drought. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956-57 (1982). But see *Granholm*, 544 U.S. at 492-93; *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 18-19 (1st Cir. 2010).

<sup>228</sup> See *Taylor*, 477 U.S. at 147-52; *Sporhase*, 458 U.S. at 956-58; *Family Winemakers*, 592 F.3d at 18-19.

<sup>229</sup> See *Family Winemakers*, 592 F.3d at 16-19; see also *Granholm*, 544 U.S. at 488-93; *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 582 n.16 (1997).

<sup>230</sup> See *Granholm*, 544 U.S. at 488-93; Seth G. Mehrten, *Pruning Direct Shipping Barriers for Optimal Yield: How the Dormant Commerce Clause Limits the Twenty-first Amendment*, 21 SAN JOAQUIN AGRIC. L. REV. 155, 166-72 (2012). See generally CUOMO & MEGNA, *supra* note 204, at 108-10 (describing how collections patterns on alcohol tax have remained fairly constant).

<sup>231</sup> *Family Winemakers*, 592 F.3d at 4.

afforded small wineries or 2% of the wine market.<sup>232</sup> The court found that the Model Direct Shipment Bill was a workable alternative to the discriminatory licensing requirement because it applied the benefit of combining distribution methods to both large and small wineries.<sup>233</sup> Therefore, the key commonality in Commerce Clause jurisprudence is that a nondiscriminatory alternative is workable because it continues to serve the same function as the discriminatory law without discriminating against actors in interstate commerce.<sup>234</sup>

The California guidelines are a workable alternative for New York for several reasons. First, as discussed above, the California guidelines do not discriminate because they do not create preferable treatment for in-state TPPs at the expense of out-of-state TPPs.<sup>235</sup> Second, the California guidelines continue to serve the same function as Ruling 01006A.<sup>236</sup> This is because the guidelines address New York's concerns with TPPs and promote New York's interests: regulatory accountability, preventing minors from obtaining alcohol, and facilitating tax collection without discriminating.<sup>237</sup>

The California guidelines promote regulatory accountability because California and New York have comparable wine laws and interests in regulating licensing.<sup>238</sup> Both states prohibit the holder of a wine license from transferring the license to other persons or premises.<sup>239</sup>

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<sup>232</sup> *Id.* at 4, 16-19.

<sup>233</sup> *Id.* at 17-18.

<sup>234</sup> See *C&A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383, 387, 390-91 (1994); *Hughes v. Oklahoma*, 441 U.S. 322, 337-38 (1979); *Freeman v. Corzine*, 629 F.3d 146, 160 (3d Cir. 2010).

<sup>235</sup> See CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137; see also discussion *supra* Part III.B.1.

<sup>236</sup> *Granholt v. Heald*, 544 U.S. 460, 488-93 (2005).

<sup>237</sup> See *id.* at 488-93; see also CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7.

<sup>238</sup> See Declaratory Ruling 01006A, *supra* note 8, at 6-7; *Liquor Store Internet Wine Sales Restricted by State Liquor Authority Ruling*, WRIGHT LAW FIRM N.Y.C. (June 11, 2013), <http://www.wrightlawfirmnyc.com/2013/06/11/liquor-store-internet-wine-sales-restricted-by-state-liquor-authority-ruling/>. Compare CAL. BUS. & PROF. CODE § 23300 (West 2015) (selling liquor without a license and the exercise of impermissible control of a licensee by a person without a license may violate California law), with N.Y. ALCO. BEV. CONT. LAW § 111 (McKinney 2014) (restricting licenses issued to the confines of the licensee and the licensee's premises).

<sup>239</sup> CAL. BUS. & PROF. § 23300 (selling liquor without a license and the exercise of impermissible control of a licensee by a person without a license may violate California law); N.Y. ALCO. BEV. CONT. § 111 (restricting licenses issued to the confines of the licensee and the licensee's premises); see also Declaratory Ruling 01006A, *supra* note 8, at 6; *Liquor Store Internet Wine Sales Restricted by State Liquor*

Moreover, the California ABC's original concern of preserving the non-transferability of a seller's license helped shape the California guidelines.<sup>240</sup> Applying the guidelines in New York would continue to preserve the non-transferability of a license and prevent license misuse.<sup>241</sup>

Next, the California model of regulating TPPs is workable in New York because another function of the guidelines is to facilitate tax collection on direct shipments. New York relies on revenue from wine and alcohol sales to fund public welfare programs,<sup>242</sup> and argues that TPPs will prevent proper tax collection because they collect funds on behalf of direct shipping sales.<sup>243</sup> Tax evasion is possible.<sup>244</sup> However, states can achieve their tax collection goals in the wine industry through other means than altogether eliminating direct shipping or online wine sales.<sup>245</sup> California, New York, and other states require a permit as a condition for direct shipment, which facilitates proper tax collection.<sup>246</sup> California guidelines only bolster tax collection because licensees are responsible for the actions of the TPPs, including any tax-related actions.<sup>247</sup> This means permitting violations could result in fines or loss of direct shipping privileges.<sup>248</sup> This heavily incentivizes licensed wineries and retailers to have legally compliant business relationships with TPPs.<sup>249</sup> Since licensees would not likely engage

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*Authority Ruling*, *supra* note 238.

