

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LEBAMOFF ENTERPRISES, LLC, et al.

Plaintiffs

Civil No. 2:17-cv-10191-AJT-SDD

vs.

Arthur J. Tarnow

United State District Judge

RICK SNYDER et al.

Defendants

Stephanie Dawkins Davis

Magistrate Judge

MICHIGAN WINE & BEER
WHOLESALE ASSOCIATION

Intervening Defendants

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND ACCOMPANYING BRIEF**

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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs move the Court pursuant to FED. R. CIV. P. 56(a) to grant summary judgment in their favor, declare Michigan's law allowing in-state but not out-of-state retailers to ship wine to consumers unconstitutional, and grant plaintiffs the relief requested in the First Amended Complaint (Doc. No. 5). Included with this motion is a Brief in Support of Summary Judgment and thirteen exhibits, which establish that there are no genuine issues of material fact and that Plaintiffs are entitled to judgment as a matter of law. As grounds for the motion, which are more fully developed in the accompanying brief, Plaintiffs assert:

1. There are no material factual disputes and the issues before the Court are matters of constitutional law.
2. A previous version of the law being challenged was declared unconstitutional by this Court in *Siesta Village Mkt. v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008), and the current law is indistinguishable from the former.
3. Michigan discriminates against Lebamoff Enterprises and other out-of-state wine retailers by prohibiting them from selling, delivering or shipping wine directly to consumers in Michigan, while permitting in-state retailers to do so. Discrimination against out-of-state wine shippers is a violation of the Commerce Clause of the United States Constitution.
4. Michigan denies Joseph Doust and other nonresidents the privilege to

engage in retail wine shipping upon the same terms as its own citizens in violation of the Privileges and Immunities Clause.

WHEREFORE, Plaintiffs request that this Court issue a judgment and order:

- a) Granting Plaintiffs' motion for summary judgment.
- b) Declaring that Michigan's law prohibiting out-of-state wine retailers from delivering and shipping wine through interstate commerce directly to consumers in Michigan is unconstitutional under the Commerce Clause.
- c) Declaring that Michigan's law prohibiting nonresidents from selling and shipping wine to consumers in Michigan is unconstitutional under the Privileges and Immunities Clause.
- d) Enjoining Defendants from enforcing provisions of the Michigan Liquor Control Code and related administrative regulations that prohibit out-of-state retailers from selling, delivering and shipping wine through interstate commerce directly to Michigan consumers, including Mich. Comp. L. §§ 436.1203, 436.1901, and 436.1537, and Mich. Admin. R. 436.1527.
- e) Enjoining Defendants to allow Lebamoff Enterprises and Joseph Doust to sell, deliver and ship wine directly to Michigan consumers. Plaintiffs do not request that the State be enjoined from collecting any tax due on such wine sales, nor that the State be prohibited from requiring a license or permit for direct interstate sales and deliveries.

f) Awarding Plaintiffs costs and expenses, including reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.

g) Awarding such other relief as the Court deems appropriate to afford Plaintiffs full relief.

Dated: February 28, 2018

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**PLAINTIFFS' BRIEF IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT**

I. Concise statement of the issues presented

Plaintiffs are challenging the constitutionality of a newly enacted Michigan law that allows in-state retailers to deliver wine directly to consumers but prohibits out-of-state retailers from doing so. There are two issues.

A. Commerce Clause. Does the Twenty-first Amendment override the normal operation of the Commerce Clause and authorize Michigan to discriminate against interstate commerce when the product is an alcoholic beverages?

B. Privileges and Immunities Clause. Does the Twenty-first Amendment override the normal operation of the Privileges and Immunities Clause and authorize Michigan to deny nonresidents the privilege to do business in the state when the business involves alcoholic beverages?

II. Controlling or most appropriate authority

A. Commerce Clause.

1. *Granholm v. Heald*, 544 U.S. 460 (2005) held that state laws allowing in-state wineries to ship to consumers but prohibiting out-of-state wineries from doing so violated the Commerce Clause and were not saved by the 21st Amendment.

2. *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 2018 WL 988931, 2018 U.S. App. LEXIS 4081 (6th Cir., February 21, 2018) held that a state law imposing a two-year residency requirement for obtaining a wine retailer license violated the Commerce Clause and was not saved by the Twenty-first Amendment.

3. *Siesta Village Market, Inc. v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008) struck down a previous version of Michigan's law allowing in-state retailers to ship wine to consumers but prohibiting out-of-state retailers from doing so.

