No. 18-2200
(Related Appeal: No. 18-2199)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEBAMOFF ENTERPRISES, INC.; JOSEPH DOUST; JACK STRIDE; JACK SCHULZ; RICHARD DONOVAN,

Plaintiffs-Appellees,

v.

RICK SNYDER; WILLIAM SCHUETTE; ANDREW J. DELONEY,

Defendants-Appellants,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervenor Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
HONORABLE ARTHUR J. TARNOW (SENIOR JUDGE)

REPLY BRIEF FOR INTERVENOR DEFENDANT-APPELLANT MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION

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SUMMARY OF ARGUMENT

Having stayed this appeal until the Supreme Court decided *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, ___ U.S. ___, 139 S. Ct. 2449 (2019), this Court now has the benefit of the clear mandate emanating from last summer's decision. The Supreme Court expressly held that, because of the Twenty-first Amendment, "a different inquiry" than the standard strict scrutiny analysis must be applied in assessing a dormant Commerce Clause challenge to a state alcoholic beverage statute. 139 S. Ct. at 2474. Under this "different inquiry," the State must show that "the predominant effect" of an alcoholic beverage law is the protection of "public health and safety" or "some other legitimate" ground – but not protectionism. *Id.* And the State's showing must consist of "'concrete evidence'" that the challenged statute "actually promotes public health or safety," or of evidence that "nondiscriminatory alternatives would be insufficient to further those interests." *Id.; accord Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, No. 18-50299, 2019 WL 6694560, at *3 (5th Cir. Dec. 9, 2019) (superseding 935 F.2d 362 (5th Cir. 2019)) (the Supreme Court in *Tennessee Wine* "clarified the standard for evaluating a discriminatory alcohol-related regulation").

To meet the Supreme Court's clarified standard, the State and the MB&WWA set forth non-speculative, supporting evidence to demonstrate that Michigan's laws requiring licensed alcoholic beverage retailers to be present (*not* resident) in the State

and to purchase from licensed Michigan wholesalers (who must also be present – not resident – in the State) are necessary to effectuate the State's protection of public health and safety in connection with the sale and consumption of alcoholic beverage products. *See* Doc. # 18 (MB&WWA Brief), Pages 31-38; Doc. # 24-1 (State Defendants Brief), Pages 28-31, 50-64. And, in doing so, the State followed the Supreme Court's guidance regarding the presumptive validity of a presence requirement to enable the State to "monitor the [retail] stores' operations through on-site inspections, audits, and the like" and to revoke a retailer's operating license in the event of a violation threatening public health or safety. *Tennessee Wine*, 139 S. Ct. at 2475. *See* Doc. # 18, Pages 31-32 and 25-26; Doc. # 24-1, Pages 24-27, 50-57. That is, the State and the MB&WWA provided actual, factual evidence that the "predominant effect" of Michigan's law is *not* protectionism.

While the State and the MB&WWA honed in on and abided by the Supreme Court's mandate and instructive reasoning in *Tennessee Wine* regarding presence requirements like the one here, Plaintiffs failed to acknowledge the Supreme Court's own language directing a "different inquiry" and the Court's favorable assessment of a presence requirement. Instead, Plainitffs try to import a strict scrutiny assessment into the Twenty-First Amendment analysis and avoid the Supreme Court's distinction between residence and precence. Plaintiffs' backdoor approach simply does not work.

The State and the MB&WWA also met the other prong of the *Tennessee Wine* directive – i.e., the State has not disregarded "obvious alternatives that better serve" the State's interests in protecting public health safety. 139 S. Ct. at 2475. *See* Doc. # 18, Pages 34-35; Doc. # 24-1, Pages 52, 53-57.[1] Plaintiffs have wrongly manipulated this "obvious alternatives" test, arguing that the State must show that allowing all out-of-state retailers across the country to direct ship poses a "unique set of public safety risks" and "more of a threat" than the already permitted winery direct shipment, insofar as the State purportedly has not demonstrated any harm associated with allowing wineries to direct ship. *See* Doc. # 28, Page 39. But Plaintiffs are incorrect on two counts: That is not the State's burden under the *Tennessee Wine* articulated standard; and the State's experience with winery direct shippers has not been without incidents of non-compliance threatening the public health and safety, particularly that of minors. Doc. # 24-1, Pages 29-31, 62-64.