<sup>240</sup> See CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7.

<sup>241</sup> See Declaratory Ruling 01006A, *supra* note 8, at 6-7.

<sup>242</sup> See CUOMO & MEGNA, *supra* note 204, at 186-223; see also Charles F. Conlon, *Taxation in the Alcoholic Beverage Field*, 7 LAW & CONTEMP. PROBS. 728, 745-46, 748 (1940).

<sup>243</sup> See *Granholt v. Heald*, 544 U.S. 460, 491 (2005).

<sup>244</sup> *Id.* at 491; FTC REPORT, *supra* note 4, at 1; see Declaratory Ruling 01006A, *supra* note 8, at 2-4; Martin, *supra* note 201, at 8.

<sup>245</sup> See *Granholt*, 544 U.S. at 489-92.

<sup>246</sup> *Id.* at 491. Some TPPs generate auto-populated tax reports, such as ShipCompliant. *Why Use ShipCompliant?*, SHIPCOMPLIANT, <https://www.shipcompliant.com/wineries/> (last visited Feb. 12, 2015). See generally STONEBRIDGE RESEARCH, THE ECONOMIC IMPACT OF GRAPES, GRAPE JUICE AND WINE ON THE NEW YORK ECONOMY, 2008, at 6 (2010), available at <http://www.newyorkwines.org/PDFs/EcImpact2010.pdf> (describing the economic impact of the wine industry in New York).

<sup>247</sup> See CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137; see also discussion *supra* Part III.B.2.a.

<sup>248</sup> See CAL. BUS. & PROF. CODE § 23673 (West 1979).

<sup>249</sup> See *Why Use ShipCompliant?*, *supra* note 246; see also *Granholt*, 544 U.S. at 491. See generally MENDELSON, *supra* note 25, at 15-19 (discussing the two basic methods states use to regulate the wine industry).



TPPs in business at the expense of losing a direct shipping permit, the arrangement incentivizes compliance with licensing conditions, including tax collection.<sup>250</sup> Moreover, the guidelines permit TPPs to provide compliance services.<sup>251</sup> Many TPPs, as a service, provide regular sales reports and remit taxes back to the wineries and retailers engaging them in business.<sup>252</sup> California, as well as other states that use this approach, has reported few problems collecting taxes.<sup>253</sup> Therefore, the guidelines incentivize wineries and retailers engaged with TPPs to report and pay taxes properly at the expense of adverse consequences.<sup>254</sup> The California guidelines could thus facilitate tax collection in New York without discriminatory effect, which means the model promotes this legitimate local interest.<sup>255</sup>

Lastly, the California guidelines are workable in New York because the guidelines function to prevent crime in the industry, namely preventing minors from obtaining alcohol. Some critics, like New York, argue that permitting online wine sales will inevitably undermine the state's interest in preventing crime.<sup>256</sup> This concern stems from the fact that TPP operators, unlike licensees, are not subject to criminal background checks.<sup>257</sup> Critics also argue that TPPs and online ordering thwart and disrupt the states ability to police underage drinking.<sup>258</sup>

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<sup>250</sup> See *Why Use ShipCompliant?*, *supra* note 246; see also *Granholt*, 544 U.S. at 491. See generally MENDELSON, *supra* note 25, at 15-19 (discussing the two basic methods states use to regulate the wine industry).

<sup>251</sup> See CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; *Why Use ShipCompliant?*, *supra* note 246; see also *Granholt*, 544 U.S. at 491. See generally MENDELSON, *supra* note 25, at 15-19 (discussing the two basic methods states use to regulate the wine industry).

<sup>252</sup> See CUOMO & MEGNA, *supra* note 204, at 108-10.

<sup>253</sup> See *Granholt*, 544 U.S. at 491; FTC REPORT, *supra* note 4, at 38-40.

<sup>254</sup> See *Granholt*, 544 U.S. at 490-91; FTC REPORT, *supra* note 4, at 38-40; *Report Shows Direct-to-Consumer Wine Shipments More Valuable Sales Channel Than Exports*, BUS. WIRE (Apr. 16, 2013, 8:00 PM), <http://www.businesswire.com/news/home/20130416006843/en/Report-Shows-Direct-To-Consumer-Wine-Shipments-Valuable-Sales> (reporting 10% increase in sales of direct-shipped wines through third parties, outpacing the growth of overall wine sales in the United States).

<sup>255</sup> See *Granholt*, 544 U.S. at 491-92; see also FTC REPORT, *supra* note 4, at 38-40.

<sup>256</sup> See 27 U.S.C. § 203 (2012); FTC REPORT, *supra* note 4, at 4. In *Granholt*, New York argued against direct shipment of out-of-state wineries to keep alcohol out of the hands of minors. 544 U.S. at 489-91.

<sup>257</sup> See generally MENDELSON, *supra* note 25, at 15-19 (discussing the two basic methods states use to regulate the wine industry).

