

Retailer Legal Update

Taking Stock of the Last Year In Alcohol Law

Retailer Legal Update: Overview

- Courthouse Update
 - Challenges to Self-Distribution Laws that Discriminate Against Out-of-State Businesses
 - Challenges to Direct Shipping Laws that Discriminate Against Out-of-State Businesses
 - Recent Supreme Court Commerce Clause Jurisprudence:
Nat'l Pork Producers Council v. Ross

Courthouse Update: Summary of Commerce Clause Argument

- Legal challenges continue to be based the Commerce Clause, *Granholm v. Heald*, and *Tennessee Wine & Spirits v. Thomas*.
- State laws are per se invalid if they favor in-state business and burden out-of-state business.
- When a state's law discriminates against out-of-state business, the state must present concrete evidence the law is the only effective way to protect public health or safety.
 - Asserted goals of protecting minors from alcohol and collecting taxes do not justify discrimination.
 - Other goals of orderly market conditions, health and safety, and regulatory accountability can be addressed through evenhanded direct shipping requirements.
 - Michigan and New York provided little evidence for why they could not police direct shipments.
- Speculation and unsupported assertions are not enough.

Courthouse Update: Summary of Commerce Clause Argument

- **Key Point:** States' alcohol laws cannot grant exceptions to the three-tier system to in-state businesses without according the same rights to out-of-state entities.

Courthouse Update: Goals

The overall legal strategy:

- Invalidate discriminatory laws and open markets.
- Push judges and legislatures to view industry members' commercial rights more expansively.
- Obtain further Supreme Court review of discriminatory state laws by fomenting Circuit Court splits.

Courthouse Update: Four New Challenges to Discriminatory Self-Distribution Laws

- **In the last year, industry members filed four (4) new cases challenging discriminatory self-distribution laws.**
- A growing number of states permit wine, beer, and/or spirits producers to self-distribute, which means to sell directly to retailers without having to use a distributor.
- In most cases, states limit self-distribution to in-state producers, usually smaller craft producers. Permissions vary between wine, beer, and spirits.
- Legislatures either don't know or don't care that laws discriminating against out-of-state businesses are invalid.

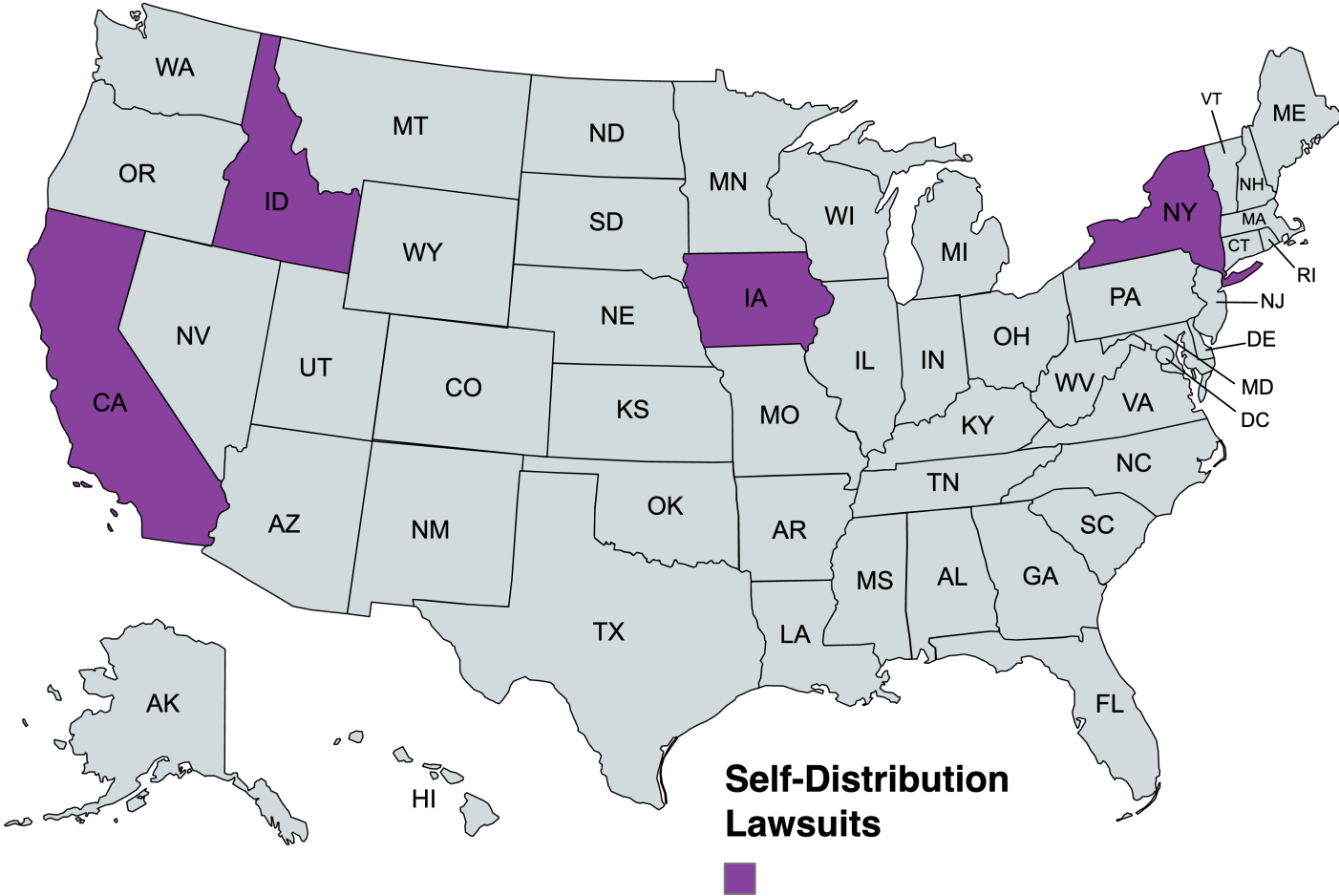
Courthouse Update: Four New Challenges to Discriminatory Self-Distribution Laws

- Self-distribution provides producers broader access to the retail marketplace at higher margins. It also allows retailers to diversify offerings and obtain otherwise inaccessible products, often at a lower price.
- If the new lawsuits make self-distribution more widely available, they will create significant new opportunities for affected producers, retailers, and consumers.

Courthouse Update: Four New Challenges to Discriminatory Self-Distribution Laws

- Until the last year, only **three** federal courts had considered Commerce Clause challenges to self-distribution laws.
- In 2005, a Washington district court relied on *Granholm* to invalidate the state's discriminatory wine and beer distribution statute. (*Costco. v. Hoen*) The Washington Legislature later extended the direct sale privilege to out-of-state producers.
- In 2010, the Third Circuit followed *Granholm* in striking down a discriminatory self-distribution law for wineries, remanding the case to the district court to determine a remedy. (*Freeman v. Corzine*)
- Also in 2010, an Illinois district court followed *Granholm* in striking down a discriminatory self-distribution law—withdrawing the privilege from in-state producers, but staying enforcement of the decision for six months to give the Illinois General Assembly time to act. (*Anheuser-Busch, Inc. v. Schnorf*)
- **Legal impacts can expand or contract the marketplace.**
- **The real battle is in state legislatures.**

Courthouse Update: Four New Challenges to Discriminatory Self-Distribution Laws



Courthouse Update: Four New Challenges to Discriminatory Self-Distribution Laws

In the last year, industry members filed four (4) new cases challenging discriminatory self-distribution laws:

#1. Iowa: *Buckel Wine v. Mosiman*

- In July 2023, Oregon and Colorado wineries filed a complaint challenging an Iowa law allowing only in-state wineries to sell directly to retailers.
- Current Status: Conducting discovery.

Courthouse Update: Four New Challenges to Discriminatory Self-Distribution Laws

#2. Idaho: *Roberts v. Gripton*

- In August 2023, two Washington breweries filed a complaint challenging an Idaho law allowing in-state breweries only to sell directly to retailers.
- Current Status: Finishing discovery. Motions for summary judgment are due by September 20, 2024.