C. Privileges and Immunities Clause. No case has previously considered whether the Privileges and Immunities Clause requires states to allow nonresidents to participate in the liquor business. The closest is *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274 (1985), which held that the Clause applied to the practice of law, also a heavily state-regulated business, and required states to allow nonresidents to engage in the legal profession upon the same terms as its own citizens. One prior Sixth Circuit case contains a general discussion of the Privileges and Immunities Clause. *Alerding v. Ohio High Sch. Athl. Ass'n*, 779 F.2d 315 (6th Cir. 1985).

III. Background

In 2005, the Supreme Court decided *Granholm v. Heald*, 544 U.S. 460 (2005). It struck down state laws that had allowed in-state wineries to ship directly to consumers but prohibited out-of-state wineries from doing so. It held that the Commerce Clause applied to alcoholic beverage laws, prohibited states from discriminating against interstate commerce, and was not nullified by the Twenty-first Amendment.

In 2008, this Court applied *Granholm v. Heald* to a related Michigan law that allowed in-state retailers to ship wine to consumers but prohibited out-of-state retailers from doing so. It declared the law unconstitutional. *Siesta Village Market, Inc. v. Granholm*, 596 F. Supp. 2d 1035, 1038-39 (E.D. Mich. 2008). Michigan responded by repealing the statute authorizing in-state retailers to ship wine, which eliminated the disparate treatment and mooted the case, which was then on appeal. *See* Case No. 2:06-cv-13041, Doc. Nos. 66, 69 (E.D. Mich.).

From 2009-2017, Michigan law treated in-state and out-of-state wine retailers equally. It prohibited all of them from shipping wine by common carrier, but allowed all of them to deliver wine using their own vehicles. Mich. Comp. L. § 436.1203(2), (11) (eff. 2009-2017).

On January 5, 2017, Michigan enacted a new version of the old discriminatory law on retailer shipping that had been struck down in *Siesta Village Market, Inc. v.*

Granholm. It once again gave in-state retailers the right to ship wine directly to consumers using common carriers or third-party facilitators, but prohibited out-of-state retailers from doing so. Mich. Comp. L. § 436.1203(3), (15). It allowed in-state retailers to continue to deliver wine using their own vehicles, Mich. Comp. L. § 436.1203(12), but took that privilege away from out-of-state retailers. Mich. Comp. L. § 436.1203(1-2). See 2016 Mich. Legis. Serv. P.A. 520 (S.B. 1088) (West 2017). The full text of the statute is set out as Exhibit 13.

On January 20, 2017, an Indiana corporation that sells wine, an individual Indiana wine merchant, and three Michigan consumers filed this suit challenging the constitutionality of the new law.¹ They sued state officials for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. On April 6, 2017, the Michigan Beer & Wine Wholesalers Association intervened as a defendant. Doc. 13.

IV. Statement of Facts

A. Lebamoff Enterprises, Inc., is an Indiana corporation which operates fifteen retail liquor stores in Fort Wayne under the name Cap n' Cork. Exhib. 2, Doust First Aff. ¶ 1. It is approximately 50 miles from the Michigan border and 65 miles from the city of Coldwater. *Id.* at ¶ 4. Many people from southern Michigan come to Fort Wayne because it is the closest regional health center, shop at Cap n' Cork stores while in the city, and have requested that Lebamoff ship wine to their

¹ An amended complaint was filed February 6, 2017. Doc. No. 5.

residences in Michigan. *Id.* at ¶¶ 2, 5. Lebamoff carries a larger inventory than what is available in Coldwater and other towns in southern Michigan. Exhib. 3, Doust Depo. at 29-32. Lebamoff has also received telephone requests to ship wine to Michigan, but cannot fulfill them because shipping into Michigan is against the law, so it loses the profit it would have made on such sales. Exhib. 2, Doust First Aff. ¶¶ 2-3. Lebamoff has its own delivery vehicles and trained employees who deliver wine throughout Indiana, and has used the specialty wine shipping services of FedEx and UPS, so it has the ability to safely deliver wine to adult residents of southern Michigan. *Id.* at ¶¶ 4, 6, 7. It would obtain a license, collect taxes and comply with Michigan regulations if allowed to ship to that state. *Id.* at ¶ 8.

