Case No. 18-2199
Case No. 18-2200

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEBAMOFF ENTERPRISES, Inc., et al.
Plaintiffs - Appellees

vs.

GRETCHEN WHITMER, et al.
Defendants - Appellants in 18-2199

MICHIGAN BEER &WINE WHOLESALERS ASSOC.,
Intervening Defendant - Appellant in 18-2200

Appeal from a Final Judgment of the United States District Court
for the Eastern District of Michigan, Hon. Arthur J. Tarnow
District Court no. 2:17-cv-10191

PETITION FOR REHEARING
and
REHEARING *EN BANC*

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I. Rule 35(b) statement

A. The panel decision conflicts with decisions of this Circuit including *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362 (6th Cir. 2013); *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423 (6th Cir. 2008); *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008); and *Fialka-Feldman v. Oakland Univ. Bd. of Trustees,* 639 F.3d 711 (6th Cir. 2011), and consideration by the full court is therefore necessary to secure and maintain uniformity of this court's decisions.

B. The panel decision conflicts with two decisions of the United States Supreme Court, *Granholm v. Heald,* 544 U.S. 460 (2005), and *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. 2449 (2019), and consideration by the full court is therefore necessary to secure and maintain uniformity of decisions.

II. Introduction

Michigan's Liquor Control Code prohibits out-of-state retailers from shipping wine to consumers but allows in-state retailers to do so. Plaintiffs contend this difference in treatment discriminates against interstate commerce in violation of the Commerce Clause.[1] The District

[1] "The Congress shall have the power [to] regulate commerce ...among the several states." U.S. CONST., ART. I, § 8, cl. 3.

Court agreed and declared the law unconstitutional. *Lebamoff Enterp. v. Snyder,* 347 F.Supp. 3d 301 (E.D. Mich. 2018). A panel of this Circuit[2] reversed and upheld the statute despite its discriminatory character. Plaintiffs-Appellees Lebamoff Enterprises *et al.* now petition the panel for rehearing and the court for rehearing *en banc* on the grounds that the panel decision conflicts with prior decisions of this Circuit and the Supreme Court.

1. Despite the discriminatory character of Michigan's wine shipping law, the panel analyzed its constitutionality only under the Twenty-first Amendment,[3] not the Commerce Clause. The prior decisions of this Circuit and the Supreme Court have held to the contrary that the validity of state laws that treat in-state and out-of-state wine sellers differently must be determined under Commerce Clause doctrine because the Twenty-first Amendment does not authorize states to discriminate against interstate commerce.

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[2] The opinion was written by Judge Sutton. Judge McKeague wrote a separate concurring opinion in which Judge Donald joined.

[3] Section 2 provides: "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." U.S. CONST., AMEND. XXI.

2. Despite the discriminatory character of the Michigan law, the panel did not apply strict scrutiny. It said that "the Twenty-first Amendment leaves these considerations to the people of Michigan, not federal judges." Op. at 14. Every prior case from this Circuit and the Supreme Court has held to the contrary that strict scrutiny is required when a state law discriminates against out-of-state wine sellers. Under strict scrutiny, the State must show with concrete evidence that the law advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory means. The panel did not engage in this inquiry.

3. Despite the fact that the panel upheld Michigan's wine shipping law, it offered an opinion that, if it had determined that the law was unconstitutionally discriminatory, the proper remedy to achieve equality would have been to nullify the shipping rights of in-state retailers. That opinion conflicts with Circuit precedent that the preferred remedy is extension of privileges rather than nullification, and constitutes an advisory opinion contrary to Circuit precedent that prohibits advisory opinions.

En banc consideration or panel rehearing is therefore necessary so that the judges and attorneys in District Court know what the law of this Circuit is. There is at least one pending case involving interstate wine sales that will be directly affected by these conflicts in precedent. *Tannins of Indianapolis, LLC v. Taylor,* 3:19-cv-00504 (W.D. Ky).

III. Argument

A. *En banc* rehearing is necessary to secure and maintain uniformity of this court's decisions

1. The panel's decision to uphold Michigan's discriminatory wine-shipping law under the Twenty-first Amendment, rather than using Commerce Clause analysis, conflicts with every other decision from this Circuit and the Supreme Court.