Equally unavailing is Plaintiffs' tortured argument that severance has no place in this case. That contention ignores the express severability clause in the State's alcoholic beverage code, contravenes the stated purpose of the challenged statutory

[1] Plaintiffs contend – not surprisingly, without any factual support (Doc. # 28, Pages 54-55) – that creating an email distribution list of all "retail shippers" is an effective nondiscriminatory alternative to on-site inspections and on-site seizure of illegal product. This mass email concept is not even a feasible or viable alternative – let alone one that would "better serve" the State's legitimate interests in protecting public health and safety.

provisions that they are to function as exceptions to the general rule prohibiting any retailer delivery, contradicts the Legislature's intent by requiring the rewriting of multiple other statutes in the State's alcoholic beverage code (rather than striking the three challenged subprovisions, specifically denominated exceptions to the rule prohibiting retailer delivery), and misreads the Supreme Court's holdings regarding extension versus nullification.

Finally, Plaintiffs' pared down Privileges and Immunities claim is no better than their original claim (which the District Court did not decide) because citizens have no fundamental privilege to sell wine. Nor does Plaintiffs' reliance on "livelihood" cases help their meritless claim; the challenged statutes in those livelihood cases required that the citizens *reside* in the state – once again, not the requirement under the challenged Michigan presence statute.

This Court should therefore (1) reverse the District Court's decision concerning Plaintiffs' dormant Commerce Clause claim, and remand with instructions to grant summary judgment to the State Defendants and MB&WWA, (2) in the alternative, reverse the District Court's remedy ruling extending the ability to deliver to all out-of-state retailers, and sever MLCC § 436.1203(3), (12), and (15), and (3) reject Plaintiffs' Privileges and Immunities claim as a matter of law.

ARGUMENT

I. Plaintiffs flat-out ignore the Supreme Court's mandate in *Tennessee Wine* that, because of the Twenty-first Amendment, "a different inquiry" than the normal strict scrutiny standard applies here.

Plaintiffs ignore the Supreme Court's "different inquiry" standard and instead attempt to import strict scrutiny into the Twenty-first Amendment § 2 analysis. Plaintiffs assert that to pass constitutional muster under the Twenty-first Amendment, the State must prove "that the prohibition 'actually promotes public health or safety' *and* that 'nondiscriminatory alternatives would be insufficient to further those interests.'" Doc. # 28, Page 36 (citing *Tennessee Wine,* 139 S. Ct. at 2474 (emphasis added)). Plaintiffs likewise assert throughout their brief that a discriminatory law cannot stand under the Twenty-first Amendment if there is *any* feasible nondiscriminatory alternative.[2]

But the Supreme Court's actual discussion of whether Tennessee's two-year durational residency requirement was permitted under the Twenty-first Amendment shows that the Court applied balancing guidelines to determine – first – if the "predominant effect of the law" was protectionism rather than the advancement of public health or safety or some other legitimate nonprotectionist goal. 139 S. Ct. at

[2] E.g., Page 35 ("so the real question is whether Michigan can justify this ban as the *only feasible way* it can protect public health and safety" (emphasis added)); and Pages 53-54 (the State must prove "the discrimination materially advances an important state issue *and* that no less discriminatory alternative would be effective" (emphasis added)).

2474. The existence of reasonable nondiscriminatory alternatives is the second prong of the disjunctive inquiry. The Court framed this in terms of whether the objective could "easily be achieved by ready alternatives," *id.* at 2475, or whether there are "obvious alternatives that better serve that goal [of promoting responsible sales and consumption practices] without discriminating against nonresidents," *id.* at 2476.

The *Tennessee Wine* language that Plaintiffs misstate merely summarized the finding that Tennessee had wholly failed to present concrete evidence[3] to support either of the two prongs, not that strict scrutiny was being applied:

> As a result, the record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those alternatives.

Id. Balancing the need and utility of a three-tier system's public health and safety measures, and whether there may be ready nondiscriminatory alternatives, is a far cry from applying strict scrutiny. Plaintiffs' assertion cannot be true given the Supreme Court's recognition of the "leeway" that § 2 gives the States,[4] and the balancing approach the Court adopted there.

