No. 18-2200

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

MICHIGAN BEER & WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan, No. 2:17-cv-10191
Hon. Arthur J. Tarnow

BRIEF OF THE WINE & SPIRITS WHOLESALERS OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Jo Moak
Jacob Hegeman
WINE & SPIRITS WHOLESALERS OF AMERICA, INC.
805 15th St. NW, Ste. 1120
Washington, DC 20005

Scott A. Keller
Jeremy Evan Maltz
BAKER BOTTS LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004
(202) 639-7700
scott.keller@bakerbotts.com

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a)(4)(A), *amicus* states that it does not have a parent corporation, nor does it issue any stock.

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INTEREST OF *AMICUS CURIAE*[1]

Wine & Spirits Wholesalers of America, Inc. ("WSWA") is a national trade organization and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents nearly 400 companies in all 50 states and the District of Columbia that hold state licenses to act as wine and/or spirits wholesalers and/or brokers. Wholesalers directly account for more than 88,000 jobs paying more than $7.5 billion in wages, and WSWA's members distribute more than 80% of all wine and spirits sold at wholesale in the United States.

Alcohol wholesalers have an interest in stable regulatory environments. This case presents a challenge to, and potential further disruption of, Michigan's regulation of alcohol. And it concerns the proper application of the Supreme Court's framework for evaluating state alcohol regulation. Therefore, WSWA has an interest in its correct articulation and application here.

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[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person, other than WSWA, its members or its counsel, contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

SUMMARY OF THE ARGUMENT

I. The states' authority to regulate alcohol is greater than their authority to regulate any other article of commerce. As the Supreme Court recently reiterated, "Section 2 [of the Twenty-first Amendment] gives the States regulatory authority that they would not otherwise enjoy," to "address alcohol-related public health and safety issues" and other legitimate state interests. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2474 (2019). The Court thus reaffirmed that state regulation of alcohol receives special, though not overwhelming, solicitude.

Consequently, the Supreme Court has recognized that the Dormant Commerce Clause test for evaluating state alcohol regulation is different from the typical Dormant Commerce Clause test. *See id.* Just last Term in *Tennessee Wine*, the Court again declined to subject state alcohol regulation to the Dormant Commerce Clause's usual "strict scrutiny" approach—a rule that imposes "virtually *per se*" invalidity. *See Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)).

Instead, "because of § 2" of the Twenty-first Amendment, the Court crafted a "different inquiry" than strict scrutiny. *Tennessee Wine*, 139 S. Ct. at 2474. The Court in *Tennessee Wine* wanted to ensure that states are actually "address[ing] alcohol-related" concerns when they enact alcohol regulations facially favoring in-state over out-of-state entities. *Id.*

So *Tennessee Wine* articulated a unique Dormant Commerce Clause test notably more accommodating than strict scrutiny: States must show that "the *predominant effect* of a law" is the protection of public health and safety (or other legitimate state interests)—*not* protectionism. *Id.* at 2474. Because "[w]here the *predominant effect* of a law is protectionism . . . it is not shielded by § 2." *Id.* (emphasis added); *see id.* at 2476 (law invalid where "the predominant effect . . . is simply to protect [in-state entities] from out-of-state competition"). To show that a law's predominant effect furthers a legitimate state interest, states may present "'concrete evidence'" that such regulations "actually promote[]" legitimate, "nonprotectionist" interests or that there are no "*obvious alternatives* that *better serve*" the states' goals. *Id.* at 2474, 2476 (emphases added) (quoting *Granholm v. Heald*, 544 U.S. 460, 490 (2005)).

II. This unique "predominant effect" Dormant Commerce Clause test for state alcohol regulation allows courts to distinguish between laws furthering legitimate interests—to which they owe "deference"—and laws for which the state's true goal is "mere economic protectionism." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (preventing pure protectionism is the "central tenet" of the Dormant Commerce Clause).

Consequently, this "predominant effect" test does not impose a heavy burden on states. Tennessee Wine held that alcohol laws are valid where "concrete evidence" shows that the laws further legitimate state interests. 139 S. Ct. at 2474. Likewise, alcohol laws are valid where there are no "obvious" and feasible nondiscriminatory means of regulation that "better serve" a state's interests. See id. at 2476. States cannot rely on "'mere speculation' or 'unsupported assertions'" to justify their alcohol laws. Id at 2474. (quoting Granholm, 544 U.S. at 490). But the "concrete evidence" merely has to show that the state is not engaging in "arbitrary discrimination." Maine v. Taylor, 477 U.S. 131, 151 (1986) (emphasis added). So alcohol laws are valid where a state provides some competent evidence that its chosen regulation promotes legitimate interests.