The panel upheld Michigan's discriminatory wine shipping law under the Twenty-first Amendment. It wrote that the Amendment gives states the authority to regulate wine sales regardless of whether they discriminate against out-of-state interests, Op. at 10-12, immunizes those laws from being challenged under the Commerce Clause, Op. at 6, 7, 8, 11, and "leaves these considerations to the people of Michigan, not federal judges." Op. at 14. This decision conflicts with prior cases from this Circuit and the Supreme Court, every one of which holds to the contrary, that *if a state liquor law is discriminatory*,

it is no longer protected by the Twenty-first Amendment and must be reviewed under Commerce Clause principles.

Prior cases from this Circuit have been quite clear that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d 608, 620 & n.7 (6th Cir. 2018), *aff'd* 139 S.Ct 2449 (2019) and "[t]he Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008). *Accord Cherry Hill Vineyards v. Lilly*, 553 F.3d 423, 431 (6th Cir. 2008) (the Amendment does not displace the Commerce Clause principle that states may not give a discriminatory preference to their own wine sellers); *Heald v. Engler,* 342 F.3d 517, 523-24 (6th Cir. 2003), *aff'd* 544 U.S. 460 (2005) (the Amendment did not empower States to favor local liquor industries through discriminatory laws).

The Supreme Court has been equally clear. In *Bacchus Ltd. v. Dias*, 468 U.S. 263, 276 (1984), the court held that the Amendment did not "empower States to favor local liquor industries by erecting barriers to

competition." In *Granholm v. Heald,* 544 U.S. 460 (2005), the Court held that "*Bacchus* forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny." *Id.* at 487-88. A discriminatory liquor law "is not saved by the Twenty-first Amendment." *Id.* at 489. The Amendment gives a state the authority to ban all direct shipping, but not to ban direct shipments from out of state while simultaneously authorizing in-state direct shipments. "If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Id* at 493. *Accord Healy v. Beer Inst*., 491 U.S. 324, 342 (1989) (the Twenty-first Amendment does not immunize state laws from invalidation under the Commerce Clause); *Brown-Forman Distill. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. 573 585 (1986) (if a state ABC law violates the Commerce Clause on its face, it is not a valid exercise of the state's powers under the Twenty-first Amendment).[4]

[4] The panel at several places asserts that a plurality opinion in *North Dakota v. United States*, 495 U.S. 423 (1990) supports its view of the broad power states enjoy under the 21st Amendment. But as this Circuit previously said in *Heald v. Engler,* 342 F.3d at 524, "the language in *North Dakota* to the effect that the states have 'virtually complete control' over the importation and sale of liquor ... has little value in a case requiring a Commerce Clause analysis. Because [it] did not involve interpretation of the Commerce Clause, we reject the implication that a state's 'virtually complete control' over liquor regulation enables it to discriminate

2. The panel did not apply the strict scrutiny test required by every other case from this Circuit and the Supreme Court.

The prior cases from this Circuit are clear. When state liquor laws are challenged as violating the nondiscrimination principle of the Commerce Clause, "courts apply strict scrutiny" under which "such laws are extremely difficult for states to justify and are usually struck down." *Am. Beverage Assen v. Snyder*, 735 F.3d 362, 369-70 (6th Cir. 2013). A discriminatory law such as Michigan's may be upheld only if the state proves that it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory means." *Cherry Hill Vineyards v. Lilly,* 553 F.3d at 433-34. *Accord Jelovsek v. Bredesen*, 545 F.3d at 438-39; *Heald v. Engler,* 342 F.3d at 524-27.

Every relevant case from the Supreme Court says the same thing. "When a state statute ... discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.,* 476 U.S. 573, 579 (1986). The Court applies strict scrutiny – an "exacting

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against out-of-state interests in favor of in-state interests. *Bacchus* simply forbids such an analysis."

standard" where the "burden is on the State to show that the discrimination is demonstrably justified" with "concrete record evidence [that] nondiscriminatory alternatives will prove unworkable." *Granholm v. Heald*, 544 U.S. at 492-93. Real evidence is required and "mere speculation or unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. 2449, 2474 (2019). *Accord Healy v. Beer Inst.*, 491 U.S. at 340-41 (discriminatory liquor law is invalid unless demonstrably justified).

The panel did not apply strict scrutiny. Indeed, it explicitly rejected what it called the "skeptical" review that had been applied in other Commerce Clause/Twenty-first Amendment cases.[5] Op. at 5. Instead, it applied only minimal scrutiny, presuming that the discriminatory ban on interstate shipping promoted temperance, Op. at 9-10, 11-12, and stating in an astonishing final sentence that questions about the constitutionality of alcohol laws are left to the states, "not to federal judges." Op. at 14.