<sup>258</sup> See *Granholt*, 544 U.S. at 489-91; FTC REPORT, *supra* note 4, at 4.

California, New York, and the forty other states that currently permit interstate direct shipping report few incidents of shipping to minors.<sup>259</sup> These states mandate that TPPs attach safeguards to online wine purchases.<sup>260</sup> For example, some states require an adult signature at the time of delivery and maintain penalty and enforcement systems to incentivize compliance with package and delivery laws.<sup>261</sup> TPPs add a further level of protection because they use age-verification technology.<sup>262</sup> Technology has eased the burden of monitoring wineries.<sup>263</sup> Therefore, the California guidelines equally — if not more so — protect the state's interest in preventing crime because TPPs give licensees technological capabilities to prevent crime.<sup>264</sup>

*b. The California Guidelines Are a Proven Alternative to New York Ruling 01006A*

A workable nondiscriminatory alternative is ultimately workable because it is a proven solution to disparate treatment of in- and out-of-state actors.<sup>265</sup> Concrete evidence must support a proven alternative.<sup>266</sup> Proven alternatives do not necessarily need to be tried and true through experimentation, but the alternative must be a viable — rather than fanciful — option.<sup>267</sup> As mentioned earlier, in *Family*

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<sup>259</sup> See FTC REPORT, *supra* note 4, at 3, 31-34; *Direct Shipment of Alcoholic Beverages to Consumers State Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 12, 2013), <http://www.ncsl.org/research/financial-services-and-commerce/direct-shipment-of-alcohol-state-statutes.aspx> (listing the states and regulations that permit direct shipment of wine).

<sup>260</sup> See FTC REPORT, *supra* note 4, at 34; see also Declaratory Ruling 01006A, *supra* note 8, at 7-8.

<sup>261</sup> See FTC REPORT, *supra* note 4, at 34; see also Declaratory Ruling 01006A, *supra* note 8, at 7.

<sup>262</sup> See Jeff Carroll, *7 Tips for Getting at Age Verification for Wine Shipments in 2013*, SHIPCOMPLIANT BLOG (Dec. 18, 2012), <http://shipcompliantblog.com/blog/2012/12/18/7-tips-for-getting-better-at-age-verification-for-wine-shipments-in-2013/> [hereinafter *7 Tips*].

<sup>263</sup> *Granholm*, 544 U.S. at 492; see Carroll, *7 Tips*, *supra* note 262. See generally Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137 (explaining the California's advisory regarding wineries and TPPs).

<sup>264</sup> See Carroll, *7 Tips*, *supra* note 262. See generally Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137 (explaining California's advisory regarding wineries, TPPs, and technology use in the industry).

<sup>265</sup> See *Granholm*, 544 U.S. at 491-92; *Maine v. Taylor*, 477 U.S. 131, 147 (1986); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956-58 (1982); *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 17-18 (1st Cir. 2010).

<sup>266</sup> See *Granholm*, 544 U.S. at 492-93; *Taylor*, 477 U.S. at 147; *Sporhase*, 458 U.S. at 958.

<sup>267</sup> See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 582 n.16 (1997); *Family Winemakers*, 592 F.3d at 17.

*Winemakers*, the Model Direct Shipping Bill was a viable alternative to a discriminatory Massachusetts statute because it did not facially or effectively discriminate against interstate commerce.<sup>268</sup>

California's guidelines offer a proven alternative to current New York law because the guidelines have facilitated beneficial and legal business relationships between TPPs and licensed wineries and retailers.<sup>269</sup> California has had almost three years of successful business between TPPs and licensees.<sup>270</sup> The state has had few, if any, problems shipping to minors.<sup>271</sup> It also successfully collects taxes through TPP technology and licensing requirements.<sup>272</sup> Other states have already begun to use the California guidelines as a model for integrating and regulating TPPs.<sup>273</sup> Therefore, the California guidelines are likely a viable option for New York.

c. *The California Guidelines and Federal Law*

The California guidelines in conjunction with federal law also incentivize TPPs and licensees to have legally compliant relationships because, under the guidelines, wineries and retailers are liable for TPP

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<sup>268</sup> *Family Winemakers*, 592 F.3d at 16-19; see *Granholm*, 544 U.S. at 491-92.

<sup>269</sup> See CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137. But see CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, UNLICENSED THIRD PARTY SERVICE PROVIDERS, *supra* note 4.

<sup>270</sup> See CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; see also Seff, Jolly & Bonnington, *supra* note 123, at 1. Since the 2011 Industry Advisory, the California ABC has not changed its position on TPPs' relations with licensed sellers. See Matthew Mann, *Observations on the New York SLA Marketplace Ruling*, WINE DIRECT (Apr. 16, 2013), <http://www.winedirect.com/blog/Observations-on-the-New-York-SLA-Marketplace-Ruling> (explaining that California is the leader in crafting guidelines for the operation of online marketplaces by unlicensed TPPs).