Furthermore, states may permissibly draw from their shared history of alcohol regulation to craft and defend their policies. Specifically, they may rely on the historical underpinnings and the modern benefits of independent alcohol distribution models. Additionally, as is true in other constitutional contexts, states may "rely on" the experiences and data of other states—though they are not bound by the decisions and failures of other states. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 51-52 (1986) ("The First Amendment does not require [the government] . . . to conduct new studies or produce evidence independent of that already generated by other [governments], so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that the [government] addresses.").

III. Here, if the Court were to conclude that Michigan's law discriminates between in-state and out-of-state alcohol retailers, the State's law is still valid. Michigan has satisfied *Tennessee Wine*'s "predominant effect" test. Under Michigan's new law, only those retailers that adhere to the State's longstanding alcohol distribution model can sell (and ship) alcohol to Michigan residents.

The predominant effect of this law is the protection of health and safety, because it allows the State to maintain an efficiently and effectively regulated alcohol market. Moreover, there are no obvious feasible and "sufficient" nondiscriminatory alternatives—and certainly none that "better serve" Michigan's legitimate regulatory regime. Any putative "alternative" that works contrary to a state's legitimate interest is no alternative at all.

At bottom, the district court's decision "confer[s] favored status on out-of-state alcohol" retailers—precisely what the Twenty-first Amendment was designed to prevent. *Tennessee Wine*, 139 S. Ct. at 2465.

ARGUMENT

I. The *Tennessee Wine* "predominant effect" test is a "different inquiry" from the strict scrutiny that normally applies in Dormant Commerce Clause challenges.

Tennessee Wine reiterated that the Twenty-first Amendment requires a different Dormant Commerce Clause test for state alcohol regulation that is less probing than the Clause's typical strict scrutiny test.

The Twenty-first Amendment accomplished two main goals. In Section 1, it repealed the Eighteenth Amendment, ending Prohibition and returning alcohol to lawful commerce. Alone, this was enough to restore the states' authority to regulate alcohol. But any regulatory efforts would have needed to conform fully with the limitations imposed by Congress and the Constitution.

So Section 2 of the Twenty-first Amendment went a step further, and it "grant[ed] the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980); *see* U.S. Const. amend XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the

United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

Of course, this power is neither exclusive nor plenary. Congress retains its own role in regulating alcohol. *See Tennessee Wine*, 139 S. Ct. at 2469 ("[Section] 2 does not entirely supersede Congress's power to regulate commerce."). And Section 2 exists as part of a "unified constitutional scheme." *Id.* at 2462. "[N]o one now contends" that the Twenty-first Amendment requires, for example, "a state law prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex" to be "immunized from challenge under the Equal Protection Clause." *Id.*

One constitutional principle, however, has defied such a straightforward harmonization: the Dormant (or Negative) Commerce Clause. Article I grants Congress the power "To regulate Commerce . . . among the several States," which "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys.*, 511 U.S. at 98.

Under the normal operation of the Dormant Commerce Clause, states generally may not afford "differential treatment [to] in-state and

out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 99. To justify such a law outside of the context of alcohol regulations, states must satisfy "strict scrutiny." *See New Energy Co. v. Limbach*, 486 U.S. 269, 279 (1988). Under strict scrutiny, a government must demonstrate that its discriminatory law is "narrowly tailored" to furthering a compelling governmental interest. *Tennessee Wine*, 139 S. Ct. at 2461.

But, relative to the federal government, the states have unique interests in the regulation of alcohol. And so the Constitution grants them distinct authority to pursue diverse policies to further those interests. The Twenty-first Amendment confers the states authority to regulate alcohol in a manner that may "burden the interstate flow" of alcohol. *Or. Waste*, 511 U.S. at 98. Thus, the Dormant Commerce Clause does not operate with equal force to alcohol regulations. *See, e.g.*, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000) (Easterbrook, J.) ("[Section] 2 of the twenty-first amendment empowers [states] to control alcohol in ways that [they] cannot control cheese.").

