

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEBAMOFF ENTERPRISES, INC,
et al.,

Plaintiffs,

No. 2:17-cv-10191

v

HON. ARTHUR J. TARNOW

RICK SNYDER, et al,

Defendants,

and

MICHIGAN BEER & WINE
WHOLESALE ASSOCIATION,

Intervenor.

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND RESPONSE IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

Defendants move this Court pursuant to Fed. R. Civ. P. 56(a) to grant summary judgment in this case for the reasons set forth in the accompanying brief, to dismiss Plaintiffs' First Amended Complaint with prejudice, and to grant any further relief this Court deems proper.

In response to Plaintiffs' motion for summary judgment, in addition to the accompanying brief, Defendants state as follows:

1. Defendants agree that there are no material factual disputes and the issues before the Court are matters of Constitutional law.
2. Defendants deny that the current law is indistinguishable from the law challenged in *Siesta Village Market*. In any event, *Siesta Village* lacks any value because it was vacated and its reasoning has now been superseded by the Sixth Circuit's decision in *Byrd v. Tennessee Wine and Spirits Retailers Ass'n*, 883 F. 3d 608 (6th Cir. 2018).
3. Defendants deny that Michigan unlawfully discriminates in the way alleged and denies that the challenged law violates the dormant Commerce Clause.
4. Defendants deny.

WHEREFORE, Defendants request that this Court deny Plaintiffs' motion for summary judgment, grant Defendants' motion for summary judgment, and dismiss Plaintiffs' complaint with prejudice.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ Mark G. Sands
Assistant Attorney General
Attorneys for Defendants
Alcohol & Gambling Enf. Div.
5th Floor, Williams Building
525 W. Ottawa Street
Lansing, MI 48933

(517) 241-0210
sandsm@michigan.gov
P67801

Dated: April 2, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 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.

/s/ Mark G. Sands
Assistant Attorney General
Attorneys for Defendants
Alcohol & Gambling Enf. Div.
5th Floor, Williams Building
525 W. Ottawa Street
Lansing, MI 48933
(517) 241-0210
sandsm@michigan.gov
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**DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION
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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Bill Schuette
Attorney General

/s/ Mark G. Sands

Assistant Attorney General
Attorneys for Defendants
Alcohol & Gambling Enf. Div.
5th Floor, Williams Building
525 W. Ottawa Street
Lansing, MI 48933
(517) 241-0210
sandsm@michigan.gov
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CONCISE STATEMENT OF ISSUES PRESENTED

1. In this Circuit, state liquor laws are immune from dormant Commerce Clause scrutiny when they are an inherent part of the three-tier system of alcohol-beverage importation and distribution. Under Michigan law, retail sales of alcohol must generally be made by a licensed retailer within the three-tier system who purchases the alcohol from a licensed Michigan wholesaler (or, in the case of spirits, the State itself). Michigan allows only retailers who have obtained the alcohol through that system to directly deliver alcohol to customers' doorsteps in Michigan. Is Michigan's law valid under the dormant Commerce Clause?
2. Only activities sufficiently basic to the livelihood of the Nation fall within the purview of the Privileges and Immunities Clause. The sale of alcohol is not an activity sufficiently basic to the livelihood of the nation so as to be protected by the Clause. Further, the challenged liquor law draws no distinctions based on the retail license applicant's state of residence. Does the challenged liquor law violate Plaintiffs' rights under the Privileges and Immunities Clause?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority: *Byrd v. Tennessee Wine and Spirits Retailers Ass'n*, 883 F. 3d 608 (6th Cir. 2018).

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

State of Virginia v. Friedman, 487 U.S. 59 (1988).

INTRODUCTION

Plaintiffs' motion for summary judgment completely ignores the "unquestionably legitimate" three-tier system of alcoholic beverage distribution, see *Granholm v. Heald*, 544 U.S. 460, 489 (2005). And no wonder. The Sixth Circuit recently held that a state's alcoholic-beverage laws are immune from dormant Commerce Clause scrutiny when they represent an inherent aspect of the three-tier system. *Byrd v. Tennessee Wine and Spirits Retailers Ass'n*, 883 F.3d 608, 621-623 (6th Cir. 2018). Inherent in that system are laws limiting alcohol importation into the State and laws limiting retail sales to alcohol that has been properly imported. Permitting Michigan-licensed retailers to sell only alcohol obtained from Michigan-licensed wholesalers and permitting only *those* retailers to deliver alcohol to customers in Michigan represents just the type of regulation deemed unassailable in *Byrd* and *Granholm*. See also *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010). Thus, as explained below, Plaintiffs' dormant Commerce Clause claim fails.