<sup>271</sup> Cf. CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, WINE DIRECT SHIPPER PERMIT APPLICATION [hereinafter WINE DIRECT SHIPPER PERMIT APPLICATION], available at <http://www.abc.ca.gov/forms/ABC248.pdf> (last visited Jan. 9, 2013) (requiring out-of-state permit holders to report the total amount of wine shipped and pay the State Board of Equalization all sales and use taxes, and excise taxes on sales to California residents); FTC REPORT, *supra* note 4, at 31-32.

<sup>272</sup> See *Integrated Platform Powering*, SHIPCOMPLIANT, <https://www.shipcompliant.com/wineries/> (last visited April 2, 2015); see also CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, WINE DIRECT SHIPPER PERMIT APPLICATION, *supra* note 271.

<sup>273</sup> See TEX. ALCOHOLIC BEVERAGE COMM'N, MPA056, MARKETING PRACTICES ADVISORY: WINE SHIPPING AND THIRD PARTY ADVERTISERS/PAYMENT PROCESSING SERVICES (2013); Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137. See generally CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7 (clarifying existing California laws and regulations regarding TPPs).

noncompliance.<sup>274</sup> The U.S. Tax and Trade Bureau has authority to revoke a winery's federal license, which all wineries must have, if it violates state law.<sup>275</sup> Without a federal license, wineries cannot operate in any state.<sup>276</sup> The Twenty-first Amendment Enforcement Act also gives state attorney generals the power to sue wineries in federal court if they violate state law.<sup>277</sup> These federal remedies, combined with licensing requirements for TPPs and direct shipments, will adequately enable New York to collect tax revenue.

In summation, California's guidelines are workable, proven, and function to advance all of New York's relevant local interests.<sup>278</sup> According to *Granholm*, and other Commerce Clause jurisprudence, the guidelines meet the requirements for a nondiscriminatory alternative.<sup>279</sup> The availability and viability of such an alternative eliminates consideration of the virtually per se discriminatory rule: Ruling 01006A.<sup>280</sup> Therefore, the California guidelines are not only constitutional, but are a nondiscriminatory alternative that New York may adopt in place of Ruling 01006A.<sup>281</sup>

### C. Inviting Wine Consumers to the Table

This Subpart argues that beyond constitutional concerns, California's guidelines are superior to New York Ruling 01006A because they promote consumer choice and benefit wineries of all size.<sup>282</sup> In contrast, New York's regulations are adverse to consumers

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<sup>274</sup> BUREAU OF ALCOHOL, TOBACCO & FIREARMS, U.S. DEP'T OF THE TREASURY, INDUSTRY CIRCULAR NO. 96-3: DIRECT SHIPMENT SALES OF ALCOHOLIC BEVERAGES (1996) [hereinafter DIRECT SHIPMENT SALES OF ALCOHOLIC BEVERAGES]; see CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7; Carroll, *Understanding the California ABC's New Advisory*, *supra* note 137.

<sup>275</sup> See ALCOHOL & TOBACCO TAX & TRADE BUREAU, U.S. DEP'T OF THE TREASURY, TITLE 27: ALCOHOL, TOBACCO AND FIREARMS, PART 1: BASIC PERMIT REQUIREMENTS UNDER THE FEDERAL ALCOHOL ADMINISTRATION ACT, NONINDUSTRIAL USE OF DISTILLED SPIRITS AND WINE, BULK SALES AND BOTTLING OF DISTILLED SPIRITS 4 (Oct. 23, 2006), available at [http://www.ttb.gov/applications/pdf/part\\_1\\_faa\\_act\\_regulations.pdf](http://www.ttb.gov/applications/pdf/part_1_faa_act_regulations.pdf).

<sup>276</sup> See BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DIRECT SHIPMENT SALES OF ALCOHOLIC BEVERAGES, *supra* note 274; CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, THIRD PARTY PROVIDERS, *supra* note 7.

<sup>277</sup> Twenty-first Amendment Enforcement Act, Pub. L. No. 106-386, § 2004, 114 Stat. 1546, 1546 (2000).

<sup>278</sup> See *supra* Part III.B.2.

<sup>279</sup> See *supra* Part III.B.1.

<sup>280</sup> See *supra* Part III.B.2.

<sup>281</sup> See *supra* Part III.B.2.

<sup>282</sup> See discussion *infra* Part III.C.1.

but arguably advantageous to the in-state wine market.<sup>283</sup> This Subpart also argues that New York should relinquish its protectionist wine regulations and adopt California's consumer- and industry-driven policy because this change would benefit all New York wineries and New York consumers.<sup>284</sup>

### 1. Why TPPs Will Benefit New York Consumers

California's policy, including its position on TPPs' place in the marketplace, demonstrates how New York's protectionist policies are detrimental to consumers. When it comes to wine, California is the most consumer-friendly state in the nation, and California's approving attitude benefits consumers.<sup>285</sup> Consumers in California have access to wine in specialty stores, grocery stores, and via direct shipment from wineries and retailers.<sup>286</sup> TPPs, which facilitate online wine sales according to the California guidelines, further increase consumer access to wine because as online wine sales increase, TPPs are experts at selling wine online.<sup>287</sup>

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<sup>283</sup> See discussion *infra* Part III.C.1.