The Supreme Court therefore has steadfastly refused to apply strict scrutiny—and its "narrowly tailored" requirement—to state alcohol

regulations. Just last Term in *Tennessee Wine*, the Court considered Tennessee's two-year durational-residency requirement for retail licenses. *See* 139 S. Ct. at 2462. The Court acknowledged that under the normal Dormant Commerce Clause test—if the state had chosen to regulate any other article of commerce in such a manner—the regulation "could not be sustained." *Id.* at 2474.

"But because of § 2, we engage in a *different inquiry*." *Id.* (emphasis added). The Court recognized that "§ 2 was adopted to give each State the authority to address alcohol-related public health and safety issues," and other legitimate interests, "in accordance with the preferences of its citizens." *Id.* So "Section 2 gives the States regulatory authority that they would not otherwise enjoy," namely power normally denied them under the Dormant Commerce Clause. *Id.*

The "different inquiry" articulated in *Tennessee Wine* requires states to show that "the *predominant effect* of a law" is the protection of public health and safety (or other legitimate state interests)—*not* protectionism. *Id.* at 2474 (emphasis added). "In conducting the inquiry, courts must look for [1] 'concrete evidence' that the statute 'actually promotes [the state's legitimate interests, including] public health or safety,' or [2]

evidence that 'nondiscriminatory alternatives would be insufficient to further those interests.'" *Wal-Mart Stores v. Texas Alcoholic Beverage Comm'n*, 935 F.3d 362, 369-70 (5th Cir. 2019) (quoting *Tennessee Wine*, 139 S. Ct. at 2472).

This test is distinct from normal Dormant Commerce Clause strict scrutiny, which requires that laws be "*narrowly tailored*." *Id.* at 2461 (quoting *Dep't of Revenue*, 553 U.S. at 338) (emphasis added). First, the Supreme Court has recognized that the states' nonprotectionist interests in, for example, "address[ing] *alcohol-related* public health and safety issues" are undeniably legitimate. *Id.* at 2474 (emphasis added). Second, under this modified test, states do not have to demonstrate that their chosen regulations are "narrowly tailored" to serve their interests. Under strict scrutiny, the narrow-tailoring requirement would penalize states for ignoring *any* nondiscriminatory alternative means of regulation. But *Tennessee Wine* requires only that states demonstrate they are not ignoring "*obvious* alternatives that *better serve*" their interests—a much lighter burden. *Id.* at 2476 (emphases added).

II. Unlike strict scrutiny, the *Tennessee Wine* "predominant effect" test does not impose an onerous burden on states, and states satisfy this test when they provide some competent evidence that the alcohol law furthers legitimate interests or no obvious nondiscriminatory alternatives exist.

Tennessee Wine's "predominant effect" test does not impose an onerous burden on states. Unlike the strict scrutiny approach, whose requirements penalize the mere fact of discrimination, the *Tennessee Wine* test has a different goal: to ensure that a state is not engaging in the "*arbitrary* discrimination against interstate commerce" left unprotected by the Twenty-first Amendment. *Taylor*, 477 U.S. at 151 (emphasis added). The test is designed to reveal when "the *predominant effect* of a law is protectionism, not the protection of public health or safety," or other legitimate state interests. *Tennessee Wine*, 139 S. Ct. at 2474 (emphasis added). When states engage in blatant protectionism, they lose the "deference" generally afforded to "laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Bacchus*, 468 U.S. at 276.

Conversely, when states act in furtherance of legitimate interests, they have broad discretion to craft policy—even policy that has some protectionist effects. The *Tennessee Wine* test has play in the joints that the strict scrutiny approach lacks. As explained further below, it tolerates an

imperfect fit between a state's asserted interest and its chosen means of regulation. And it forestalls a more probing adversarial inquiry into the state's regulation. So once states come forward with some "concrete evidence" supporting their policies, they fully meet their burden under *Tennessee Wine*, ending the inquiry. *See* 139 S. Ct. at 2474. Nothing in the Supreme Court's decisions suggests that a state's successful justification of its law should later devolve into a mini-trial or a battle of the experts.

At a minimum, states must assert a legitimate interest. *Cf. Bacchus*, 468 U.S. at 273 (quoting Hawaii's brief that the purpose of its discriminatory tax was "'to promote a local industry'"). The protection of health and safety is a legitimate state interest, and states may have additional legitimate interests too. Once states assert a legitimate interest, they must then simply provide "concrete evidence" that their chosen means of regulation "actually promotes" their interest, or that they are not eschewing "obvious" and feasible nondiscriminatory alternatives that "better serve" their interest. *Tennessee Wine*, 139 S. Ct. at 2474, 2476.

