No. 18-2199

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEBAMOFF ENTERPRISES, INC, et al.,

Plaintiffs-Appellees,

v.

RICK SNYDER, et al.,

Defendants-Appellants,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervenor.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Arthur J. Tarnow

BRIEF FOR DEFENDANTS-APPELLANTS

Dana Nessel
Michigan Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General

Mark G. Sands (P67801)
Melinda A. Leonard (P63638)
Donald S. McGehee (P37489)
Assistant Attorneys General
Co-Counsel of Record

Attorneys for Defendants-Appellants
Alcohol & Gambling Enforcement Div.
1st Floor, G. Mennen Williams Bldg.
525 W. Ottawa, PO Box 30736
Lansing, MI 48909
(517) 241-0210

Dated: October 3, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This Case tests the limits of the State's authority to regulate the importation and distribution of alcohol under § 2 of the Twenty-first Amendment. The United States Supreme Court recently held that § 2 saves a state's alcohol laws from invalidation under the dormant Commerce Clause if its laws have the predominant effect of protecting public health and safety. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas,* 588 U.S. __; 139 S. Ct. 2449 (2019). Oral argument will assist this Court in deciding this significant issue in alcohol-regulation, which is jurisprudentially significant nationwide.

JURISDICTIONAL STATEMENT

Lebamoff Enterprises, Inc., and the individual plaintiffs (Lebamoff's co-owner and three Michigan wine aficionados) commenced this action in district court pursuant to 42 U.S.C. § 1983. (R.1, Pet., Page ID #1-8.) On September 28, 2018, the district court issued an opinion and order denying Defendants' motion for summary judgment and granting Plaintiffs' motion for summary judgment. (R. 43, Op. & Order at 19-22, Page ID #863-866; R. 44, Judgment, Page ID #867-68.) The State Defendants filed a timely notice of appeal. (R. 48, Notice of Appeal, Page ID # 897-99.) Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Under the dormant Commerce Clause, finding that a distinction in a state law constitutes "discrimination" requires a comparison of similarly situated entities. Michigan law requires alcohol retailers to be located in Michigan, requires them to buy alcohol from licensed wholesalers or the State, and prohibits them from importing alcohol. Lebamoff wants to export alcohol to Michigan without being present in Michigan or obtaining its alcohol through the State's alcohol distribution system. Did the district court err by failing to consider whether in-state and out-of-state retailers are "similarly situated"?

2. Section 2 of the Twenty-first Amendment shields a discriminatory law that has the predominant effect of protecting public health and safety from invalidation under the dormant Commerce Clause. Requiring retailers to be in Michigan protects public health by deterring sales to minors and allowing regulatory inspections and illegal-alcohol seizures. Requiring retailers to purchase from a wholesaler or the State protects the public from unsafe alcohol. Did the district court err by finding that the challenged law was not a valid exercise of state power under § 2?

3. In fashioning injunctive relief, a district court should not use its remedial powers to circumvent the legislative intent. The Michigan Legislature included a severability clause in the Liquor Control Code and, in passing the challenged law, specifically removed the ability of out-of-state retailers to deliver to Michigan customers and bypass the three-tier system. Did the district court abuse its discretion by extending the retailer delivery law to out-of-state entities?

INTRODUCTION

This case requires the Court to examine *Tennessee Wine & Spirits Retailers Ass'n v. Thomas,* 588 U.S. __; 139 S. Ct. 2449 (2019), the United States Supreme Court's recent decision addressing the interplay between the "dormant" Commerce Clause and § 2 of the Twenty-first Amendment, and apply it to dispositively different facts. Unlike the Tennessee statute at issue in that case, which forbade anyone from receiving a retailer license who had not resided in Tennessee for two years, the challenged Michigan statute here concerns the actual flow of alcohol into the state and its distribution within its borders. This case strikes at the heart of the three-tier system of alcohol distribution ("three-tier system"). It asks whether out-of-state retailers can bypass Michigan's three-tier system, import alcohol into the state on their own, and ship or deliver alcohol directly to Michigan consumers.

The record in this case is uncontested. For health, safety, and welfare reasons, Michigan's three-tier system of alcohol distribution prohibits retailers from importing spirits into the state and requires them to purchase spirits from the State itself. Similarly, the three-tier system, in almost every instance, prohibits retailers from importing

beer and wine into the state and requires them to purchase those products from licensed Michigan wholesalers. Retailers located within Michigan who are subject to this strict regulatory system may ship and deliver alcohol to consumers. Retailers located outside of Michigan who are not subject to this strict regulatory system may not. The district court determined that distinction to be unconstitutional in violation of the dormant Commerce Clause. But the district court's holding was in error because it failed to consider whether in-state and out-of-state retailers are similarly situated for purposes of finding discrimination under the dormant Commerce Clause. They are not. Here, an Indiana retailer wants to operate and compete outside of Michigan's three-tier highly regulated system, gaining privileges that Michigan retailers lack.

The district court also erred because requiring retail establishments to be physically present is a permissible exercise of State power under § 2 of the Twenty-first Amendment. As was noted by the *Tennessee Wine* court, a physical presence requirement allows the State to undertake an inspection regime necessary to protect the health and safety of the public. Likewise, requiring retailers to purchase

alcohol from a licensed wholesaler is a critical part of the public-safety function of a liquor control state. *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. United States,* 495 U.S. 423, 447 (1990) (Scalia, J., concurring)). This Court should reverse the district court and remand with instructions to grant summary judgment to the State Defendants.

In fashioning its remedy for Plaintiffs, the district court created a gaping hole in Michigan's regulatory system by expanding retailer-delivery privileges to out-of-state retailers, thus permitting the Indiana retailer to avoid Michigan's three-tier system, and allowing the free flow of all types of alcohol into the state outside of its strict regulatory scheme. This holding was also in error because the district court failed to adopt the Michigan Legislature's sevability clause ("If any provision of this act is found to be unconstitutional . . . the offending provision shall be severed and shall not affect the remaining portions of the act." Mich. Comp. Laws § 436.1925(2)) and disregarded the impact expansion would have on Michigan's regulatory system.

STATEMENT OF THE CASE

A. Michigan's Alcohol-Regulatory System

1. Michigan's three-tiered system of alcohol distribution requires alcohol sold at retail to be obtained from a licensed wholesaler or the State itself.

The Michigan Liquor Control Code (Code) and the MLCC's administrative rules pervasively control the importation and distribution of intoxicating liquors in Michigan. Like many states, Michigan controls the sale of alcohol within its borders through a three-tier system of licensed suppliers, wholesalers, *see* Mich. Comp. Laws § 436.1113(8), and retailers, *see* Mich. Comp. Laws § 436.1111(6). Retailers selling alcohol to consumers located in Michigan must purchase that alcohol from the State or from a State-licensed wholesaler in almost all instances. Mich. Comp. Laws §§ 436.1203(1); 436.1901(1), (3), (4), (6).

The Code divides retail licenses into two categories: (1) licenses allowing sale of alcoholic beverages for consumption off the licensed premises (off-premises); and (2) licenses allowing sale of alcoholic beverages for consumption on the licensed premises (on-premises). (R. 34-2, Hagan Aff., ¶ 3, Page ID #455-56.) This case specifically

involves off-premises retail sales. As of March 2018, Michigan had issued licenses to approximately 16,444 retailers to sell alcohol for off-premises consumption. (R. 34-3, Wendt Aff., ¶ 7, Page ID # 478.) A retail liquor license in Michigan attaches to a certain location—the licensed premises—which must be in Michigan.

Licensed off-premises retailers may sell beer, wine, and "mixed spirit drink," *see* Mich. Comp. Laws § 436.1109(7), to consumers that the retailers have purchased from licensed wholesalers. *See* Mich. Comp. Laws §§ 436.1113(8); 436.1901(6). Those wholesalers, in turn, purchase the beer, wine, and mixed spirit drink from licensed suppliers or manufacturers, importing the beverages into Michigan as necessary. Mich. Comp. Laws §§ 436.1403, 436.1305, 436.1307.

Consumers also obtain distilled spirits (hard liquor) from licensed retailers, but off-premises retailers purchase spirits directly and exclusively from the State of Michigan. The MLCC uses "authorized distribution agents" to distribute spirits products and serves as the importer and initial purchaser of spirits for sale, use, distribution in Michigan. Mich. Comp. Laws §§ 436.1203(7), 436.1205(1).

In late 2016, the Michigan Legislature amended § 203 of the Code, Mich. Comp. Laws § 436.1203, in four relevant ways.[1] First, the amendment permitted certain MLCC-licensed retailers to deliver wine to Michigan consumers through a common carrier, Mich. Comp. Laws § 436.1203(3). Second, the amendment authorized certain MLCC-licensed retailers to use their own employees to deliver spirits to Michigan consumers, Mich. Comp. Laws § 436.1203(14). (This authority already applied to deliveries of beer and wine. Mich. Comp. Laws § 436.1203(12)). Third, the amendment allowed certain MLCC-licensed retailers to deliver wine, beer, and spirits to Michigan consumers through MLCC-licensed "third-party facilitators." Mich. Comp. Laws § 436.1203(15)-(16). Fourth, the amendment closed a gap in the three-tier system by eliminating permission for out-of-state retailers (who are not licensed by the MLCC and do not obtain their products from Michigan wholesalers) to use their own employees to deliver beer and wine to Michigan consumers that has not moved through the three-tier system.[2]

[1] Senate Bill 1088, which became 2016 PA 520.

[2] *See* Mich. Comp. Laws § 436.1203(11) (1998) (current version Mich. Comp. Laws § 436.1203 (2017)).

Plaintiffs-Appellees, Lebamoff Enterprises, Inc. (the corporate owner of retail liquor stores in Indiana); Joseph Doust (Lebamoff's co-owner, general manager, and a self-proclaimed "wine merchant"); and three Michigan wine aficionados (Jack Stride, Jack Schultz, and Richard Donovan) sued the State thereafter, alleging in their Complaint that allowing only retailers within Michigan's three-tier system to deliver alcohol to Michigan consumers violates the dormant aspect of the Commerce Clause of the United States Constitution. (R. 5, Am. Compl., ¶¶ 3-4, 13-20, Page ID #19-22.) Lebamoff does not hold a Michigan retailer license and does not want to operate within Michigan's three-tier system or purchase its wine from a licensed Michigan wholesaler. (R. 34-9, Doust Dep., pp. 8, 20-21 Page ID # 601, 613-14; R. 5, at ¶¶ 15-16, Page ID #21.) Plaintiffs Lebamoff Enterprises and Doust also alleged that the challenged statute deprived them of the privileges and immunities accorded to Michigan citizens. (R. 5, ¶¶ 21-28, Page ID #22-23.) Although the Complaint focused on wine because of Plaintiffs' specific interests, their challenge applies equally to beer and spirits.