B. Joseph Doust is one of the co-owners of Lebamoff Enterprises and a professional wine merchant. He advises customers, helps them select and obtain wines, including older vintages and other hard-to-find wines. He delivers wine to them and assists them in making arrangements for beverage service at special occasions like weddings. Exhib. 4, Doust Second Aff. ¶¶ 1-2; Exhib. 3, Doust Depo. at 19-20, 29-32. He has hundreds of steady customers who rely on him, some of whom have moved to Michigan where he can no longer send wine to them. He is also unable to provide service to potential new customers from Michigan because he cannot deliver or ship wine to them. He loses income when he loses sales. Exhib. 4, Doust Second Aff. ¶¶ 3, 5. He would obtain a Michigan

license if one were available that allowed him to ship or deliver into Michigan, and would collect and remit taxes. He will not ship wine into Michigan illegally because he could be fined or have the wine confiscated. *Id.* at ¶ 4.

C. Richard Donovan, Jack Stride and Jack Schulz are Michigan wine consumers who want to be able to order wine from out-of-state retailers for different reasons. Mr. Donovan lives in Fennville, MI, population approximately 1500. The nearest adequate wine store is about 50 miles away in Grand Rapids, and the nearest store with a broad selection of wine is 150 miles away in Ann Arbor or Chicago. He wants to have wine delivered to avoid the expense and inconvenience of traveling to those cities. Exhib. 5, Donovan Aff. ¶¶ 1-3. Mr. Stride and Mr. Schulz are young lawyers from Detroit who cannot afford the time to search local stores for the wine they want. They use the Internet and home delivery for buying most of their goods, find it convenient, and want to be able to acquire wine the same way. Exhib. 6, Stride Aff. ¶¶ 1, 3-4; Exhib.7, Schulz Aff. ¶¶ 1, 3, 8. Mr. Schulz has looked especially for good Greek wine, because he is engaged to a woman of Greek heritage from a large family, and wants to serve it to them when they visit Detroit. He has been able to find only a small selection of inexpensive Greek wines locally, but has seen better quality Greek wines at out-of-state and online retailers. Exhib. 7, Schulz Aff. ¶¶ 4-7.

D. Each of the consumer plaintiffs has experienced the same harm: Trying to

buy a wine they wanted from an online retailer, but being unable to complete the transaction because the retailer would not ship to Michigan. They ended up having to expend additional time to try to find the wine locally, being unable to do so, and substituting a less desirable wine. Exhib. 5, Donovan Aff. ¶¶ 4, 6, 7; Exhib. 6, Stride Aff. ¶¶ 5-7; Exhib. 7, Schulz Aff. ¶ 10.

E. Russell Bridenbaugh, a wine expert with 35 years' experience, reports that there are approximately 200,000 different wines for sale in the U.S. but that brick-and-mortar retail stores carry only a small percentage of them, from 300 labels at a small shop or grocery store to 2500- 5000 wines at one of the major wine stores in a metropolitan area. Exhib. 8, Bridenbaugh Decl. ¶¶ 4-5. Popular, highly-rated and older vintage wines are especially hard to find at local stores, *id* at ¶ 6, but can often be found at one of the big Internet retailers, most of whom are located in California, New York, New Jersey and Florida. *Id.* at ¶ 7. As an example, he conducted a search for eight wines that had previously been available at a Michigan retailer but were sold out, to simulate the experience of a consumer who had enjoyed a particular wine but found it was out of stock when he went back to buy more. Mr. Bridenbaugh found that none of the eight was available from any major Michigan retailer and none could be ordered directly from the winery, but all were still available at Internet retailers located in other states. *Id.* at ¶¶ 8-11.

F. Tom Wark, Executive Director of the National Association of Wine

Retailers, is an expert in the wine retailing business. He reviewed documents from the Michigan Liquor Control Commission and found that Michigan's consumers have access to a only about 10% of the wines available for sale in the country. From 2012-16, the federal government approved 511,437 wines for sale in the U.S., Exhib. 9, Wark Report at 2, but during the same time period, Michigan approved only 44,233 wines for sale in Michigan. Ex. 10, List of LCC Approved Wine.² Many of the wines not approved by Michigan are available from out-of-state retailers, but Michigan has closed the border and distorted the marketplace. Exhib. 8, Wark Report at 3-4. This results in higher prices and fewer choices to consumers and economic protection for Michigan wholesalers and retailers. *Id.* at 4; Exhib. 11, FTC Report at 3-4. Protecting Michigan retailers against out-of-state competition was an express goal of the new law (S.B. 1088). At the December 8, 2016 hearing in the House Commerce and Trade Committee, the bill's sponsor, Sen. MacGregor, explained that Michigan retailers were at a "competitive disadvantage with out of state retailers... So, this is a bill to help out our local businesses to be more competitive in the marketplace." No one testified that a goal of S.B. 1088 was to promote any of the goals of the 21st Amendment, such as temperance, an orderly marketplace, or tax collection. Exhib. 9, Wark Report at 4.