Nor did *Tennessee Wine*'s "predominant effect" test impose a heightened evidentiary standard. To the contrary, the Supreme Court uses the term "concrete evidence" across multiple areas of law in juxtaposition

with phrases like "mere speculation," "unsupported assertions," *Granholm*, 544 U.S. at 490, 492; "mere conjecture," *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 420 (2013); and "generalized pleas," *United States v. Kimbell Foods*, 440 U.S. 715, 730 (1979). The requirement for concrete evidence is thus a requirement for *some* competent evidence. *See, e.g.*, *Anderson v. Liberty Lobby*, 477 U.S. 242 at 251,256 (1986) (using "concrete evidence" as "some evidence").

Likewise, this Court too has used the phrase "concrete evidence" similarly. *See, e.g.*, *Franklin Am. Mortg. Co. v. Univ. Nat'l Bank*, 910 F.3d 270, 283 (6th Cir. 2018) ("UNB argues that there is a genuine issue of material fact over whether FAMC properly mitigated its damages[.] . . . UNB failed to produce or point to any concrete evidence showing that FAMC's mitigation efforts were unreasonable."); *Greer v. United States*, 207 F.3d 322, 334 (6th Cir. 2000) ("Greer has not presented concrete evidence demonstrating the precise causal connection between such personal injuries and [a settlement payment]."); *Frank v. D'Ambrosi*, 4 F.3d 1378, 1384 (6th Cir. 1993) (per curiam) ("To withstand a defense motion for summary judgment, he must adduce some concrete evidence on which a reasonable juror could return a verdict in his favor."); *Jones v.*

Wittenberg Univ., 534 F.2d 1203, 1212 (6th Cir. 1976) ("Appellants claim that the damages awarded in the wrongful death action are without foundation because neither of the recognized beneficiaries made a concrete showing of pecuniary loss.").

A state fails to offer concrete evidence if it declines to provide *any* evidence. For instance, the Supreme Court determined that the state in *Tennessee Wine* presented no concrete evidence at all. *See* 139 S. Ct. at 2474 ("During the course of this litigation, the [intervenor-defendant] relied almost entirely on the argument that Tennessee's residency requirements are simply 'not subject to Commerce Clause challenge,' and the state itself mounted no independent defense. *As a result, the record is devoid of any 'concrete evidence'* . . . .") (emphasis added) (internal citation omitted) (quoting *Granholm*, 544 U.S. at 490); Tr. of Oral Argument at 42, *Tennessee Wine*, 139 S. Ct. 2449 (No. 18-96) ("[The State] didn't -- it didn't file a single affidavit. It didn't put forward any kind of a witness. It didn't put on any defense whatsoever.").

Similarly, in *Granholm*, the Court concluded that "the States provide[d] *little concrete evidence* for the sweeping assertion that they cannot police direct shipments by out-of-state wineries." 544 U.S. at 492. In fact,

the State of New York "explicitly concede[d]" in the district court that its disparate treatment of out-of-state wineries was "intended to be protectionist." *Swedenburg v. Kelly*, 232 F. Supp. 2d 135, 146 (S.D.N.Y. 2002) (citing State Liquor Authority Divisional Order No. 714, ¶ 4, (Aug. 31, 1976)); *id.* at 148 ("There is evidence in the record that the direct shipping ban was designed to protect New York State businesses from out-of-state competition.").

States may offer any evidence that tends to show that the "predominant effect" of its chosen regulations are the promotion of its legitimate interests. Although the Supreme Court's decisions have provided some guidance about its *substantive* expectations for the evidence that states submit, it has never dictated the *form* the evidence must take. So, for example, the Court has not limited states to expert reports alone. As the Appellants have provided here, this evidence can include affidavits from state officials, state-sponsored or academic studies, and reports from state agencies. *See* Br. of Defs.-Appellants at 39-53 ("Michigan's Br.") (detailing evidence the State provided to support its law).