Even if not immune from attack, the law is still valid because nondiscriminatory alternatives will prove unworkable. For instance, Michigan's experience with licensed direct-shipping wineries demonstrates that they sell wine to minors at a much higher rate than Michigan retailers sell any alcohol to minors. Implementing the relief Plaintiffs seek would require Michigan to monitor a

nationwide industry of 388,000 potential retailers, which is beyond the scope of Michigan's regulatory capability.

Finally, Plaintiffs Doust's and Lebamoff Enterprises' claims that Michigan's law violates the Privileges and Immunities Clause fail for three reasons. First, Lebamoff, a corporation, is not a "citizen" of the United States and therefore not entitled to the protections of the Privileges and Immunities Clause. Second, contrary to Doust's arguments, Michigan does not restrict retail licensure to Michigan citizens; Michigan law does not contain the distinction his claim depends on. Third, even if the citizenship restriction existed, obtaining a license to sell intoxicating liquor is not a natural or fundamental right and, therefore, is not sufficiently basic to the livelihood of the nation as to be protected by the Privileges and Immunities Clause. Defendants are entitled to summary judgment.

STATEMENT OF FACTS

A. Statutory Background

The Michigan Liquor Control Code (Code) and administrative rules pervasively control the importation and distribution of intoxicating liquors in Michigan. Like many states, Michigan controls the sale of alcohol within its borders through a three-tier system of suppliers, wholesalers, and retailers. With limited exceptions, consumers located in Michigan may purchase only alcohol that has moved through this system. Mich. Comp. L. §§ 436.1203(1); 436.1901(1), (3), (4), (6). They may purchase beer, wine, and “mixed spirit drink,” see Mich. Comp. L. § 436.1109(5), from licensed retailers, see Mich. Comp. L. §§ 436.1111(5); 436.1537. The licensed retailers must purchase those products from licensed wholesalers. See Mich. Comp. L. §§ 436.1113a(7); 436.1901(6). Those wholesalers, in turn, purchase the beer, wine, and mixed spirit drink from licensed suppliers or manufacturers, importing the beverages into Michigan, as necessary. Mich. Comp. L. §§ 436.1403, 436.1305, 436.1307. Consumers also obtain distilled spirits (hard liquor) from licensed retailers, but the retailers purchase spirits directly from the State of Michigan, which uses “authorized distribution agents” (ADAs) to distribute spirits products. Mich. Comp. L. § 436.1203(7). The Commission serves as the importer and initial purchaser of spirits for sale, use, or distribution in Michigan. *Id.*

The Code generally divides retail licenses into two categories: (1) licenses allowing sale of alcoholic beverages for consumption off the licensed premises (off-premises); and (2) licenses allowing sale of alcoholic beverages for consumption on the licensed premises (on-premises). Exhib. A, Hagan Aff., ¶ 3, Mar. 28, 2018. Michigan has issued licenses to approximately 16,444 retailers to sell alcohol for off-premises consumption. Exhib. B, Wendt Aff., ¶ 8, Mar. 28, 2018. The MLCC also issues non-retail licenses to persons in the other two tiers of the three-tier system: manufacturers/suppliers of alcoholic beverages and Michigan wholesalers. Exhib. A, Hagan Aff., at ¶ 4.