Courthouse Update: Four New Challenges to Discriminatory Self-Distribution Laws

#3. New York: *Alba Vineyards v. New York State Liquor*

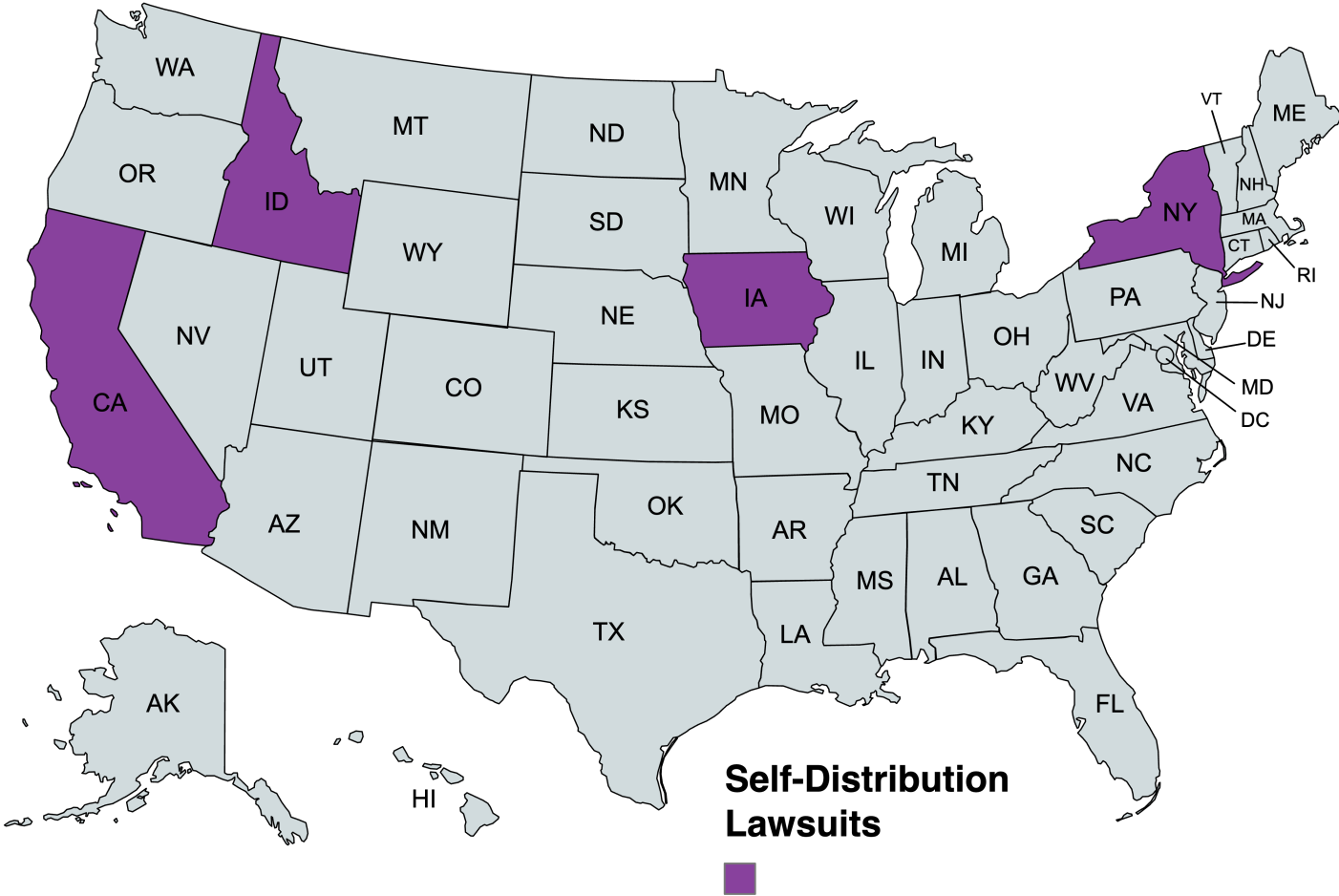
- In September 2023, a New Jersey winery and a New York retailer filed a complaint challenging a New York law allowing only in-state wineries to sell directly to retailers.
- Current Status: Discovery is complete. Trial is scheduled for July 16, 2024.

Courthouse Update: Four New Challenges to Discriminatory Self-Distribution Laws

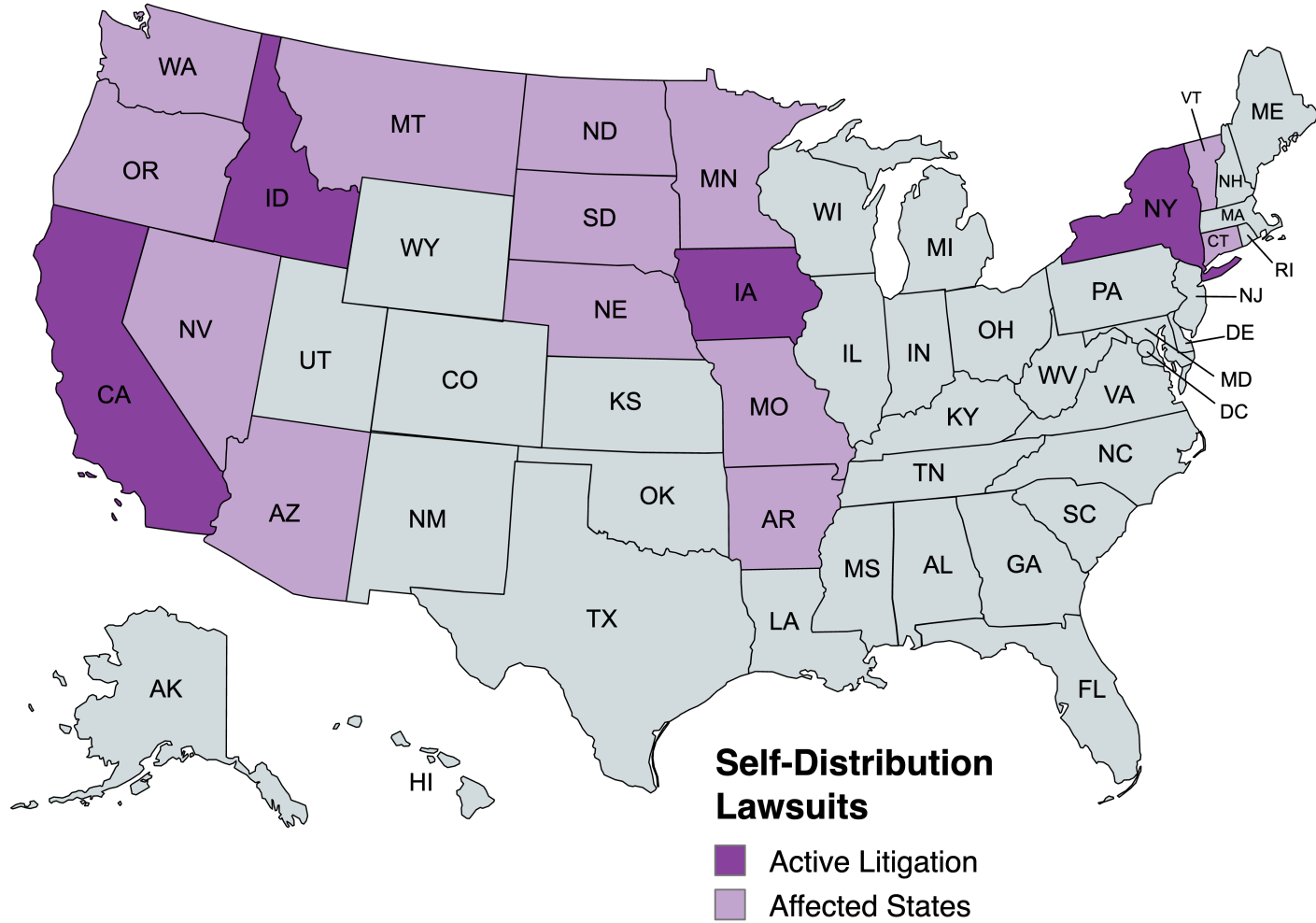
#4. California: *Dwinnell v McCullough*

- In November 2023, a Washington winery challenged a California law allowing only in-state wine producers to ship directly to California retailers.
- Current Status: Conducting discovery.