² The full spreadsheet supplied by the Liquor Control Commission was 661 pages; only the first and last are attached showing the cumulative numbers.

V. Jurisdiction and standard of review

A. This Court has federal-question jurisdiction under 28 U.S.C. § 1331.

B. Summary judgment is appropriate when the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. FED.R.CIV.P. 56(A). The burden then shifts to the non-moving party to prove with concrete evidence that there is a genuine issue for trial.

American Beverage Ass'n v. Snyder, 735 F.3d 362, 369 (6th Cir. 2013). A court must view all the facts and the inferences in the light most favorable to the nonmoving party. FED.R.CIV.P. 56(A).

VI. ARGUMENT

A. Commerce Clause violation

The Commerce Clause gives Congress the power to regulate commerce among the several States. U.S. Const., art. I, § 8, cl. 3. It has long been understood that the Clause also has a negative aspect that denies the states the power to discriminate against the flow of goods moving in interstate commerce, *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994); *Huish Detergents, Inc. v. Warren Cnty., Ky.*, 214 F.3d 707, 712 (6th Cir.2000). The dormant Commerce Clause is driven by concerns about economic protectionism—i.e., regulatory measures that benefit in-state economic interests by burdening or banning out-of-state competitors. *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008).

Protectionism is forbidden in all fields of commerce, including the sale of alcoholic beverages. *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

The Sixth Circuit has adopted a two-step analysis in Commerce Clause cases, summarized in *American Beverage Ass'n v. Snyder*, 735 F.3d at 369-70. First, a court determines what level of scrutiny is required. If a law discriminates against interstate commerce on its face, purposefully, or in practical effect, courts apply strict scrutiny, and such laws are usually struck down without further inquiry. *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. at 578–79. If a law is not discriminatory, courts use the lower-scrutiny *Pike* balancing test, under which laws burdening interstate commerce are usually upheld unless the burden is clearly excessive in relation to the local benefit.³ This case involves a discriminatory law subject to strict scrutiny.

Once a court determines that a law is discriminatory, the burden shifts to the State to prove that the difference in treatment of in-state and out-of-state entities advances a legitimate local purpose that cannot adequately be served by less discriminatory alternatives. The standards for such justification are exacting and require concrete record evidence clearly proving that alternatives will not work. *Granholm v. Heald*, 466 U.S. at 492-93. Given that Michigan already allows other kinds of direct wine shipments and its purported justifications for prohibiting them

³ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

were rejected in *Granholm, id.*, and *Siesta Village Mkt. v. Granholm*, 596 F. Supp. 2d at 1042-44, it is hard to imagine the State will be able to meet this burden.

1. The Michigan Liquor Control Code discriminates against out-of-state retailers by allowing only in-state retailers to ship wine to consumers

This Court in *Siesta Village Market* found that the prior version of Michigan's retail shipping law was discriminatory. 596 F. Supp. 2d at 1040. The current version is virtually indistinguishable. A Michigan retailer may deliver wine using its own vehicles, a third-party facilitator, or a common carrier. Mich. Comp. L. § 436.1203(3), (12), (15). A retailer located outside the state may not. Mich. Comp. L. § 436.1203(1)-(3). The State concedes this. Answer ¶¶ 13-18, Doc. 11.

This discrimination has an economic impact that benefits in-state interests by shielding them from interstate competition, and harms out-of-state retailers and Michigan consumers. In-state retailers are given exclusive rights to sell over the Internet. Consumers who shop online out of preference or necessity are limited to using the few online wine retailers located in Michigan. Statement of Facts ¶ C. Those retailers do not carry anywhere near a majority of wines for sale in the U.S., so consumers searching for rare, out-of-stock, hard-to-find or older wines are out of luck, even though the wine may be offered for sale at a dozen out-of-state retailers. Statement of Facts ¶¶ D, E. When wines are unavailable because interstate shipping is banned, consumers switch their purchases to in-state retailers

who benefit economically. Statement of Facts ¶¶ C, D, F. The ban on direct shipping protects in-state wholesalers and retailers from competition which causes higher prices and lower selection. Statement of Fact ¶ F. Out-of-state retailers like Lebamoff Enterprises are harmed because they lose sales. Statement of Facts ¶ A.