In late 2016, the Michigan Legislature amended § 203 of the Code, Mich. Comp. L. § 436.1203,¹ in four relevant ways. First, the amendment permits certain MLCC-licensed retailers to deliver wine to Michigan consumers through a common carrier, Mich. Comp. L. § 436.1203(3). Second, the amendment authorizes certain MLCC-licensed retailers to use their own employees to deliver spirits to Michigan consumers, Mich. Comp. L. § 436.1203(14). (This authority already applied to deliveries of beer and wine. Mich. Comp. L. § 436.1203(12)). Third, the amendment allows certain MLCC-licensed retailers to deliver wine, beer, and spirits to Michigan consumers through MLCC-licensed “third-party facilitators.” Mich. Comp. L. § 436.1203(15)-(16). Fourth, the amendment closed

¹ Senate Bill 1088, which became 2016 PA 520.

a gap in the three-tier system by eliminating permission for out-of-state retailers (who are not licensed by the MLCC and do not obtain their products from Michigan wholesalers) to use their own employees to deliver beer and wine to Michigan consumers that has not moved through the three-tier system.²

Contrary to Plaintiffs’ selective editing of his comments, see Pls’ Mtn. for Summ. J., p. 8, one of the bill’s sponsors, Senator MacGregor, explained that the bill was necessary to put Michigan retailers on an equal footing “with out-of-state entities *that are doing it* [shipping alcohol directly to Michigan customers] *illegally right now.*” Michigan House of Representatives Commerce and Trade Committee Hearing, December 8, 2016, at 40:13; available at <http://www.house.mi.gov/SharedVideo/PlayVideoArchive.html?video=COMM-120816.mp4> (emphasis on the portion of the quote omitted from Plaintiffs’ brief added). Plaintiffs’ also conveniently removed Sen. MacGregor’s reference to another major purpose of the bill—to “provide tools to help the Commission and AG with gathering [data related to direct shipments] and also helping us with the illegal shipments that are happening as well.” *Id.*

A retail liquor license in Michigan attaches to a certain location—the licensed premises—which must be located in Michigan. But Michigan does not impose a residency requirement on owners of licensed retail establishments,

² See prior version, subsection 11.

contrary to Plaintiffs’ contentions in their Motion for Summary Judgment, see Pls’ Mtn. for Summ. J., p. 14; Exhib. B, Wendt Aff., at ¶ 8 (noting that the MLCC has issued over 1,800 retail licenses to entities that are incorporated and headquartered in other states).

B. Plaintiffs’ Lawsuit

The Plaintiffs in this case are Lebamoff Enterprises, Inc. (the corporate owner of retail liquor stores in Indiana); Joseph Doust (Lebamoff’s co-owner, general manager, and a self-proclaimed “wine merchant”); and three Michigan wine aficionados—Jack Stride, Jack Schultz, and Richard Donovan. Am. Compl., ¶ 3-4. In this 42 U.S.C. § 1983 lawsuit, they claim in Count I that allowing only retailers within Michigan’s three-tier system to directly deliver alcohol to Michigan consumers violates the dormant aspect of the Commerce Clause of the United States Constitution. Am. Compl., ¶¶ 13-20. In Count II, Plaintiffs Lebamoff Enterprises and Doust additionally allege that this limitation deprives them of the privileges and immunities accorded to Michigan citizens. Am. Compl., ¶¶ 21-28. Plaintiffs request a judgment declaring Senate Bill 1088 unconstitutional and an injunction prohibiting Defendants from enforcing the statute and requiring Defendants to permit out-of-state wine retailers to “sell, ship, and deliver directly to consumers in Michigan.” Am. Compl., request for relief ¶¶ A-C. Although Plaintiffs focus on wine, the statute in question applies to beer and

spirits as well. The practical effect of the relief Plaintiffs seek would be to open the door for all alcohol to be directly delivered to the doorstep of Michigan citizens from any retailer throughout the nation.

In their motion for summary judgment, Plaintiffs also request an injunction prohibiting enforcement of other Michigan laws not mentioned in the complaint: Mich. Comp. L. §§ 436.1901 and 436.1537, and Mich. Admin. Code, R. 436.1527. Pls' Mtn. for Summ. J., p. ii; Am. Compl., request for relief ¶ D. Plaintiffs provide no argument concerning these additional provisions and do not identify the purportedly unconstitutional language in each provision.