Courthouse Update: Four New Challenges to Discriminatory Self-Distribution Laws



Courthouse
Update:
Four New
Challenges to
Discriminatory
Self-Distribution
Laws



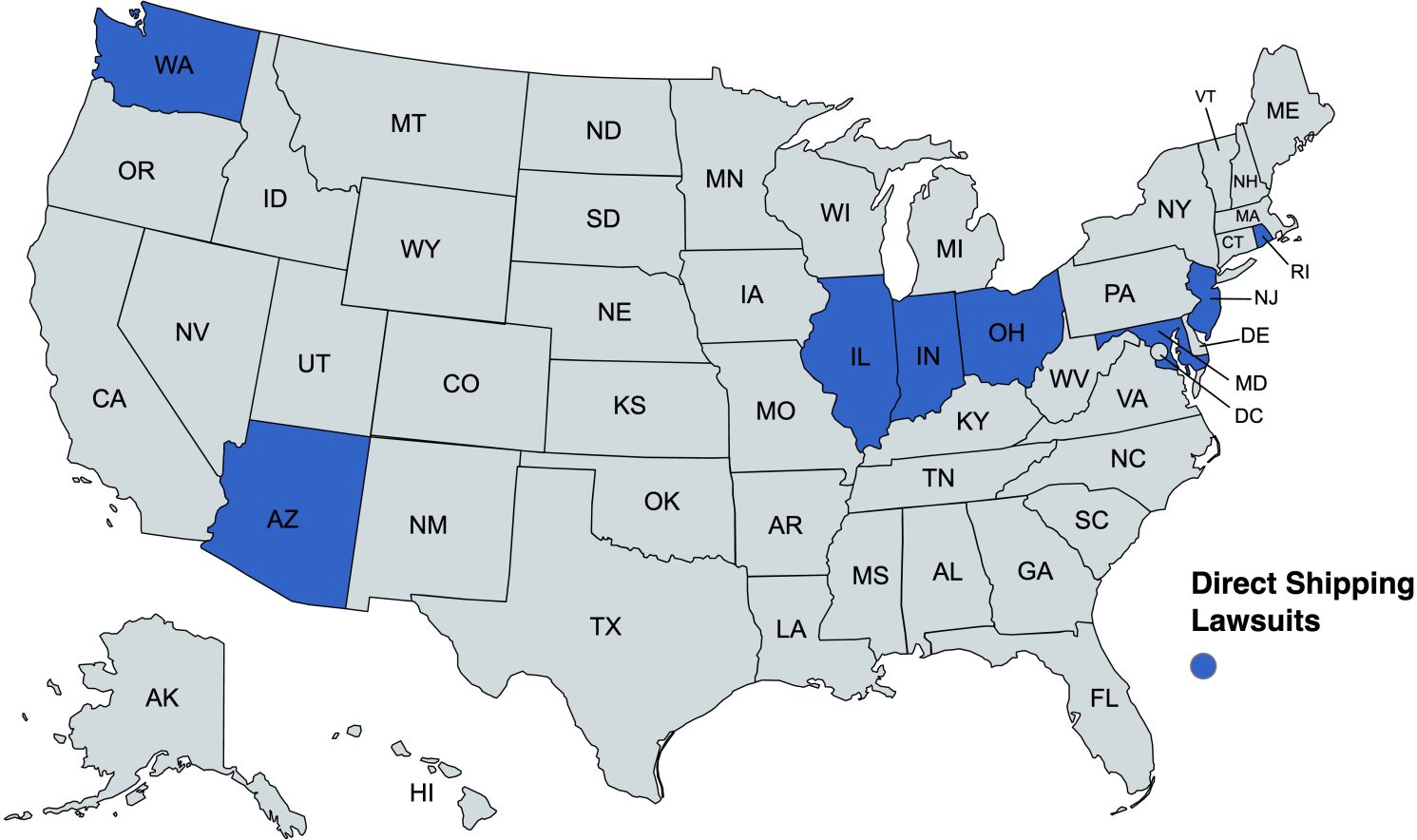
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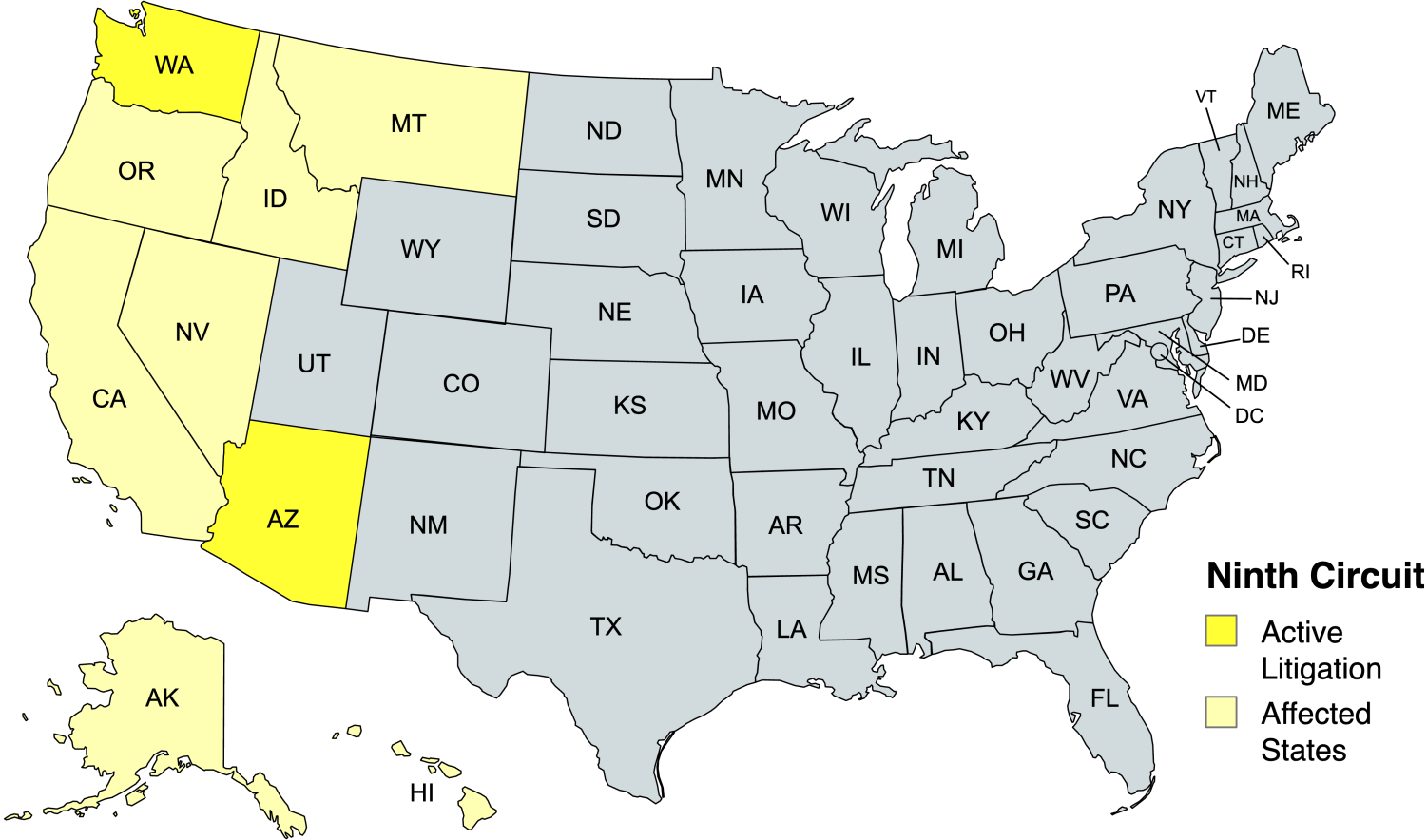
Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

- **There are eight (8) challenges to laws restricting direct-to-consumer shipping currently winding through the federal court system.**
- As with self-distribution, these legal challenges target discriminatory state alcohol laws that favor in-state businesses.
- The cases involve winery, brewery, and distillery shipping as well as retailer shipping. *Granholm* is not limited to wine or producers.
- Direct shipping rights are important to domestic and foreign producers, retailers, and consumers. If industry members prevail, they can significantly expand market access to retailers and consumers in other states.

Mapping Courthouse Trends: Eight Challenges to Discriminatory Direct Shipping Laws



Mapping Courthouse Trends: Ninth Circuit



Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#1. Arizona/Ninth Circuit: *Day v Henry*

- Challenges Arizona law allowing only in-state wine retailers to ship wine directly to Arizona consumers. Filed July 30, 2021.
- On August 9, 2023, the District Court granted summary judgment for Arizona. (*Day v. Henry*, 2023 WL 5095071 (D. Ariz. Aug. 9, 2023)).
 - Requiring physical retail premises in state is a fundamental aspect of the three-tier system and serves the state's legitimate interests in policing and maintaining that system.
 - No discrimination because out-of-state retailers are equally eligible to obtain an Arizona retail license.
 - *Granholm* was about wineries, not retailers. (Contradicts *Tenn. Wine*)
- On August 31, 2023, plaintiffs appealed the case to the Ninth Circuit.
- Current Status: The parties filed their opening, answering, and reply briefs. They are waiting for a date for oral argument.

Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#1. Arizona/Ninth Circuit: *Day v Henry*

- *Goldstein v. Henry*, filed in April 2024, challenges the same Arizona law.
- The Ninth Circuit has not yet ruled upon discriminatory alcohol laws.
- In *Black Star Farms, LLC v. Oliver*, it upheld a shipping restriction that applied equally to in-state and out-of-state wineries, but it warned it would apply a higher level of scrutiny to a discriminatory restriction. (600 F.3d 1225, 1230 (9th Cir. 2010)(California law).)

Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#2. Washington: *Shady Knoll Orchards & Distillery v. Postman*

