

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LEBAMOFF ENTERPRISES, INC.,)	
JOSEPH DOUST)	
JACK STRIDE)	
JACK SCHULZ)	
and)	2:17-cv-10191-AJT-SDD
RICHARD DONOVAN)	
)	Hon. Arthur J. Tarnow
Plaintiffs,)	
)	
vs.)	
)	
RICK SNYDER, Governor of Michigan,)	
WILLIAM SCHUETTE, Attorney General of Michigan,)	
AND ANDREW J. DELONEY, Chairperson of the)	
Michigan Liquor Control Commission)	
)	
Defendants,)	
)	
and)	
)	
MICHIGAN BEER & WINE WHOLESALERS)	
ASSOCIATION,)	
)	
Intervener.)	

**INTERVENING DEFENDANT’S COMBINED MOTION FOR SUMMARY
JUDGMENT PURSUANT TO FED. R. CIV. P. 56 AND RESPONSE TO
PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

Intervening defendant MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION, by and through its attorneys, Willingham & Coté, P.C., moves this Honorable Court, in accordance with the provisions of Rule 56(c) of the

Federal Rules of Civil Procedure, to grant Summary Judgment in its favor and to deny Plaintiffs' Motion for Summary Judgment for the following reasons:

1. Plaintiffs' Commerce Clause challenge fails under *Granholm v Heald*, 544 U.S. 460 (2005), which affirmed that Michigan's three-tier alcoholic beverage distribution system is "unquestionably legitimate" under the Twenty-first Amendment and under controlling Sixth Circuit authority, *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608,623, n. 8 (6th Cir. 2018), which struck down a Tennessee alcoholic beverage retailer residency requirement while noting that requiring a retailer's physical presence in the state is an inherent, and therefore constitutionally permissible, aspect of a three-tier system.

Plaintiffs' Privileges and Immunities Clause challenge fails because Lebamoff, as a corporation, is not entitled to Privileges and Immunities protection. Doust's claim fails because Michigan does not deny him the right to sell wine upon the same terms as Michigan citizens and selling wine is not a right protected by the Clause.

2. A more detailed analysis of the relevant facts and law are set forth in the accompanying brief.

WHEREFORE, Intervening defendant .MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION, by and through its attorneys, Willingham & Coté, P.C., moves this Honorable Court, in accordance with the provisions of Rule

56(c) of the Federal Rules of Civil Procedure, to grant Summary Judgment in its favor, deny Plaintiffs' Motion for Summary Judgment, dismiss Plaintiffs' Complaint with prejudice, and grant such other relief as is equitable and just.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.
Attorneys for MB&WWA

Dated: April 2, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2018, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.
Attorneys for MB&WWA

Dated: April 2, 2018

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**BRIF IN SUPPORT OF INTERVENING DEFENDANT’S COMBINED
MOTION FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P.
56 AND RESPONSE TO PLAINTIFFS’ MOTION FOR SUMMARY
JUDGMENT**

STATEMENT OF THE ISSUES PRESENTED

I. Michigan requires that licensed retailers have a physical location in Michigan in order to make intrastate shipments to Michigan consumers. Is that requirement a permissible exercise of its Twenty-first Amendment authority so as to withstand Plaintiffs' Commerce Clause Challenge?

II. Does Plaintiffs' Privileges and Immunities challenge fail as a matter of law?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

United States Constitution, Twenty-first Amendment

Granholm v. Heald, 544 U.S. 460 (2005)

North Dakota v. United States, 495 U.S. 423 (1990)

Crowley v. Christensen, 137 U.S. 86 (1890)

Byrd v. Tennessee Wine & Spirits Retailers A'ssn, 883 F.3d 608 (6th Cir. 2018)

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Exhibit A: Plaintiff Joe Doust's Answers to Defendant's First Set of Interrogatories and Requests for Production of Documents

Exhibit B: Affidavit of Francis James Kaminski.

Exhibit C: Michigan Liquor Control Commission, Retailer License & Permit Application

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Informed by Pre-Prohibition problems with alcohol abuse and National Prohibition's failure to solve those problems, Michigan's Legislature has developed a complex regulatory scheme that seeks to ensure that a potentially dangerous product is available to persons over 21 years of age, but not so available (or sold so cheaply) so as to foster overconsumption or make illegal activities (e.g., bootlegging) attractive. What had been an acute problem is now a chronic problem, not eradicated but controlled through effective regulation.

As an exercise of its authority under the Twenty-first Amendment, Michigan has established a three-tier distribution system (comprised of suppliers, in-state wholesalers and in-state retailers) governing the importation and distribution of alcoholic beverages within the state.

Under Michigan's three-tier system in-state retailers are not allowed to import wine into Michigan, but must buy wine from licensed in-state wholesalers and they must comply with extensive regulations. As part of the regulatory system they may sell and deliver wine directly to Michigan consumers.¹

Plaintiffs claim that because physically present in-state licensed retailers may deliver wine to consumers, the dormant Commerce Clause, U.S. Const., art. I,

¹ Mich. Comp. L. § 436.1203. The challenged law was passed in 2017 and changed a statutory scheme which had allowed in-state and out-of-state retailers to ship wine to Michigan consumers but only if using their own employees.

§ 8, cl.3, mandates that out-of-state retailers acting outside Michigan's three-tier system must be allowed to export wine into this state directly to Michigan consumers, without the wine ever passing through the three-tier system.

Plaintiffs are not challenging an *exception* to the three-tier system. Rather, they are challenging the constitutionality of the three-tier system itself.

In the guise of alleging “discrimination,” they seek a ruling that hundreds of thousands of unlicensed out-of-state retailers must be allowed to do what *no retailer* is allowed to do under Michigan law – (1) import wine into Michigan and (2) sell wine which has not passed through its three-tier system to Michigan consumers.

Plaintiffs want to leave Michigan licensed retailers subject to the comprehensive laws and regulations that are part of the three-tier system (designed to protect public health and safety, ensure tax collection and promote orderly markets) but allow Lebamoff and hundreds of thousands of other out-of-state retailers to operate outside of Michigan's regulatory scheme.² Plaintiffs do not seek equal treatment; they seek special treatment.

² There are some 380,000 alcoholic beverage retailers in the United States. Affidavit of Mary Anne Donley, MLCC Enforcement Division Regional Manager (“Donley Affidavit”), Exhibit D to defendants' brief, at ¶ 20.