<sup>284</sup> See discussion *infra* Part III.C.1. Texas used the California ABC Advisory on TPPs as a model for its state regulations on TPPs. See TEX. ALCOHOLIC BEVERAGE COMM'N, *supra* note 273.

<sup>285</sup> AM. WINE CONSUMER COAL., CONSUMING CONCERNS: THE 2013 STATE-BY-STATE REPORT CARD ON CONSUMER ACCESS TO WINE (2013), available at <http://www.wineconsumers.org/wp-content/uploads/2013/08/ConsumingConcerns4small.pdf>. In 2012, California wine sales numbered 250.2 million cases shipped to the United States and abroad. Press Release, Wine Inst., 2012 Wine Sales in U.S. Reach New Record: Record California Winegrape Crop to Meet Surging Demand (April 8, 2013) [hereinafter 2012 Wine Sales Press Release], available at <http://www.wineinstitute.org/resources/pressroom/04082013>.

<sup>286</sup> AM. WINE CONSUMER COAL., *supra* note 285. See generally 2012 Wine Sales Press Release, *supra* note 285 (discussing the growth of wine sales in retail outlets). On the other hand, New York alcohol regulators favor policies that are not consumer friendly. See Robert Taylor, *New York Alcohol Authorities Order New Jersey's Wine Library to Stay out of Their State*, WINE SPECTATOR (Aug. 23, 2013), <http://www.winespectator.com/webfeature/show/id/48821> [hereinafter *Alcohol Authorities Order*].

<sup>287</sup> See AM. WINE CONSUMER COAL., *supra* note 285; 2012 Wine Sales Press Release, *supra* note 285; see also Taylor, *Alcohol Authorities Order*, *supra* note 286. In 2011, Wine.com, the leading online wine retailer for the past seven consecutive years, announced their sales for the fiscal year were \$56 million. Jeff Lefever, *Where to Buy Wine Online: The Top Eight Wine Ecommerce Sites for Unique and Interesting Wines*, FORBES (Oct. 13, 2011), <http://www.forbes.com/sites/jefflefevere/2011/10/13/where-to-buy-wine-online-the-top-eight-wine-ecommerce-sites-for-unique-and-interesting-wines>. Lot18, a premiere flash website, stated it was on pace for \$25 million in their first year of business. *Id.*

On the other hand, New York is not a consumer-friendly state for oenophiles.<sup>288</sup> It prohibits wine sales in grocery stores and direct-to-consumer shipping from retailers.<sup>289</sup> Furthermore, its statutory and regulatory scheme dates back to the repeal of Prohibition.<sup>290</sup> Consequently, wine is a heavily regulated commodity in New York.<sup>291</sup>

The wine market indicates that state barriers to the industry are likely to have negative effect on consumers.<sup>292</sup> The negative effect of Ruling 01006A is that it deprives New York consumers from utilizing TPPs to order wine online, which frustrates consumer choice, preventing consumers from buying popular wines and from reaping price savings.<sup>293</sup> A study found that consumers who shop online could

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<sup>288</sup> AM. WINE CONSUMER COAL., *supra* note 285; see Taylor, *Alcohol Authorities Order*, *supra* note 286.

<sup>289</sup> AM. WINE CONSUMER COAL., *supra* note 285; see Taylor, *Alcohol Authorities Order*, *supra* note 286 (explaining that sending wine to New York residents from out-of-state retailers is prohibited, and that New York is cracking down to prevent retail shipping).

<sup>290</sup> MENDELSON, *supra* note 25, at 65. Further, New York enacted its Alcohol Beverage and Control Laws on July 1, 1934. See generally N.Y. ALCO. BEV. CONT. LAW § 1 (McKinney 2014) (demonstrating that the alcohol regulations have remained virtually unchanged since 1934).

<sup>291</sup> See Tom Wark, *Over Stepping Their Authority: New York vs Wine Retailers*, FERMENTATION: THE DAILY WINE BLOG (Aug. 26, 2013), <http://fermentationwineblog.com/2013/08/over-stepping-their-authority-new-york-vs-wine-retailers/>. In August 2013, the New York SLA sent the largest New Jersey retailer, The Wine Library, a cease and desist letter for selling wine to residents of New York. See Taylor, *Alcohol Authorities Order*, *supra* note 286. New York favors laws that promote the in-state wine industry. See *Long Islanders Excited About Law Allowing for Farm Stand Wine Sales*, CBS NEW YORK (Oct. 1, 2013, 10:04 PM), <http://newyork.cbslocal.com/2013/10/01/long-islanders-excited-about-law-allowing-for-farm-stand-wine-sales>. In July 2012, Governor Cuomo signed legislation to support New York wineries and increase demand for local products. *Governor Cuomo Signs Legislation Allowing Wine to Be Sold at Farmer's Markets and Designating New Wine Trails Along State Roadways*, GOVERNOR ANDREW M. CUOMO (Sept. 30, 2013), <http://www.governor.ny.gov/news/governor-cuomo-signs-legislation-allowing-wine-be-sold-farmers-markets-and-designating-new-wine>. In October 2012, the Governor held New York's first Wine, Beer, and Spirits Summit aimed at promoting New York wine and announcing plans for the future. *Id.*

<sup>292</sup> Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 ANTITRUST L.J. 505, 543 (2008); see Wark, *supra* note 291. See generally STONEBRIDGE RESEARCH, *supra* note 246, at 6-7 (recognizing potential in New York's wine industry if regulations are liberalized).