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[3] According to the Court, the Tennessee retailers association "relied almost entirely on argument" (instead of factual evidence), and Tennessee "mounted no independent defense." *Id.* at 2474.

[4] Section 2 "allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety aspects of alcohol use

Plaintiffs persist in pushing the regular strict scrutiny standard (despite the Supreme Court's express directive that a "different inquiry" applies) because they cannot prevail under the "predominant effect" balancing guidelines provided by the Court in *Tennessee Wine*. They likewise ignore the Court's assessment of retailer presence as presumptively valid – i.e., because "the stores at issue are physically located within the State," "the State can monitor the stores' operations through on-site inspections, audits and the like," and revoke the retailer's operating license for non-compliance, thus deterring conduct that "threatens public health or safety." *Id.* at 2475. The MB&WWA's opening brief shows in detail, with references to extensive and concrete evidence in the record, that presence (not residency) of licensed Michigan retailers, and the requirement that they purchase from licensed Michigan wholesalers (who also must be located in the State), are essential to the State's goal of protecting public health and safety. *See* Doc. # 18, Pages 31-39 (on-site inspections and physical audits of inventory and sales records of both retailers and wholesalers enable detection of multiple types of Code violations, including bootlegging and adulterated product; enforcement depends on the ability to actually seize illegal product from the retailer's and/or wholesaler's premises; jurisdiction to take such enforcement measures would be lacking in other states; assistance of law

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and to serve other legitimate interests, but it does not allow protectionist measures with no demonstrable connection to those interests." *Id*. at 2474.

enforcement in other states would not be available; license revocation would be limited by the State's limited jurisdictional authority); *see also* State Defendants Brief, Doc. 24-1, Pages 23-31 (the uncontested record evidences the importance of on-site inspections and the critical function of the presence requirement in effectuating inspections; assistance of local law enforcement is essential in continuing on-site sting operations and product seizure; the ability to trace and seize harmful or illegal alcoholic beverage products depends on the product being registered with the State and sold through the licensed wholesaler to the retailer). Mindful of the Supreme Court's explication in *Tennessee Wine*, the State and the MB&WWA specifically point to Michigan's on-site inspection law and its license revocation authority and explain why the efficacy and enforcement of these provisions depend on the retailer's presence in the State. Plaintiffs largely fail to address the "predominant effect" balancing inquiry, or any of the evidence cited by the MB&WWA, opting instead to argue generalities about sales to minors and recalls.

The Court should reject Plaintiffs' assertion that strict scrutiny governs the Twenty-first Amendment part of the analysis. Given Plaintiffs' failure to acknowledge the Supreme Court's assessment of retailer presence and their failure to address the evidence of the State and the MB&WWA supporting the predominant effect of furthering health and safety, including responsible sales and consumption,

the Court should find the challenged law is a valid exercise of the State's power under § 2.

II. Plaintiffs incorrectly equate retailer presence with residency and fail to address the essential ties between physical presence of licensed retailers (and wholesalers) and the effective enforcement of public health and safety protections advanced by Michigan's three-tier system.

Plaintiffs assert: "The Supreme Court has consistently held that physical presence requirements violate the Commerce Clause." Doc. # 28, Page 46. The assertion is not accurate, at least in the context of State alcohol regulation. *Tennessee Wine* involved durational residency, not presence. The Supreme Court presumptively recognized that physical presence of retailers in the State is permitted, as the Court relied on presence as a basis for finding that durational residency was not needed to protect public health and safety. 139 S. Ct. at 2475. In addition, the Supreme Court in *North Dakota v. United States*, 495 U.S. 423, 447 (J. Scalia, concurring), recognized that a State may require wholesalers to be physically present as part of its three-tier system.