Plaintiffs' Commerce Clause challenge fails under *Granholm v. Heald*³ which affirmed that Michigan's three-tier alcoholic beverage distribution system is "unquestionably legitimate" under the Twenty-first Amendment⁴ and under controlling Sixth Circuit authority, *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*,⁵ which struck down a Tennessee alcoholic beverage retailer residency requirement while noting that requiring a retailer's physical presence in the state is an inherent, and therefore constitutionally permissible, aspect of a three-tier system.

Plaintiffs' Privileges and Immunities Clause challenge also fails as a matter of law. Lebamoff, as a corporation, is not entitled to Privileges and Immunities protection. Doust's claim fails because Michigan does not deny him the right to sell wine upon the same terms as Michigan citizens and, in any case, selling wine is not a right protected by the Clause.

STATEMENT OF FACTS

Plaintiff Lebamoff Enterprises, Inc. is an Indiana corporation that operates 15 wine retail stores in Fort Wayne, Indiana.⁶ Lebamoff is not a licensed Michigan retailer and does not seek to purchase its wine through a licensed Michigan

³ 544 U.S. 460 (2005).

⁴ *Granholm*, 544 U.S. at 489, quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

⁵ 883 F.3d 608, 622-623, n. 8 (6th Cir. 2018).

⁶ Doust Affidavit, Exhibit 2 to plaintiffs' brief, at ¶1.

wholesaler or to otherwise operate within Michigan's three-tier system.⁷ Plaintiff Joseph Doust is a co-owner of Lebamoff and a wine consultant who resides in Indiana. The remaining plaintiffs are residents of Michigan who allege they would purchase wine from out-of-state retailers and have it directly shipped to their residences if Michigan law allowed them to do so.⁸

Under Michigan law wine "suppliers" (which does not include in-state retailers) can import wine into Michigan.⁹ Yet, Lebamoff, who is neither a licensed supplier nor a licensed retailer under Michigan law, insists the Commerce Clause gives it the right to export wine into Michigan and to deliver that wine directly to Michigan consumers, all outside of the three-tier system.

Plaintiffs assert that if allowed to sell wine into Michigan directly to Michigan consumers, Lebamoff will "obtain a license, collect taxes and comply

⁷ Lebamoff has been sanctioned by Indiana for violations of Indiana law. See Exhibit A, Plaintiff Joe Doust's Answers to Defendant First Interrogatories and Requests for Production of Documents, at ¶ 1 and Attachment A. Lebamoff is also a plaintiff in a suit similar to this one, which was decided against Lebamoff at the trial level and is now pending in the Seventh Circuit. See *Lebamoff Enterprises, Inc. v. Rauner*, No. 16 C 8607, slip op., 2017 WL 2486084 (N.D. Ill. June 8, 2017); *Lebamoff Enterprises, et al. v. Rauner, et al.*, (7th Cir. Doc. No. 17-2495).

⁸ Am. Comp., at ¶¶ 3-4, 22.

⁹ There is a limited quantity exception for personal importation and an exception for wine imported pursuant to a prior order of the Michigan Liquor Control Commission so that, for example, individuals who travel outside of Michigan can bring in a limited quantity of alcoholic beverages. Mich. Comp. L. § 436.1203(9).

with Michigan regulations”.¹⁰ But that allegation does not bear scrutiny. Lebamoff does not assert it will comply with Michigan’s three-tier system, nor could it, since licensed retailers in Michigan purchase wine from licensed Michigan wholesalers, something Lebamoff, as an Indiana retailer, cannot do and does not seek to do.¹¹ As discussed below there are numerous other Michigan regulations with which Lebamoff would not (or could not) comply.

The affidavits filed by defendants and by intervenor defendant describe in detail the Michigan Liquor Control Commission (“MLCC” or the “commission”) activities and the regulations that are part of Michigan’s three-tier system.¹²

Michigan law has strong “anti-tied house” provisions to prevent integration among the three tiers and to ensure that manufacturers and wholesalers do not dominate or hold any impermissible financial interests in a retailer.¹³

Extensive administrative rules address the licensing process and require disclosure of financial information, ownership interests, officers and directors,

¹⁰ Plaintiffs’ brief at ¶ 5.

¹¹ Doust Dep., Exhibit 3 to plaintiffs’ brief, at pp. 8, 20-21.

¹² Please see: Affidavit of Francis James Kaminski, former employee and owner of a licensed Michigan beer and wine wholesaler (“Kaminski Affidavit”), Exhibit B; Affidavit of Tom Hagan, MLCC Director of Enforcement (“Hagan Affidavit”), Exhibit A to defendants’ brief; Donley Affidavit, Exhibit D to defendants’ brief; Affidavit of Pamela Hamilton, MLCC Director of Financial Management Division (“Hamilton Affidavit”), Exhibit E to defendants’ brief; and, Affidavit of Julie A. Wendt, MLCC Director of Executive Services Division (“Wendt Affidavit”), Exhibit B to defendants’ brief.

¹³ Mich. Comp. L. § 436.1603 and Mich. Comp. L. § 436.1605.

criminal history, entity organizational documents, as well as the submission of fingerprints and other information.¹⁴ Michigan does not require that the owners of in-state retailers be residents of Michigan and thus plaintiffs have not cited (and cannot cite) to any such rule or regulation. Indeed, the MLCC's application form for a retailer license requests applicants incorporated in other states to provide a corporate certificate of good standing "from the state where incorporated," demonstrating that out-of-state entities are eligible for the license.¹⁵

Retail licensees are prohibited from selling or furnishing wine or other alcohol beverages to persons under 21 years of age, and are subject to requirements to obtain evidence of age and identity prior to sale.¹⁶

An applicant is subject to rules and restrictions related to the actions of its officers, directors, managers, agents, and employees, which are regularly checked by the commission's enforcement division.¹⁷ Violations of these laws and regulations can subject an applicant or a licensee to denial, suspension and

¹⁴ Mich. Admin. Code, R. 436.1105, R. 436.1109-11, R. 436.1115. See also Mich. Comp. L. § 436.1501, Mich. Comp. L. § 436.1525. Being able to revoke a Michigan retailer's license to sell alcoholic beverages is a powerful deterrent and enforcement tool that would not be nearly as effective with regard to a scofflaw out-of-state retailer, who would continue to be able to do business in the state where it was located.

¹⁵ See Exhibit C which is copy of the MLCC's retailer license application.

¹⁶ Mich. Comp. L. § 436.1905; Mich. Comp. L. § 436.1906(6); Mich. Admin. Code, R. 436.1533(5).