<sup>293</sup> Ohlhausen & Luib, *supra* note 292, at 543-44; see, e.g., Wark, *supra* note 291 (arguing that New York's SLA overstepped its authority in order a New Jersey online wine retailer to cease and desist). See generally STONEBRIDGE RESEARCH, *supra* note 246, at 5-7 (recognizing potential in New York's wine industry if regulations are liberalized).

save between 26% and nearly 40% compared to shopping in stores.<sup>294</sup> New York's anticompetitive state regulations insulate suppliers from online competition and ultimately deprive consumers of lower prices and selections.<sup>295</sup> In conclusion, New York's bans and barriers on interstate shipping and online ordering represent the largest regulatory barrier to expanding the consumer choice in wine and online wine sales.<sup>296</sup>

If New York liberalizes the online wine market and promotes competition facilitated by TPPs, its residents will reap benefits as consumers.<sup>297</sup> The ability to purchase wine online enables consumers to save money, choose from an endless variety of wines, and have the convenience of delivery at home.<sup>298</sup> Moreover, the Internet's search services allow consumers to more readily locate the lowest online price for a particular wine and discover new wines through personalized recommendation software.<sup>299</sup> Therefore, TPPs will benefit New York consumers because they offer access to lower prices and greater selection, in addition to convenient online ordering and direct shipping.<sup>300</sup>

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<sup>294</sup> See Alan E. Wiseman & Jerry Ellig, Legislative Action, Market Reaction and Interstate Commerce: Results of Virginia's Natural Experiment with Direct Wine Shipment 28-29 (Dec. 15, 2005) (unpublished manuscript) [hereinafter Legislative Action], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=836364](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=836364). See generally STONEBRIDGE RESEARCH, *supra* note 246 (recognizing potential in New York's wine industry if regulations are liberalized).

<sup>295</sup> See FTC REPORT, *supra* note 4, at 5; Wiseman & Ellig, Legislative Action, *supra* note 294, at 29; see also *Granolm v. Heald*, 544 U.S. 460, 467-68 (2005).

<sup>296</sup> See FTC REPORT, *supra* note 4, at 1-3; Wiseman & Ellig, *Market and Nonmarket Barriers*, *supra* note 9, at 3-5; see also *Granolm*, 544 U.S. at 467-68.

<sup>297</sup> See FTC REPORT, *supra* note 4, at 23-26; Wiseman & Ellig, *Market and Nonmarket Barriers*, *supra* note 9, at 1 (discussing the prospects of a virtual vineyard, its potential for bargains, and broad expansion of product availability); see also *Granolm*, 544 U.S. at 467.

<sup>298</sup> FTC REPORT, *supra* note 4, at 40; Wiseman & Ellig, *Market and Nonmarket Barriers*, *supra* note 9, at 28. An FTC study suggests that consumers could save, on average, 8-13% on wines costing more than \$20 and an average of 20-21% on wines costing more than \$40 per bottle if they use the least expensive direct shipping method. FTC REPORT, *supra* note 4, at 19-21.

<sup>299</sup> See Wiseman & Ellig, Legislative Action, *supra* note 294, at 17-19; *Customer Case Study: Wine.com*, RICHRELEVANCE, <http://www.richrelevance.com/wp-content/uploads/2011/01/wine.com-case-study.pdf> (last visited Jan. 28, 2014) (explaining that installing personalization software of TPP websites, such as Wine.com, increase average order value 15% and as much as 26% — described as “taking the corner wine store experience online”).

<sup>300</sup> See FTC REPORT, *supra* note 4, at 19-21; Wiseman & Ellig, *Market and Nonmarket Barriers*, *supra* note 9, at 28.

## 2. Why TPPs Will Benefit New York Wineries

TPPs are not only beneficial to consumers, but also facilitate an online wine market that is beneficial to wineries of every size. In the United States, the number of small wineries — those making approximately 30,000 cases or less a year — has significantly grown.<sup>301</sup> Yet as the number of small wineries has increased, the number of wholesalers has decreased significantly.<sup>302</sup> This is problematic because as the winery-to-wholesaler ratio increases, the marketplace increasingly cuts off small wineries.<sup>303</sup> The cut-off occurs because it is economically unsound for wholesalers to distribute and carry wines of such limited quantity.<sup>304</sup>

Since the vast majority of New York wineries are small,<sup>305</sup> selling smaller volumes of wine per year, they face greater difficulties finding distributors.<sup>306</sup> Even if a small winery could find a wholesaler to

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<sup>301</sup> *Granholtm*, 544 U.S. at 467; see *North American Winery Total Passes 8,000*, WINES & VINES (Feb. 4, 2013), <http://www.winesandvines.com/template.cfm?section=news&content=111242> (explaining that since 2004, the number of small wineries has doubled to 6,000).