[5] To the extent that the panel even acknowledges that a strict scrutiny test exists, it misstates it as only requiring that a law be "tailored to advance a legitimate state purpose, omitting any reference to the state's burden. Op. at 5.

Strict scrutiny requires the State to prove that reasonable nondiscriminatory alternatives are unworkable. The panel opinion does not mention this requirement or discuss the nondiscriminatory alternatives that were brought to the panel's attention. Brief of Plaintiffs-Appellees at 29-30, 32-33, 39. Those alternatives include issuing out-of-state retailers the same direct-shipper permit Michigan already issues to out-of-state wineries that ship to Michigan consumers. MICH. COMP. L. § 436.1203(4-6).

It was also brought to the panel's attention that thirteen states have found nondiscriminatory ways to regulate direct shipping by wine retailers that protect the public while allowing out-of-state retailers to participate in the online market. CAL. BUS. & PROF. CODE § 23661.2; CONN. GEN. STAT. § 30-18a; IDAHO CODE § 23-1309A; LA. REV. STAT. § 26:359(B); NEB. REV. STAT. § 53-123.15(5); NEV. REV. STAT. § 369.490; N.H. REV. STAT. § 178:27; N.M. STAT. § 60-7A-3(E); N.D. CENT. CODE § 5-01-16(5); OR. REV. STAT. § 471.282(1); VA. CODE ANN. § 4.1-207(6); W. VA. CODE ANN. §§ 60-8-6(b), 60-8-6a; WYO. STAT. § 12-2-204(a). This Circuit has previously said that if other states have adopted nondiscriminatory alternatives to a ban on interstate shipping, the

State must show that it has some unique regulatory interest or there is something different about its marketplace that would make these alternatives unworkable. *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 434. The panel neither considered any alternatives nor required the State to show they would not work in Michigan.

3. The panel's decision that in-state and out-of-state wine sellers are not similarly situated conflicts with precedent

In the course of its opinion, the panel suggested that even if it had engaged in Commerce Clause analysis, the result would have been the same because there was no discrimination in the first place. In-state and out-of-state wine shippers are not similarly situated because they are regulated by different states. Op. at 7.[6] This conflicts with prior decisions of this Circuit and the Supreme Court, all of which consider in-state and out-of-state wine shippers to be similarly situated even though they operate in distinct regulatory environments. *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 432-43; *Heald v. Engler,* 342 F.3d at 525; *Granholm v. Heald,* 544 U.S. at 473-74 (discrimination against out-of-

[6] The panel ultimately did not rest its decision to ignore the nondiscrimination principle of the Commerce Clause on this basis, saying it "need not decide" the issue because the Twenty-first Amendment would dictate the same result either way. Op. at 7.

state wine shippers was "obvious").[7] *Accord Jelovsek v. Bredesen*, 545 F.3d at 438; *Healy v. Beer Inst.*, 491 U.S. at 340-41. *See also Bacchus Ltd. v. Dias*, 468 U.S. at 268-69 (in-state sellers of Hawaiian pineapple wine to tourists were similarly situated to out-of-state businesses that shipped a broad variety of liquor products to Hawaii). The Supreme Court has consistently held in other Commerce Clause contexts that retailers selling the same kinds of products and competing for the same consumers are similarly situated. *E.g., Gen. Motors v. Tracy*, 519 U.S. 278, 298-99 (1997); *Exxon Corp. v. Maryland,* 437 U.S. 117, 126 (1978).

4. The panel's decision that different constitutional standards apply to laws regulating retailers than laws regulating wineries conflicts with precedent

In another section of its opinion, the panel holds that retailers occupy a different tier within the three-tier system than wineries, so a different constitutional analysis is required than the one used by this Circuit in *Cherry Hill Vineyards v. Lilly* and *Jelovsek v. Bredesen,* and by the Supreme Court in *Granholm v. Heald.* Op. at 12. This conflicts with *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, in which the Supreme Court explicitly rejected the argument that different

[7] The panel cited one case from a different circuit. *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010).

constitutional rules apply to different tiers, saying "[t]here is no sound basis for this distinction." 139 S.Ct. at 2470-71. The Commerce Clause restricts protectionism in all forms. *Id.* at 2461, 2469.[8]