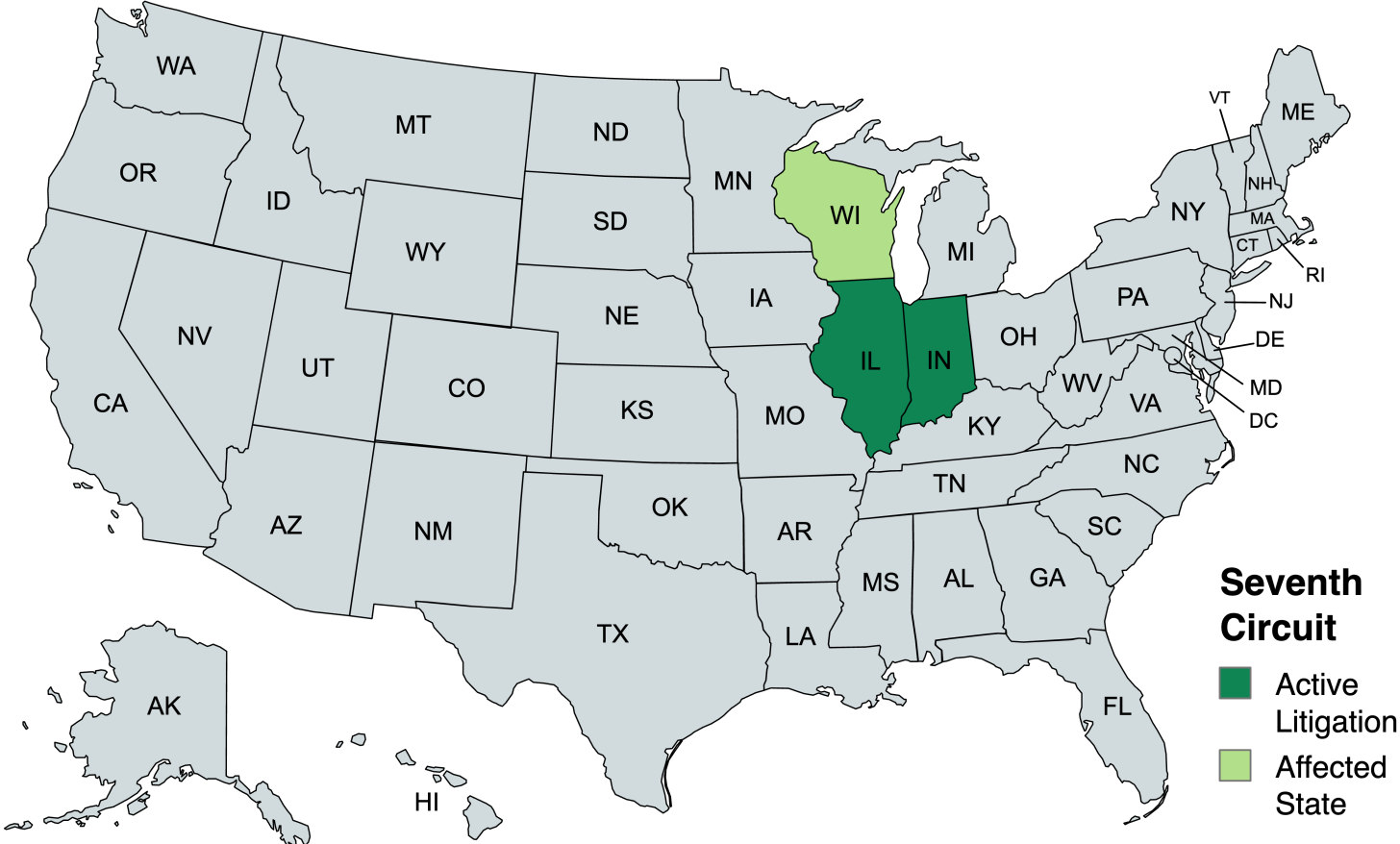
- Challenges Washington law allowing only in-state distillers to ship directly to retailers and consumers. Filed June 20, 2023.
- On October 24, 2023, the District Court declined to dismiss the case.
 - “Defendant invites the Court to dismiss the case on the basis that, since *Granholm* and *Tennessee Wine* were decided, other courts of appeals—namely, the **Fourth**, **Sixth**, and **Eighth** Circuits—have apparently allowed the creation of three-tier systems ‘with limited exceptions ... in which [distributors] can play multiple roles,’ including state physical presence for direct sales. However, Plaintiff retorts that courts in the **First**, **Seventh**, and **Eleventh** Circuits have reached the opposite conclusions. Plaintiff also represents that the **Ninth** Circuit has not squarely confronted these issues. Even accepting Defendant's claims that some post-*Granholm* authority exists which would support a discriminatory in-state physical presence requirement, the existence of a circuit split compels the Court to stay its hand. At this stage, Defendant has not shown that Plaintiff's allegations, if proven true, fail to state a plausible claim to relief.” (*Shady Knoll Orchards & Distillery LLC v. Postman*, 2023 WL 7004422, at *4 (E.D. Wash. Oct. 24, 2023).)

Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#2. Washington: Shady Knoll Orchards & Distillery v. Postman

- Current Status: Conducting discovery and preparing motions for summary judgment.
- **The District Court's 2023 ruling acknowledged the growing Circuit Court split on direct shipping laws.**
- **Circuit Court splits:**
 - **Make it harder for courts to apply the law (as here);**
 - **Lead to inconsistent and unfair results for similarly situated litigants; and**
 - **Increase uncertainty for all market participants.**

Mapping Courthouse Trends: Seventh Circuit



Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#3. Illinois/Seventh Circuit: *Freehan v. Berg* (formerly *Lebamoff v. Rauner*)

- Challenges Illinois law allowing only in-state wine retailers to ship wine directly to Illinois consumers. Originally filed in 2015.
- On November 28, 2018, the Seventh Circuit overruled the district court's dismissal of the Commerce Clause claim.
 - *Granholm* applies beyond the producer tier.
 - The parties should present evidence about the discriminatory impact of the law and any nonprotectionist justifications.
 - "Limiting licenses to in-state storefronts might make sense if all sales had to be on an in-person basis. The great majority of out-of-state retailers would have no use for such a license, and the failure of the state to offer it would raise no eyebrows. But once the license allows a store to ship product anywhere within the state, refusing to extend that privilege to out-of-state businesses is facially discriminatory."
- Plaintiff Lebamoff sold its business, but new plaintiffs refiled the case in Illinois District Court on October 1, 2021.
- Current Status: Preparing motions for summary judgment.

Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#4. Indiana/Seventh Circuit: *Chicago Wine v. Holcomb*

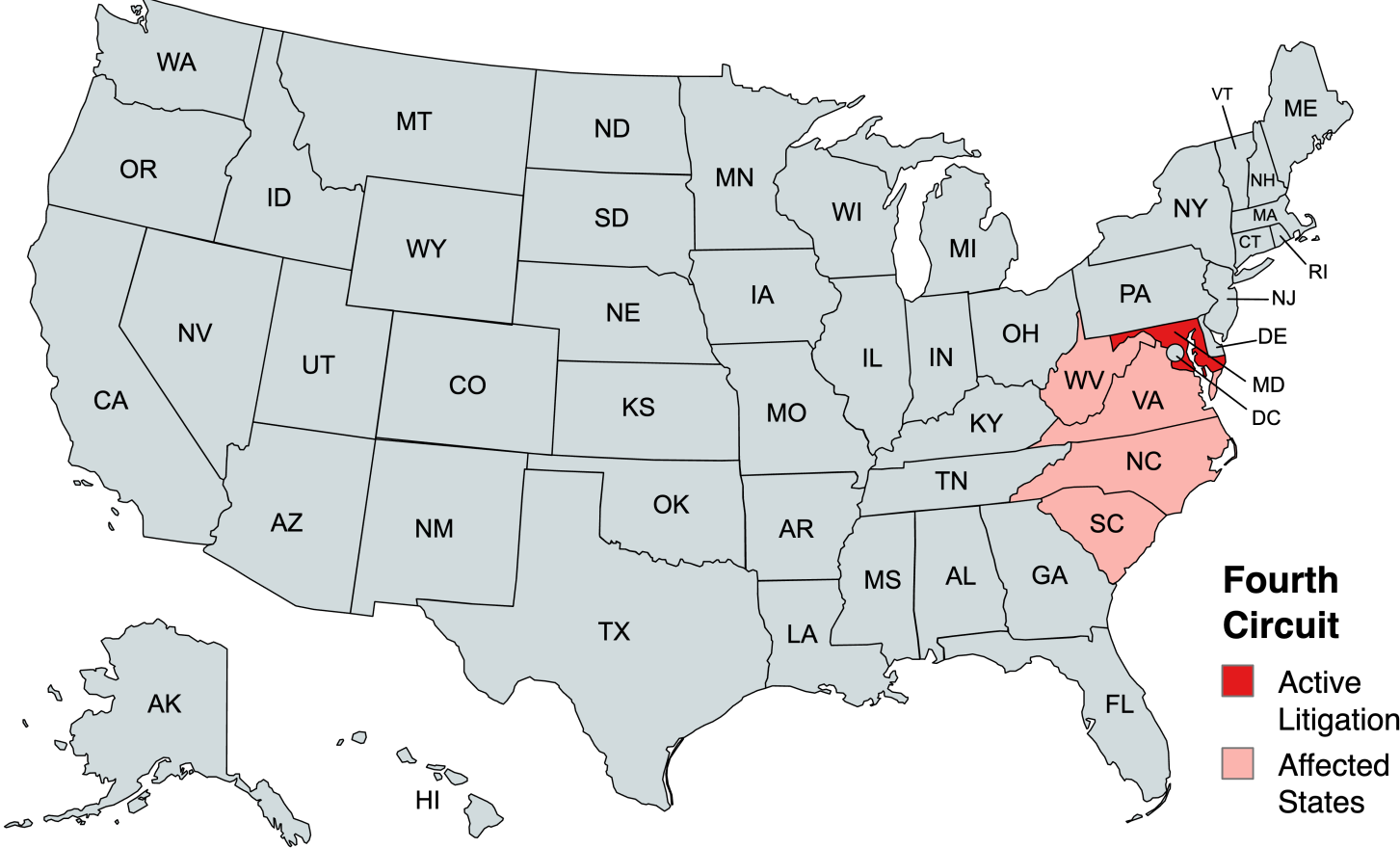
- Challenges Indiana law allowing only in-state wine retailers to ship wine directly to Indiana consumers. Filed July 8, 2019.
- On March 30, 2021, the District Court granted summary judgment for Indiana:
 - No discrimination because both in- and out-of-state retailers must obtain inventory from in-state wholesalers. Both are equally eligible for Indiana wine retailer permits.
 - The law advances public health, protects against unsafe or counterfeit products, and keeps alcohol out of the hands of minors. (*Chicago Wine Co. v. Holcomb*, 532 F. Supp. 3d 702, 715 (S.D. Ind. 2021).)
- On December 10, 2021, the Seventh Circuit heard oral arguments. But on June 16, 2022, Judge Kanne, part of the three-judge panel, died.
- Current Status: No word from the Court since oral arguments!!

Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#4. Indiana/Seventh Circuit: *Chicago Wine v. Holcomb*

- The Seventh Circuit previously struck down a facially neutral direct shipping law that unfairly burdened out-of-state wineries. (*Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008)(Indiana law.)
- **The Seventh Circuit's ruling in *Chicago Wine* could affect the balance of the Circuit Court split.**

Mapping Courthouse Trends: Fourth Circuit



Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#5. Maryland: *Furlong v. Brown*

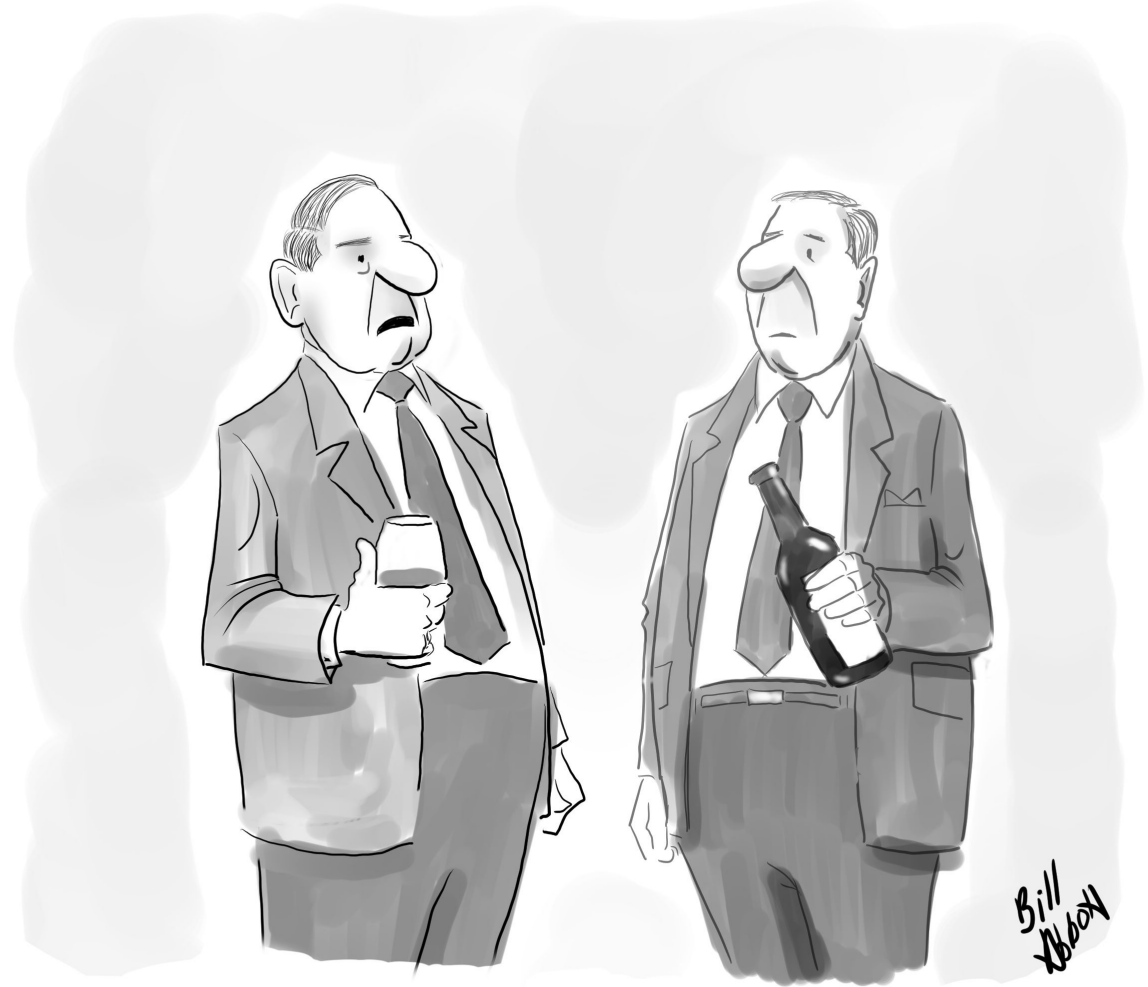
- Challenges Maryland law allowing only in-state alcohol manufacturers to ship directly to consumers. Filed July 31, 2023.
- The law is scheduled to expire on June 30, 2024, but the Maryland General Assembly has extended it twice before.
- On March 15, 2024, the District Court declined to dismiss the case:
 - “if a state's three-tier system is posited as a legitimate nonprotectionist ground for discriminating against out-of-state commerce, the system must not be undermined by the law in question. In this case, [the law] subverts the three-tier system by allowing in-state, but not out-of-state, manufacturers to bypass the three-tier system and ship directly to consumers.” (*Furlong v. Brown*, 2024 WL 1140686, at *3 (D. Md. Mar. 15, 2024).)
- Current Status: Conducting discovery.

Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#5. Maryland: *Furlong v. Brown*

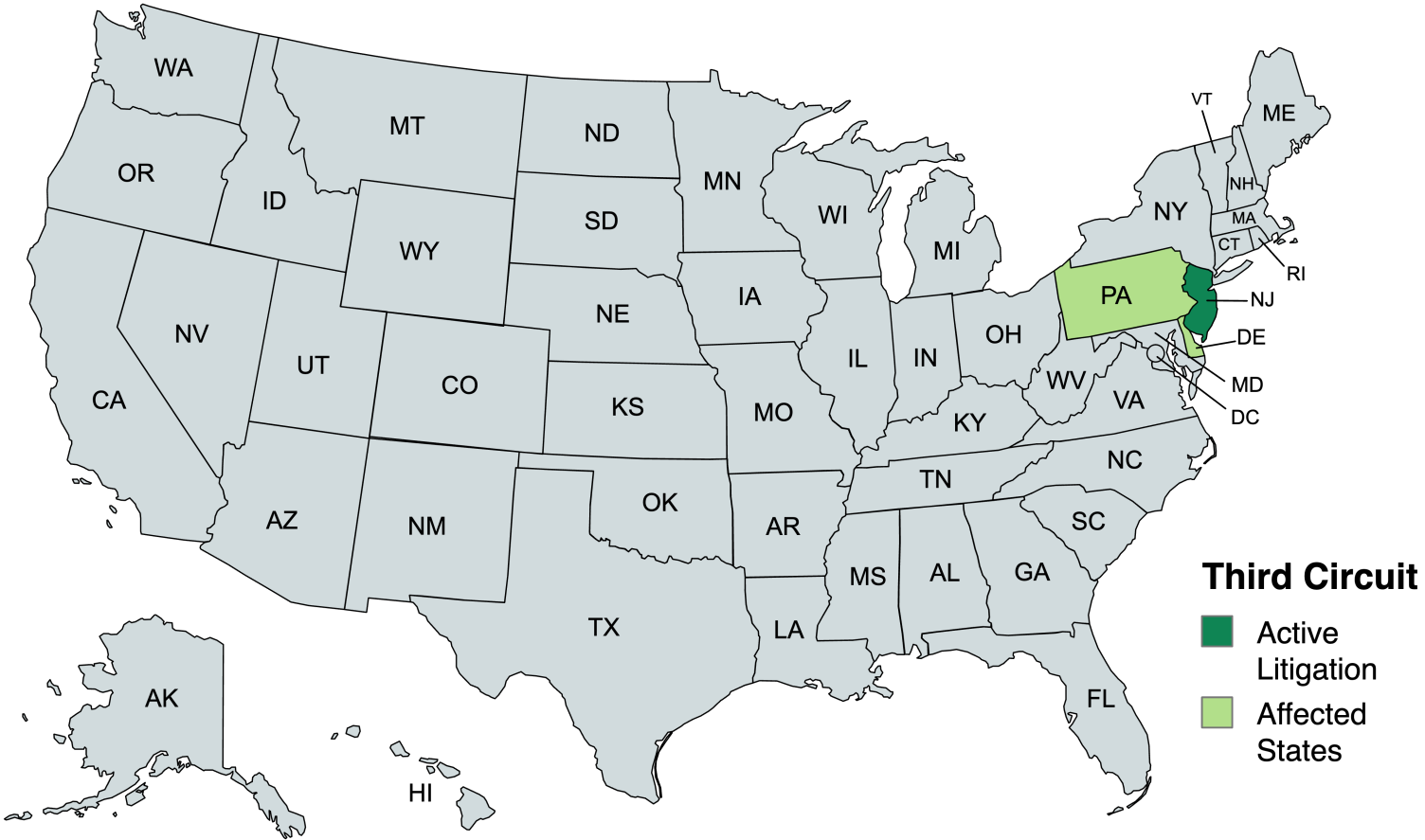
- The Fourth Circuit previously upheld a discriminatory retailer shipping restriction as necessary to maintaining the three-tier system, confining *Granholm* to producer shipping. (*B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 229 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 567, 214 L. Ed. 2d 336 (2023)(North Carolina law).)
- In *Furlong*, the District Court distinguished *B-21 Wines*:
 - “whereas the law in [*B-21 Wines*] ensured ‘that all wine sold to North Carolina consumers by retailers goes through the State's three-tier system,’ in this case the Act undermines the three-tier system by allowing Maryland manufacturers to bypass wholesalers and retailers altogether.”
- **If producers can change direct shipping law in the Fourth Circuit, then they can affect the balance of the circuit split – though the Fourth Circuit may continue to distinguish between producer and retailer shipping.**

Courthouse Trends:
Three (3)
More
Direct
Shipping
Cases
to Go!



"This wine is pretty bold, Johnson. Are we having a problem with authority?"

