UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEBAMOFF ENTERPRISES, INC., et al.,

Plaintiffs,

v

RICK SNYDER, et al,

Defendants,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervenor.

No. 2:17-cv-10191

HON. ARTHUR J. TARNOW

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. It is not unconstitutionally discriminatory to require alcohol to enter a State through its three-tier system.

Byrd v. Tennessee Wine and Spirits Retailers Ass'n, 883 F.3d 608, 617 (6th Cir. 2018), not *Siesta Village Market v. Granholm*, 596 F.Supp.2d 1035 (E.D. Mich. 2008), establishes the test applicable to Michigan's retailer-delivery law. Plaintiffs would rather avoid *Byrd*'s test—and Michigan's three-tier system. But contrary to *Siesta Village*, *Byrd* held that the dormant Commerce Clause applies "'to a lesser extent when the [alcohol] regulations concern the retailer or wholesaler tier . . . of the three-tier distribution system.'" 883 F.3d at 617, quoting *Cooper v. Texas Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016).

Plaintiffs continue to treat alcohol like any other product, blending non-alcohol cases into the analysis, as if the Twenty-first Amendment lacks meaning. But as *Byrd* held, the Twenty-first Amendment *immunizes* state liquor regulations that "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." *Byrd*, 883 F.3d at 622 (internal quotation omitted). The Twenty-first Amendment gives the States the core power to funnel alcohol sales through the "unquestionably legitimate" three-tier system of alcohol distribution. *Granholm v. Heald*, 544 U.S. 460, 489 (2005); *North Dakota v. United States*, 495 U.S. 423, 432 (1990). This power includes "'requir[ing] that all

liquor sold for use in the State be purchased from a licensed in-state wholesaler.'" *Heald*, 544 U.S. at 489, quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring). Michigan's retailer-delivery law—also applicable to beer and spirits, not just wine—preserves Michigan's requirement that alcohol enter Michigan through a wholesaler (or, for spirits, through the State itself). It is not unconstitutionally discriminatory under the dormant Commerce Clause.

Heald and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275-76 (1984), although alcohol cases, do not change the result. *Heald* examined laws allowing in-state, but not out-of-state, wine producers to bypass the wholesaler tier and deliver to consumers. *Heald* was not a "retail shipping case" because it involved consumer sales, as Plaintiffs say. Pls. Reply at 24. The challenged discrimination was in the producer tier. Likewise, the tax law in *Bacchus* discriminated in the producer tier by exempting locally-produced alcohol from the tax. *Id.* at 274.

Defendants do not contend that *Heald* permits discrimination outside the producer tier or concerning something other than products. *Heald* did not reach that question, and *Byrd* rejected that conclusion, 883 F.3d at 621-22. But *Byrd* did conclude that dormant Commerce Clause principles apply "to a lesser extent when the regulations concern the retailer or wholesaler tier . . . ." *Id.* at 617. Producer-tier cases like *Heald* and *Bacchus* do not answer to what "lesser extent" dormant Commerce Clause principles apply in this retailer-tier case. Similarly, *Cherry Hill*

Vineyards, LLC v. Lilly, 553 F.3d 423 (6th Cir. 2008), and *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008), are unhelpful producer-tier cases. Indeed, the *Byrd* Court's thorough analysis of retailer-tier and wholesaler-tier cases would have been useless if product-tier cases carried the day.

Plaintiffs accept only *Byrd*'s final conclusion and deem the remainder dicta. But the Court's test was necessary to its result. The Court held that Tennessee's retailer-residency law was not immune from dormant Commerce Clause scrutiny because it was not closely related to the State's core Twenty-first Amendment powers; it regulated where individuals lived instead of "the flow of alcoholic beverages." *Id.* at 623. Conversely, the Sixth Circuit stated that "requiring wholesalers and retailers to be in the state is permissible[.]" *Id.* at 623 n. 8 (citation omitted). That kind of requirement controls the flow of alcohol in the State. As even Plaintiffs recognize, this case concerns the movement of goods across state lines, not the movement of people. Pls. Reply at 8.

Plaintiffs muddy the waters by asserting that "[t]he only situations in which bans on interstate shipping have been found not to be discriminatory are those where instate sellers were also prohibited from shipping." Pls. Reply at 7. But this misrepresents the caselaw. In *Arnold's Wines v. Boyle*, 571 F.3d 185 (2d Cir. 2009), according to Plaintiffs, "New York only allowed in-state retailers to deliver using their own vehicles." Pls. Reply at 7. Actually, New York also allowed in-

state retailers to deliver alcohol directly to consumers' homes "in vehicles . . . hired and operated by such licensee[s] from a trucking or transportation company . . . ." 571 F.3d at 188, citing N.Y. Alco. Bev. Cont. Law § 105(9). Moreover, Texas similarly allowed in-state retailers to deliver using "common carriers licensed under the [Texas Alcoholic Beverage Code], which include such companies as FedEx." *Wine Country Gift Baskets v. Steen*, 612 F.3d 809, 812 (5th Cir. 2010). And, of course, in *Lebamoff Enterprises v. Rauner*, 2017 WL 2486084, *2 (N.D. Ill., June 8, 2017), the Court upheld an Illinois law permitting in-state retailers to ship because permitting out-of-state retailers to avoid Illinois' three-tier system would unfairly disadvantage in-state retailers.