The discrimination is also purposeful. After this Court struck down the previous version of this law in 2008, Michigan heeded the Court’s admonition that it must treat in-state and out-of-state retailers alike. It prohibited everyone from shipping by common carrier, and allowed everyone to deliver wine in their own vehicles. See Mich. Comp. L. § 436.1203(11) (eff. 2009-2017).⁴ Then in 2017, the State deliberately changed the law to make it discriminatory, by adding more shipping privileges for in-state retailers, and taking away delivery privileges from out-of-state retailers. The legislature was fully aware of the *Siesta Village* decision and fully aware the new law was discriminatory, see Exhib. 1, Tanford Decl. ¶ 11, and Exhib. 12, Letter to Legis., but it passed the bill anyway in order to protect in-state economic interests. Statement of Fact ¶ F.

A statute that is facially and purposefully discriminatory is usually *per se* invalid. *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. at 578–79. In

⁴ MCL 1203 (11) provided: “A retailer that holds a specially designated merchant license in this state [or] an out-of-state retailer that holds its state’s substantial equivalent license... may deliver beer and wine to the home or other designated location of a consumer in this state...”

Granholm v. Heald, the Court said:

Time and again, the Supreme Court has held that ... 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.

544 U.S. at 472. It does not matter that the statute is regulating wine instead of soft drinks. The Twenty-first Amendment “does not allow States to regulate the direct shipment of wine on terms that discriminate.” 544 U.S. at 476. Nor does it matter that the statute is regulating shipments by retailers rather than by wineries, because all “state regulation of alcohol is limited by the nondiscrimination principle of the *Commerce Clause*.” 544 U.S. at 487. *See Byrd v. Tenn. Wine & Spirits Ass’n*, 2018 WL 988931, 2018 U.S. App. LEXIS 4081 (6th Cir., February 21, 2018) (residency rule for retail licenses violated the Commerce Clause and was not saved by the 21st Amendment).

2. Michigan has numerous nondiscriminatory alternatives it already uses to regulate other out-of-state businesses

A discriminatory law is invalid unless the State can prove that no reasonable non-discriminatory alternative exists that would adequately advance its regulatory interests. The burden of proof is “exacting,” *Granholm v. Heald*, 466 U.S. at 493, and requires an extensive factual record clearly demonstrating the absence of workable alternatives. *Maine v. Taylor*, 477 U.S. 131, 140-43 (1986). The State cannot possibly meet this burden because it already employs a variety of non-

discriminatory alternatives that allow other out-of-state businesses to participate in its regulatory system. It allows out-of-state wineries to sell and ship wine directly to consumers if they obtain a direct seller permit. Mich. Comp. L. § 436.1203(4). It allows out-of-state microbrewers to sell and deliver beer directly to consumers if they have a permit from a sister state. Mich. Comp. L. § 436.1203(12). It issues licenses to nonresidents to perform other jobs in the liquor industry, such as suppliers, Mich. Admin. Code R. 436.1705, direct shippers, Mich. Comp. L. § 436.1203(4), and third-party facilitators. Mich. Comp. L. § 436.1203(15), (17). The Commission has discretion to issue a special permit to ship wine into the state under any circumstance it sees fit. Mich. Comp. L. § 436.1901(4).

Michigan also already has procedures in place for regulating Internet sales. It allows retailers located in the state to take Internet orders, verify age online, and deliver to consumers using a common carrier or third-party service without ever seeing the purchaser face to face. Mich. Comp. L. § 436.1203(3). It authorizes common carriers to deliver to consumers if they verify age upon delivery. Mich. Comp. L. § 436.1203(5). It can require a bond to assure payment of taxes. Mich. Comp. L. § 436.1801. It can obtain and test samples from out-of-state shippers. Mich. Admin. Code R. 436.1728. It can condition participation on obtaining a Michigan license, and can revoke that license if the licensee breaks the rules. Mich. Comp. L. § 436.1903. Surely some combination of these existing enforcement

mechanisms would adequately regulate direct sales by retailers. Indeed, for almost ten years, Michigan allowed just that -- deliveries of wine to Michigan residents by out-of-state retailers. Mich. Comp. L. § 436.1203(11) (repealed 2017).