Mapping Courthouse Trends: Third Circuit

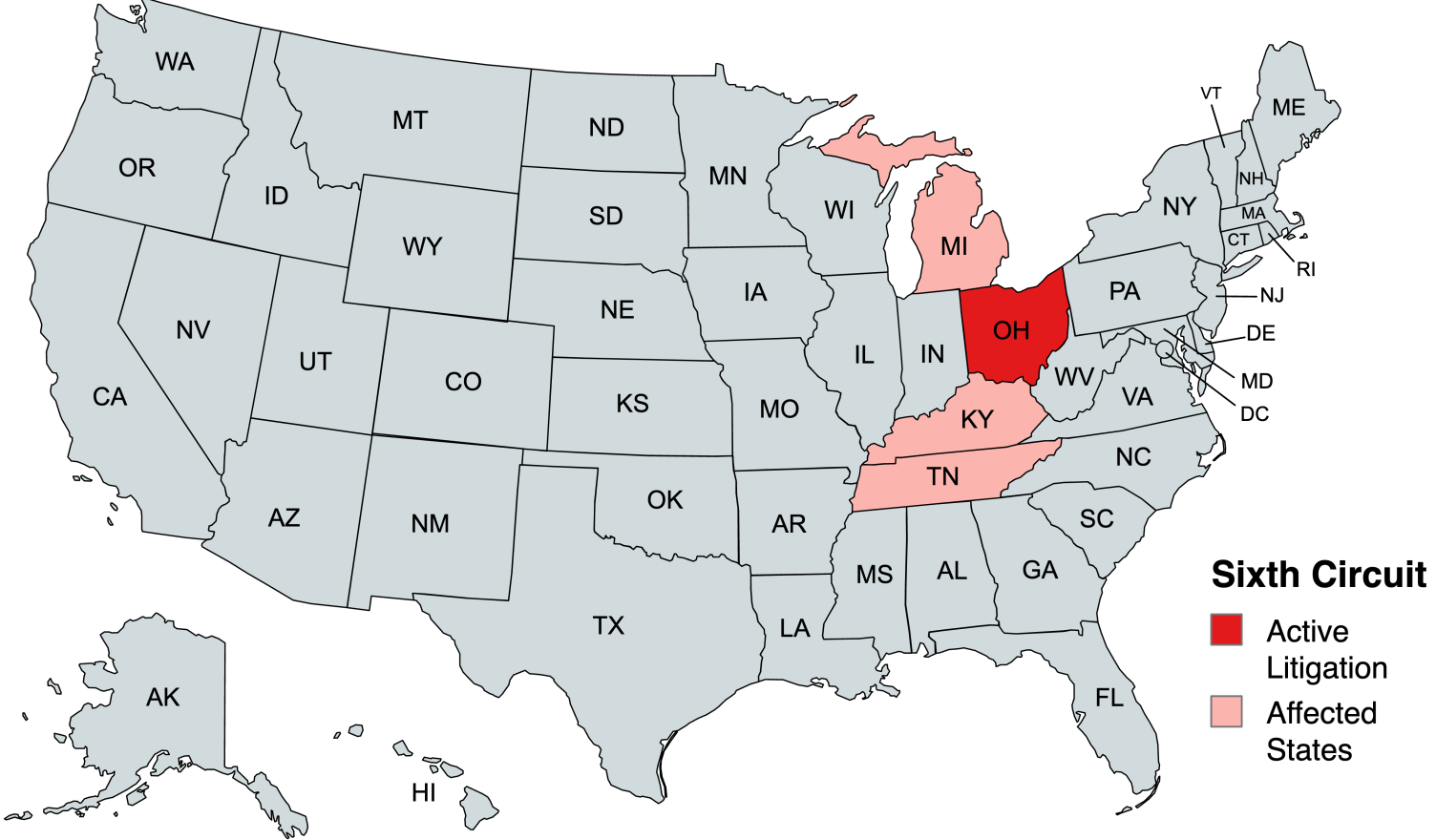


Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#6. New Jersey/Third Circuit: *Weg v. Graziano*

- Challenges New Jersey law allowing only in-state wine retailers to ship directly to consumers. Filed July 2019.
- On Aug. 22, 2023, the District Court upheld the ban on wine shipments from out-of-state retailers. (*Jean-Paul Weg., LLC v. Graziano*, 2023 WL 5370522, at *14 (D.N.J. Aug. 22, 2023)(granting summary judgment.)
 - Law is not protectionist, as it requires the same licenses for in- and out-of-state retailers, all of whom must have a physical presence in New Jersey (New Jersey does not require residency).
 - New Jersey cannot inspect the premises of out-of-state retailers, uncover their connections to organized crime, or determine if illegal sales to minors occur there. It cannot not expect help from New York authorities, and controlling these issues is a legitimate means of pursuing the health and safety of New Jersey residents.
- Industry members appealed this case to the Third Circuit.
- Current Status: The parties filed their opening, answering, and reply briefs. They are waiting for a date for oral argument.
- The Third Circuit previously struck down discriminatory direct shipping laws for wineries. (*Freeman v. Corzine*, 629 F.3d 146, 160 (3d Cir. 2010)(New Jersey law)(remanding to District Court for remedy).)

Mapping Courthouse Trends: Sixth Circuit



Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#7. Ohio/Sixth Circuit: *Block v. Canepa*

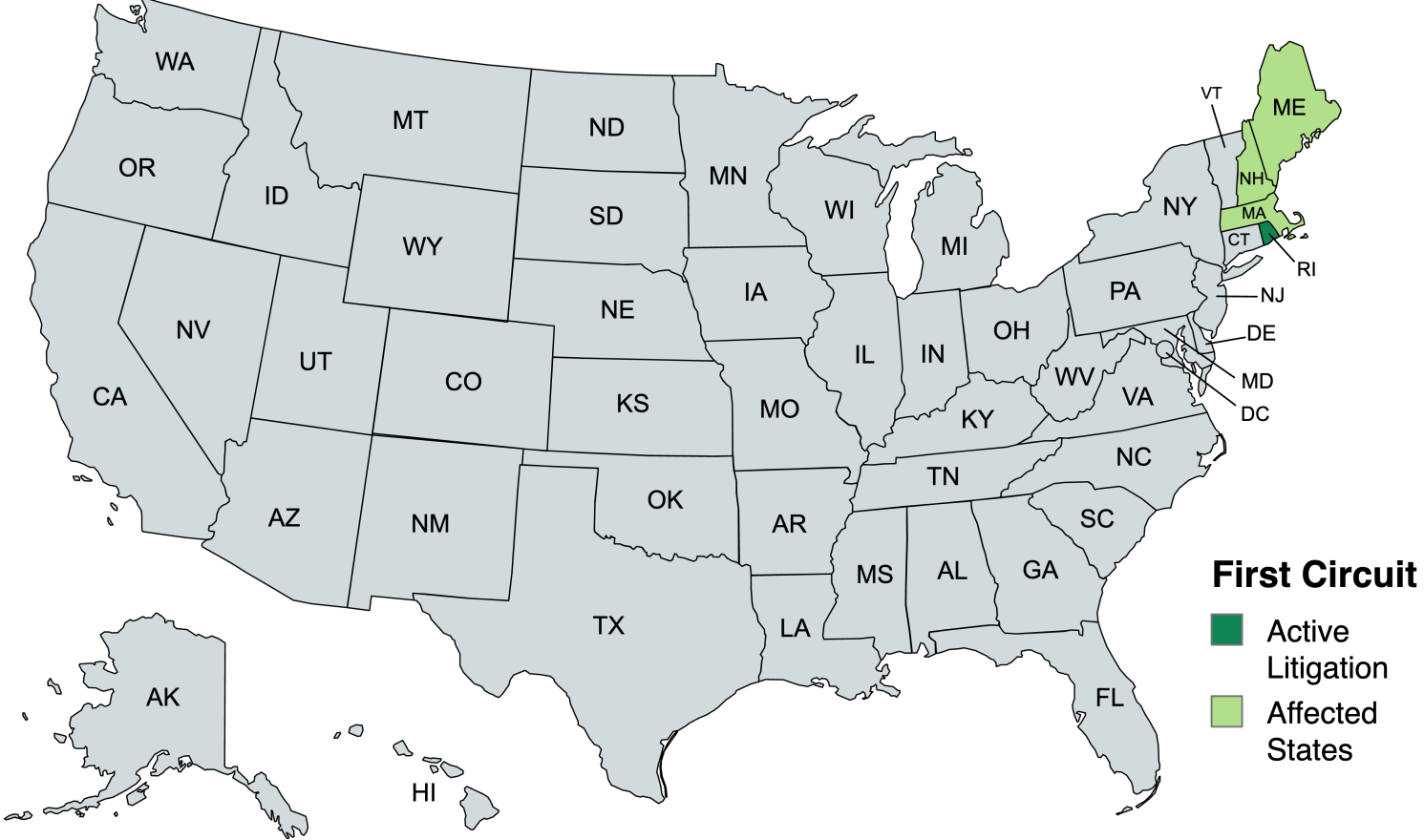
- Challenges Ohio law allowing only in-state wine retailers to ship directly to consumers, and transportation limit preventing consumers from receiving more than 4.5 liters (six 750 ml bottles) of shipped wine from beyond Ohio during any 30-day period. Filed July 2020.
- On July 14, 2023, the Sixth Circuit remanded the case back to district court to weigh evidence of a nonprotectionist ground for the discriminatory law.
 - “The district court failed to consider Plaintiffs’ evidence in this case concerning Ohio’s Direct Ship Restriction. Instead, it treated *Lebamoff [v. Whitmer]*’s holding – which dealt with a different state’s law and involved different evidence – as dispositive.”
 - “*Lebamoff* did *not* hold that direct ship restrictions are always constitutional.” The *Lebamoff* court upheld Michigan’s discriminatory law because the plaintiffs failed to refute evidence the law “serves the public health.” (*Block v. Canepa*, 74 F.4th 400, 414-15 (6th Cir. 2023).)

Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#7. Ohio/Sixth Circuit: *Block v. Canepa*

- Current Status: This case is now back before the district court, where the parties are filing motions for summary judgment.
- ***Block* may affect Circuit Court splits on both the transportation limit and the direct ship restriction.**
- A decision invalidating the direct ship restriction would overturn or limit the Sixth Circuit's 2020 decision in *Lebamoff v. Whitmer*. The Sixth Circuit's *Block* decision has already weakened *Lebamoff* as persuasive authority.
- The Fourth Circuit (*B-21 Wines, Inc. v. Bauer*) and Eighth Circuit (*Sarasota Wine Market, LLC v. Schmitt*) relied on *Lebamoff*.

Mapping Courthouse Trends: First Circuit



Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

#8. Rhode Island/First Circuit: *Anvar v. Dwyer*

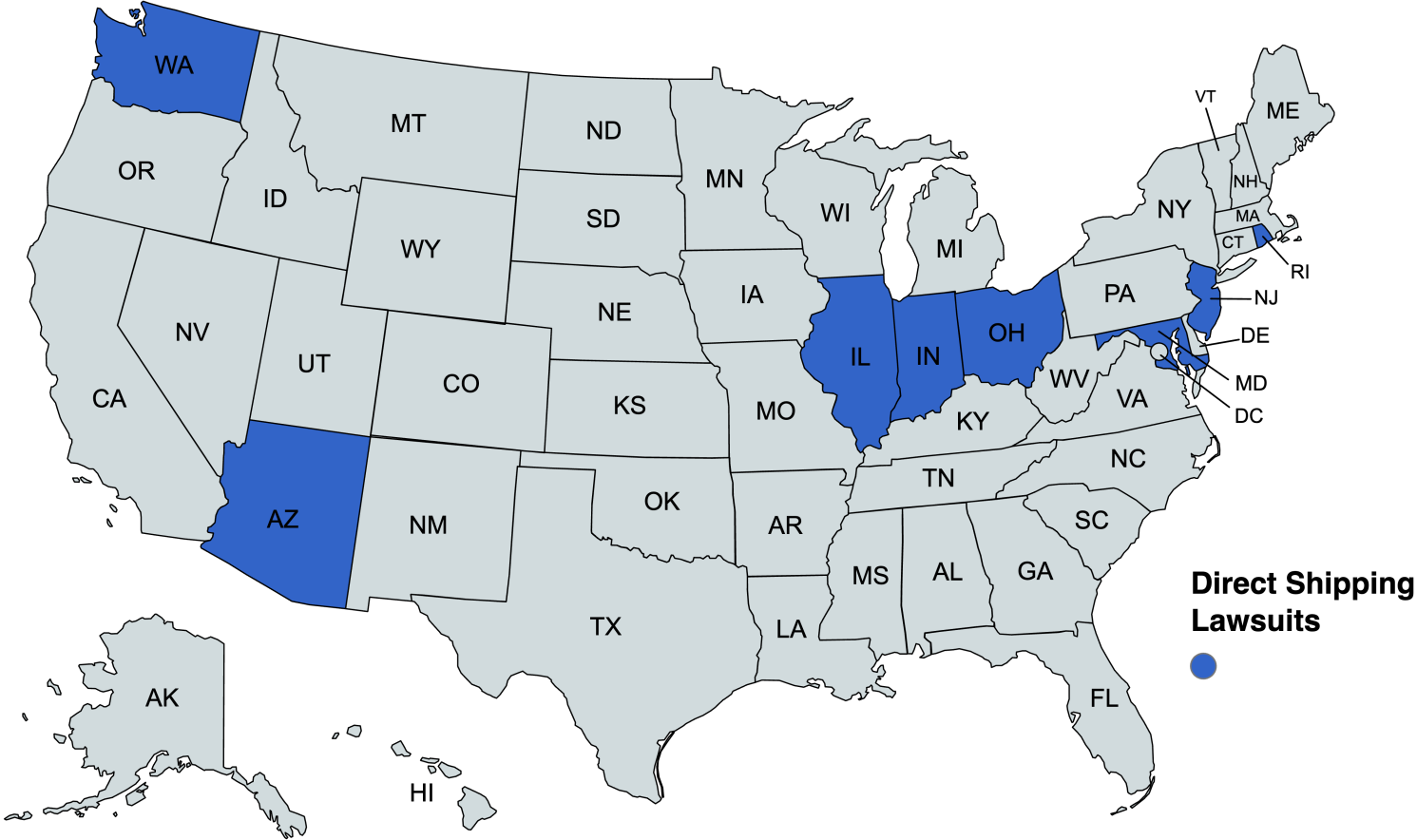
- Challenges Rhode Island's requirement that retailers and wholesalers maintain physical presence in-state as discriminatory. Filed October 2019.
- On September 7, 2023, the First Circuit reversed the District Court's grant of summary judgment in Rhode Island's favor, directing the District Court to consider evidence supporting a nonprotectionist ground for the law.
 - "[T]here is nothing inherent in the three-tier system—which aims at preventing vertical integration between alcohol producers, wholesalers, and retailers—that necessarily demands an in-state-presence requirement for retailers. Such a requirement—if it is to be sanctioned—must be supported by 'concrete evidence' demonstrating that its predominant effect advances the goals of the Twenty-first Amendment and not merely the protection of in-state business interests." (*Anvar v. Dwyer*, 82 F.4th 1, 10–11 (1st Cir. 2023)(citations omitted).)

Courthouse Update: Eight Challenges to Discriminatory Direct Shipping Laws

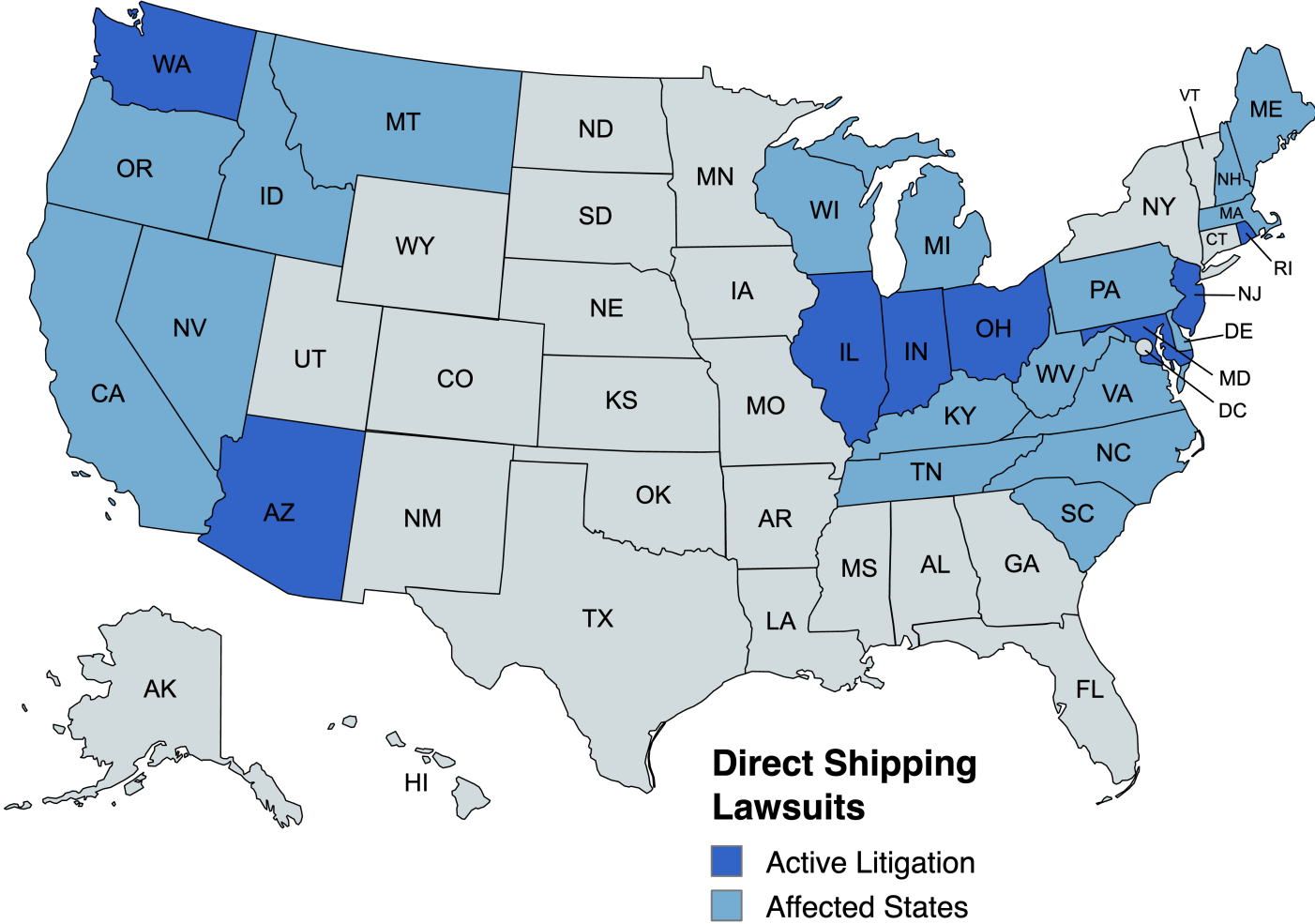
#8. Rhode Island/First Circuit: *Anvar v. Dwyer*

- Current Status: The parties are doing an additional round of discovery, after which they will submit new motions for summary judgment.
- The First Circuit has considered related cases twice before.
- In 2007, the First Circuit upheld Maine's requirement for face-to-face wine sales to consumers which prohibited direct shipment by both in and out-of-state wineries (*Cherry Hill Vineyard, LLC v. Baldacci*).
- In 2010, the First Circuit invalidated a facially neutral Massachusetts law that effectively granted direct shipping privileges to in-state wineries only (*Family Winemakers of Cal. v. Jenkins*).