¹⁷ Mich. Admin. Code, R. 436.1011.

revocation of the liquor license.¹⁸ Retailers that lack proper financial responsibility (e.g., insurance) are also subject to revocation of their licenses.¹⁹

All brands of wine (and beer) coming into Michigan must be registered with the state.²⁰ Nowhere does Lebamoff allege that it only sells wines that are registered in Michigan. Michigan prohibits the sale of alcoholic beverages without a label displaying the brand name and type of alcoholic liquor contained therein, among other requirements.²¹

Michigan retail licensees must maintain books and records and make them available for inspection by the MLCC.²² This allows the MLCC to track the distribution of beverage alcohol to ensure compliance with laws and assure that beverage alcohol is not “bootlegged” and being illegally diverted from the three-tier system. The MLCC has the right to inspect the premises of licensees to make sure retailers and wholesalers are complying with the various laws and

¹⁸ Mich. Comp. L. § 436.1903.

¹⁹ Mich. Admin. Code, R. 436.2021.

²⁰ There would be no practical way to confirm whether an alcoholic beverage coming from an Indiana retailer (for example) was registered for sale in Michigan. Indeed, were plaintiffs contention that some brands are not available in Michigan true it would mean those brands were not registered for sale in Michigan (i.e., if a supplier was not selling its products in Michigan it would have no reason to go to the trouble of registering that brand for sale in Michigan), so plaintiffs would abrogate this requirement if they succeed.

²¹ Mich. Comp. L. § 436.2005; Mich. Admin. Code, R. 436.1611.

²² Mich. Admin. Code, R. 436.1007, R. 436.1645.

administrative rules.²³ Retailers are prohibited from warehousing alcohol on unlicensed premises.²⁴ The premises of a retailer upon which an unlawful sale occurs are deemed a public nuisance and subject to abatement, which is a strong deterrent.²⁵

Michigan licensed wholesalers and retailers have responsibility for collecting and remitting state and local taxes and must keep extensive records, which allows the commission to cross check records among the various tiers to ensure compliance.²⁶ Licensees are required to file monthly statements with the commission indicating the total amount paid for alcoholic liquor purchased during the preceding month.²⁷

Michigan's "cash law" does not allow wholesalers to sell, or retailers to buy, wine on credit.²⁸ This ensures retailers are operating a viable business (and thus less likely to skirt the law). It also prevents wholesaler favoritism ("aid and assistance") through the grant of credit, which could be used to induce a retailer to

²³ Mich. Comp. L. § 436.1217; Mich. Admin. Code, R. 436.1007, R. 436.1645.

²⁴ Mich. Comp. L. § 436.1901(1); Mich. Admin. Code, R. 436.1025.

²⁵ Mich. Comp. L. § 600.3801(d). Of course, Michigan could not declare the premises of out-of-state retailers who violate Michigan law a public nuisance under Michigan law, and certainly could not act as expeditiously as it could against a Michigan retailer to remedy violations of Michigan law.

²⁶ Mich. Comp. L. § 436.1301; Mich. Comp. L. § 436.1409; Mich. Admin. Code, R. 436.1007, R. 436.1641, R. 436.1725, R. 436.1727, R.436.1865.

²⁷ Mich. Admin. Code, R. 436.1631, R. 436.1720.

²⁸ Mich. Comp. L. § 436.2013.

only sell the products carried by the wholesaler offering credit terms (thus reducing consumer choice).²⁹

Michigan requires that wholesalers “post and hold” the prices at which they sell wine to retailers for a certain period of time.³⁰ This allows for effective enforcement of the requirement that a wholesaler sell to all its retailers at the same price thus promoting orderly markets.³¹ It allows for a level playing field between retailers since the largest and smallest (and urban and rural) retailers pay the same price for the same wine within the same market area. Likewise, Michigan does not allow quantity discounts from wholesalers to retailers (which could make alcoholic beverages less expensive and thus lead to more consumption).³²

The affidavits filed by defendant and by intervening defendant describe the enforcement activities of the MLCC, which by statute is assisted by Michigan law enforcement officers.³³ The Donley Affidavit and the Hamilton Affidavit describe

²⁹ Indiana does not have a similar cash law requirement and allows retailers to buy on credit from wholesalers. See Doust Dep., Exhibit 3 to plaintiffs’ brief, at pp. 21-22.

³⁰ Mich. Admin. Code, R. 436.1726.

³¹ Michigan has determined that prohibiting quantity discounts (i.e. discounts to purchasers of large quantities of alcoholic beverages) is sound policy because it could lead to lower prices for alcoholic beverages adversely encouraging consumption and because it would disrupt orderly markets (a complex goal that seeks to not have retailers skirt the law remain a viable business.).

³² Mich. Comp. L. § 436.1609a(5); Mich. Admin. Code R. 436.1625(5), 436.1726(4). See also Wendt Affidavit, Exhibit B to defendants’ brief, at ¶ 24.

³³ See Hagan Affidavit, Exhibit B to defendants’ brief, at ¶¶ 23-29, and Mich. Comp. L. § 436.1201(4).

the enforcement and tax collection problems that exist with respect to direct shipment to Michigan consumers by out-of-state wineries, including those licensed as direct shippers and those that are unlicensed.³⁴ There are approximately 9,000 wineries and approximately 380,000 alcohol beverage retailers in the United States.³⁵ The Hagan Affidavit explains that it would not be possible to effectively enforce public health and safety regulations (including laws prohibiting sales to minors) and tax collection laws if retailers across the United States are allowed to export wine into Michigan to be delivered wine to the homes of Michigan consumers outside the three-tier regulatory system.³⁶

Alcoholic beverage retailers are not licensed by the federal government; therefore, there is no federal permit that can be revoked or suspended if a retailer fails to comply with Michigan law. In contrast, wineries are required to have a federal permit and to comply with federal and state laws.³⁷

³⁴ Donley Affidavit, Exhibit D to defendants' brief; Hamilton Affidavit, Exhibit E to defendants' brief.

³⁵ See Donley Affidavit, Exhibit D to defendants' brief, at ¶¶ 13, 20; Wendt Affidavit, Exhibit B to defendants' brief, at ¶ 15.

³⁶ Hagan Affidavit, Exhibit A to defendants' brief, at ¶¶ 30-33.