5. The panel's assertion that current precedent says that a state can require retailers to be physically present misstates and conflicts with actual precedent

In its opinion, the panel asserted that this Circuit has previously held that states may require retailers to be physically present in the state. Op. at 6, citing *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d at 622-23 & n.8. This is a gross misstatement. The section of the *Byrd* opinion the panel refers to was actually a description of a Fifth Circuit case the court might have adopted.[9] It did not actually do so,

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[8] In the course of its discussion, the panels says that only "explicit discrimination" triggers Commerce Clause scrutiny. Op. at 12. This conflicts with the definition of discrimination adopted by every other case in this Circuit and the Supreme Court, that a statute may "discriminate against interstate commerce, either by discriminating on its face, by having a discriminatory purpose, or by discriminating in practical effect." *Cherry Hill Vineyards v. Lilly,* 553 F. 3d at 431-33 (extensive discussion).

[9] *Cooper v. Tex. ABC*, 820 F.3d 730, 743 (5th Cir. 2016). The case is no longer good law even in the Fifth Circuit, because it was based on an interpretation of *Granholm v. Heald* that the Commerce Clause applied "to a lesser extent when the regulations concern the retailer or wholesaler tier as distinguished from the producer tier, of the three-tier distribution system." That interpretation was rejected by the Supreme Court in *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, where it said "[t]here is no sound basis for this distinction." 139 S.Ct. at 2470-71.

however, stating only that requiring a retailer to be located within the state "*may be* essential to the three-tier system," 883 F.3d at 323 (emphasis added), if the State carries its usual burden of proving that nondiscriminatory alternative are unworkable. It did not relieve the State of this burden, nor suggest that a physical presence could be required for retailers who were selling wine online and delivering by common carrier. The implication that a physical-presence requirement could be upheld without concrete evidence of its necessity conflicts with *Granholm v. Heald*, 544 U.S. at 475, which held that "States cannot require an out-of-state firm to become a resident in order to compete on equal terms."

6. The panel's opinion that the proper remedy for a discriminatory shipping law is to nullify the shipping rights of in-state businesses conflicts with circuit precedent

After the panel ruled that the Michigan law was constitutional, it went on to issue an opinion on what the proper remedy would have been if it had ruled the other way and found the direct-shipping law to be unconstitutionally discriminatory. If said that the only valid remedy would have been to take away shipping rights from in-state retailers rather than extending them to out-of-state retailers. Op. at 15-16. This

conflicts with the decision in *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 435, in which this court approved the opposite remedy – extending shipping rights to out-of-state wine sellers rather than taking them away from in-state businesses who are not represented in the case.

B. The panel should grant rehearing to consider whether it should issue an advisory opinion about the proper remedy

Regardless of whether rehearing *en banc* is granted, the panel should rehear the case to reconsider whether it should have issued an opinion on remedy, for two reasons:

First, it was an advisory opinion. Once the panel decided that the Michigan law was not unconstitutionally discriminatory, the question of remedy became moot. The panel nevertheless issued its opinion that the only valid remedy would have been to achieve equality by nullifying the shipping rights of in-state retailers. All prior cases from this circuit agree that advisory opinions on moot issues are improper. *See Fialka-Feldman v. Oakland Univ. Bd. of Trustees,* 639 F.3d 711, 715 (6th Cir. 2011); *George Fischer Foundry Sys., Inc. v. Adolph H. Hottinger Maschinenbau GmbH*, 55 F.3d 1206, 1210 (6th Cir. 1995).

Second, the panel's decision to substitute its preference for nullification in place of the District Court's decision that extension of

shipping privileges was the better remedy, conflicts with Circuit precedent that the choice of remedy is a matter of discretion for the District Court, *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).

IV. Conclusion

The panel decision in this case conflicts with precedents from this Circuit and the Supreme Court, so consideration by the full court is necessary to secure and maintain uniformity of this court's decisions. If rehearing *en banc* is not granted, the panel should rehear the case applying the correct level of scrutiny or, at a minimum, withdraw its advisory opinion on remedy.

Respectfully submitted:
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CERTIFICATE OF SERVICE

I certify that on May 4, 2020, the foregoing petition was served on all parties through the court's CM/ECF system by filing in both 18-2199 and 18-2200.

s/ James A. Tanford
James A. Tanford

CERTIFICATE OF WORD COUNT

I certify that the total number of words in this petition including footnotes is 3141.

s/ James A. Tanford
James A. Tanford