3. The Twenty-first Amendment is not a defense

Although the Twenty-first Amendment gives states broad discretion over how to structure their alcohol distribution systems, it is not a defense to a charge of discrimination against nonresidents. In *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 276, the Supreme Court held that the Amendment did not empower States to favor local liquor interests by erecting barriers to competition. 468 U.S. at 276. In *Granholm*, the Court held that “state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause,” and that “*Bacchus* forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny,” 544 U.S. at 487-88. It cited with approval Justice Scalia’s concurrence in *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989), that a liquor law's discriminatory character eliminates whatever immunity might be afforded by the Amendment.

Cases from this circuit concur. The 21st Amendment did not displace the nondiscrimination rule, *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 431, nor give States the authority to discriminate against out-of-state goods. *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008). Most recently in *Byrd v. Tenn. Wine*

& Spirits Retailers Ass’n, the court said that the Amendment could not save Tennessee’s residency rule for retail licenses, because the law regulated *who* can engage in economic activity rather than *how* alcoholic beverages could be sold.

The Twenty-first Amendment gives a state the power to oversee the alcoholic-beverage business, but it does not give the state the power to dictate where individuals live, because a state’s alcoholic-beverage laws “cannot deprive citizens of their right to have access to the markets of other States on equal terms.”

2018 WL 988931 at *10, 2018 U.S. App. LEXIS 4081 at *24-25 (citing *Granholm v. Heald*, 544 U.S. at 473). *See also*. The 21st Amendment gives a state freedom to decide whether to allow consumers to buy wine over the Internet and have it shipped, but once it authorizes Internet sales, it must operate that market in a nondiscriminatory way that allows equal participation by out-of-state sellers.

Two opinions in other circuits have upheld bans on wine shipping by out-of-state retailers, but neither involved a discriminatory law that gave in-state retailers the exclusive right to ship.⁵ One of them -- *Arnold’s Wines v. Boyle*, 571 F.3d 185, 190-91 (2d Cir. 2009) -- sharply criticizes *Granholm* as “judicial activism,” and says in dicta that it would have upheld the ban on shipping by out-of-state retailers even if it had been discriminatory because all laws regulating retailers should be totally immune from challenge under the Commerce Clause. This extreme position

⁵ New York only allowed local retailers to deliver wine in their own vehicles, *Arnold’s Wines*, 571 F.3d at 188, and Texas only allowed them to deliver within their immediate area. *Wine Country Gift Baskets.com*, 612 F.3d at 812.

has been rejected by this circuit. *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 2018 WL 988931 at *10, 2018 U.S. App. LEXIS 4081 at *24-25. The second opinion -- *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 819 (5th Cir. 2010) -- also criticizes Granholm as going too far, and suggests that some retailer laws may be immune from scrutiny. This Circuit has interpreted *Wine Country* as being “in line with the Supreme Court’s reasoning in Granholm -- the Twenty-first Amendment does not validate a state’s *discriminatory* laws.” *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 2018 WL 988931 at *10, 2018 U.S. App. LEXIS 4081 at *24-25, n.3. The Twenty-first Amendment “gives a state the power to oversee the alcoholic-beverage business, but it does not give a state the power to dictate where individuals live, because a state’s alcoholic-beverage laws ‘cannot deprive citizens of their right to have access to the markets of other States on equal terms.’” 2018 WL 988931 at *10, 2018 U.S. App. LEXIS 4081 at *24-25 (quoting *Granholm*).

B. The Privileges and Immunities Clause violation

The Privileges and Immunities Clause provides that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const., art. IV., § 2, cl. 1.⁶ It places nonresidents upon the same footing as residents insofar as the advantages resulting from state citizenship are concerned.

⁶ The 14th Amendment contains a confusingly labeled Privileges or Immunities Clause: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. Const. amend. XIV, § 1.

McBurney v. Young, 569 U.S. 221, 226-27 (2013). The Clause is violated when -- as in the present case -- a state law treats residents and nonresidents differently and “advantage[s] in-state workers and commercial interests at the expense of their out-of-state competitors.” *McBurney v. Young*, 569 U.S. at 228.

This does not mean that a state must always apply all its laws equally to nonresidents. The Supreme Court has long held that the Clause only protects those privileges that are “fundamental.” *McBurney v. Young*, 569 U.S. at 226. However, the Court also has repeatedly found that the opportunity to pursue one’s livelihood qualifies as fundamental, so a state must allow nonresidents to engage in their occupations in the state on terms of substantial equality with its own citizens. *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280 (1985). Engaging in an occupation is fundamental because jobs are vital to the national economy, whether a person is practicing law, *id.* at 280-81, working on the Alaska pipeline, *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978), fishing for shrimp, *Toomer v. Witsell*, 334 U.S. 385, 398-99 (1948), or selling goods by mail-order. *Ward v. State*, 79 U.S. 418, 424-25 (1870). *See also Alerding v. Ohio High Sch. Athl. Ass’n*, 779 F.2d 315, 317 (6th Cir. 1985) (fundamental privileges include the opportunity to pursue a livelihood). Indeed, counsel has been unable to find a single federal case in which any bona fide occupation was found not fundamental.