³⁷ See Federal Alcohol Administration Act of 1933, 27 U.S.C., §§ . 201 *et seq.* (1933). See also Bureau of Alcohol, Tobacco and Firearms ("ATF"), ATF Ruling 2000-1 which can be found at, <https://www.ttb.gov/rulings/2000-1.htm> which confirms the FAA Act's authority does not extend to situations where an out-of-state retailer is making a shipment into the state of the consumer, and that alcohol beverage retailers are not required to obtain basic permits under the FAA Act. The Alcohol and Tobacco Tax and Trade Bureau ("TTB"), a successor agency to

As noted, Michigan law does not allow in-state retailers to import wine into Michigan. That can only be done by a person (e.g., a wine manufacturer or supplier of wine) with the appropriate license (e.g., an out of state seller of wine license or a direct shipper license (available to wineries)).³⁸

STANDARD OF REVIEW

Summary judgment is proper pursuant to Fed. R. Civ. P. 56(c) where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Initially, the moving party must meet the burden of showing the absence of a genuine issue of material fact as to an essential element of the opposing party's case.³⁹ The burden may be met by showing the non-movant, having had sufficient opportunity for discovery, has no sufficient evidence to create a genuine issue of material fact on an essential element of his or her case. In deciding a motion for summary judgment, the factual record presented must be interpreted in a light most favorable to the non-movant.

the ATF, confirms the ATF Ruling 2000-1 remains in effect and reflects the current TTB policy.

³⁸ Mich. Comp. L. § 436.1203(4)(10) and (11).

³⁹ See *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989).

In order for a plaintiff to survive a motion for summary judgment, he or she must come forward with specific facts showing there is a genuine issue for trial.⁴⁰

ARGUMENT

I. PLAINTIFFS' DORMANT COMMERCE CLAUSE CHALLENGE FAILS AS A MATTER OF LAW.

A. The Twenty-first Amendment grants Michigan virtually complete control over how to structure its liquor distribution system.

The dormant Commerce Clause analysis is unique with respect to state laws regulating the importation, distribution and sale of alcohol. This is because alcohol is constitutionally distinct from any other commercial product. Section 2 of the Twenty-first Amendment states:

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.⁴¹

The Twenty-first Amendment protects the states' core interests in "promoting temperance, ensuring orderly market conditions, and raising revenue."⁴²

⁴⁰ *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *B.F. Goodrich Co. v. US Filter Corp.*, 245 F.3d 587, 591-92 (6th Cir. 2001).

⁴¹ U.S. Const. amend. XXI, § 2.

⁴² *North Dakota*, 495 U.S. at 433.

The Twenty-first Amendment “limits the effect of the dormant Commerce Clause on a state’s regulatory power over the delivery or use of intoxicating beverages within its borders.”⁴³ Section 2 gives the states “‘virtually complete control’ over the importation and sale of liquor and the structure of the liquor distribution system.”⁴⁴ And, “[g]iven the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly.”⁴⁵

The Supreme Court has affirmed that three-tier distribution systems are an “‘unquestionably legitimate’” exercise of a State’s authority under the Twenty-first Amendment.⁴⁶

B. Michigan’s requirement that licensed retailers have a physical location in Michigan in order to make intrastate shipments is a permissible exercise of its Twenty-first Amendment authority.

Plaintiffs assert Michigan’s law is discriminatory because Michigan allows licensed retailers located in Michigan to make *intrastate* wine sales by direct shipment,⁴⁷ but does not allow unlicensed retailers *outside* of Michigan to *export into* the state wine which has not passed through Michigan’s three-tier regulatory system and to sell that wine directly to Michigan consumers. Plaintiffs’ assertion

⁴³ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

⁴⁴ *North Dakota*, 495 U.S. at 431 (quoting *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

⁴⁵ *North Dakota*, 495 U.S. at 433.

⁴⁶ *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432).

⁴⁷ Mich. Comp. L. § 436.1203(3).

that Michigan treats in-state economic interests more favorably than out-of-state interests is false. *Intrastate* shipment by licensed retailers is not the logical equivalent of the *exporting* of wine into Michigan by unlicensed out-of-state retailers.

The difference in treatment is not based on a retailer's citizenship or residency in the state. Out-of-state retailers, like Lebamoff, may enter the Michigan market and compete within Michigan's three-tier system, and many have done so.⁴⁸

Michigan residents are not given special treatment vis-a-vis non-residents. For example, a licensee owner incorporated in Michigan with retail stores in both Michigan and Indiana cannot directly ship alcohol to Michigan consumers from its Indiana location (just as Lebamoff can't ship wine to Michigan consumers from its Indiana location) because in doing so it would not be complying with Michigan's three-tier regulatory system. All licensed retailers (no matter their residency) in Michigan have the same rights, privileges and burdens. To effectively regulate,

⁴⁸ Michigan does not require retailers who want to be licensed to be residents of Michigan. In fact, there are numerous out-of-state entities who are licensed retailers in Michigan. See Wendt Affidavit, Exhibit B to defendants' brief, at ¶ 9. The lack of a Michigan residency requirement can be gleaned from the MLCC's Retailer License & Permit Application, a current copy of which is attached as Exhibit C, which contemplates out-of-state applicants by requesting, among other things, certificates of good standing "from the state where incorporated."

Michigan law legitimately requires an *in-state presence* (but not residency) for retailer licensure.

What plaintiffs really are challenging is Michigan's requirement that retailers be physically present in and licensed by the state – which is an inherent component of the three-tier system itself. Because licensed retailers may only sell wine which has passed through Michigan's three-tier system including the wholesaler “funnel” – either over-the-counter or by *intrastate* shipment – their physical presence in the state is inseparable from the operation of the three-tier system.

The Supreme Court in *Granholm* made clear that it was not calling into question the validity of the three-tier system.⁴⁹ Rather, the Court drew a distinction between permissible, evenhanded state regulation and impermissible, “straight forward attempts to discriminate.”⁵⁰ In *Granholm* the Court struck down *exceptions* to the three-tier systems that allowed in-state wineries to ship wine they produced directly to in-state consumers, while prohibiting out-of-state wineries from doing the same. The Court said the Twenty-first Amendment's aim was “to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation and use,” but “[t]he amendment did not

⁴⁹ *Granholm*, 544 U.S. at 488-489. Indeed, the *Granholm* Court noted, without criticism, that as part of its three-tier system, in-state Michigan retailers were allowed to ship wine to Michigan consumers. *Granholm*, 544 U.S. at 469.