To the extent Plaintiffs rely on *Granholm v. Heald*, 544 U.S. 460 (2005), that case involved exceptions to the three-tier system which allowed in-state but not out-of-state wineries to sell limited quantities to consumers by direct shipment – i.e., to sell and deliver the wine they produced altogether outside the three-tier distribution chain. The New York statute allowed out-of-state wineries to take advantage of the exception, but only if they established a physical presence in New York. Requiring

a winery to establish a physical presence in the State in order to avoid the three-tier system was found to be an artificial, protectionist measure, since in-state wineries were naturally present and could take advantage of the exception. On the other hand, the Court in *Granholm* cited with approval Justice Scalia's statement in *North Dakota v. United States* that States may require wholesalers to be present, and that three-tier systems are "'unquestionably legitimate.'" 544 U.S. at 489.[5]

The insistence on physical presence for effective enforcement has been upheld, even at the supplier level. *See Heublein v. South Carolina Tax Comm'n*, 409 U.S. 275 (1972), which upheld a physical presence requirement on manufacturers in circumstances in which, unlike those in *Granholm*, there was no discriminatory exemption from three-tier requirements for any in-state suppliers.

III. Producers of alcoholic beverages, like wineries, are not the functional equivalent of alcoholic beverage retailers, so Plaintiffs' attempt to draw an analogy between the two tiers is faulty.

In addition to blurring the Supreme Court's distinction between retailer presence and residency, Plaintiffs incorrectly assert that alcoholic beverage retailers are so similar to wineries that the fact that Michigan allows out-of-state wineries to sell their own products to Michigan consumers requires that out-of-state retailers be

[5] Plaintiffs' characterization of MB&WWA's position as arguing that the Supreme Court in *Tennessee Wine* overruled *Granholm* (Doc. # 28, Page 47), while creatively histrionic, is not a correct reading of either MB&WWA's position or the dicta in *Tennessee Wine*.

given the privilege of selling directly to Michigan consumers products they don't produce. But retailers (like Lebamoff which sells wine, beer, and spirits) are fundamentally different than producers (like wineries) in their business model and in the federal and state regulations they must follow.

Because of the complex goals and the balancing in which legislators must therefore engage, alcoholic beverage laws routinely draw distinctions between the privileges and obligations of the different distribution tiers.[6] Some of the distinctions that justify the different treatment at issue here include:

- The essential business of a winery is the production and sale of its own wine; therefore, it has the strongest incentive to ensure that it maintains its reputation by not selling defective or tainted product and by not violating state law.
- Unlike alcoholic beverage retailers, wineries are required to obtain a federal permit that could be put in jeopardy if they fail to follow the law of any state in which they do business. BATF Industry Circular 96-3 (1997).[7]
- Wineries register their products with Michigan.[8] Mich. Admin. Code, R. 436.1719(1)(c) and (2) (wine); *see also* Mich. Admin. Code,

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[6] Regulatory schemes also draw distinctions within tiers. For example, within the retailer tier, on-premises retailers (bars and restaurants) are regulated differently than off-premises retailers (liquor stores), and retailers are also regulated differently based upon the type of alcoholic beverages they sell.

[7] Retailers are not required to obtain a federal permit, so they don't face the threat of being put entirely out of business (by losing their federal permit) if they violate the law of a state where they don't have their principal place of business.

[8] Registration of products plays an essential role in Michigan's regulatory scheme. It ensures that a product is one that can be sold in Michigan and enables the State to discover bootlegged (unregistered) products being sold by a retailer, it

R. 436.1611(1)(d) (beer products must be registered). In contrast, out-of-state retailers don't register the products they sell and likely carry many products that have not been registered in Michigan by the producer/supplier of that product[9] – thus making the product ineligible for sale in Michigan.

- Because of the nature of the wineries' business, the number of wineries is limited and vastly smaller than the number of alcoholic beverage retailers, making effective regulation more achievable in a practical sense.[10]

- Because wineries sell only wine they produce, there is no threat that they will also attempt to sell beer or spirits to a Michigan consumer and have it delivered along with wine.

- Out-of-state retailers are required to follow the alcoholic beverage regulations of the state where they are located. Thus, a retailer like Lebamoff must buy its wine from an Indiana wholesaler, and would not be able to buy wine from a Michigan wholesaler (even if it declared it wanted to do that) – a regulatory requirement that has no relevance or application to wineries.

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allows the State to make sure various regulations (e.g., post and hold and the prohibition against below cost sales) are being complied with, and ensures that taxes are being collected and paid (because there is a record that can be traced from supplier to wholesaler to retailer).