The states' respective and shared histories in regulating alcohol also create a significant basis for states to both craft and defend their

policies. For example, the longstanding practice of separating alcohol producers from retailers arose out of deleterious tied-house arrangements, whereby alcohol producers supplied retailers with premises and equipment in exchange for retailers exclusively (and excessively) selling the producer's alcohol. *Tennessee Wine*, 139 S. Ct. at 2463 n.7. In response, states created "comprehensive system[s]" of alcohol regulation that separated producers and retailers. *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality op.). In the experience of the states, as recounted by the Supreme Court, this separation "promot[es] temperance, ensur[es] orderly market conditions, and rais[es] revenue." *Id.*

And, as they may in other constitutional contexts, states can "rely on the experiences" of other states. *See Playtime Theatres*, 475 U.S. at 51. In practice, this means that states would not need "to conduct new studies or produce evidence independent of that already generated by other [states], so long as whatever evidence the [state] relies upon is reasonably believed to be relevant to the problem that the [state] addresses." *Id.*; *see Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 393 & n.6 (2000) (suggesting that states could rely on "evidence and findings accepted in" *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), to support state campaign-

finance law). Importantly, although states may rely on the experiences of other states, they are not limited by other states' policy choices—especially other states' policy failures. Rather, the Twenty-first Amendment provides states with power to craft alcohol laws to best address the particular concerns of each state.

Furthermore, the *Tennessee Wine* "predominant effect" test recognizes that state alcohol laws are valid unless they eschew "*obvious* alternatives that *better serve* [the state's interest] without discriminating against nonresidents." *Tennessee Wine*, 139. S. Ct. at 2476 (emphases added). Importantly, this is a very different inquiry than strict scrutiny. The *Tennessee Wine* test does not require states to demonstrate that every "abstract possibility" of a nondiscriminatory alternative is unworkable. *Taylor*, 477 U.S. at 147. *Tennessee Wine*'s "predominant effect" test is thus aimed at uncovering purely protectionist regulations while otherwise permitting states to exercise discretion. And it focuses only on "obvious" alternatives that "better serve" the states' interests. These qualifiers serve to give states necessary breathing room to retain broad authority for regulating alcohol "in accordance with the preferences of [their] citizens." *Tennessee Wine*, 139 S. Ct. at 2474.

III. Michigan's law here satisfies the *Tennessee Wine* test because it furthers Michigan's legitimate interests in maintaining an independent alcohol distribution system, and there are no obvious, feasible alternatives that "better serve" the State's interests.

Michigan's law here ensures that only retailers adhering to the State's independent alcohol distribution system can sell (and ship) alcohol to consumers. This is not the kind of "arbitrary discrimination against interstate commerce" that *Tennessee Wine* prohibits. *Taylor*, 477 U.S. at 151.

Like many other states, Michigan has a three-tier alcohol distribution system, under which Michigan separately licenses and regulates producers, wholesalers, and retailers. Subject to certain limited exceptions, alcohol sales are channeled through those tiers: alcohol travels from licensed producers to licensed wholesalers to licensed retailers and finally to consumers. *See Granholm*, 544 U.S. at 466, 489.[2] Separating and

[2] Not every drop of alcohol goes through this process. For example, Michigan allows out-of-state wineries to ship wine directly to consumers. *See* Mich. Comp. Laws § 436.1203(4). Allowing producers to directly ship to consumers is unlike allowing retailers to ship to consumers. The former is an *exception* to the general rule that all alcohol must pass through licensed wholesalers and retailers before getting to consumers. When retailers ship alcohol purchased from licensed wholesalers, on the other hand, that still takes place wholly within the general distribution system.

isolating the tiers of distribution promotes a responsible marketplace filled with innovation and choice.

This case concerns Michigan repealing an exception to its comprehensive system. In 2016, Michigan broadened the circumstances under which in-state retailers may sell and deliver (via shipment) alcohol to Michigan residents. *See* Mich. Comp. Laws §§ 436.1203(3), (12), (15); 436.1607(1). The State also repealed the sole circumstance in which out-of-state retailers had been able to ship alcohol to Michigan residents. *See id.*

In short, the amendments ensured that alcohol delivered by retailers flows through Michigan's alcohol distribution system—which is undoubtedly constitutional. The State of Michigan and the Michigan Beer & Wine Wholesalers Association ("MBWWA") contend that Michigan's law does not discriminate against interstate commerce because in-state retailers and out-of-state retailers are not "similarly situated." Thus any disparate treatment between the two does not invite any Dormant Commerce Clause scrutiny. *See* Michigan's Br. at 30-35; Br. of Intervening Def.-Appellant at 30-35. ("MBWWA's Br.").

But even assuming *arguendo* that Michigan's law does discriminate between in-state and out-of-state retailers, Michigan's law—as supported by the *uncontested* record—nevertheless satisfies *Tennessee Wine*. The "predominant effect" of the law here is "the protection of public health [and] safety." *Tennessee Wine*, 139 S. Ct. at 2474.