In the proceedings below, Plaintiffs-Appellees did not dispute any evidence presented concerning Michigan's alcohol-regulatory system or its benefits to the public health, safety, and welfare.

2. The undisputed evidence shows that the three-tier system helps protect citizens from the extreme social harm caused by alcohol.

The uncontested record below shows that Michigan's three-tier alcoholic beverage distribution system was created to avoid the extreme social harm caused by the pre-Prohibition alcohol market. Pamela Erickson, a former Executive Director of the Oregon Liquor Control Commission and expert on alcohol policy, observed that before Prohibition, large national manufacturers owned the "saloons," which were almost the exclusive sellers of alcohol in communities nationwide. (R. 34-4, Erickson Aff., ¶ 9, Page ID #497-98.) These manufacturers pushed the retailer "saloons" to aggressively sell their product. (*Id.)* This vertically integrated system—the "Tied House"—meant that the local retailers were controlled by an absentee owner who was primarily interested in extracting profits by whatever means possible. (*Id.)* Erickson described this system as one of the most significant problems with pre-Prohibition alcohol distribution. (*Id.)* The pre-Prohibition

distribution structure led to major problems with public intoxication, violence, addiction, and family ruination. (*Id.)* These extensive negative societal effects led to the drastic step of implementing Prohibition. (*Id.)*

When Prohibition ended after ratification of the Twenty-first Amendment, States gained authority to reestablish a new, regulated alcohol market and did so with a view toward combatting the societal dangers of excessive alcohol consumption. (*Id.* at ¶ 7, Page ID #495.) Like many states, Michigan implemented a three-tier system, separating the supplier, wholesaler, and retailer tiers, Mich. Comp. Laws §§ 436.1305, 436.1403, 436.1603, 436.1607. This system protects the public from the Tied House, (R. 34-4, ¶ 10, Page ID #498-500), and is critical to the State's ability to regulate alcohol importation and distribution, according to MLCC Enforcement Division regional manager Mary Anne Donley. (R. 34-5, Donley Aff., ¶ 9, Page ID # 515. *See also* R. 34-7, ¶ 6, Page ID #535.)

Despite the post-Prohibition restructuring of the alcohol distribution system, excessive alcohol use causes 88,000 deaths in the United States annually. (R. 34-4, Erickson Aff., ¶ 7, Page ID #495.) It

also accounts for 1 of 10 deaths among work-age adults. (*Id.)* In 2010, excessive alcohol use cost the U.S. economy $249 billion. (*Id.)*

3. Michigan's alcohol regulatory system is specifically designed to protect the public health, safety, and welfare.

As explained by Sara Weber, Director of the MLCC Licensing's Division, the three-tier system "enable[s] the State of Michigan to protect the health, safety, and welfare of citizens through the careful control and regulation of intoxicating liquors." (R. 34-7, Weber Aff., ¶ 6, Page ID #535.) Licensed retailers in Michigan are subject to a rigorous regulatory scheme. (R. 34-7, ¶ 8, Page ID #536-37.) The MLCC employs a comprehensive review and screening process for retail-license applicants and considers several factors in determining whether to license a particular retail location, including the applicant's management experience, its general business reputation and moral character, and the opinions of local residents, government, and law enforcement. (*Id.)*; *see also* Mich. Admin. Code, R. 436.1105(2)(a)-(g). The comprehensive screening of all liquor-license applicants requires significant time, personnel, and resources of the MLCC and often involves using local Michigan enforcement agencies such as police

departments, sheriffs' departments, health departments, and others. (R. 34-7, ¶ 9, Page ID #537.) The premises of the retailer-applicant are inspected during the application review process. (R. 34-5, ¶ 6, Page ID #514.) On average, it takes the MLCC about 2-3 months from its receipt of an application for an off-premises retailer license to investigate and approve a new licensee. (R. 34-7, ¶ 9, Page ID #537.)

In addition, once licensed, retailers have a continuing obligation to allow inspection of their records and to make the licensed premises available for inspection by MLCC investigators or local law enforcement. (*Id.* at ¶ 11, Page ID #537-38); *see also* Mich. Comp. Laws § 436.1217; Mich. Admin. Code, R. 436.1027. Tom Hagan, director of the MLCC Enforcement Division, explains that the MLCC devotes significant resources to monitoring licensee compliance with Michigan's liquor laws. (R. 34-2, Hagan Aff., at ¶ 20, Page ID #464-66.) In fact, in 2016, the MLCC pursued 2,247 violation cases against licensees to administrative hearings. (*Id.* at ¶ 21, Page ID #466.) A vital part of licensee monitoring consists of on-site interviews with retail-licensee employees. (*Id.* at ¶ 10, Page ID #459.) MLCC investigators also visit retail licensees to conduct "decoy" operations involving minors who,

under Enforcement Division supervision, attempt to purchase alcohol. (*Id.* at ¶ 20, Page ID #464-66.)

Michigan's licensing and regulation scheme would not work without the assistance and cooperation of local law enforcement agencies, which have a "special duty" to enforce the Code and rules. (*Id.* at ¶ 23, Page ID #466-67, citing Mich. Comp. Laws § 436.1201(4); R. 34-7, ¶ 11, Page ID #537-38.) Local law enforcement agencies routinely help the MLCC conduct criminal background checks and on-site inspections; they also conduct hundreds of decoy "stings" each year in their respective jurisdictions at licensed Michigan retailer premises. (R. 34-2, ¶¶ 24-26, Page ID #467-68.) In the five years before the close of discovery, local law enforcement agencies conducted 1,661 of the 3,125 sting operations involving retail-licensee sales to minors. (*Id.* at ¶ 26, Page ID #468.) And 24% of all citations against licensees for violations of the Code in 2016 involved local law enforcement agencies. (*Id.* at ¶ 21, Page ID #466.)

Significantly, during inspections of licensed retail premises, Commission investigators or local law enforcement officers can seize evidence of violations, such as alcohol that is adulterated, dangerous to

the public health, or otherwise violates Michigan law. *See* Mich. Comp. Laws § 436.1217; Mich. Admin. Code, R. 436.1027.

Countries without a three-tier system have had periodic problems with unsafe products. (R. 34-4, ¶ 21, Page ID #508-09.) One study on fake alcohol reported injuries and deaths from many countries, including China, the Czech Republic, Russia, and the United Kingdom. (*Id.)* In particular, Mexico recently experienced a rash of tainted alcohol products being sold in tourist areas, which resulted in the death of at least one U.S. citizen. (*Id.*)

In contrast, under Michigan's three-tier system, alcohol sold in a retail store can be traced back to the licensed wholesaler from whom it was obtained and ultimately from the manufacturer of that product. (*Id.*) The Commission can detect counterfeit and illegal alcohol at the retail level if the licensed retailer cannot produce the paperwork showing from which wholesaler it purchased the alcohol. (*Id.*) Tainted alcohol can be traced from the manufacturer, through the wholesaler, and to every retail store where it is sold. The result is a very safe system. (*Id.)*

But if out-of-state retailers are permitted to sell alcoholic beverages that they did not purchase from Michigan wholesalers or the State of Michigan, the product-safety function a wholesaler provides is lost. (*Id.)* The Commission cannot enforce removal of adulterated or dangerous products from retailer shelves if the retailer's premises (and, thus, the retailer's alcohol) is not in the State and subject to inspection. Nor can it help effectuate a recall of a product if it does not know the product has been shipped or delivered into this state. (*Id.*)

Michigan also encourages temperance and orderly markets by setting minimum prices for spirits sold by the Commission, Mich. Comp. Laws § 436.1229(1), and by regulating wholesalers and manufacturers. Wholesalers must "post and hold" the prices at which they sell wine to retailers for a certain period, Mich. Admin. Code, R. 436.1726. Julie Wendt, Director of the MLCC's Executive Services Division, noted in her unopposed affidavit that the "post and hold" rules prevent wholesalers from discriminating among retailers and prevent quantity discounts. (R. 34-3 at ¶ 24, Page ID #488-89.) Every product sold must be posted after approval by the MLCC. Michigan also prohibits both wholesalers and manufacturers from offering volume discounts. Mich.

Comp. Laws § 436.1609a(5); Mich. Admin. Code, R. 436.1625(5), 436.1726(4). Wendt stated that allowing consumers to obtain wines for lower prices than in-state retailers pay would frustrate the rule's purpose of promoting temperance by not over-stimulating consumption. (R. 34-3 at ¶ 24, Page ID #488-89.) Further, a "cash law" prohibits wholesalers from selling and retailers from buying alcohol on credit. (R. 33-2, Kaminski Aff., ¶ 5, Page ID #379-80.); Mich. Comp. Laws § 436.2013. This encourages orderly markets by ensuring that retailers are operating a viable business and, thus, are not tempted to violate the law in order to increase profits. It also combats potential "aid and assistance" from wholesalers giving credit to favored retailers in exchange for the retailer agreeing to sell only that wholesaler's products. These market stabilizing regulations would not apply to an out-of-state retailer like Lebamoff who will not buy products through Michigan's three-tier system.

The undisputed evidence in this case also shows that allowing out-of-state retailers to deliver to Michigan consumers can increase illegal sales to minors. Erickson opined that retailers delivering alcohol outside their own states have less incentive to control alcohol sales by

not selling to minors. (R. 34-4 at ¶ 8, Page ID #496-97.) Her opinion is expressly supported by Lebamoff's co-owner in this case, who admitted that Lebamoff would not use the same stringent training to avoid selling to minors out-of-state that it uses for sales within Indiana. (R. 34-9, at p. 41, Page ID #634.) Notably, even Lebamoff's "stringent" training had resulted in 12 citations for furnishing alcohol to minors and another two citations for allowing a minor to loiter at the time of discovery in this case. (*Id.* at p. 47, Attach. A; Page ID #640, 651-681.)

Michigan's difficulties regulating the comparatively small volume of direct shipments of wine to consumers by out-of-state wineries further demonstrates the importance of in-state retailer presence for both inspection purposes and to limit sales to minors. (R. 34-5, ¶¶ 14-15, Page ID #517-18.) Michigan permits certain wineries to obtain "direct shipper" licenses and, as an exception to the three-tier system, directly ship limited amounts of wine to consumers. Mich. Comp. Laws § 436.1203(4)(h) (allowing direct shipment of not more than 1,500 9-liter cases or 13,500 liters of wine total per calendar year). Not long ago, the MLCC increased its direct-shipment enforcement efforts after receiving complaints about illegal shipments. Even though granted specific

appropriations to fund these efforts, the MLCC's direct-shipper enforcement team, comprised primarily of five investigators and four supervisors (who have other responsibilities as well), monitors the 1,203 licensed direct shippers of wine nationwide and unlicensed alcohol sellers (including over 9,000 other United States wineries) to ensure they are not illegally shipping alcohol into Michigan. (R. 34-5, at ¶¶ 13-20, Page ID # 517-21.)