[9] Indeed, one of Plaintiffs' rallying cries is that Lebamoff will ship products that are not available because they are not on Michigan's approved list of registered products. Doc. # 27, Pages 16-21. Some products are not eligible for registration in Michigan because Michigan has prohibited the sale of that type of alcoholic product (e.g., marijuana infused beverages) although other states may allow their sale. There are other numerous reasons why the producer/supplier of an alcoholic beverage may not want it to be registered for sale in Michigan. *See* Kaminiski Aff., RE 33-2, Page ID # 379-380.

[10] The idea that there will be less than 2,000 retailer/importers who will seek to deliver to Michigan consumers, as suggested by Plaintiffs, is speculative at best, and simply sketchy statistics at worst. Plaintiffs cite as authority a statement by Tom Wark, a lobbyist for wine retailers, which is based on the number of retailers that took orders on a *single* web site, Winesearcher.com. RE 35-1, page ID # 731.

Plaintiffs' argument that the State must allow out-of-state retailers to direct ship because it allows out-of-state wineries to direct ship is wrong for several reasons. It would impose a burden of proof on the State different from and more onerous than the clarified standard set out by the Court in *Tennessee Wine*. Further, Plaintiffs' contention would inappropriately burden the State by requiring it to show that retailer direct shipment poses "unique" risks of non-compliance with State alcoholic beverage law (Doc. # 28, Page 39) and to show that the states allowing retailer direct shipping have experienced "a public safety problem" (*id.*, Page 49). Finally, Plaintiffs incorrectly assert that winery direct shipment in the State is not problematic. Each of these contentions is misplaced.

Once again, Plaintiffs stray from the "predominate effect" standard (apparently recognizing the State and the MB&WWA met that standard) and concoct inapposite burdens of proof instead. And, once again, Plaintiffs ignore the record evidence – not only the evidence establishing that the predominate effect of the law is not protectionism, but the evidence showing the problems the State has encountered with out-of-state wineries not complying with the State's regulations. *See* Doc. # 24-1, Pages 29-31, 62-63. As the Supreme Court held in *Tennessee Wine*, each statute must be analyzed individually, 139 S. Ct. at 2472; Plaintiffs' attempt to take cover under the winery direct shipment statute to avoid dealing with the evidentiary record regarding the retailer delivery statute is as futile as it is obvious.

IV. Plaintiffs' assertion that Michigan has purposefully discriminated against out-of-state retailers is contrary to the record.

Plaintiffs try to paint a picture of purposeful discrimination against out-of-state retailers in favor of licensed Michigan retailers. They assert that the same material provision of the challenged law was struck down by the District Court in *Siesta Village Market, L.L.C. v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008). They point to Attorney Tanford's letter to Michigan legislators in September 2016 claiming the law under consideration would violate the Commerce Clause. They also point to Senator MacGregor's comment supposedly showing a purpose of protecting Michigan retailers, although Plaintiffs have distorted his comment by eliminating the surrounding context. Plaintiffs also contend there is some discriminatory purpose in eliminating the provision of the prior law in subsection (11) of Mich. Comp. L. § 436.1203, which created a narrow exception to the general prohibition against retailer delivery that allowed Michigan retailers holding a specially designated merchant license and out-of-state retailers holding a substantially equivalent license to deliver wine and beer to Michigan consumers, but only using the retailer's own employees (and only if certain other conditions were met). But none of this purported evidence of discriminatory intent is probative of Plaintiffs' claim.

The challenged provisions of MCL § 436.1203 (2016 P.A. 520) generally returned the law to how it had traditionally been prior to 2009. In 2009, the

subsection (11) exception was created in response to the District Court's 2008 decision in *Siesta Village*, although the effect was limited given that deliveries could only be made by in-state or out-of-state retailers using the retailer's own employees. 2008 P.A. 474, effective March 31, 2009.

But in the ensuing years, the case law changed. *Siesta Village* was a District Court decision and was one of the first cases to address the retailer issue. Over time, the consensus of Federal Circuit Courts was that permitting only licensed in-state retailers to sell to consumers, whether by in-store sales or by delivery, was a legitimate and inherent part of three-tier systems established by the States under their Twenty-first Amendment powers. *E.g., Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2nd Cir. 2009), *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010), and *Cooper v. Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016).