Mapping Courthouse Trends: Eight Challenges to Discriminatory Direct Shipping Laws



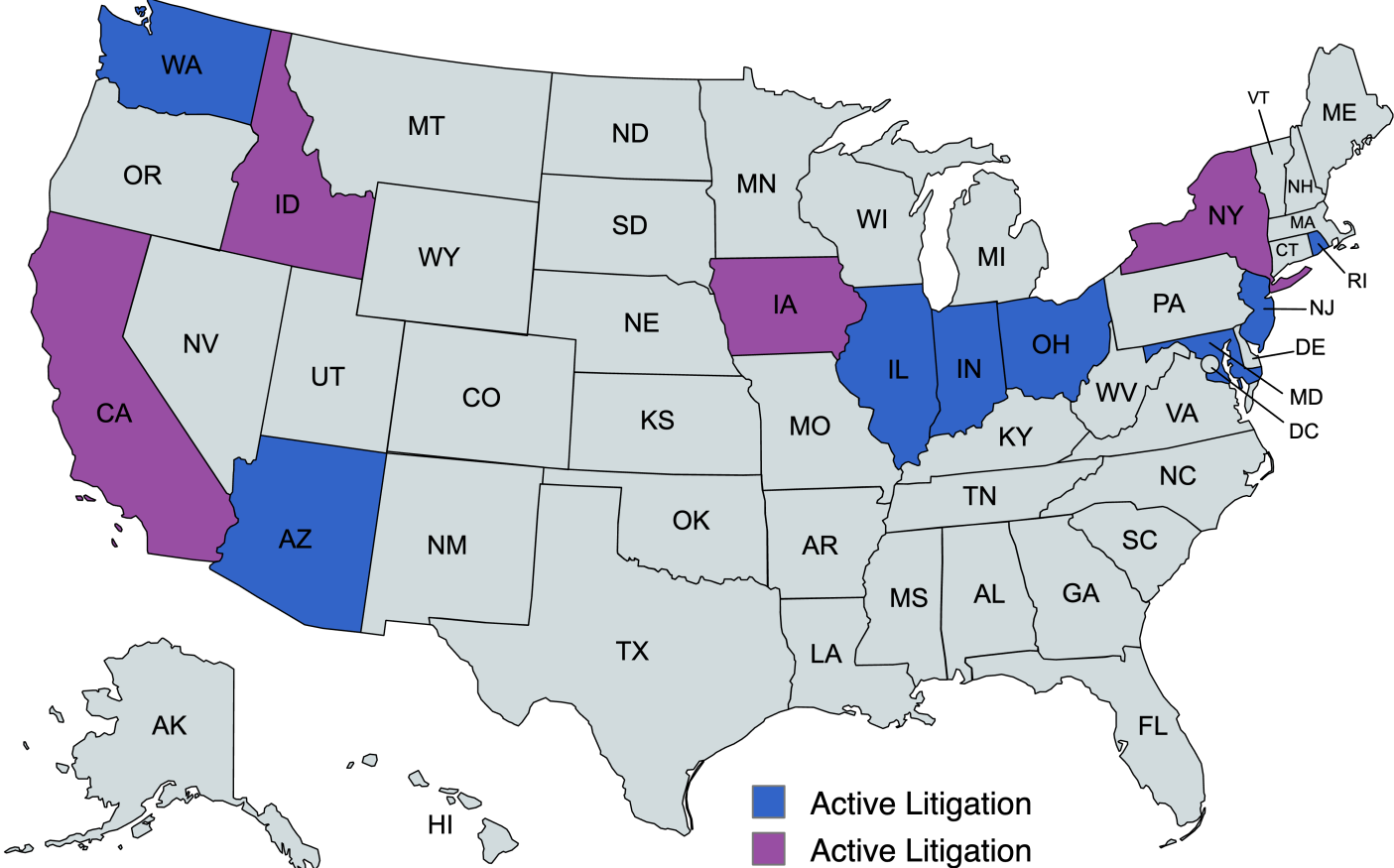
Mapping Courthouse Trends: Eight Challenges to Discriminatory Direct Shipping Laws



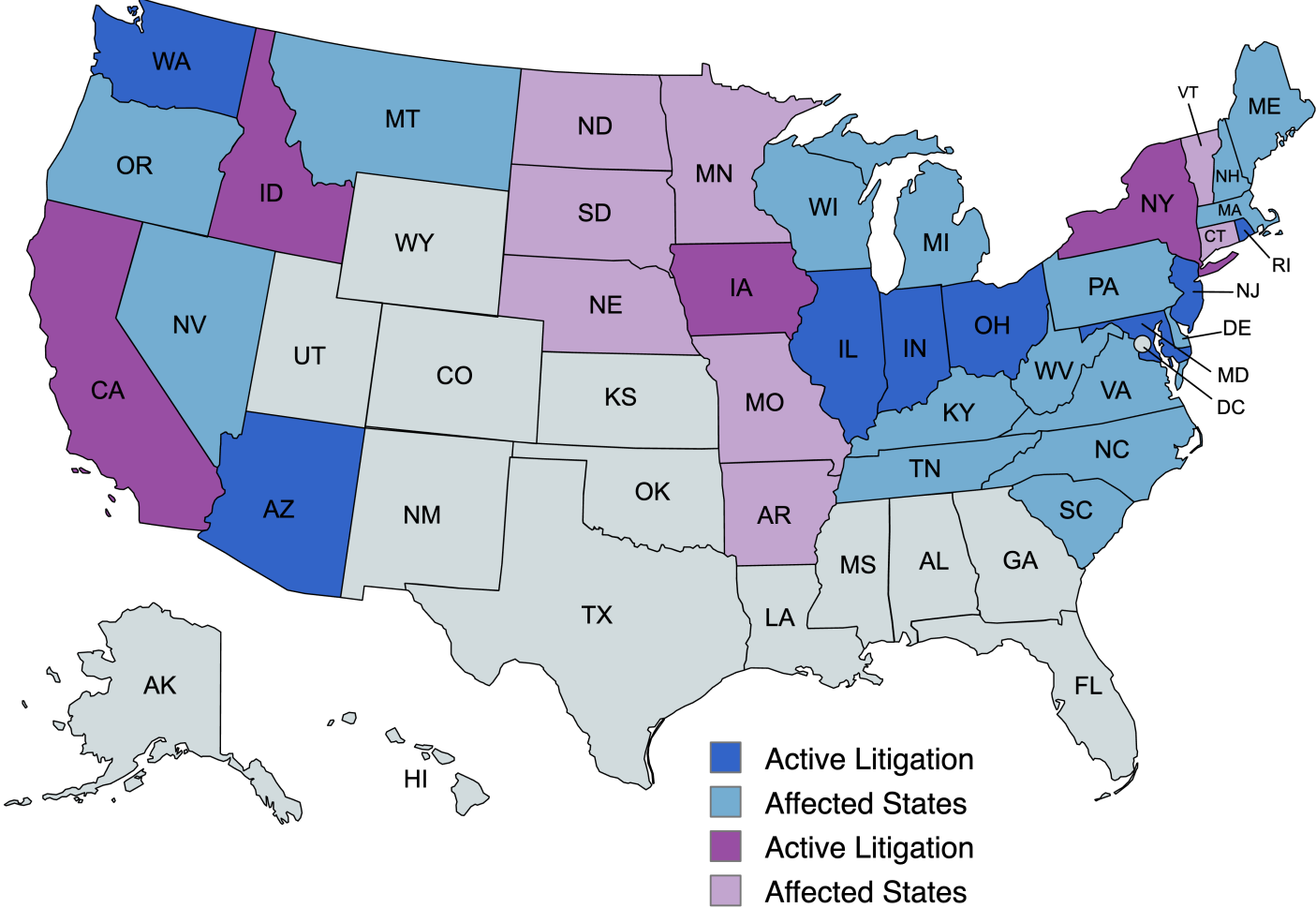
Courthouse Update: Direct Shipping & Self-Distribution Lawsuits

- Discriminatory shipping laws upheld: Fourth, Fifth, Sixth, and Eighth Circuits
- Discriminatory shipping laws struck down: First, Third, Seventh, and Eleventh Circuits
- So far, the Circuit Court split is roughly even, but current lawsuits may transform the legal landscape.
 - What will the Ninth Circuit decide?
 - Will a majority view emerge?
 - Will the Supreme Court weigh in?
- Industry members are playing the long game.
- Lawsuits are high-risk, high reward.
- The end result could dramatically expand or contract access to the alcohol marketplace.

Mapping
Courthouse
Trends:
Direct
Shipping &
Self-Distribution
Lawsuits



Mapping Courthouse Trends: Direct Shipping & Self-Distribution Lawsuits



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Courthouse
Trends:
New
Supreme Court
Commerce
Clause
Jurisprudence—
*Nat'l Pork
Producers
Council v. Ross*

Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023).

- Reaffirms reasoning of *Granholm* and *Tennessee Wine*:
 - The “antidiscrimination principle lies at the “very core” of our dormant Commerce Clause jurisprudence.” “In its ‘modern’ cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws ‘driven by ... “economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.””
- But no discrimination in pork law.
- Rejects the view that the Commerce Clause forbids enforcement of state laws that have the practical effect of controlling commerce outside the state.
- **May be used to limit use of the Commerce Clause outside the context of laws discriminating against out-of-state interests.**

Retailer Legal
Update:
Questions?