As a result of the team's efforts, since 2015, over 220 cease-and-desist letters have been sent to unlicensed wineries shipping into Michigan (and that number has grown to over 350 since the close of discovery). Between 2015 and March 2018, 198 violation complaints were issued against licensed direct-shipper wineries. (*Id*. at ¶ 17, Page ID #519.) During that same time period, the MLCC had issued 175 violation warning notices to direct-shipper licensees for shipping violations including labeling, packaging, invoicing, and delivery matters. (*Id*.)

The direct-shipper enforcement team has also conducted controlled-buy operations using minors to purchase wine from licensed direct shippers. (*Id*. at ¶ 18, Page ID #519-20.) In 2015, the team

conducted 24 controlled-buy operations, and on eight occasions minors were able to purchase wine and have it delivered. (*Id.*) Four of those sales were by out-of-state direct shippers. (*Id.*) In 2017, the team conducted 53 controlled-buy operations involving out-of-state licensed direct shippers, and on 19 occasions minors were able to purchase wine and have it delivered. (*Id.*) None of the three in-state licensed direct shippers tested during 2017 sold or delivered wine to minors. (*Id.*)

Of course, the 1,203 licensed direct shippers represent less than one percent of the 388,000 nationwide alcohol retailers that, if Plaintiffs prevail, could be permitted to directly deliver alcohol to Michigan consumers. (R. 34-3, ¶ 16, Page ID #483-84.)

As further analyzed below, MLCC officials agree that no State, including Michigan, has the staff or capability to thoroughly investigate even a fraction of the nationwide retailers that may want to directly deliver alcoholic beverages to Michigan consumers. (*Id.*; R. 34-2, ¶¶ 30-33, Page ID #469-71; R. 34-4, ¶¶ 17-19, Page ID #504-6; R. 34-5, ¶ 21, Page ID #521-22; R. 34-7, ¶ 13, Page ID #538-39.) Plaintiffs did not contest the MLCC's judgment.

B. Proceedings Below

After discovery, the parties filed cross motions for summary judgment. The State Defendants argued that "discrimination" for purposes of the dormant Commerce Clause did not exist in this case because Lebamoff is not similarly situated to a licensed, in-state retailer. (R. 34, Def's Br. in Support of Mtn. for Summ. J, pp. 24-25, Page ID #429-30.) The State Defendants also argued that the retailer-delivery statute was a valid exercise of state power under § 2 of the Twenty-first Amendment because in-state presence was an "inherent part of the three-tier system," the standard this Court had articulated in *Byrd v. Tennessee Wine & Spirits Retailers Ass'n.*, 883 F.3d 608 (6th Cir. 2018). R. 34, p. at 18-28, Page ID #423-433.

Without addressing whether out-of-state retailers are similarly situated with in-state retailers, the district court granted summary judgment to Plaintiffs on their dormant Commerce Clause claim, holding that Michigan's retailer delivery statute discriminates against out-of-state retailers. (R. 43, Op. & Order, p. 7-8, Page ID #851-52.) The district court also failed to recognize that permitting retailer deliveries does not exempt any alcohol sale from the three-tier

distribution system and opined that Michigan had "departed from a hermetically-sealed three-tier system when it chose to permit its wine retailers to join the digital marketplace." (*Id.* at p. 9, Page ID #853.) The district court also held that the statute was not a valid exercise of the State's authority under § 2 of the Twenty-first Amendment because the State could not "demonstrate that permitting in-state retailers to ship directly to consumers while denying out-of-state retailers the right to do so is inherent to its three-tier system." (*Id.* at p. 13, Page ID #857.) Without considering the intent of the Legislature to sever any section of the Code found unconstitutional, Mich. Comp. Laws § 436.1925(2), or evaluating the disruption to Michigan's three-tier system that its remedy could cause, the Court then enjoined the State "from enforcing provisions of Mich. Comp. Laws §§ 436.1607 and 436.1203 to preclude out-of-state retailers of wine from shipping through interstate commerce to Michigan." (*Id.* at p. 21, Page ID #865.)

STANDARD OF REVIEW

This Court reviews de novo the district court's grant of summary judgment. *Odle v. Decatur Cnty., Tenn.*, 421 F.3d 386, 389 (6th Cir. 2005). Summary judgment is appropriate when "the movant shows that

there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This Court "must view all the facts and the inferences drawn therefrom in the light most favorable to the nonmoving party." *Cummings v. City of Akron*, 418 F.3d 676, 682 (6th Cir. 2005) (internal quotations and citation omitted). After the moving party has satisfied its burden, the burden shifts to the non-moving party to set forth "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

SUMMARY OF ARGUMENT

The district court's decision to collapse Michigan's three-tier system of alcohol distribution and grant out-of-state retailers privileges that not even in-state retailers enjoy rests on three fundamental legal errors and cannot be reconciled with the Supreme Court's recent decision in *Tennessee Wine*. First, the district court failed to consider the threshold question in determining whether a distinction in a state law constitutes "discrimination" under the dormant Commerce Clause—whether an out-of-state retailer such as Lebamoff is similarly situated to Michigan retailers. *See Gen. Motors Corp. v. Tracy*, 519 U.S.

278, 298–300 (1997) (stating that "any notion of discrimination assumes a comparison of substantially similar entities"). Michigan's retail liquor market consists of persons who are licensed as retailers by MLCC, who obtain all spirits (hard liquor) from the MLCC and beer and wine from licensed Michigan wholesalers, and who cannot import alcohol into the State. Lebamoff does not hold a Michigan license or obtain alcohol through either channel. And it intends to export alcohol into Michigan. It seeks to do something that no Michigan retailer is permitted to do. Lebamoff is not in "competition" with in-state retailers and, therefore, is not "similarly situated" with them, preventing any finding of discrimination under the dormant Commerce Clause.

Second, the district court's decision is inconsistent with *Tennessee Wine* because Michigan's in-state presence requirement for retail establishments has the predominant effect of protecting public health and safety. *Tennessee Wine*, 139 S. Ct. at 2474. This Court has already opined that requiring retailers to be in the state is permissible. *Byrd*, 883 F.3d at 623 n. 8. The Supreme Court did not conclude otherwise, specifically recognizing inspections and license-revocation authority as important tools to protect public health and safety. *Tennessee Wine*,

139 S. Ct. at 2475. The undisputed factual record below conclusively established that implementing both tools requires in-state presence. No state has the ability to inspect even a fraction of the 388,000 alcohol retailers nationwide, and the State cannot depend on out-of-state law enforcement to enforce Michigan law. Plaintiffs here did not contest any of the State's evidence concerning the important health, welfare, and safety interests served by the challenged statute.

Third, even assuming arguendo that the retailer-delivery statute is invalid, the district court abused its discretion because it used its remedial powers to extend the law to out-of-state retailers despite the clear intent of the Michigan Legislature not to do so. Not only did the Legislature include a severability clause in the Liquor Control Code, but when it enacted the retailer-delivery statute it specifically removed a former provision of law that allowed alcohol to enter the state without passing through the three-tier system. The remedy fashioned by the district court cannot be reconciled with the clear intent of the Michigan Legislature and its commitment to the three-tier system. *See*, e.g., *Heckler v. Mathews*, 465 U.S. 728, 739 n. 5 (1984) (stating that a district court should not use its remedial powers to circumvent the intent of the

legislature). As such, the district court abused its discretion when it expanded Michigan's retailer-delivery statute instead of severing the unconstitutional provision from the rest of the law.

ARGUMENT

The Commerce Clause both expressly grants Congress the power to regulate commerce among the several states, *see* U.S. Const. art. I, § 8, cl. 3, and implicitly limits the states' power to discriminate against interstate commerce. *See Tennessee Wine*, 139 S. Ct. 2459 (*citing New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)). The Commerce Clause "encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." The dormant Commerce Clause typically applies when a state attempts to regulate or control economic conduct wholly outside its borders with the goal of protecting in-state economic interests from out-of-state competitors. *See New Energy*, 486 U.S. at 273–74 (citing cases). "[I]n all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm*, 544 U.S. at 472 (quotation omitted).

Recently, the United States Supreme Court provided further analysis of State alcohol regulation under the Commerce Clause in *Tennessee Wine*. There, the Court applied a two-step analysis to review

Tennessee's durational-residency requirement. The first step, just as in any dormant Commerce Clause case, was to ask whether the challenged regulation discriminated against out-of-state goods or nonresident economic actors for purposes of the dormant Commerce Clause. *Tennessee Wine*, 139 S. Ct. at 2461-62. Because that was the case there, the Court proceeded to the second step, making a "different inquiry" than in a usual dormant Commerce Clause case. *Id.* at 2474. Because the challenged statute in *Tennessee Wine* concerned alcohol regulation, the Court asked whether the statute was a valid exercise of State power under § 2 of the Twenty-first Amendment that "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* Section 2 shields only laws that have the predominant effect of protecting public health and safety. *Id.* The Court found no such rationale for the Tennessee residency requirement at issue.

Unlike Tennessee, Michigan's system does not discriminate based on residency. Moreover, this case presents the threshold issue not raised in *Tennesee Wine* that the distinction drawn in Michigan's retailer-delivery law is not "discrimination" for purposes of a dormant

Commerce Clause analysis because Michigan retailers are not similarly situated to out-of-state retailers. Rather than seeking equal access to the Michigan market, Lebamoff asks this Court to give it an advantage over Michigan retailers by allowing it to have alcohol imported into Michigan on its own and avoid purchasing its alcohol from the State or a licensed wholesaler. Since the in-state and out-of-state retail entities are not similarly situated, the challenged distinction does not constitute "discrimination."

Even if the Court concludes that in-state retailers and out-of-state retailers are similarly situated, Michigan's statute is still valid under *Tennessee Wine*. For public health and safety reasons, Michigan requires its retailers to get their alcohol through the three-tier system and be physically present in the state before the sale or delivery of alcohol can occur. This is a fundamental requirement of any three-tier system, and no evidence in this case disputes the public health and safety reasons for it. Thus, Michigan's retailer-delivery statute has the predominant effect of protecting public health and safety and, therefore, under *Tennessee Wine*, it would still fall well within the scope of Michigan's power under the Twenty-first Amendment.

I. Out-of-state retailers and in-state retailers within the three-tier system are not "similarly situated" for constitutional purposes.