This change in the case law underpinned some of the new provisions established by 2016 P.A. 520, part of which functioned to eliminate the former subsection (11) exception. Public support for any three-tier system requires a balancing of interests and responsiveness to changing circumstances. This is part of the "leeway" given to States, recognized most recently in *Tennessee Wine*. The Legislature's desire, in light of the circumstances, to return this area of the law to its traditional status prior to the 2008 *Siesta Village* decision is not evidence of a

protectionist purpose; it is a reflection that the Legislature wanted to maintain a three-tier system without exceptions and viewed that as appropriate given the development of appellate case law.

Nor is Attorney Tanford's letter to the Legislature evidence of purposeful discrimination. Mr. Tanford, clearly an interested person, provided his opinion, but it was nothing more than that. And, as noted, that opinion on constitutionality was contradicted by appellate decisions such as *Arnold's Wines* and *Wine Country Gift Basket*. It would be an odd result if a letter from an interested attorney on constitutional law would trump federal appellate case law.

Finally, plaintiffs quote Senator MacGregor's comments out of context. The full context shows the Senator was expressing concern about *illegal sales* being made in Michigan, creating *unfair* competition for licensed Michigan retailers who were following the law, and leading to an unsurprising desire to tighten up the three-tier system by eliminating the former subsection (11) exception.[11] Senator

[11] Senator MacGregor's comment (without ellipsis or paraphrasing) is as follows: "[Michigan retailers] currently cannot [ship wine using a common carrier], they cannot do this legally. And they are under tremendous disadvantage, competitive disadvantage, with out-of-state entities *that are doing it illegally right now.* So this is a bill to help out our constituents, our local businesses to be more competitive in the marketplace. *It also has plenty of checks and balances in there because we're dealing with alcohol. So this legislation would require common carriers, UPS, FedEx, and others, to report alcohol shipments to the State. This would help provide tools to help the Commission and AG with gathering this data and also helping us with the illegal shipments that are happening as well."* http://www.house.mi.gov/MHRPublic/videoarchive.aspx. To obtain the recording

MacGregor was not advocating against out-of-state retailers; he was advocating against illegal sales by out-of-state retailers using common carriers (when no retailer – in-state or out-of-state – was allowed to use a common carrier).

V. Licensed Michigan retailers operating within Michigan's three-tier distribution system are not similarly situated to out-of-state retailers who seek to import alcohol into Michigan outside of the regulatory system.

Plaintiffs assert that retailers outside Michigan are similarly situated to licensed Michigan retailers because they have the same consumer market and sell the same type of products using the same internet and deliver using the same common carrier. Doc. # 28, Page 32. They assert that Michigan's three-tier system is just another "supply chain," and that most Commerce Clause cases involve economic actors with different supply chains.

Of course, a licensed Michigan retailer's "supply chain" is a state-mandated one, part of the three-tier system that has been acknowledged by the Supreme Court to be "'unquestionably legitimate.'" *Granholm v. Heald,* 544 U.S. at 489, quoting *North Dakota v. United States*, 495 U.S. at 432. Plaintiffs are quick to dismiss the public protections Michigan seeks to advance by its three-tier system; and they then ignore the extensive proofs provided by the MB&WWA and the State Defendants

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of the 12/8/16 meeting, enter "commerce and trade" in the search box and 2016 in the drop box for year. Sen. MacGregor's testimony starts at 40:13.

showing how physical presence of retailers and wholesalers is essential to furthering public health and safety of Michigan consumers, and Michigan citizens in general.

Plaintiffs have no answer to the evidence. They assert instead that Lebamoff is similarly situated to Michigan licensed retailers because, after all, Lebamoff is required to have an Indiana retailer license. The argument, apparently, is that in the internet age, Michigan no longer has a legitimate interest in regulating the distribution of alcohol and must accede to whatever is acceptable to Indiana (or to any other State from which retailers may wish to import wine into Michigan and deliver it to consumers). But Plaintiffs' rationale contravenes the very cornerstone of § 2 of the Twenty-first Amendment, recognized most recently in *Tennessee Wine*, that "each State [has] the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens." 139 S. Ct. at 2474.