<sup>302</sup> *Granholtm*, 544 U.S. at 467 (citing Gina M. Riekhof & Michael E. Sykuta, *Regulating Wine by Mail*, REG., Fall 2004, at 30, 30-31) (restating that the number of licensed wholesalers dropped from 1,600 to 600 between 1984 and 2002); Ohlhausen & Luib, *supra* note 292, at 507; Wiseman & Ellig, *Market and Nonmarket Barriers*, *supra* note 9, at 5 (approximating that between the 1950s and 2002, consolidation of distributors dropped from 5,000 to 400 wholesalers); see also Paul Franson, *California Warns Internet Wine Sellers*, WINES & VINES (June 23, 2009), <http://www.winesandvines.com/template.cfm?section=news&content=65546> (stating that arising outlets, such as TPPs, have arisen because of technology and difficulty finding distributors as a result of wholesalers consolidating their focus on the strongest, or largest, brands).

<sup>303</sup> *Granholtm*, 544 U.S. at 467; FTC REPORT, *supra* note 4, at 6; Ohlhausen & Luib, *supra* note 292, at 507.

<sup>304</sup> Ohlhausen & Luib, *supra* note 292, at 507. Distributors and wholesalers have lobbied state legislators to pass laws to maintain a privileged and profitable position in the wine market. Wiseman & Ellig, *Market and Nonmarket Barriers*, *supra* note 9, at 4; see also ROBERTSON, *supra* note 24, at 108-09.

<sup>305</sup> S. 1909, 2011 Gen. Assemb., Reg. Sess. (N.Y. 2011); see ROBERTSON, *supra* note 24, at 108 (noting that there is an increasing and rapid expansion of small boutique wineries in New York and these wineries are producing only a few thousand cases a year, which cannot be found in retail stores but could be found online); see, e.g., *Wine Related Questions*, LONG ISLAND WINE COUNCIL, [http://www.liwines.com/?page\\_id=42#wine](http://www.liwines.com/?page_id=42#wine) (last visited Jan. 8, 2014) (demonstrating that there are fifty-seven licensed wine producers on Long Island with around 500,000 cases produced per annum, which is less than 9,000 cases per winery).

<sup>306</sup> See N.Y. S. 1909; ROBERTSON, *supra* note 24, at 108 (noting there is an increasing and rapid expansion of small boutique wineries in New York and these wineries are producing only a few thousand cases a year, which cannot be found in



distribute its wine, the wholesaler's markup would render shipment through the three-tier system economically infeasible.<sup>307</sup> Smaller wineries are also at a disadvantage in retail stores because most retailers lack sufficient shelf space to carry smaller vineyards' wine labels.<sup>308</sup> Without a distributor, wineries cannot sell their products nor make a profit.

However, TPPs may remedy the vitality of small wineries in the marketplace because they facilitate direct-to-consumer shipping via the Internet.<sup>309</sup> Since New York's small wineries cannot rely on wholesaler to distribute their wine, they must rely heavily on direct-to-consumer sales as an important part of their business.<sup>310</sup> Because of direct-to-consumer sales, smaller wineries also use and rely on Internet-based wine clubs, a form of TPP, and other forms of e-commerce to sell new and distressed products.<sup>311</sup> The Internet gives small wineries easier access to consumers and limits geographic restraints with direct shipping.<sup>312</sup> Therefore, TPPs' facilitation of direct-to-consumer shipping over the Internet increasingly opens the marketplace to New York's small wineries, rather than closing it off.<sup>313</sup>

Lastly, TPPs also benefit midsize to large well-established wineries because they offer diversity of choice in distribution channels.<sup>314</sup> New

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retail stores but could be found online).

<sup>307</sup> *Granholm*, 544 U.S. at 468; see ROBERTSON, *supra* note 24, at 118 (explaining that getting a distributor is virtually impossible in some states for small wineries and that wholesalers limit diversity in wine selection and increase costs for all parties). A typical wholesale markup is around 25%, which adds costs on the consumer and wineries. *Id.*

<sup>308</sup> See FTC REPORT, *supra* note 4, at 1.

<sup>309</sup> See *Granholm*, 544 U.S. at 468; FTC REPORT, *supra* note 4, at 23-26; see also Lance Cutler, *Industry Roundtable: Wine Clubs*, WINE BUS. MONTHLY (Jan. 15, 2010), <http://www.winebusiness.com/wbm/?go=getArticle&dataId=71559>.

<sup>310</sup> See *Granholm*, 544 U.S. at 468; FTC REPORT, *supra* note 4, at 23-26; see also Cutler, *supra* note 309.

<sup>311</sup> See NAT'L AGRIC. STATISTICS SERVS., U.S. DEP'T OF AGRIC., NEW YORK WINERY SURVEY 2008, at 5 (Oct. 2009), available at <http://www.newyorkwines.org/PDFs/NASSWinerySurveyPub2008.pdf>; Cutler, *supra* note 309; see also Seff, Jolly & Bonnington, *supra* note 123, at 1.