Plaintiffs-Appellees contend that the statute discriminates against out-of-state wine retailers because they are barred from delivering wine to Michigan customers. (R. 5, ¶¶ 13-20, Page ID #21-22.) The district court agreed, holding that the retailer-delivery statute "explicitly denies out-of-state retailers a privilege available to their in-state competitors." (R. 43, Op. & Order, p. 8, Page ID #852.) But before a Court considers whether a state law violates the dormant Commerce Clause, it must first consider the threshold question of whether the in- and out-of-state entities are "similarly situated" for constitutional purposes. Only then can the Court determine that the distinction drawn in the state law constitutes "discrimination." In this case, the district court erred by failing to consider this threshold inquiry.

"'[A] statute impermissibly discriminates only when it discriminates between two *similarly situated* in-state and out-of-state interests.'" *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm.*, 935 F.3d 362, 376 (5th Cir. 2019) (quoting *Allstate Ins. Co. v Abbott*, 495 F.3d 151, 163 (5th Cir. 2007), and citing *Exxon Corp. v. Maryland*, 437

U.S. 117 (1978)) (emphasis added). "[A]ny notion of discrimination assumes a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298–300. Different treatment does not constitute discrimination unless the those being treated differently are, for relevant purposes, similarly situated. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me*, 520 U.S. 564, 601-02 (1997) (Scalia, J., dissenting) (citing *Tracy*, 519 U.S. at 298-299). Persons are similarly situated when "they are alike in all relevant aspects." *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3rd Cir. 2009) (equal protection case). For purposes of dormant Commerce Clause analysis, to be considered similarly situated, the supposedly favored and disfavored entities must compete within a single market. *See Tracy,* 519 U.S. at 300.

Thus, before the district court found the challenged statute facially discriminatory, it should have examined whether the different treatment of out-of-state and in-state retailers under the challenged statute constitutes discrimination. In short, it does not. Licensed in-state retailers who obtain alcohol from licensed in-state wholesalers or from the State of Michigan are not similarly situated with unlicensed out-of-state entities who do not receive their alcohol from licensed

Michigan wholesalers or from the State of Michigan. Under Michigan's retailer-delivery statute, only licensed retailers who have received their products according to Michigan law, meaning from licensed wholesalers or from the State of Michigan, can sell and deliver alcoholic beverages to Michigan customers.[3]

To be in competition with licensed retailers in Michigan, a retailer's establishment must (1) be physically located in Michigan; (2) have a retailer license; and (3) obtain its alcohol from a licensed wholesaler or from the State of Michigan. Lebamoff fulfills none of these requirements.[4] This Court should follow the Fifth Circuit's opinion rejecting the idea that licensed in-state retailers are "competitors" with unlicensed out-of-state retailers:

> [The out-of-state retailer] is not similarly situated to Texas retailers and cannot make a logical argument of discrimination. The illogic is shown by the fact that the remedy being sought in this case—allowing out-of-state retailers to ship anywhere in Texas because local retailers

[3] Michigan law makes no distinction among owners of retail establishments based on the owner's state of residency. In fact, Michigan has issued over 1,800 retail licenses to entities that are incorporated and headquartered in other states. (R. 34-3, at ¶ 8, Page ID #478.)

[4] Even if Michigan permitted Lebamoff to purchase alcohol from its wholesalers or from the State itself, those products could not be exported to Indiana. *See* Ind. Code §§ 7.1-3-14-4(a), 7.1-5-11-1.5.

> can deliver within their counties—would grant out-of-state retailers dramatically greater rights than Texas ones. [*Wine Country Gift Baskets v. Steen*, 612 F.2d 809, 820 (5th Cir. 2010).]

Likewise, permitting out-of-state retailers to deliver to Michigan consumers would grant them dramatically greater rights than Michigan retailers. In such a system, out-of-state retailers could displace the State as the exclusive importer of spirits into Michigan and skip the wholesaler tier completely for beer and wine. Out-of-state retailers are not bound by regulations that help stabilize Michigan's liquor market and promote temperance, such as the pricing regulations, the prohibition on volume discounts, and the requirement that wholesalers post wine prices and hold those prices upon approval by the MLCC.

Similarly, the lead opinion in *Brooks v. Vasser*, 462 F.3d 341, 352 (4th Cir. 2006), opined that "an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself." Since a State can require alcohol to pass through its three-tier system, a retailer that does not obtain its alcohol through a licensed wholesaler is not in "competition"

with a retailer that does. As such, the two entities are not "similarly situated" for purposes of the Commerce Clause.

Because licensed retailers and unlicensed retailers from other states serve different markets, eliminating the "burden" imposed on out-of-state retailers by Michigan's retailer-delivery statute "would not serve the Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Tracy*, 519 U.S. at 299. Despite recognizing the importance of the three-tier system, the district court's holding incorrectly gives preferential advantages to out-of-state retailers that do not have to follow Michigan's Liquor Control Code or have the alcohol they sell within this state pass through its three-tier system. The Constitution does not require Michigan to face the Hobson's choice of hobbling its retail licensees either by not allowing them to deliver alcohol to consumers or by forcing them to "compete" at a disadvantage against unregulated out-of-state interests. Because the in-state retailers are not similarly situated to out-of-state retailers, it is not necessary to determine

whether the statute is valid under § 2 of the Twenty-first Amendment, *See Tennessee Wine*, 139 S. Ct. at 2472.

II. Michigan's retailer-delivery statute is a valid exercise of the State's power under the Twenty-first Amendment.

Even if this Court concludes that in-state and out-of-state retailers are similarly situated for constitutional purposes and that Michigan's retailer-delivery statute discriminates against out-of-state retailers within the meaning of the dormant Commerce Clause, the district court still erred in granting summary judgment to Plaintiffs because limiting delivery privileges to retailers located within the State and, thus, who have received their products as permitted through Michigan's three-tiered system, is a valid exercise of the State's authority under § 2 of the Twenty-first Amendment.

A. Michigan's retailer-delivery statute differs from Tennessee's retailer-residency requirement in a dispositive way.

Before applying the *Tennessee Wine* analysis to this case, it bears repeating that the challenged restriction here is not the same as the challenged restriction in *Tennessee Wine*. There, the state restricted licensure based on the state of *residency* of applicants. The Court

properly concluded that the residency restriction had no relationship to the flow of alcohol in the state or public health and safety. But here, the challenged regulation—that only those retail establishments *located* in Michigan that have received alcohol in accordance with Michigan law may deliver it to consumers—directly concerns the flow of alcohol into Michigan and the public health and safety. In Michigan, once any person or entity obtains a retail license, the licensee is free to purchase alcohol from a wholesaler or the State and to deliver that alcohol to Michigan consumers. All retailers are treated the same regardless of the state of residency of their owners. Critically different from *Tennessee Wine*, nothing in Michigan's Liquor Control Code creates a barrier for out-of-state companies or persons to obtain a retailer license as long as the licensed premises (and therefore the alcohol being sold to consumers) is located in Michigan.

B. *Tennessee Wine* permits a state to protect its citizens against the health and safety risks alcohol poses.

In *Tennessee Wine*, the Supreme Court stated that § 2 ratifies a State's power to "pursue their legitimate interests in regulating the health and safety risks posed by the alcohol trade." *Id.* at 2472

(quotation omitted). The Fifth Circuit, in *Wal-Mart Stores*, recently said that the *Tennessee Wine* Court "clarified the standard for evaluating a discriminatory alcohol-related regulation, charging courts to 'ask whether the challenged [discriminatory] requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." 935 F.3d at 369 (quoting *Tennessee Wine*, 139 S. Ct. at 2474). The Fifth Circuit noted that this new standard "has teeth. '[M]ere speculation' or 'unsupported assertions' of fact are insufficient to validate an otherwise discriminatory law." *Id.* If the "'predominant effect' of the discriminatory law is protectionism and not 'the protection of public health or safety,' the law is not shielded by § 2." *Id.* at 369-370 (quoting *Tennessee Wine*, 139 S. Ct. at 2474). The uncontroverted evidence here shows that the challenged law predominately protects public health and safety.

1. This Court has already held that requiring physical presence of a retailer is a valid exercise of State power under § 2 of the Twenty-first Amendment.

A fundamental feature of a three-tier system is that a retailer be physically present in the state where it sells alcohol. This Court has already recognized that "requiring wholesalers and retailers to be in the state is permissible." *Byrd*, 883 F.3d at 623 n 8 (citing *Cooper v. Texas Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016)). In affirming *Byrd*, the Supreme Court suggested that such an elementary requirement has the predominant effect of protecting public health and safety. Specifically, the Court stated that "since the [retailers'] stores at issue are physically located within the State," the State can "monitor the stores' operations through on-site inspections, audits, and the like. . . . Should the State conclude that a retailer has 'failed to comply with state law,' it may revoke its operating license. . . . This 'provides strong incentives not to sell alcohol' in a way that threatens public health and safety." *Tennessee Wine*, 139 S. Ct. at 2475 (internal citations omitted).

2. Requiring physical presence facilitates the State's ability to "monitor the stores' operations through on-site inspections, audits, and the like."

Uncontroverted evidence in this case shows that the "on-site inspections, audits, and the like" noted by the Supreme Court in *Tennessee Wine* serve a critical public safety function. Retailer-applicants are required to undergo an on-site inspection during the application process. Once a license is issued, every retail licensee is required to make its licensed premises available for inspection by MLCC investigators or local law enforcement officials. *See* Mich. Comp. Laws § 436.1217; Mich. Admin. Code, R. 436.1027; (R. 34-3, Wendt Aff., ¶ 13, Page ID #481-2.). The Code also expressly provides the MLCC the opportunity to inspect alcohol at the licensed wholesaler's premises before it is delivered to a retailer, further protecting the public from illegal alcohol. Subject to limited exceptions, Mich. Comp. Laws § 436.1204(3) requires a wholesaler to make beer, wine, and mixed spirit drink delivered to its premises "available for inspection by the [C]omission for at least 24 hours before the wholesaler delivers [the product] to a retailer."

In 2016, MLCC staff members conducted 18,039 on-site physical inspections and related contacts at retail establishments for licensing and enforcement purposes. (R. 34-2, Hagan Aff. ¶ 9, Page ID #458-59.) Such on-site inspections "routinely uncover evidence of violations of the Code and administrative rules." (*Id.* ¶ 10, Page ID #459.) On-site review of financial information can uncover money-laundering operations and other financial crimes. (*Id.*) It can also lead to the detection of the sale of controlled substances on the licensed premises. (*Id.* at ¶ 20, Page ID #464-66.) Moreover, on-site inspections and "sting" operations undertaken by MLCC investigators and local law enforcement can detect and prevent the sale of alcohol to underaged persons. (*Id.*) In the five years before the end of discovery in this case, there had been 3,125 violations for sales to minors uncovered by sting operations involving a minor decoy. (R. 34-3, ¶ 13, Page ID #481-82.) The assistance of local law enforcement agencies is vital to effectively regulating Michigan's retail license market. (R. 34-2, ¶ 30, Page ID #469.) For instance, over half of successful sting operations to detect and prevent the sale of alcohol to minors were conducted by local law enforcement. (R. 34-3, ¶ 13, Page ID #481-82.) Moreover, out-of-state

entities such as Lebamoff would be allowed to deliver alcohol without complying with Michigan's stringent server-training laws. *See* Mich. Comp. Laws § 436.1906; Mich. Admin. Code, R. 436.1060. For example, a retailer whose employees deliver alcohol must undergo MLCC-approved server training. *See* Mich. Comp. Laws §§ 436.1203(12)(c), (14)(c).