Plaintiffs also inappropriately emphasize Texas's geographic limitation on alcohol deliveries. But allowing a retailer to deliver alcohol, even statewide, does not change the retailer's character in the three-tier system.[1] As explained in Defendants' prior brief, Michigan's retailer-delivery law maintains the retailer's role as the final licensee in the three-tier system, having authority to sell directly to consumers. And permitting retailers to sell and deliver only alcohol that they have received from Michigan wholesalers is an inherent aspect of the three-tier system.

[1] Plaintiffs also mischaracterize the Texas law as "requir[ing] all liquor to be sold over the counter on the premises of a retail store, after a face-to-face appearance by the customer." Pls. Reply at 29. But the Texas law at issue in *Wine Country* allowed a customer to place an order "either in person at the premises, in writing, by mail, or by telegraph or telephone." Texas Alco. Bev. Code § 22.03(a).

If the Court reaches the question of Michigan's lack of nondiscriminatory alternatives, it should conclude that Plaintiffs have not shown that any exist. Specifically, Plaintiffs, by focusing only on wine, have not refuted Defendants' arguments on the vast number of retailers or youth access. Plaintiffs' desired remedy would also allow beer and spirits to flow. And youths have obtained access. Stings recounted in Defendants' prior brief involved actual deliveries to minors. Finally, the Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a, is far less powerful than administrative action revoking a federal permit.

II. Michigan's law does not violate the Privileges and Immunities Clause.

Plaintiffs cannot sustain their Privileges and Immunities claim. They ask the Court to ignore *Bank of Augusta v. Earle*, 38 U.S. 519, 519 (1839), which prohibits corporations from raising this claim, because *Earle* is an "old case." Pls. Reply at 35-36. But *U.S. Industries, Inc. v. Gregg*, 540 F.2d 142, 151 (3rd Cir. 1976), on which they rely, criticizes "*unwarranted reliances* on old cases . . . ." Relying on the Supreme Court's holding on a bright line issue is not "unwarranted." Plaintiffs also criticize *Earle* based on *McBurney v. Young*, 569 U.S. 221 (2013), because the Court disregarded that the "corporation . . . contracted to supply the information to clients." Pls. Reply at 35. But that fact was irrelevant; the company's *owner*, the *individual* plaintiff, had requested the documents from Virginia and asserted the

Privileges and Immunities claim. See *McBurney v. Mims*, Docket No. 3:09-cv-44 (E.D. Va. May 1, 2009), 2009 WL 1209037 at *2.

Finally, Plaintiffs dispute *Earle*'s value because the Supreme Court has held that corporations are *persons* for purposes of the First Amendment, see *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310 (2010), and the Religious Freedom Restoration Act, see *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Neither case matters. *Burwell* is irrelevant because it concerned a statute that included "corporations" in the definition of "persons." 134 S. Ct. at 2768. *Citizens United* is irrelevant because it did not change how corporations were viewed. Rather, the Court cited cases dating to the 1930s that applied First Amendment protections to corporations. 558 U.S. at 342, citing, e.g., *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). *Grosjean* predates *Asbury Hospital v. Cass Co., N.D.*, 326 U.S. 207 (1945), which, as Plaintiffs noted, continued to bar corporations from asserting Privileges and Immunities claims.

Regardless, the challenged law does not require anyone to live in Michigan to get a license, unlike the law in *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274 (1985). Plaintiffs incorrectly say that *Piper* rejected a requirement that attorneys have in-state *office*s; rather, the law in *Piper* required in-state *residency*. The Court said that increasing availability for court proceedings (unrelated to office location) did not justify barring nonresidents from becoming licensed attorneys. 470 U.S. at

286-87. Michigan's requirement that retail establishments be in Michigan is not a residency requirement on retail owners. Even so, Plaintiffs' arguments about in-state establishments are actually dormant Commerce Clause arguments that fail under *Byrd*. The Commerce Clause and the Privileges and Immunities Clause are related, *Piper*, 470 U.S. at 279-80 & n.8, so *Byrd*'s test would still apply.

III. Conclusion

The Twenty-first Amendment allows states to regulate the flow of alcohol by requiring alcohol to pass through the three-tier system. *Byrd* specifically permits the State to impose that requirement "notwithstanding" that the inherent aspects of the three-tier system "conflict with" the nondiscrimination principles of the dormant Commerce Clause. 883 F.3d at 622. Plaintiffs' suggestion that those principles require the Court to destroy the three-tier system and permit unlimited shipments of all kinds of alcohol from out-of-state retailers contradicts *Byrd*.

Respectfully submitted,

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Dated: May 7, 2018

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on May 7, 2018, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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