The fact that the wine business is heavily regulated and that a license is

required to sell wine at retail does not remove that occupation from the protection of the Privileges and Immunities Clause. To the contrary, it requires that the license must be equally available to nonresidents. *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 280-81 (law license); *O'Reilly v. Bd. of App. of Montgomery Co., Md.*, 942 F.2d 281, 284-85 (4th Cir. 1991) (taxi license). The Clause guarantees nonresidents equal treatment, so at a minimum, a state must allow them to apply for the same licenses and engage in the same licensed activities as state residents.

1. Michigan denies nonresidents the opportunity to engage in the retail wine business upon the same terms as its own citizens.

Plaintiffs' evidence shows that the way Michigan regulates retail wine sales, deliveries and shipments discriminates against nonresidents and advantages in-state workers and local merchants. Much of this is obvious from the face of the law itself. A state resident may obtain a license to sell wine at retail called a Specially Designated Merchant (SDM) license. Mich. Comp. L. § 436.1537(1)(f). Holders of those licenses may ship wine directly to consumers by common carrier, Mich. Comp. L. § 436.1203(3), deliver wine to homes and businesses in their own vehicles, Mich. Comp. L. § 436.1203(12), and use third-party facilitators to take wine orders from and make deliveries to consumers. Mich. Comp. L. § 436.1203(13), (15). Nonresidents may not sell, import or deliver wine from a point outside the state directly to a Michigan consumer. Mich. Comp. L. §§ 436.1201(1),

436.1203(1); State's Answer ¶¶ 15-16, Doc. 11. Although the Code is vague about whether nonresidents could obtain SDM licenses at all, obtaining the license would do them no good. As this Court noted in *Siesta Village Market*, 596 F. Supp. 2d at 1039, to be allowed to ship or deliver wine to consumers, the SDM license is not enough. The nonresident would have to establish premises in Michigan, Mich. Comp. L. §§ 436.1203(3), 436.1203(15), and the Supreme Court has held that a state cannot require a person to establish premises in the licensing state. *Granholm v. Heald*, 544 U.S. at 474-75; *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 279-83.

Joseph Doust is a professional wine merchant who lives in Indiana 50 miles from the Michigan border. He has potential old and new customers in Michigan. He believes he can be successful despite being located outside Michigan because of the individual attention he gives his customers and his access to many hard-to-find wines, Statement of Facts, ¶ B, especially now that Michigan has opened the market to allow Internet wine sales. Doust wants the opportunity to compete for business in Michigan upon the same terms as residents. He will get a license, pay taxes, file reports and comply with other Michigan regulations. Statement of Facts ¶ B. The only thing preventing him is Michigan's law limiting retail shipping licenses and privileges to residents. The wine business may be heavily regulated, require licenses and be connected to important state interests, but that does not exempt it from the Privileges and Immunities Clause. The practice of law is

similarly heavily regulated, requires licenses and is connected to important state interests, but the Clause applies to it. *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 279-83.

2. The state may protect its interests by less restrictive means.

The Privileges and Immunities Clause is not absolute. Like the Commerce Clause, it does not necessarily preclude discrimination against nonresidents if the state proves there is an important reason for the different treatment and no less restrictive means is available that would adequately protect its interests. *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 284.

The State cannot possibly meet this burden, because it already employs a variety of less restrictive ways to regulate nonresidents but allow them to participate in the wine business. They are set out in the Commerce Clause section of the brief at pages 14-15. Most obviously, Michigan allows nonresidents who operate wineries to ship wine directly to consumers if they obtain a direct shipper permit. Mich. Comp. L. § 436.1203(4). It could make the permit available to nonresidents who operate wine retail stores, impose the same requirements that they verify age online and at time of delivery, *id.* § 436.1203(3), (5), and revoke the license of anyone who breaks the rules, just as it does for citizens. *Id.* § 436.1903.