None of the tools Michigan relies upon to enforce its laws are available if it is required to allow out-of-state retailers to deliver alcohol. Under the district court opinion, all of the approximately 388,000 alcohol retailers in the United States could begin selling alcohol over the internet, exporting that alcohol to Michigan, and avoiding the three-tier system. The district court did not give adequate attention to the State's concern that it cannot regulate a nationwide market on its own, opining that the State could "tighten" regulations or charge out-of-state retailers higher application fees (which would seem to be unlawful based on the district court's dormant Commerce Clause holding). (R. 34, p. 15, Page ID # 859.) But this view is at odds with the district court's holding that exempts out-of-state retailers from the three-tier system. If a retailer like Lebamoff does not have to go through

Michigan's three-tier system, then it does not matter how "tight" the rules under that system are.

Of course, *no state* could ever efficiently and effectively regulate 388,000 nationwide alcohol retailers, no matter how "tight" their regulations are. As a result, on-site inspections that are necessary to detect and prevent the sale of alcohol to minors would not take place, illegal or adulterated alcohol would not be seized, and important server-training requirements would not be met. Nor would the MLCC be able to rely on out-of-state local law enforcement or out-of-state liquor authorities to uphold Michigan laws. (R. 34-3, ¶ 15, Page ID #483.) Indeed, a holding that out-of-state law enforcement and liquor regulators must enforce Michigan law would be the kind of extraterritorial law that the Supreme Court struck down in *Healy v. The Beer Inst., Inc.*, 491 US. 324, 336-37 (1989).

Simply put, a three-tier system cannot exist if retailers are not physically present in the state and subject to the inspection regime highlighted by the Supreme Court in *Tennessee Wine*. The practical effect of the district court's ruling would allow unregulated shipments of alcohol to flood into Michigan in clear contradiction of the State's

authority to control the flow of alcohol in its borders under § 2 of the Twenty-first Amendment.

3. The State can revoke a retailer's license to sell alcohol and seize all alcohol in its possession if it is physically present in the state.

Tennessee Wine also recognized that a State can ensure the health and safety of its citizens by revoking the license of a retailer that does not comply with State law. *Tennessee Wine*, 139 S. Ct. at 2475. A Michigan retailer that violates Michigan law can have its license revoked and all alcoholic liquor in its possession seized by the MLCC. Mich. Comp. Laws § 436.1907. For example, quite recently, in June 2019, MLCC investigators visited the premises of a licensee and discovered that, although licensed to manufacture wine, the licensee was not doing so and was, instead, selling wine in its tasting room that it had received from another entity. *Greenbush Brewing Co. v. Michigan Liquor Control Comm'n*, No. 1:19-cv-536 (W.D. Mich. Sept. 16, 2019) (provided as Attachment 1). The MLCC was able to immediately seize and impound the illegal product on-site. *Id.*

Those remedies are not available against 388,000 nationwide retailers, including Lebamoff. Michigan cannot revoke an out-of-state

retailer's license to sell alcohol in another state where it presumably makes the majority of its sales. Moreover, Michigan cannot seize alcohol from an out-of-state retailer—even if that alcohol is deemed to be dangerous, adulterated, or not approved for sale in Michigan. In fact, any attempt by Michigan to enforce its own laws outside its territory would run afoul of the Supreme Court's extraterritorial jurisprudence. *See Healy*, 491 U.S. at 336-37 (holding that a state law requiring out-of-state shippers to affirm their posted prices in Connecticut were no higher than prices posted in bordering state had an impermissible extraterritorial effect). Michigan cannot rely on another state (like Indiana) to revoke its own retailer's license for that retailer's violation of Michigan's law. (R. 34-7, ¶ 15, Page ID # 539.) Likewise, Michigan could not depend on any Federal licensing remedy against an out-of-state retailer. (*Id.*) Unlike direct shipping wineries, which have a Federal permit, retailers like Lebamoff are not licensed by the federal government. (*Id.*) Thus, they are not subject to federal oversight.

Under the Twenty-first Amendment Enforcement Act of 2000, 27 U.S.C. § 122a, Michigan has "the power to sue wineries in federal

court to enjoin violations of state law." *Granholm*, 544 U.S. at 492. This limits the state to seeking piecemeal enforcement of its law through individual requests for injunctive relief in Federal Court. While a Court could enjoin future shipments, such an injunction would not preclude a retailer from continuing to do business in its own state. Such a limited remedy does not provide the same strong incentives to follow state law as the loss of a liquor license. Rather, the small risk of detection within a sea of potentially hundreds of thousands of retailers would pale in comparison to the rewards of selling alcohol in a manner contrary to Michigan law in order to gain an advantage over in-state retailers who have to follow the law or risk losing their license altogether. This is particularly true of the sale of alcohol, a product highly desirable to minors. In fact, the State Defendants were not able to find a single published case where a State used this Act to enforce its shipping laws.

The threat of revocation also "'provides strong incentives not to sell alcohol' in a way that threatens public health and safety." *Tennessee Wine*, 139 S. Ct. at 2475 (quoting *Granholm*, 544 U.S. at 490). Plaintiff Doust's own testimony proves that this is the case. Lebamoff

is in Indiana and has a strong incentive not to sell alcohol in Indiana in a way that threatens public health and safety. Doust testified that Indiana requires salespersons to take an online course and that Lebamoff goes above and beyond those requirements by conducting "continuing education training" by in-house staff. (R. 34-9, at p. 12, Page ID # 605.) This is consistent with the Supreme Court's expectation that being subject to license revocation gives a retailer a strong incentive to follow the law. But if Lebamoff can deliver alcohol to Michigan, the MLCC would not have the authority to revoke its existing license to operate. Thus, the incentive to follow the law is weaker, as evidenced by Doust's admission that he would not require individuals who deliver wine to Michigan to fulfill the same stringent training that goes above and beyond Indiana's requirements. (*Id.* at p. 41, Page ID #634.)

Requiring a retailer to be physically present "'provides strong incentives not to sell alcohol' in a way that threatens public health and safety." Accordingly, it is a permissible exercise of State power under § 2 of the Twenty-first Amendment.

C. Requiring retailers to purchase alcohol from a licensed Michigan wholesaler or the State of Michigan has the predominant effect of protecting public health and safety.

The district court's decision to except out-of-state retailers from the requirement to purchase alcohol from licensed wholesalers or the State itself was erroneous because requiring retailers to get their alcohol through licensed wholesalers is a key tool relied upon by liquor control states to protect public health and safety. The Supreme Court has recognized that a state may "require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Granholm*, 544 U.S. at 489 (quoting *North Dakota,* 495 U.S. at 447 (Scalia, J., concurring)). Requiring alcohol sold at retail to be obtained from a licensed wholesaler or the State of Michigan serves two critical public safety functions: (1) to ensure that the alcoholic beverages consumed by citizens do not put the public at risk, e.g., counterfeit or adulterated alcohol; and (2) to identify the location of products in case of a recall. (R. 34-3, ¶ 19, Page ID #485-86.)

Serious public health risks, including incidents of death, from consumption of fake alcohol have occurred across the globe. (R. 34-4, ¶ 21, Page ID # 508-10.) For example, in 2017 Mexico experienced a

rash of tainted alcohol products sold in tourist areas that killed at least one U.S. citizen and injured others. *Id.* Since the conclusion of discovery in this case, at least 10 U.S. citizens have died in the Dominican Republic, possibly due to tainted alcohol obtained from hotel minibars.[5] And recently the State of Israel Ministry of Health issued a press release warning the public that counterfeit liquor bottles had been found for sale in supermarkets across the country.[6]

Michigan's primary defense against these products ending up in consumers' hands is the three-tier system. In Michigan's system, the wholesaler tracks all products and can quickly identify any products that were manufactured in an unsafe manner and where those products were distributed. (*Id.*) In addition, inspections conducted by MLCC investigators and local law enforcement can detect adulterated or misbranded spirits or liquor purchased by retailers from unauthorized

---

[5] Madeline Holcombe, et al, *FBI Assisting Dominican Republic authorities by looking at minibar toxicology samples of US tourists who died,* CNN.com (June 19, 2019), available at https://www.cnn.com/2019/06/19/us/dominican-republic-fbi-toxicology/index.html (accessed September 19, 2019).

[6] State of Israel Ministry of Health, *Alcoholic Beverages Found to be Counterfeit*, issued August 15, 2019, available at https://www.health.gov.il/English/News_and_Events/Spokespersons_Messages/Pages/15082019_3.aspx (accessed September 19, 2019).

sources. (R. 34-2, ¶ 20, Page ID #464-66.) Specifically, if investigators find a suspicious bottle of alcohol, they will ask the retailer for a record of which wholesaler it purchased the alcohol from. That record can be checked against the record of a licensed wholesaler. Michigan law requires the retailer to provide that information to the MLCC, and the retailer's license could be suspended or revoked if it fails to do so. But if out-of-state retailers are permitted to sell alcohol that they did not purchase from Michigan wholesalers, this product-safety function is lost. (R. 34-4, ¶ 21, Page ID #508-10.)

There are thousands of alcohol products available over the internet, and without requiring a product to be approved by the MLCC and enter the state through a licensed wholesaler, there is little ability to determine the authenticity of that product. (*Id.*) Some products—like powdered alcohol, alcohol infused with stimulants, or marijuana-infused alcohol—have been determined to be too dangerous to sell in Michigan. *See, e.g.,* Mich. Comp. Laws § 436.1914b. For instance, the MLCC banned alcohol-infused energy drinks after nine college students in Washington were taken to the emergency room after drinking a

highly-caffeinated alcoholic energy drink.[7] But those bans are not nationwide, so a retailer from a State that allows these dangerous products would be allowed to ship them into Michigan. The MLCC cannot stop the importation of a product if it does not know the product has been shipped and delivered into the state. (R. 34-4, ¶ 21, Page ID #508-10.)