⁵⁰ *Granholm*, 544 U.S. at 488-489.

give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods....”⁵¹ Because New York’s and Michigan’s direct-shipment laws created *exceptions* to the states’ three-tier-systems favoring in-state wine producers while out-of-state producers remained subject to the three-tier system, the Court found the laws “involve[d] straightforward attempts to discriminate in favor of local producers,” and thus violated the dormant Commerce Clause.⁵² At the same time, the Court re-affirmed that a state’s law requiring all alcohol sold within its border to pass through a three-tier system is an “unquestionably legitimate” exercise of a state’s authority under the Twenty-first Amendment.⁵³

Granholm’s express approval of the three-tier system can only mean that *Granholm* did not invalidate disparate treatment that is *inherent* in the three-tier system itself.⁵⁴ This essential point of *Granholm* has been recognized by controlling Sixth Circuit authority. Indeed, all post-*Granholm* Circuit Courts of Appeal have reached the same conclusion, including the Second and Fifth Circuits

⁵¹ *Id.* at 484-485.

⁵² *Id.* at 489.

⁵³ *Id.* (quoting *North Dakota*, 495 U.S. at 432).

⁵⁴ See *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 623, n. 8 (6th Cir. 2018) (“[w]hat matters is what type of discrimination is *permissible*.” (quoting in agreement with Sutton, J., concurring in part and dissenting in part)) (italicized emphasis in the original).

in cases involving challenges to state laws which prohibit out-of-state retailers from shipping to consumers although in-state retailers are permitted to do so.⁵⁵

1. Sixth Circuit Authority.

In *Byrd v. Tenn. Wine & Spirits Retailers*⁵⁶ the Sixth Circuit struck down a Tennessee retailer residency requirement while noting that requiring a physical presence in the state is an inherent, and therefore constitutionally permissible, aspect of a three-tier system.

Byrd applied the following analysis:

To determine whether the Twenty-first Amendment immunizes a state's alcoholic beverages law from scrutiny under the dormant Commerce Clause, a court needs to examine "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."⁵⁷

Critically, the Sixth Circuit distinguished *durational residency* requirements from a requirement that a retailer be *physically* located in the state, adopting the reasoning of the Fifth Circuit in *Cooper v. Texas Alcoholic Beverage Comm'n* (*Cooper II*).⁵⁸ See *Byrd*, 883 F.3d at 623, n. 8, citing *Cooper II*, *supra* ("requiring

⁵⁵ *Byrd*; *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2nd Cir. 2009); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010); *Cooper v. Texas Alcoholic Beverage Comm'n* (*Cooper II*), 820 F.3d 730 (5th Cir. 2016).

⁵⁶ 883 F.3d 608 (6th Cir. 2018).

⁵⁷ 883 F.3d at 622 (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275-276 (1984)).

⁵⁸ 820 F.3d 730, 743 (5th Cir. 2016).

wholesalers and retailers to be in the state is permissible, but requiring owners to reside within the state for a certain period is not.”).

Because Michigan law requires a retailer (functioning within the three-tier system) to be physically located in the state, but does not impose a citizenship or residency requirement, *Byrd* forecloses plaintiffs’ dormant Commerce Clause claim.

2. Second and Fifth Circuit Authority.

The Second and Fifth Circuits have rejected dormant Commerce Clause challenges to state alcohol laws similar to the Michigan law at issue here.

In *Wine Country Gift Baskets.com v. Steen*⁵⁹ the Fifth Circuit upheld a Texas statute that allowed in-state retailers to ship alcohol to consumers within the retailer’s geographic area, but prohibited out-of-state retailers from shipping alcohol to consumers in Texas.⁶⁰ The Court held that disparate treatment inherent in the three-tier system is permissible under *Granholm*: “The discrimination that would be questionable, then, is that which is not inherent in the three-tier system itself. If *Granholm*’s legitimizing of the tiers is to have meaning, it must at least

⁵⁹ 612 F.3d 809 (5th Cir. 2010).

⁶⁰ *Id.* at 820-821. Texas law also imposed a durational Texas residency requirement to obtain a retailer’s permit. However, Texas advised the District Court that it did not seek to enforce its citizenship rule. *Wine Country Gift Baskets*, 612 F.3d at 812. As stated above, Michigan does not condition retail licensure on Michigan citizenship or durational residency, but requires that each retail licensee have a physical location in Michigan, which allows practical enforcement of the laws and regulations mentioned in the statement of facts.

mean that.”⁶¹ The Court then described what clearly is permissible under the Twenty-first Amendment:

Because of *Granholm* and its approval of three-tier systems, we know that Texas may authorize its in-state, permit holding retailers to make sales and may prohibit out-of-state retailers from doing the same. Such an authorization therefore is not discrimination in *Granholm* terms. The rights of retailers at a minimum would include making over-the-counter sales.⁶²

The Court then held that conditioning licensed retailers’ right to make intrastate direct shipments on being physically located within the state is inherent in the three-tier system:

When analyzing whether a State’s alcoholic beverage regulation discriminates under the dormant Commerce Clause, a beginning premise is that wholesalers and retailers may be required to be within the state.⁶³

The Court concluded the plaintiffs’ claim “challenged an inherent aspect of [the three-tier system]” and that “[b]ecause *Granholm* told us that the three tiers are legitimate under the Twenty-first Amendment...*Granholm* already worked out the answer to the analysis.”⁶⁴

The Second Circuit in *Arnold’s Wines, Inc. v. Boyle*⁶⁵ similarly rejected a dormant Commerce Clause challenge to a New York law prohibiting out-of-state

⁶¹ *Id.* at 818.

⁶² *Id.* at 818-820.

⁶³ 612 F.3d at 820.

⁶⁴ *Id.* at 821.

⁶⁵ 571 F.3d 185 (2nd Cir. 2009)

retailers from shipping beverage alcohol to New York consumers. The Court found the plaintiffs' challenge to the law "requiring all wholesalers and retailers to be present in and licensed by the state" was "a frontal attack on the constitutionality of the three-tier system itself" and therefore "directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier-system."⁶⁶ The Court explained:

In reaching its holding, the *Granholm* Court noted that the challenged regulations were discriminatory exceptions to, rather than integral parts of, the underlying three-tier systems. Had the three-tier system itself been unsustainable under the Twenty-first Amendment, the *Granholm* Court should have had no need to distinguish it from the impermissible regulations at issue.⁶⁷

As to *Arnold's Wines*, plaintiffs assert that the New York statute at issue only allowed in-state retailers to deliver wine to New York consumers using their own vehicles.⁶⁸ That is not correct, since the statute also allowed delivery using vehicles owned by a trucking or transportation company approved by the liquor authority.⁶⁹ Further, contrary to plaintiffs' assertion, the Second Circuit did not criticize *Granholm*, but rather, faithfully applied the principles from that case. *Arnold's Wines* rejected the challenge to the prohibition against out-of-state retailers direct shipping holding that the law "treats in-state and out-of-state liquor

⁶⁶ *Id.* at 190.