Pretending there is no issue, Lebamoff says it will obtain a retailer's license from Michigan if one is made available and will comply with Michigan regulations. The promise is meaningless. Lebamoff has made clear that it seeks to import wine into Michigan outside of the three-tier system and to sell alcoholic beverage products that have not been registered with and approved for sale by the State, something no Michigan licensed retailer or wholesaler can do. Lebamoff will not comply with myriad regulations that can only be accomplished when the mandate of purchasing from licensed Michigan wholesalers is followed – such as post-and-hold

requirements as well as prohibitions on credit purchases, volume discounts, and aid and assistance from wholesalers – all of which were acknowledged by the District Court to provide important protections as part of Michigan's three-tier system. RE 43, Page ID # 847.

Plaintiffs try to justify their argument by assuming that a lower alcohol price is always a proper goal. But that is not the judgment of the Michigan Legislature. Effective alcohol regulations balance the desire to make alcoholic beverages affordable, yet not so inexpensive as to spur overconsumption. Two examples are that Michigan does not allow a wholesaler or a retailer to sell alcohol at a loss – i.e., no below cost sales (Mich. Admin. Code R. 436.1055, and Erickson Aff., ¶ 8, RE 34-4, Page ID # 496), and wholesalers may not provide volume discounts to retailers (Mich. Comp. L. § 436.1609a(5), Mich. Admin. Code, R. 436.1625(5), R. 436.1726(4)). Indiana has no such prohibitions. Doust Dep. Tr., p. 34, RE 34-9, Page ID # 627 (Indiana allows retailers so sell alcohol below cost), and *id.*, pp. 21-22, RE 34-9, Page ID # 614-615 (Indiana allows credit purchases and volume discounts).

Lebamoff's position is that Michigan must live with not only Indiana's alcohol paradigm, but that of any other State whose retailers wish to import alcohol into Michigan. That disregard for States' rights under § 2 also underlies Plaintiffs' counsel's suggestion at oral argument that Indiana's licensing of wholesalers (or,

implicitly, such licensing by any other State) ought to satisfy Michigan. *See* Motion Hearing Transcript, p. 48, and footnote RE 41, Page ID # 839. The argument makes a mockery of the Twenty-first Amendment.[12]

VI. Plaintiffs' Privileges and Immunities Clause argument (despite being pared down) still fails because there is no fundamental privilege to sell wine at retail.

The District Court did not decide Plaintiffs' Privileges and Immunities claim (Opinion, RE 43, Page ID # 864), which they asserted on behalf of all Plaintiffs (including Lebamoff, the Indiana corporation operating retail stores in Indiana). On appeal, apparently recognizing the complete lack of merit of Lebamoff's claim as a corporation, Plaintiffs limit their brief to "Joseph Doust's Privileges and Immunities Claim" based on Mr. Doust's self-proclaimed "professional wine merchant" status. Doc. # 28, Page 57.

But Plaintiffs' narrowed claim nevertheless lacks the essential prerequisite – i.e., a "fundamental" privilege within the protection of the Privileges and Immunities Clause. *McBurney v. Young*, 569 U.S. 221, 226 (2013). The Supreme Court has held that there is no "right [or] *privilege* of a citizen of the state or of a citizen of the

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[12] Doubling down on their attack on § 2 and the three-tier system, Plaintiffs contend that Michigan's (and Indiana's) requirement that in-state retailers purchase from in-state wholesalers is equally unconstitutional. Doc # 28, Page 53. Because this appeal concerns only the three retail delivery subprovisions of MLCC § 436.1203, the MB&WWA will not undertake a full refutation of Plaintiffs' assertion – other than to note such a challenge would go to the heart of § 2 and each State's three-tier system.

United States" to sell alcoholic beverage products "by retail." *Crowley v. Christensen*, 137 U.S. 86, 91 (1890) (emphasis added).

Plaintiffs' attempt to fill that void with the notion of a fundamental privilege to engage in a job is misleading at best. Every one of the cases Plaintiffs cite for the proposition that Mr. Doust's livelihood as a wine merchant is a fundamental privilege concerns a state statute that limits the ability to engage in an occupation to *residents* of that state. *See Sup. Ct. of N.H. v. Piper*, 470 U.S. 274 (1985) (law license available only to New Hampshire residents); *Hicken v. Orbeck*, 437 U.S. 518 (1978) (Alaska pipeline jobs offered only to Alaska residents); *Toomer v. Witsell*, 334 U.S. 385 (1948) (only South Carolina residents could fish certain South Carolina waters); *Ward v. Maryland*, 79 U.S. 418 (1870) (only Maryland residents allowed to sell goods by mail order). Once again, Plaintiffs fail to distinguish between a mere presence requirement (such as that deemed presumptively valid in *Tennessee Wine* and challenged here) and a residency requirement.