Allowing out-of-state retailers to ship alcohol would also hinder the MLCC's consumer protection role. Under the current three-tier system, the MLCC can track any alcohol sold at retail. So, if alcohol is later determined to be dangerous or defective, the MLCC can determine which retailers obtained that alcohol from either a wholesaler or the manufacturer itself. In any event, the MLCC can act quickly to recall the product, get it off Michigan retail shelves, and inform the public of the dangers of the product. But this system requires that the MLCC have knowledge of and control over alcoholic products imported into Michigan. (R. 34-5, ¶ 21, Page ID #521-24.) As noted in Mary Anne

[7] See MLCC Alcohol Energy Drinks Administrative Order, issued November 4, 2010, available at https://www.michigan.gov/documents/dleg/Alcohol_Energy_Drink_Order_11_4_2010_337769_7.pdf (accessed October 1, 2019).

Donley's unopposed affidavit, the MLCC would not be able to help protect Michigan customers from tainted alcohol that is not ordinarily available in Michigan but has been delivered by out-of-state retailers. (*Id.*) The ability to get dangerous products off of retailer shelves necessarily depends on in-state presence.

Requiring alcohol sold at retail to be obtained from a licensed wholesaler or the State itself has a predominant effect of protecting the health and safety of Michigan citizens.

D. Requiring retailers to be in the state has the predominant effect of curtailing the sale of alcohol to minors.

Michigan's experience with licensed direct-shipping wineries shows that out-of-state entities are more likely to sell wine to minors than in-state counterparts. (R. 34-4, ¶¶ 13-16, Page ID #501-04; R. 34-5, ¶ 18, Page ID #519-20.) In 2017, over one-third of the licensed out-of-state direct shippers tested sold and shipped wine to minors, while none of the licensed Michigan direct shippers tested during these controlled-buy operations sold or delivered wine to minors. (R. 34-5, ¶ 18, Page ID #519-20.) At the same time, out of 16,444 licensed in-state retailers, there were only 1,504 citations for selling alcohol to minors. *Id.* In

other words, in 2017, minors were able to successfully purchase wine at a much higher rate from an out-of-state licensed winery than they were able to purchase alcohol from a licensed Michigan retailer. And under the plain terms of the district court's ruling, Michigan would have to allow out-of-state retailers to deliver beer and spirits—products that are much more desirable to minors.

Michigan's experience is consistent with a 2015 study by The Hill Group, involving a series of 26 controlled buys involving interstate shipments. (R. 34-4, ¶ 15, Page ID #503.) The study found an extremely low level of compliance. (*Id.*) For example, only 1 of 15 unlicensed sellers refused to ship wine to a Michigan consumer; none of the deliveries had the appropriate labeling on the delivered package; and individuals under the age of 21 were able to order, purchase, and receive shipments of alcohol. (*Id.*) Another study conducted by Rebecca Williams and Kurt Ribisl of the University of North Carolina concluded that "[a]ge verification procedures used by Internet alcohol vendors do not adequately prevent online sales to minors." (*Id.* at ¶ 16, Page ID #503-04.)

Plaintiffs did not refute the evidence presented to the district court, and that evidence demonstrates that minors will have more access to alcohol if out-of-state retailers like Lebamoff can deliver alcohol into Michigan. Michigan's interest in keeping alcohol out of the hands of children is the strongest possible public health and safety concern. And limiting retail sales and delivery to retailers located within the state gives the state the best possible chance of detecting and preventing those sales. Since the predominant effect of the law is to protect public health and safety, not protectionism, is it a valid exercise of state power under § 2. *See Tennessee Wine*, 139 S. Ct. at 2474.

III. The district court's remedy circumvents the Michigan Legislature's intent that the retailer-delivery provision be severed from the Code and substantially disrupts the statutory scheme.

A. Standard of Review

This Court reviews the terms of an injunction issued by the district court for an abuse of discretion. *United States v. Szoka*, 260 F.3d 516, 521 (6th Cir. 2001). The district court abuses its discretion if it "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Id.*

B. Analysis

The district court committed a fundamental error when it failed to consider whether its remedy was consistent with the Legislature's intent. In fashioning injunctive relief, a district court generally has the discretion to "either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 435 (6th Cir. 2008) (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)). While this Court has noted that extension is the generally preferred course, a district court "should not, of course, 'use its remedial powers to circumvent the intent of the legislature[.]'" *Heckler v. Mathews*, 465 U.S. 728, 739 n. 5 (1984) (quoting *Califano*, 443 U.S. at 94 (Powell, J., concurring in part and dissenting in part)). The Court should "'measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'" *Id.* (quoting *Welsh v. United States,* 398 U.S. 333, 365 (1970) (Harlan, J., concurring in the result)).

The district court in this case enjoined the State "from enforcing its retailer-delivery statute to preclude out-of-state retailers of wine from shipping though interstate commerce to Michigan customers." (R. 43, p. 21, Page ID #865.) But the Court failed to even *consider*, let alone harmonize, the intent of the Legislature, nor did it perform any analysis of the facts weighing against extension. Its decision cannot survive scrutiny in that light. The Liquor Control Code states that "If any provision of this act is found to be unconstitutional . . . the offending provision shall be severed and shall not affect the remaining portions of the act." Mich. Comp. Laws § 436.1925(2). In other words, unlike in *Cherry Hill*, the clear intent of the Michigan Legislature would be to sever the entire retailer-delivery provision from the rest of the Michigan Liquor Control Code. The severability clause indicates that the Legislature would prefer no retailer delivery if the alternative is opening Michigan to unregulated shipments by any of the 388,000 nationwide alcohol retailers.

This preference is further demonstrated by the fact that the *former* version of the statute allowed retailers from other states with similar licenses to deliver beer and wine to Michigan consumers using

their own employees. Mich. Comp. Laws § 436.1203(11) (1998) (current version Mich. Comp. Laws § 436.1203 (2017)). But the Legislature closed that gap in the three-tier system in the relevant statutory amendments by repealing the authority of any out-of-state retailer to deliver alcohol. In other words, the Legislature specifically chose *not* to allow out-of-state retailers to deliver wine and beer to Michigan consumers. This change also reflects the Legislature's commitment to the three-tier system, the policy underlying the regulation.

Not only can the district court's decision to extend the retailer-delivery statute to out-of-state retailers not be reconciled with the Legislature's intent, the district court failed to consider the degree of disruption to the system of alcohol distribution that extending delivery to out-of-state retailers will have. Among other things, extension will require extensive new legislation and extensive new monetary and personnel resources to meet license demand. Thus, the district court abused its discretion by fashioning a remedy that disregards this disruption and "circumvent[s] the legislature's intent," *Cherry Hill*, 553 F.3d at 435. Accordingly, the district court's remedy should be reversed.

CONCLUSION AND RELIEF REQUESTED

The district court erred by failing to consider that in-state and out-of-state retailers are not "similarly situated" for constitutional purposes. In-state and out-of-state retailers are not in "competition" in Michigan and, therefore, Michigan's retailer delivery statute does not discriminate against out-of-state interests.

But even if it did, the district court also erred because requiring retailers to be physically present is a permissible exercise of State power under § 2 of the Twenty-first Amendment. This Court should reverse the district court and remand with instructions to grant summary judgment to the State Defendants.

Alternatively, if this Court does find that Michigan law violates the dormant Commerce Clause, then the proper remedy is that set forth by the Michigan Legislature—to sever the offending provision. The district court abused its discretion in failing to consider the plain intent of the Legislature to sever this provision and its decision should be reversed.

Respectfully submitted,

Dana Nessel
Michigan Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General

/s/ Mark G. Sands
Mark G. Sands (P67801)
Melinda A. Leonard (P63638)
Donald S. McGehee (P37489)
Assistant Attorneys General
Co-Counsel of Record
Attorneys for Defendants-Appellants
Alcohol & Gambling Enforcement Div.
1st Floor, G. Mennen Williams Bldg.
525 W. Ottawa, PO Box 30736
Lansing, MI 48909
(517) 241-0210

Dated: October 3, 2019

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 10,663 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Office 365 Pro Plus, Word Version 1908 in 14-point Century Schoolbook.

/s/ Mark G. Sands
Mark G. Sands (P67801)
Assistant Attorney General
Co-Counsel of Record
Attorney for Defendants-Appellants
Alcohol & Gambling Enforcement Div.
1st Floor, G. Mennen Williams Bldg.
525 W. Ottawa, PO Box 30736
Lansing, MI 48909
(517) 241-0210
SandsM1@michigan.gov

CERTIFICATE OF SERVICE

I certify that on October 3, 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, if any).

/s/ Mark G. Sands
Mark G. Sands (P67801)
Assistant Attorney General
Co-Counsel of Record
Attorney for Defendants-Appellants
Alcohol & Gambling Enforcement Div.
1st Floor, G. Mennen Williams Bldg.
525 W. Ottawa, PO Box 30736
Lansing, MI 48909
(517) 241-0210
SandsM1@michigan.gov

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellents, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	**Date**	**Record Entry No.**	**Page ID No. Range**
Complaint	01/20/2017	R. 1	Page ID # 1-8
Amended Complaint	02/06/2017	R. 5	Page ID # 13-23
Defs' Answer to Amended Complaint	03/24/2017	R. 11	Page ID # 109-123
Intervening Defs' Answer to Amended Complaint	04/06/2017	R. 14	Page ID # 128-141
Pls' Mtn. for Summ. J.	02/28/2018	R. 31	Page ID # 203-232
Intervening Def's Mtn. for Summ. J.	04/02/2018	R. 33	Page ID # 287-336
Kaminski Aff.	04/02/2018	R. 33-2	Page ID # 379-380
Defs' Mtn. for Summ. J.	04/02/2018	R. 34	Page ID # 393-452
Hagan Aff.	04/02/2018	R. 34-2	Page ID # 455-56, 458-59, 464-66, 469-71
Wendt Aff.	04/02/2018	R. 34-3	Page ID # 478, 481-86, 488-89
Erickson Aff.	04/02/2018	R. 34-4	Page ID # 495-510
Donley Aff.	04/02/2018	R. 34-5	Page ID # 515, 517-24

Weber Aff.	04/02/2018	R. 34-7	Page ID # 535-39
Doust Dep.	04/02/2018	R. 34-9	Page ID # 601, 604-05, 613-15, 634, 640, 651-81
Pls' Response to Defs' and Intervening Defs' Mtns. For Summ. J.	04/23/2018	R. 35	Page ID # 682-730
Intervening Def's Reply	05/07/2018	R. 36	Page ID # 743-750
Defs' Reply	05/07/2018	R. 37	Page ID # 751-759
Opinion and Order	09/28/2018	R. 43	Page ID #845-866
Judgment	09/28/2018	R. 44	Page ID # 867-68
Notice of Appeal	10/12/2018	R. 48	Page ID # 897-99

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREENBUSH BREWING CO., et al., Plaintiffs,	)	
	)	No. 1:19-cv-536
-v-	)	
	)	Honorable Paul L. Maloney
MICHIGAN LIQUOR CONTROL COMMISSION, et al., Defendants.	)	

OPINION

Plaintiffs Greenbush Brewing Company, Michigan Cider Association, Farmhaus Cider Company, and Vander Mill, LLC, filed this motion for a preliminary injunction (ECF No. 11), claiming that Defendants Michigan Liquor Control Commission (MLCC), Andrew J. Deloney, Kurt Cox, and Jon Reeder have irreparably harmed them by seizing Greenbush's wine and hard cider inventory. Plaintiffs contemporaneously filed a motion for a temporary restraining order, which this Court denied (ECF No. 13). For the reasons to be explained, the motion for a preliminary injunction will be denied.