⁶⁷ *Id.* at 191.

⁶⁸ Plaintiffs' brief, at p. 16, fn. 5.

⁶⁹ *Arnold's Wines*, 571 F.3d 185, 188.

evenhandedly under the state's three-tier system and thus complies with *Granholm's* nondiscrimination principle.”⁷⁰

Plaintiffs' effort to distinguish the Fifth Circuit's decision in *Wine Country Gift Baskets, supra*, is likewise unavailing. While the Texas statute allowed in-state retailers to direct ship to consumers within their local area, rather than throughout the state, and the Court did acknowledge that limitation in its holding, the geographic limitation did not alter the analysis. As noted in the opinion, Texas specifically took the position that the geographic limitation on direct shipments was irrelevant to the constitutional analysis.⁷¹

Plaintiffs are thus faced with the controlling Sixth Circuit *Byrd* opinion, and the Second and Fifth Circuits having rejected their position. The Sixth, Second and Fifth Circuits' opinions confirm a state's right to require in-state retailers to have a physical location in the state, to allow licensed in-state retailers operating within three-tier systems to ship wine directly to in-state consumers while disallowing out-of-state retailers from delivering wine to consumers outside the three-tier system.

⁷⁰ *Id.* at 191.

⁷¹ *Wine Country Gift Baskets*, 612 F.3d at 819.

3. Siesta Village Market is inconsistent with *Granholm* and *Byrd*.

In relying on *Siesta Village Market, LLC v. Granholm*,⁷² plaintiffs ignore the fact that *Byrd* now requires a different result than that reached in *Siesta Village*. They also ignore the fact that its interpretation of *Granholm* is inconsistent with the rulings in numerous other appellate decisions, most notably *Arnold's Wines* and *Wine Country Gift Baskets*.

C. The challenged law regulates in-state economic interests and out-of-state economic interests evenhandedly.

Licensed Michigan retailers operating within the three-tier system are not similarly situated as out-of-state retailers like Lebamoff who seek to sell and deliver wine to Michigan consumers without being bound by Michigan's three-tier system and its comprehensive regulatory scheme.

Michigan law extends the right to deliver wine *intrastate* to any person or entity who becomes a Michigan licensed retailer, regardless of their residency or the residency of their owner. Michigan evenhandedly imposes delivery and shipment restrictions on *all* licensed retailers (regardless of residency) as part of “an effective and uniform system for controlling liquor.”⁷³

⁷² 596 F.Supp.2d 1035 (E.D. Mich. 2008), vacated by *Siesta Village Market v. Granholm*, No. 06-CV-13041 (E.D. Mich., July 17, 2009).

⁷³ *Granholm*, 544 U.S. at 484.

Michigan's facially-neutral requirement that licensed retailers maintain their retail locations in Michigan is not discriminatory merely because it might not provide a particular out-of-state retailer with the same economic opportunities as licensed in-state retailers. The Commerce Clause forbids the states from imposing economic burdens on out-of-state economic interests in order to create an advantage for in-state economic interests.⁷⁴ But states are not obligated to ensure equally efficient access to out-of-state retailers; this has even greater force with respect to alcohol regulation, where the states have unique authority under the Twenty-first Amendment to regulate the importation and distribution of alcohol, including undisputed authority to "funnel sales through the three-tier system."⁷⁵

Michigan comprehensively regulates licensees because it is vitally concerned with the sale and distribution of beverage alcohol.⁷⁶ By issuing licenses only to retailers and wholesalers that have a business location in the state (but regardless of citizenship and without any owner residency requirement), the MLCC can and does effectively monitor the licensees' activities to ensure

⁷⁴ See, e.g., *Granholm*, 544 U.S. at 472 ("States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses"); see also *id.* ("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'") (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 99 (1994)).

⁷⁵ *Granholm*, 544 U.S. at 489.

⁷⁶ Please see the summary of pertinent Michigan statutes and regulations in the statement of facts.

compliance with the laws that protect public health and safety, promote temperance, ensure tax collection and preserve orderly markets. In the absence of the physical licensed premises requirement, Michigan could not realistically enforce its statutes and rules. It certainly cannot compel enforcement of its regulations by other states or by non-Michigan regulators or law enforcement officers.

In *Wine Country Gift Baskets, supra*, the Fifth Circuit recognized that unlicensed out-of-state retailers were not similarly situated to licensed in-state retailers and therefore “cannot make a logical argument of discrimination.”⁷⁷ “The illogic is shown by the fact that the remedy being sought in this case...would grant out-of-state retailers dramatically greater rights than Texas ones.”⁷⁸

The Second Circuit reached the same conclusion in *Arnold’s Wines*, finding New York’s regulatory scheme did not impermissibly discriminate against out-of-state retailers because it “mandates that both in-state and out-of-state liquor pass through the same three-tier system before ultimate delivery to the consumer.”⁷⁹

The same conclusion was reached recently by the United States District Court for the Northern District of Illinois in *Lebamoff Enterprises, Inc. v. Rauner*,⁸⁰ which dismissed a dormant Commerce Clause challenge by Lebamoff to an

⁷⁷ 612 F.3d at 820.

⁷⁸ 612 F.3d at 820.

⁷⁹ 571 F.3d at 191.

⁸⁰ No. 16 C 8607, slip op., 2017 WL 2486084 (N.D. Ill. June 8, 2017).

Illinois' law that is nearly identical to Michigan's. In his opinion, Judge Der-Yeghiayan summarized the illogic in plaintiffs' discrimination claim:

To allow [Lebamoff] to operate outside the three-tier system in Illinois while in-state retailers diligently operate within the regulatory system and help to limit the potential social problems connected with improper use of alcohol, would actually provide Out-of-State Plaintiffs with an unfair advantage over the in-state retailers rather than remove any self-perceived disadvantage to Plaintiffs. Plaintiffs' Commerce Clause claims in this action thus seek to foster unfair advantages in commerce, which is ironically contrary to the Commerce Clause.⁸¹

There is no evidence that the challenged law is intentionally discriminatory, although plaintiffs so characterize it in referencing only part of a statement made by Senator MacGregor in a committee hearing.⁸² What Senator MacGregor actually said was:

[Michigan retailers] currently cannot [ship wine using a common carrier], they cannot do this legally. And they are under tremendous disadvantage, competitive disadvantage, with out-of-state entities *that are doing it illegally right now*. So this is a bill to help out our constituents, our local businesses to be more competitive in the marketplace. *It also has plenty of checks and balances in there*

⁸¹ *Id.* at *2.