The Privileges and Immunities Clause does not apply; Plaintiffs' Privileges and Immunities claim should be rejected as a matter of law.

VII. The Code's severability provision, the express language of the challenged statutory provisions, the nature of the full Code section ("Sale, delivery or importation" of alcoholic beverage products), and the principles of extension and nullification all support severance of the three exception provisions of the Code section.

Because of the infirmities of the District Court's remedy ruling, Plaintiffs' argument in defense of it ignores four critical factors: (1) the Michigan alcoholic beverage code contains an express mandatory severability provision (§ 436.1925(2)) that the District Court did not mention – let alone apply; (2) one of the two stated purposes of the challenged Code section (§ 436.1203(2)(b)) is to "maintain strong, stable, and effective regulation by having beer and wine sold by retailers consumed in this state *by passing through the 3-tier distribution system* established under this act" – a stated purpose that would be nullified if out-of-state retailers were allowed to direct ship outside of the three-tier system as the District Court's improper remedy would permit; (3) the express language of § 436.1203 (which contains 24 subprovisions) refers to the three challenged subprovisions (§ 436.1203(3), (12), and (15)) as *exceptions* to the general rule against any retailer delivery of any alcoholic beverage product to a Michigan consumer – yet it is the general rule (the across the board prohibition on retailer delivery), not the specific challenged exceptions, that the District Court struck;[13] and (4) Plaintiffs' citation to government entitlement

[13] In doing so, the District Court not only "use[d] its remedial powers to circumvent the intent of the legislature," but failed to "consider the degree of potential disruption of the statutory scheme that would occur by extension as

cases such as *Califano v. Westcott*, 443 U.S. 76, 82 (1979) (benefits to unemployed father extended to unemployed mother given Congressional commitment to goal of assisting needy children), and *Heckler v. Matthews*, 465 U.S. 728, 739 n.5 (1984) (pension offset provisions applied the same to men and women), where extension of the benefit was consistent with (not contrary to) Congress's intent to benefit an aggrieved class, undermine the District Court's ruling and Plaintiffs' argument in support of it.[14]

For the reasons discussed in MB&WWA's opening brief, whether this is considered severance or "choice of remedies" as urged by Plaintiffs, the clear outcome is that the Legislature intended the three-tier system to remain entirely in place if the three retailer delivery subprovisions – exceptions to the general rule prohibiting retailer delivery (in-state or out-of-state) – were found unconstitutional.

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opposed to abrogation." *Heckler v. Matthews*, 465 U.S. 728, 739 n.5 (1984) (internal citations omitted). The District Court's remedy would require changes to multiple statutory provisions to extend the retail delivery privilege to out-of-state retailers – requiring significant changes to the State's licensing, enforcement, and tax collection efforts. In contrast, abiding by the Code's mandatory severance provision and the Legislature's intent, and striking only the three enumerated subprovisions, would leave all other aspects of the Code intact.

[14] Plaintiffs' other cases – *Michigan Bell Telephone Co. v. Engler*, 257 F.3d 587, 591-92 (6th Cir. 2001), and *Leavitt v. Jane L.*, 518 U.S. 137 (1996) – likewise support severance of the three discrete "offending" subprovisions of § 436.1203, leaving the preexisting three-tier system statutory structure intact.

CONCLUSION

MB&WWA respectfully requests that this Court (1) reverse the District Court's decision concerning Plaintiffs' dormant Commerce Clause claim, and remand with instructions to grant summary judgment to the State Defendants and MB&WWA, (2) in the alternative, reverse the District Court's remedy ruling extending the ability to deliver to all out-of-state retailers, and sever MLCC § 436.1203(3), (12), and (15), and (3) reject Plaintiffs' Privileges and Immunities claim as a matter of law.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 16, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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