I. Background

Wine[1] is "in bond" or "bonded" when it has been produced and packaged but has not been sent to distribution or to a tasting room for consumption. Bonded alcohol is "untaxpaid," and a "bonded premises" is a federally authorized area where untaxpaid alcohol may be stored and handled. When a winemaker sells product to a distributor, retailer, or

[1] This case involves both wine and cider. Cider is treated as wine under state and federal law.

ATTACHMENT 1

individual customer, federal excise tax liability is incurred and paid, and the wine is no longer in bond. A winemaker may also transfer its wine in-bond to a different bonded premises, and the receiving party becomes responsible for the eventual tax liability. Federal tax law places no restrictions on these bonded transfers of wine.

In Michigan, "small wine maker" licenses allow licensees to manufacture not more than 50,000 gallons of wine per year and sell that wine to wholesalers, retailers, consumers by direct shipment, and at retail on the licensed winery premises such as tasting rooms. MCL 436.1111(12); MCL 436.1113(10). Small wine maker licenses cost $25 and are not subject to Michigan's Liquor License quota. MCL 436.1525(1)(d). However, small wine maker licenses do not allow licensees to sell wine manufactured by other wineries. To sell wine or beer manufactured and bottled off-site, a licensee needs a tavern license. MCL 436.1113a(2). Tavern licenses are limited by Michigan's Liquor License quota, which is based on population in local geographic units. MCL 436.1531(1). Thus, tavern licenses are usually only obtainable by transfer from another party.

In December 2018, the Michigan Legislature placed restrictions on bonded transfers of wine for wine makers and small wine makers. MCL 436.1204a provides, in relevant part:

> (1) A manufacturer shall not sell or transfer alcoholic liquor to a licensed manufacturer in this state except as provided in subsections (2) and (3).
>
> (2) Notwithstanding any provision in this act to the contrary, a manufacturer may sell or transfer wine or spirits to a licensed manufacturer, and a licensed manufacturer may purchase or receive wine or spirits, under any of the following conditions:
>
> (a) For a sale or transfer of wine:
>
> (*i*) The selling or transferring manufacturer is a wine maker, small wine maker, or out-of-state entity that is the substantial equivalent of a wine maker or small wine maker and is selling or transferring the wine to a wine maker,

ATTACHMENT 1

small wine maker, or out-of-state entity that is the substantial equivalent of a wine maker or small wine maker.

(*ii*) The purchasing or receiving wine maker or small wine maker manufactures wine at its licensed premises or the purchasing or receiving small wine maker bottles wine at its licensed premises.

* * *

(3) A wine maker, small wine maker, distiller, or small distiller may not sell alcoholic liquor purchased or received under this section unless 1 of the following conditions is met:

(a) The purchasing or receiving manufacturer modifies the purchased or received alcoholic liquor by performing a portion of the manufacturing process as described in section 109(1).

(b) The purchasing or receiving small wine maker bottles the purchased or received wine.

(c) The purchasing or receiving wine maker or small wine maker is selling a shiner[2] on which the wine maker or small wine maker has placed a label under section 111(10).

(4) This section does not prevent a manufacturer from selling, purchasing, or receiving nonalcoholic ingredients to or from another manufacturer.

The Legislature also amended the definition of "manufacture" to read:

> "Manufacture" means to distill, rectify, ferment, brew, make, produce, filter, mix, concoct, process, or blend an alcoholic liquor or to complete a portion of 1 or more of these activities. Manufacture does not include bottling or the mixing or other preparation of drinks for serving by those persons authorized under this act to serve alcoholic liquor for consumption on the licensed premises. In addition, manufacture does not include attaching a label to a shiner. All containers or packages of alcoholic liquor must state clearly the name, city, and state of the bottler.

MCL 436.1109(1). Essentially, the Legislature now allows a purchasing small wine maker to sell bonded wine for consumption only if it has modified the bonded wine by performing part of the manufacturing process on it or if it has bottled the bonded wine. Small wine

[2] A "shiner" is an unlabeled sealed container of wine that the purchasing wine maker must label before selling. MCL 436.1111(10).

ATTACHMENT 1

makers may also receive unlabeled sealed bottles of wine called "shiners," label them, and sell them.

Plaintiff Greenbush holds both a microbrewer license and a small wine maker license. Greenbush operates a tasting room on its licensed premises in Sawyer, Michigan. At some point, the MLCC became aware that Greenbush possessed and offered for sale unaltered bonded wine and cider. On June 19, 2019, Defendants Cox and Reeder investigated Greenbush's premises and spoke with Greenbush's Director of Operations, Anna Rafalski, and Brewer, Joseph Hinman. The investigators asked Rafalski and Hinman how Greenbush manufactured wine and cider; Rafalski explained that Greenbush only manufactured beer on the premises.

Cox and Reeder also asked about the wine and cider stored on the premises. Rafalski stated that Greenbush possessed wine produced by Fenn Valley Vineyards, which it received in unlabeled shiner bottles or 1/6-barrel kegs. Greenbush did not label the shiners. Rafalski also stated that Greenbush's cider was manufactured by Vander Mill, which shipped cider to Greenbush in 1/2-barrel kegs. Cox and Reeder requested copies of any federally required filings regarding wine production, but Rafalski conceded that no such forms were available.

Based on this investigation, Reeder and Cox determined that Greenbush was violating the new Michigan law, seized and impounded all wine and cider on Greenbush's property, and informed Greenbush that it could no longer sell wine or cider. At Greenbush's request, Reeder and Cox left for an hour so that Greenbush could move the wine and cider into cold storage. When Reeder and Cox returned, Rafalski had spoken with counsel, and informed the investigators that Greenbush did, in fact, produce wine and cider at the brewery. Rafalski

ATTACHMENT 1

explained that Greenbush had made sangria from bonded wine and that Greenbush had attempted to brew cider. Cox and Reeder filed a violation report and submitted it to the MLCC; this administrative matter is still pending, and the seized inventory is being held awaiting MLCC's decision. Plaintiffs now seek a preliminary injunction and the return of their inventory, arguing that federal law preempts the new Michigan statutes and that the statutes are void for vagueness.

II. Legal Framework

A trial court may issue a preliminary injunction under Federal Rule of Civil Procedure 65. A district court has discretion to grant or deny preliminary injunctions. *Planet Aid v. City of St. Johns, Mich.*, 782 F.3d 318, 323 (6th Cir. 2015). A court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (quoting *Northeast Ohio Coal. for Homeless & Service Employees Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)).

The four factors are not prerequisites that must be established at the outset but are interconnected considerations that must be balanced together. *Northeast Ohio Coal.*, 467 F.3d at 1009; *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002)

ATTACHMENT 1

(internal citation omitted); see *Patio Enclosures, Inc. v. Herbst*, 39 Fed. App'x 964, 967 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)).

The purpose of a preliminary injunction is to preserve the status quo. *Smith Wholesale Co., Inc. v. R.J.R. Tobacco*, 477 F.3d 854, 873 n. 13 (6th Cir. 2007) (quoting U.S. v. Edward Rose & Sons, 384 F.3d 258, 261 (6th Cir. 2004)). The Sixth Circuit has noted that "[a]lthough the four factors must be balanced, the demonstration of some irreparable injury is a sine qua non for issuance of an injunction." *Patio Enclosures*, 39 Fed. App'x at 967 (citing *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)).

III. Analysis

A. Success on the Merits

1. Federal Preemption

Preemption claims are grounded in the Supremacy Clause of the Constitution, which provides that the laws of the United States "shall be the supreme Law of the land; . . . any Thing in the constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. This gives Congress the power to enact statutes that preempt state law. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989). Congressional intent to preempt is the most important factor to consider in a preemption claim. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008). Federal law may expressly preempt state law, but if it does not, intent may "also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." *Id.*

ATTACHMENT 1

"[T]here is a strong presumption against federal preemption of state law[.]" *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 694 (6th Cir. 2015). This presumption also applies to federal agency regulations. *Schoolcraft Mem'l Hosp. v. Mich. Dep't of Cmty. Health*, 570 F. Supp. 2d 949, 958 (W.D. Mich. 2008). The presumption can only be overcome by a showing that preemption was the "clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Plaintiffs concede that Congress did not expressly preempt state law on this issue; instead, they first argue that Congress has pervasively regulated the field of bonded transfers of wine, so the Michigan statutes at issue are preempted. The Court disagrees.

The core of Plaintiffs' argument is that Congress intended to preempt state law on this issue because it has published so many regulations regarding the production of wine. However, as Plaintiffs stated at oral argument, the federal government regulates production of alcohol while states retain control over the distribution and sales of alcohol. *See e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). MCL 436.1204a fits squarely inside the realm of distribution and sales, governing the process of distribution for small wine makers, and dictating which small wine makers may sell wine they have purchased in bond. The sheer volume of federal regulations concerning the production of wine has no bearing on whether this statute, concerning distribution and sales, is preempted.

In their pleadings, Plaintiffs cited several specific statutes as illustrative points. However, each statute discusses the tax liability for or the logistics of bonded transfers. 26

ATTACHMENT 1

U.S.C. 5362(b) permits bonded transfers under the IRS code and discusses excise tax liability. This section explicitly does not consider the removal of wine "for consumption or sale." 26 U.S.C. 5362(b)(4). 27 C.F.R. § 24.101 permits bonded transfers under the Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB). 27 C.F.R. § 25 governs beer and is wholly inapplicable. Even giving Plaintiffs the benefit of the doubt and reviewing 27 C.F.R. §§ 24.280-24.284 (which govern bonded transfers of wine) reveals only a discussion of the logistics and paperwork required for bonded transfers of wine. In contrast, MCL 436.1204a concerns *who* may participate in the bonded transfers of wine, and who may remove wine from in-bond status to sell it for consumption. None of the federal statutes Plaintiffs cite govern who may operate bonded premises, nor do they consider the removal from bonded status. Plaintiffs have failed to show that MCL 436.1204a is barred because of field preemption.