⁸² Plaintiffs rely on an unsworn statement from Tom Wark (a lobbyist for retailers), Exhibit 9 to plaintiffs' brief, in which Mr. Wark represents to the Court that Senator MacGregor said during a committee hearing that Michigan retailers were at a competitive disadvantage with out-of-state retailers and that the bill under consideration would help Michigan retailers to be more competitive. From this, Mr. Wark tells the Court that he "can say with a high degree of confidence that [the passage of SB 1088] resulted from a desire to protect retailers from competition by discriminating against interstate commerce." Exhibit 9 to plaintiffs' brief, at p. 4. But, the plaintiffs neglected to give the full context of Senator MacGregor's statement which shows he was concerned with illegal shipments.

*because we're dealing with alcohol. So this legislation would require common carriers, UPS, FedEx, and others, to report alcohol shipments to the State. This would help provide tools to help the Commission and AG with gathering this data and also helping us with the illegal shipments that are happening as well.*⁸³

The statement certainly does not show a discriminatory purpose. In any event, it is well-established that the expression of an opinion by a single Michigan legislator is not evidence of a statute's legislative intent.⁸⁴

As purported evidence of discriminatory intent, plaintiffs also reference a letter sent by plaintiffs' counsel to Michigan legislators in September 2016.⁸⁵ It would be a strange outcome, indeed, if an attorney could write a letter to legislators asserting the attorney's personal opinion that a bill under consideration is unconstitutional and then bootstrap that letter into "proof" of intentional discrimination.

D. Michigan's law does not discriminate against out-of-state products.

Michigan's retailer direct shipment law does not discriminate against wine produced in other states in order to benefit locally-produced wine. All wine is

⁸³ <http://www.house.mi.gov/MHRPublic/videoarchive.aspx>. To obtain the recording of the 12/8/16 meeting, enter "commerce and trade" in the search box and 2016 in the drop box for year. Sen. MacGregor's testimony starts at 40:13.

⁸⁴ See *Chmielewski v. Xermac, Inc.*, 457 Mich. 593, 608, n. 18; 580 N.W.2d 817 (1998), and *Detroit Pub. Sch. Bd. of Ed. v. Romulus Community Sch. Bd. of Ed.*, 227 Mich. App. 80, 89, n. 4; 575 N.W.2d 90 (1997).

⁸⁵ See Exhibit 12 to plaintiffs' brief.

treated the same in the hands of licensed Michigan retailers and all wines can be shipped to consumers by in-state retailers.

Plaintiffs assert some brands or vintages are not available for purchase from Michigan retailers, but that is not because Michigan law discriminates against those wines or their producers. Rather, it is because of limited production of the wine or decisions by the wine maker as to where it wants to sell its product.⁸⁶ Indeed, any winery in the United States may, as more than a thousand have,⁸⁷ obtain a direct shipper license and it will have access to direct ship its wine to all Michigan consumers.⁸⁸

If plaintiffs are correct that some particular brands are not available in Michigan, that is not because Michigan bars those brands in order to favor wines produced in Michigan (as the Kaminski Affidavit⁸⁹ explains, Michigan wholesalers have an incentive to carry large and varied wine portfolios, and describes common practices by wholesalers to assist retailers in obtaining particular wines sought by customers). And, it is certainly not because Michigan allows licensed in-state retailers to make *intrastate* sales and deliveries to Michigan consumers (i.e., there is no causal connection between an in-state retailer's ability to sell and ship all

⁸⁶ See Kaminski Affidavit, Exhibit B, at ¶¶ 14-16.

⁸⁷ Donley Affidavit, Exhibit D to defendants' brief, at ¶ 13.

⁸⁸ See Mich. Comp. L. § 436.1203(4), (10) and (11).

⁸⁹ Exhibit B, at ¶¶ 14-18.

wines the retailer chooses to sell with the lack of availability of any particular wine in the state).

Plaintiffs assert that some limited number of hard-to-get “specialty” wines warrants a court to override Michigan’s three-tier system (and by implication every other three-tier system in the country) and allow out-of-state sellers to by-pass three-tier systems to sell directly to consumers. But the relief plaintiffs request is not so limited. Plaintiffs are seeking a ruling that would allow *all* out-of-state retailers to by-pass Michigan’s three-tier system for *all* wines.

If plaintiffs believe there is some public policy reason to carve out an exception for a few hard-to-get wines, that is an issue that should be raised with the legislature, not a court.

Plaintiffs also opine that since out-of-state wineries can direct ship to Michigan consumers, there would be little added burden in setting up and enforcing a regulatory system that allows the same for out-of-state retailers. Plaintiffs’ discussion of the issue is irrelevant since plaintiffs have not shown the challenged statute is impermissible under the Commerce Clause. In any case, plaintiffs’ assertions are contrary to the facts. Please see affidavits of Hagan, Donley and Hamilton,⁹⁰ which describe in detail the problems of enforcement.

⁹⁰ Exhibits A, D, and E to defendants’ brief.

Plaintiff Lebamoff promises it will comply with Michigan laws if the Court rules in its favor. That is an empty promise. Lebamoff seeks to import wine not purchased from a Michigan wholesaler and sell it directly to Michigan consumers outside of the three-tier regulatory system. Avoiding the three-tier system is not complying with Michigan law. And, of course, Lebamoff cannot speak for hundreds of thousands of other out-of-state retailers.

II. PLAINTIFFS' PRIVILEGES AND IMMUNITIES CHALLENGE FAILS AS A MATTER OF LAW.

Plaintiff Lebamoff Enterprises, a corporation, is not a “citizen” of the United States and therefore not entitled to the protections of the Privileges and Immunities Clause. *See Bank of Augusta v. Earle*,⁹¹ (a corporation cannot claim “the rights which belong to its members as citizens of a state.”)

With respect to Joseph Doust, plaintiffs allege Michigan law denies him the privilege to engage in his occupation as a professional wine merchant in Michigan upon the same terms as Michigan citizens.⁹² That claim fails for two reasons: 1) selling wine in Michigan is not a fundamental right protected by the Privileges and Immunities Clause; and 2) Michigan does not deny Doust the right to sell wine upon the same terms as Michigan citizens.

⁹¹ 38 U.S. 519, 519 (1839).