First, Michigan has an interest in maintaining and strengthening an independent alcohol distribution model. *See, e.g.*, *Granholm*, 544 U.S. at 489 ("States may . . . [channel] sales through the three-tier system."). And Michigan has provided concrete evidence that the amendment was necessary to "maintain strong, stable, and effective regulation by having [alcohol] sold by retailers to consumers in this state *[pass] through the 3-tier distribution system* . . . ." Mich. Comp. Laws § 436.1203(2)(b) (emphasis added).

The State may only exercise full regulatory authority over retailers when they are located in-state. *See* Michigan's Br. at 12-15 (providing evidence that the State, often through local officials, conducts rigorous inspections of alcohol licensees); *see also Granholm*, 544 U.S. at 489 (recognizing that states may impose requirements that wholesalers and

retailers be located "*in-state*") (emphasis added) (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment)).

And Michigan has demonstrated that its amendment "actually promotes" its interest. *Tennessee Wine*, 139 S. Ct. at 2474. Now, apart from one narrow exception, all alcohol shipped from a retailer to a consumer travels through the State's three-tier system. *See* Michigan's Br. at 15-17. Michigan is therefore acting in accordance with the lessons learned from the states' shared history. *See id.* at 10-12 (detailing the historical evidence Michigan relied on and provided to the district court).

Importantly, the law at issue here is significantly different from the two-year durational-residency requirement invalidated in *Tennessee Wine*. *See* 139 S. Ct. at 2462. In contrast to *durational-residency* requirements, the Court expressly distinguished laws dealing with *physical presence*. The former focus on where an *applicant* resides. The latter, however, focus on where the retail stores are physically located. *See id.* at 2475. As *Tennessee Wine* explained, when stores "are physically located within the State," then "the State can monitor the stores' operations through on-site inspections, audits, and the like." *Id.*; *see* Michigan's Br. at 39-46 (explaining how Michigan oversees retailers and deters

wrongdoing); MBWWA's Br. at 22-29 (same). This wholly legitimate, non-protectionist interest supports laws furthering in-state physical presence requirements—and simultaneously distinguishes durational residency requirements.

Second, any putative alternatives to Michigan's policy would be "insufficient to further [Michigan's] interests" in its alcohol distribution system. *Tennessee Wine*, 139 S. Ct. at 24744. And there's certainly not an alternative that "better serves" the State's interests in ensuring that consumers only buy from licensed retailers. Any alternative would require Michigan to compromise on its distribution system. And under the *Tennessee Wine* test, any such "alternatives" are no alternatives at all.

* * *

The district court's decision puts Michigan to a choice that *Tennessee Wine* does not permit: either compromise on its independent alcohol distribution system or violate the Dormant Commerce Clause. In holding for the plaintiffs and "extending the benefits of the [amendment] to out-of-state retailers" as a remedy, the district court "allow[ed] Lebamoff to do what no Michigan retailer may do: ship wine to Michigan consumers that has not passed through the Michigan three-tier system." *Lebamoff*

Enters. v. Snyder, 347 F. Supp. 3d 301, 306, 311 (E.D. Mich. 2018). In other words, the district court incorrectly held that the Dormant Commerce Clause "conferred favored status on out-of-state alcohol" retailers, *Tennessee Wine*, 139 S. Ct. at 2465, putting Michigan in precisely the "bind" that the Twenty-first Amendment was designed to prevent. *Granholm*, 544 U.S. at 478.

CONCLUSION

The district court's judgment should be reversed.

October 10, 2019

Respectfully submitted,

/s/ Scott A. Keller

Scott A. Keller*
Jeremy Evan Maltz
BAKER BOTTS LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004
(202) 639-7700
scott.keller@bakerbotts.com

Jo Moak
Jacob Hegeman
WINE & SPIRITS WHOLESALERS OF AMERICA, INC.
805 15th St. NW, Ste. 1120
Washington, DC 20005

* Admitted only in Texas. Not admitted in the District of Columbia. Practicing under the supervision of principals of the firm who are members of the District of Columbia bar.

Counsel for Amicus Curiae
Wine & Spirits Wholesalers of America, Inc.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was filed and served on October 10, 2019, via ECF upon counsel of record for the parties.

/s/ Scott A. Keller
Scott A. Keller

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 4394 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief 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 brief has been prepared in 14-point Century Schoolbook font.

Dated: October 10, 2019

/s/ Scott A. Keller
Scott A. Keller