<sup>312</sup> See STONEBRIDGE RESEARCH, *supra* note 246, at 6-7; Wiseman & Ellig, *Market and Nonmarket Barriers*, *supra* note 9, at 22; see also "Flash" Wine Sites Proliferate as Consumers Search the Internet for Better Deals, SHANKEN NEWS DAILY (Nov. 15, 2011), <http://www.shankennewsdaily.com/index.php/2011/11/15/1941/flash-wine-sites-proliferate-as-consumers-search-the-internet-for-better-deals/>.

<sup>313</sup> See FTC REPORT, *supra* note 4, at 23-26; STONEBRIDGE RESEARCH, *supra* note 246, at 6-7; see also "Flash" Wine Sites Proliferate as Consumers Search the Internet for Better Deals, *supra* note 312.

<sup>314</sup> See STONEBRIDGE RESEARCH, *supra* note 246, at 6; Seff, Jolly & Bonnington, *supra*

York's larger wineries may choose to distribute wine with a wholesaler, a TPP, or a combination of both.<sup>315</sup> For example, a winery may use a wholesaler to distribute wine to grocery stores nationwide and offer its limited edition bottles to a wine club.<sup>316</sup> Additionally, larger wineries may use TPPs to place products on multi-brand websites, and sell distressed inventory through flash sales online.<sup>317</sup> Diversity of choice allows a winery the freedom to choose how to market its wine efficiently and effectively in an industry flooded by regulations. Thus, even large wineries can capitalize on profits and reach far more consumers by engaging in various distribution methods.<sup>318</sup>

Accordingly, a policy that focuses on providing an economic advantage to wineries of all sizes will allow New York to capitalize on its wine industry as a driving force in the local economy, as it has in California.<sup>319</sup> Overall, California's wine policy could maximize the economic potential New York wineries, while equally promoting consumer choice.<sup>320</sup> Thus, New York should adopt California's policy because it offers benefits for consumers and maximizes the economic potential for start-up, small, midsized, and large well-established wineries.<sup>321</sup>

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note 123, at 1; see also "Flash" Wine Sites Proliferate as Consumers Search the Internet for Better Deals, *supra* note 312.

<sup>315</sup> See Seff, Jolly & Bonnington, *supra* note 123, at 2; see also "Flash" Wine Sites Proliferate as Consumers Search the Internet for Better Deals, *supra* note 312. See generally STONEBRIDGE RESEARCH, *supra* note 246, at 6 (recognizing potential in New York's wine industry if regulations are liberalized).

<sup>316</sup> See *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 6-8 (1st Cir. 2010); Hansen, *supra* note 95.

<sup>317</sup> See Hansen, *supra* note 95.

<sup>318</sup> See *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1233 (9th Cir. 2010); *Family Winemakers*, 592 F.3d at 8; Hansen, *supra* note 95.

<sup>319</sup> See STONEBRIDGE RESEARCH, *supra* note 246, at 6-7 ("New York's wine industry has continued to grow . . . . Creating jobs, generating taxes, supporting a shaken tourism sector and New York agriculture, the wine industry provides one of the few bright spots in New York's struggling economy. . . . However, New York's antiquated and economically counterproductive laws and regulations continue to impede industry growth and cost the state jobs, tax revenues and investments. New York's regulatory environment imposes severe challenges on New York producers compared to its major competitors in California, Washington State and Oregon, whose states recognize their wine industries as key drivers of the local economy."); see also *Black Star Farms*, 600 F.3d at 1233; *Family Winemakers*, 592 F.3d at 6-7.

<sup>320</sup> See FTC REPORT, *supra* note 4, at 22-26; STONEBRIDGE RESEARCH, *supra* note 246, at 5-7; Hansen, *supra* note 95.

<sup>321</sup> See FTC REPORT, *supra* note 4, at 22-26; STONEBRIDGE RESEARCH, *supra* note 246, at 6-7; Hansen, *supra* note 95.

## CONCLUSION

This Note scrutinized the constitutionality of New York and California wine law under *Granholm*. It concluded that New York Ruling 01006A was unconstitutional,<sup>322</sup> while the California guidelines were constitutional.<sup>323</sup> It also examined California and New York wine laws pertaining to the relationship between licensees and unlicensed TPPs, arguing that the California guidelines are a nondiscriminatory alternative to New York Ruling 01006A.<sup>324</sup> Lastly, it contended that California afforded the wine industry a policy in favor of consumers and wineries of all sizes, creating a more liberal and modern market for wine in a digital world.<sup>325</sup> In conclusion, New York should adopt California's guidelines and allow TPPs and licensees to have beneficial business relationships because it is constitutional, aligns with state law, and promotes consumer choice and economic benefit for wineries.<sup>326</sup>

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<sup>322</sup> See discussion *supra* Part III.A.

<sup>323</sup> See discussion *supra* Part III.B.

<sup>324</sup> See discussion *supra* Part III.B.2.

<sup>325</sup> See discussion *supra* Part III.C.

<sup>326</sup> See discussion *supra* Part III.A–C.