Plaintiffs next argue that the statute is in direct conflict with federal law. Conflict preemption exists where compliance with both federal and state law is physically impossible, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Plaintiffs have not identified what specific provisions conflict; rather, they argue broadly that the state's impairment of a license issued under a federal regulatory scheme is improper. This argument is misplaced: Plaintiffs cite cases involving a license issued by the federal government under a federal regulation that later was subject to stricter state requirements. *See, e.g., Ray v Atlantic Richfield Co.*, 435 U.S. 151 (1978) (a state's judgment that a vessel was unsafe was preempted

ATTACHMENT 1

by the federal government's judgment that it was safe); *Leslie Miller, Inc., v. Arkansas*, 352 U.S. 187 (1956) (per curiam) (federal certification of a contractor as "responsible" preempted inconsistent state licensing requirements). This is classic conflict preemption, and the federal law preempts the state law.

However, that is not the issue presented here. In the case at bar, licenses are issued by the state government under state regulations. The relevant federal regulations permit certain actions to be taken by licensed individuals, and the state then places some conditions on the permitted actions. In this case, states may not "impair significantly, the exercise of a power that Congress explicitly granted." *Barnett Bank of Marion Cty, N.A., v. Nelson*, 517 U.S. 25, 33 (1996). States may not take actions that amount to "suspension or revocation" of a federally-granted "right to operate." *Castle v. Hayes Freight Lines*, Inc., 348 U.S. 61, 64 (1954). However, if Congress intends to subject a grant of power to state and local restrictions, these restrictions do not amount to a significant impairment. *Barnett Bank*, 517 U.S. at 33-34.

Plaintiffs set forth a conclusory allegation that MCL 436.1204a amounts to the suspension of a federally-granted right to operate, but again fail to acknowledge that the federal regulatory scheme intentionally leaves the distribution and sales of alcohol to the states. As discussed above, federal law governs bonded transfers of wine and state law governs the sale of wine for consumption; a restriction on the sale of wine for consumption does not suspend, revoke, or substantially impair Plaintiffs' ability to engage in the federally-granted power to perform bonded transfers of wine. Rather, MCL 436.1204a concerns who may

ATTACHMENT 1

remove wine from bonded status and sell it to consumers. Therefore, the statutes are not in direct conflict, and federal law does not preempt the state law at issue.

Finally, Plaintiffs make a brief argument that MCL 436.1204a has no cognizable relation to state interests, and therefore, the statute is unenforceable. In the context of the Commerce Clause, the Supreme Court recently reaffirmed that states have the leeway to enact laws that address the public health and safety effects of alcohol or other state interests, but states cannot enact protectionist measures that do not serve legitimate interests. *Tenn. Wine and Spirits Retailers Ass'n. v. Thomas*, 139 S. Ct. 2449, 2474 (2019). Plaintiffs argue that the new legislation advances no state interest because bonded wine is already carefully monitored for unlawful activity: the TTB requires careful measurements of bonded wine transfers at both the shipping port and the receiving port, so no threat of diversion is present. Again, the Court disagrees.

Defendants explain that the Michigan Legislature was concerned with the exact fact pattern presented here: a small wine maker license being used to circumvent the Michigan Liquor Control Code by selling bonded wine without actually using the small wine maker license to manufacture wine. This controverts the state interest in controlling the amount of available liquor licenses, the carefully monitored issuance of those licenses, and the ability to adequately monitor compliance with those licenses. This state interest sufficiently justifies the restrictions imposed by MCL 436.1204a, which directly relates to that interest by ensuring that "small wine maker" licenses are to make, rather than simply to sell, wine.

ATTACHMENT 1

2. Vagueness

Plaintiffs also argue that parts of MCL 436.1204a and all of MCL 436.1109(1) (the definition of manufacture) are void for vagueness. A statute is void for vagueness if it fails "(1) to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct," and (2) fails to articulate standards that allow enforcement officers to enforce the law in a non-arbitrary manner. *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 556 (6th Cir. 1999). Statutes are not rendered void simply because they contain "flexibility and reasonable breadth, rather than meticulous specificity." *Platt v. Bd. of Comm'rs on Grievances and Discipline of the Ohio Supreme Court*, 894 F.3d 235, 246 (6th Cir. 2018) (quoting *Grayned v. City of Rockford*, 408 US 104, 110 (1972)).

Looking first to MCL 436.1109(1): the statute defines "manufacture" as:

> to distill, rectify, ferment, brew, make, produce, filter, mix, concoct, process, or blend an alcoholic liquor or to complete a portion of 1 or more of these activities. Manufacture does not include bottling or the mixing or other preparation of drinks for serving by those persons authorized under this act to serve alcoholic liquor for consumption on the licensed premises. In addition, manufacture does not include attaching a label to a shiner. All containers or packages of alcoholic liquor must state clearly the name, city, and state of the bottler.

Plaintiffs argue that the terms "make," "produce," "concoct," and "process" are insufficiently vague and render this statute void. The Court disagrees. These four words appear at the end of a list of specific wine manufacturing techniques, and each of the disputed words are readily definable by consulting a dictionary. The inclusion of these four words does not render the statute insufficiently vague; rather, they provide flexibility and breadth for wine manufacturing techniques not identified by name. Further, the statute specifically

ATTACHMENT 1

outlines what manufacturing is *not*. This definition provides sufficient guidance for an ordinary person to understand what "manufacture" means. *See Platt*, 894 F.3d at 246.

Plaintiffs next contest MCL 436.1204a(2)(a)(*ii*). This subsection allows only winemakers that meet the following condition to purchase or receive wine: "The purchasing or receiving wine maker or small wine maker manufactures wine at its licensed premises or the purchasing or receiving small wine maker bottles wine at its licensed premises." Given the definition of "manufacture," the Court believes that this statute provides reasonable guidance for an ordinary person. Plaintiffs argue that it is unclear what quantity of wine manufacturing qualifies under the statute. True, the statute does not define exactly how much wine must be manufactured (or bottled), but the statute plainly states that the wine maker must engage in the process of manufacturing or bottling wine in any quantity. The statute need not define a quantity with meticulous specificity to be understood. *See id.* It follows that MCL 436.1204a(2)(a)(*ii*) provides sufficient guidance for an ordinary person to understand its meaning. *See Belle Maer Harbor*, 170 F.3d at 556.

Finally, MCL 436.1204a(3) provides:

> (3) A wine maker, small wine maker, distiller, or small distiller may not sell alcoholic liquor purchased or received under this section unless 1 of the following conditions is met:
>
> (a) The purchasing or receiving manufacturer modifies the purchased or received alcoholic liquor by performing a portion of the manufacturing process as described in section 109(1).
>
> (b) The purchasing or receiving small wine maker bottles the purchased or received wine.
>
> (c) The purchasing or receiving wine maker or small wine maker is selling a shiner on which the wine maker or small wine maker has placed a label under section 111(10).

ATTACHMENT 1

Again, given the definition of "manufacturing," this statute is reasonably clear. An ordinary person can read the statutes together and understand that to sell bonded wine, the receiving wine maker must either perform a portion of the manufacturing process on it or bottle it. MCL 436.1204a(3) provides sufficient guidance for an ordinary person to understand its meaning. *See id.*

Plaintiffs also argue that the MLCC has enforced MCL 436.1204a randomly and arbitrarily around the state. However, this argument is misplaced. When considering a void-for-vagueness argument, the "question is not whether discriminatory enforcement occurred here, as we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." *Gentile v State Bar of Nev.*, 501 U.S. 1030, 1051 (1991). Plaintiffs have not identified what parts of the statute are so vague that they lead to inconsistent or discriminatory enforcement. Plaintiffs have failed to show a reasonable likelihood of success on their claims.

B. Irreparable Harm

"To be granted an injunction, the plaintiff must demonstrate, by clear and convincing evidence, actual irreparable harm or the existence of an actual threat of such injury." *Patio Enclosures, Inc. v. Herbst*, 39 Fed. Appx. 694, 969 (6th Cir. 2002), quoting *Clark v. Mt. Carmel Health*, 124 Ohio App. 3d 308, 339 (1997) (quotation marks omitted). The loss of customer goodwill "often amounts to irreparable injury because the damages flowing from such losses are difficult to compute." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992).

ATTACHMENT 1

Greenbush has alleged that it has suffered a loss of customer goodwill because it has not been able to sell wine, cider, or other fruit-based alcoholic drinks. However, Greenbush has failed to present any evidence to support these claims beyond conclusory statements that some customers may prefer fruit and wine products over beer. Greenbush has attempted to demonstrate the loss of some customer goodwill, but has failed to show irreparable harm by clear and convincing evidence. Vander Mill, Farmhaus, and the Michigan Cider Association make a conclusory claim that "some" of their customers have stopped purchasing cider as a result of the MLCC's actions. However, this is a vague assertion and these Plaintiffs have provided no evidence, let alone clear and convincing evidence, to show that they have suffered irreparable harm.

C. The Equities

The equities slightly disfavor the issuance of a preliminary injunction. Issuing an injunction enjoining Defendants from enforcing MCL 436.1204a would hinder the MLCC's ability to enforce the Liquor Code and the state's interest in regulating liquor sales within its borders. Further, issuing an injunction would harm the public interest of regulation of alcohol sales, and the public interest of avoiding oversaturation of taverns or bars. Therefore, both the possible harm to Defendants and the public interest weigh against granting a preliminary injunction.

D. Conclusion

After consideration of the factors together, the Court does not find that a preliminary injunction is warranted, primarily because Plaintiffs have not established a substantial likelihood of success on their claims that the statutes at issue are unconstitutional.

ATTACHMENT 1

However, the Court is sympathetic to Plaintiff Greenbush's desire for guidance from the MLCC, and Greenbush's complaint that it may not receive answers to its statutory interpretation questions for months because a hearing has not yet been scheduled on the administrative complaint. Plaintiffs deserve answers from the MLCC to their questions about the meaning of the new legislation, which are questions that this Court cannot consider on the pleadings before it. To the extent that a ruling from the MLCC's administrative process would provide guidance about MCL 436.1109(1) and MCL 436.1204a, Plaintiffs deserve that guidance. Therefore, the Court orders the MLCC to hold a hearing on the administrative complaint within 60 days of the date of this order. The Court also orders that a final decision on that complaint shall issue within 120 days of the date of this order.

ORDER

For the reasons stated in the Court's Opinion, Plaintiffs' motion for a preliminary injunction (ECF No. 11) is **DENIED**.

IT IS FURTHER ORDERED THAT Defendant MLCC shall arrange and hold a hearing on Plaintiff Greenbush's administrative complaint by December 10, 2019, and that a final decision shall issue in Greenbush's case by January 24, 2020.

IT IS SO ORDERED.

Date: September 16, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

ATTACHMENT 1