⁹² Am. Comp. at ¶¶ 21-28

The Privileges and Immunities Clause provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”⁹³ The purpose of the Clause “is to strongly constitute the citizens of the United States as one people, by placing the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.”⁹⁴ The Supreme Court has “long held that the Privileges and Immunities Clause only protects those privileges and immunities that are ‘fundamental.’”⁹⁵ Doust’s Privileges and Immunities challenge therefore requires him to demonstrate Michigan violates his fundamental right, and imposes impermissibly disparate treatment relative to that right.

But the right to sell wine (or any beverage alcohol) in Michigan is not a fundamental right. This is confirmed by the Supreme Court’s explicit recognition in *Granholm* that “[a] State which chooses to ban the sale and consumption of alcohol altogether could bar its importation....”⁹⁶ Further, the Michigan Supreme

⁹³ U.S. Const. art. IV, § 2, cl. 1.

⁹⁴ *McBurney v. Young*, 569 U.S. 221, 226 (2013) (internal quotation marks and alterations omitted).

⁹⁵ *Id.*; see also *Baldwin v. Fish and Game Comm’n of Montana*, 436 U.S. 371, 383 (“Only with respect to those ‘privileges’ and ‘immunities’ bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident equally.”).

⁹⁶ *Granholm*, 544 U.S. at 488-489.

Court has long held that “no one has an inherent right to a [liquor] license.”⁹⁷ And, the United States Supreme Court held over one hundred years ago that “[t]here is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States.”⁹⁸

Plaintiffs rely on *New Hampshire v. Piper*,⁹⁹ but that case that did not involve the Twenty-first Amendment; it held that a residency requirement for membership in state bar was invalid under the Privileges and Immunities Clause. Michigan’s statute, in any event, does not have a residency requirement to be in-state retailers.

Plaintiffs also cannot show that Michigan law provides disparate treatment between Doust and licensed retailers. Michigan permits Doust to enter the Michigan market and to apply for a license if he is willing to comply with Michigan’s three-tier system like all other licensees. But Doust does not want to sell wine in Michigan *upon the same terms as Michigan licensed retailers*. He wants rights that no one possesses under Michigan law. He claims he should be permitted to sell wine directly to Michigan consumers without complying with Michigan’s three-tier system – a right that no Michigan citizen is afforded.

⁹⁷ *Case v. Michigan Liquor Control Comm’n*, 314 Mich. 632, 643; 23 N.W.2d 109 (Mich. 1946).

⁹⁸ *Crowley v. Christensen*, 137 U.S. 86, 91 (1890).

⁹⁹ 470 U.S. 274 (1985).

III. REMEDY

For the reasons stated above, the Court should reject plaintiffs challenge and hold that the statute does not violate the Commerce Clause or Privileges and Immunities Clause. Such an outcome moots any discussion of a remedy. However, the following is offered in the event the Court reaches the issue of remedy.

Plaintiffs remedy seeks special treatment, not equal treatment. While plaintiffs' rhetoric about "unequal treatment" pervades their brief, the remedy they seek would grant unlicensed retailers, who do not maintain a physical location in Michigan and who do not participate in Michigan's three-tier system, a distinct advantage over licensed in-state retailers.

In effect, plaintiffs want this Court to take on the role of the Michigan Legislature (and, for example, create new laws with regard to collection of excise taxes) and permit out-of-state retailers to avoid the "funnel" of the Michigan wholesaler tier. Such a remedy is patently inconsistent with controlling legal authority. Indeed, this type of rewriting of a state's liquor code – which would negate the state's Twenty-first Amendment regulatory authority – was rejected in winery direct shipment cases such as *Beskind v. Easley*,¹⁰⁰ where the Court stopped in-state wineries from shipping to consumers (pursuant to an exception to the regulatory scheme) rather than extending that right to wineries located out-of-state.

¹⁰⁰ 325 F.3d 506 (4th Cir, 2003).

Should this Court rule in plaintiffs' favor, it should resolve the matter in a way that least infringes on Michigan's sovereign authority over its own affairs.¹⁰¹ Should plaintiffs prevail, the only appropriate remedy would be to sever and strike the provision allowing direct shipments by in-state retailers. Indeed, such a remedy would be required because of the "severability" provision of the Liquor Control Code, Mich. Comp. L. § 436.1925(2), which provides:

If any provision of this act is found to be unconstitutional by a court of competent jurisdiction and all rights of appeal have expired or been exhausted, the offending provision shall be severed and shall not affect the remaining portions of the act.

Michigan courts follow the rule of severability as a matter of course.¹⁰² Likewise, the Sixth Circuit routinely applies the severability mandate.¹⁰³

Prohibiting licensed in-state retailers from delivering to Michigan consumers would do the least harm to the structure of Michigan's regulatory system for alcoholic beverages and would be most consistent with the ruling in *Granholm* that "the Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor

¹⁰¹ *Alden v. Maine*, 527 U.S. 706, 758-759 (1999).

¹⁰² See, e.g., *Avis Rent-a-Car System, Inc. v. City of Romulus Schools*, 400 Mich. 337, 348-349; 254 N.W.2d 555 (Mich. 1977); *Detroit Osteopathic Hospital Corp. v. City of Southfield*, 377 Mich. 128, 137-138, n. 2; 139 N.W.2d 728 (Mich. 1966).

¹⁰³ See, e.g., *Byrd*, *supra*; *Garcia v. Wyatt-Ayerst Labs*, 385 F.3d 961, 965-967 (6th Cir. 2004); *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 591-592 (6th Cir. 2001); and *Larkin v. Michigan*, 883 F. Supp. 172, 179 (E.D., Mich. 1994), *aff'd* 89 F.3d 285 (6th Cir. 1996).

control system”¹⁰⁴ and its recognition that the Twenty-first Amendment allows a state to require all liquor sold for use in the state be purchased through a licensed in-state wholesaler.¹⁰⁵

RELIEF REQUESTED

Summary Judgment should be entered in favor of intervening defendant. Summary Judgment should be denied as to the plaintiffs. Plaintiffs’ Amended Complaint should be dismissed with prejudice. The Court should enter any other relief that is equitable and just.

Respectfully submitted,

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Michigan Beer & Wine Wholesalers
Association

Dated: April 2, 2018

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¹⁰⁴ 544 U.S. at 488 (quoting *California Retail Liquor Dealers Ass’n v. Midcal Aluminium, Inc.*, 445 U.S. at 110).

¹⁰⁵ *Id.* at 489 (quoting *North Dakota*, 495 U.S. at 432).

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2018, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

Respectfully submitted,

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