There is no logical reason that a bottle of wine shipped from a nonresident retailer is more of a threat to the State's regulatory interests than the same bottle shipped from a resident retailer or from a nonresident winery owner, and therefore

must be banned instead of regulated. Surely some combination of the regulations imposed on nonresident winery owners and resident retailers could be imposed on Mr. Doust and allow him to engage in the wine retail business in Michigan under the supervision of the Liquor Control Commission.

3. The Twenty-first Amendment does not exempt state liquor laws from the Privileges and Immunities Clause

No prior case in this circuit or any other has considered whether the 21st Amendment overrides the normal operation of the Privileges and Immunities Clause and gives states special authority to discriminate against nonresidents who wish to engage in the liquor business, so this is a matter of first impression. However, two lines of closely related cases can provide guidance. Both lead to the same conclusion: that the Twenty-first Amendment does not exempt state alcoholic beverage laws from the requirements of the Privileges and Immunities Clause.

The first are the Commerce Clause/Twenty-first Amendment cases discussed above at pages 15-17, which hold that the Amendment does not give states the authority to pass nonuniform laws that discriminate against out-of-state wine shippers. *Granholm v. Heald*, 544 U.S. at 484-87; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 276; *Healy v. Beer Institute*, 491 U.S. at 341-42, 344. The Supreme Court has noted in the past that the Privileges and Immunities and Commerce Clauses arose from the same principle that the Constitution creates a single

national economic union, *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 279-80, and there is a mutually reinforcing relationship between them. *Hicklin v. Orbeck*, 437 U.S. at 531. Therefore, since the Twenty-first Amendment does not authorize states to discriminate against interstate commerce when the product is an alcoholic beverage, it also does not authorize states to discriminate against nonresidents engaged in the liquor business.

The second line of cases are those balancing the states' Twenty-first Amendment authority against constitutional provisions other than the Commerce Clause. The Supreme Court has held repeatedly that the Amendment "places no limit whatsoever" on any constitutional provisions other than the Commerce Clause, and does not permit states to enact laws that would violate other constitutional provisions. *44 Liquormart v. R.I.*, 517 U.S. 484, 515-16 (1996) (First Amendment challenge to advertising ban); *Craig v. Boren*, 429 U.S. 190, 206 (1976) (Equal Protection challenge to higher drinking age for men); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (Due Process challenge to posting habitual drunkard notice). This, too, suggests that the Twenty-first Amendment cannot be a defense to a violation of the Privileges and Immunities Clause.

VII. Remedy

In fashioning a remedy, this Court's job will be to eliminate the discrimination so that out-of-state wine retailers are treated the same as Michigan retailers. In

theory, there are two ways to achieve equality -- extend rights to everyone or deny rights to everyone. Thus, this Court could level the economic playing field by striking down the law harming out-of-state retailers, or by striking down the provisions benefitting in-state retailers.

A district judge has broad discretion in choosing the remedy and fashioning the terms of an injunction, *U.S. v. Miami Univ.*, 294 F.3d 797, 806 (6th Cir. 2002), including in constitutional cases. *Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005). It is, however, bound to follow whatever legal guidelines are set down by the courts of appeals. *U.S. v. Szoka*, 260 F.3d 516, 521 (6th Cir. 2001).

The Supreme Court has said that when faced with an unconstitutional law, the proper remedy is to sever the problematic portions of a statute while leaving the remainder intact. *Ayotte v. Planned Parenthood of No. New Eng.*, 546 U.S. 320, 328-30 (2006). The “problematic portions” in this case are those that offend the Constitution by interfering with interstate commerce and denying nonresidents the same privileges Michigan gives its own citizens. This Court should therefore enjoin Defendants from enforcing the law that excludes nonresidents and bans their wine shipments, and require the Defendants to allow out-of-state retailers to compete for wine sales. This would be consistent with the general principle expressed in *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979), that when a law has been unconstitutionally giving benefits to some and denying them to others, the

presumptively correct remedy is extension rather than nullification. It would also be consistent with *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 435, in which the Sixth Circuit held to the same effect, that when a state had been allowing resident winery owners to ship directly to consumers but improperly denying that privilege to nonresidents, the proper remedy was to extend the privilege to all.

VIII. CONCLUSION

Ten years ago, this Court declared a similar Michigan law unconstitutional in *Siesta Village Market v. Granholm*. The result this time should be the same. The law violates the Commerce and Privileges and Immunities Clauses.

Respectfully submitted:
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CERTIFICATE OF SERVICE

I certify that on February 28, 2018, I electronically filed the foregoing motion and memorandum with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys for Defendants and Intervening Defendant.

s/ James A. Tanford
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