C. Alcohol Regulation History

Michigan's three-tier alcoholic beverage distribution system was created to avoid the extreme social harm caused by the pre-Prohibition alcohol market. Pamela Erickson, a former Executive Director of the Oregon Liquor Control Commission and expert on alcohol policy, notes that before Prohibition, large national manufacturers owned the "saloons," which were almost the exclusive sellers of alcohol. Exhib. C, Erickson Aff., ¶ 8, Mar. 6, 2018. These manufacturers pushed the retailer "saloons" to aggressively sell their product, leading to major problems with public intoxication, violence, addiction, and family ruination. *Id.* The extensive negative societal effects of this system led to the drastic step of implementing Prohibition. *Id.*

When Prohibition ended after ratification of the Twenty-First Amendment, States gained authority to reestablish a new, regulated alcohol market and did so with a view toward combatting the societal dangers of excessive alcohol consumption. *Id.* at ¶ 7. But even with extensive regulation, serious problems remain and would only worsen if the regulations are weakened. Excessive alcohol causes 88,000 deaths in the United States annually. *Id.* It also accounts for 1 of 10 deaths among work-age adults. *Id.* In 2010, excessive alcohol use cost the U.S. economy \$249 billion. *Id.*

Erickson also opines that retailers delivering alcohol outside their own states have less incentive to control alcohol sales by not selling to minors. *Id.* at ¶ 7. Her conclusion is supported here, where Lebamoff has admitted that it would not use the same stringent training to avoid selling to minors out-of-state that it uses for sales within Indiana. Exhib. H, Doust Dep. at 41, Sept. 13, 2017. Of course, even Lebamoff’s “stringent” training has resulted in 12 citations for furnishing alcohol to minors and another two citations for allowing a minor to loiter. Exhib. H, Doust Dep. at Ex. 1.

D. Michigan’s Licensing and Regulatory Scheme

As explained by Sara Weber, Director of the MLCC Licensing Division, the three-tier system “enable[s] the State of Michigan to protect the health, safety, and welfare of citizens through the careful control and regulation of intoxicating

liquors.” Exhib. F, Weber Aff., ¶ 6, Mar. 29, 2018. By separating the supplier, wholesaler, and retailer tiers, Mich. Comp. L. §§ 436.1305, 436.1403, 436.1603, 436.1607, Michigan’s liquor laws protect the public from one of the most significant problems with pre-prohibition alcohol distribution—the “Tied House.” Exhib. C, Erickson Aff., at ¶ 9. The Tied House was a vertically integrated system in which large, national alcohol manufacturers owned most of the retail-alcohol outlets in most local communities throughout the United States. *Id.* This meant that the local retailers were controlled by an absentee owner who was primarily interested in extracting profits by whatever means possible. *Id.* The separation of the tiers inherent in the post-Prohibition three-tier system is critical to the State’s ability to regulate alcohol importation and distribution, as MLCC Enforcement Division regional manager Mary Anne Donley observes. Exhib. D, Donley Aff., ¶ 4, Mar. 29, 2018; see also Exhib. F, Weber Aff., at ¶ 6. And Michigan’s system is neutral as to product origin. Julie Wendt, Director of the MLCC’s Executive Services Division explains that, once in the hands of licensed retailers, all alcoholic beverages, no matter where produced, are treated exactly the same under Michigan law. Exhib. B, Wendt Aff., at ¶ 4. Likewise, alcoholic beverages that enter the stream of commerce outside of the three-tier system are not treated differently based on their point of origin. *Id.*

Licensed retailers in Michigan are subject to a rigorous regulatory scheme. Exhib. F, Weber Aff., at ¶ 8. The MLCC employs a comprehensive review and screening process for applicants seeking to be licensed to sell intoxicating liquors at retail. *Id.* The MLCC considers a number of factors in determining whether to license a particular retailer, including the applicant's management experience, its general business reputation and moral character, and the opinions of local residents, government, and law enforcement. *Id.* The comprehensive screening of all liquor-license applicants requires significant time, personnel, and resources of the MLCC and the State of Michigan and often involves using local Michigan enforcement agencies such as police departments, sheriffs' departments, health departments, and others. *Id.* at ¶ 9. On average, it takes about 2-3 months from the receipt of an application for an off-premises retailer license to investigate and approve a new licensee. *Id.* In addition, licensed retailers have a continuing obligation to allow inspection of their records and to make the licensed premises available for inspection by MLCC investigators or local law enforcement. *Id.* at ¶ 11.

Another important regulation in Michigan is the requirement that wholesalers "post and hold" the prices at which they sell wine to retailers for a certain period of time. Mich. Admin. Code, R. 436.1726. This prevents wholesalers from discriminating among retailers; which helps maintain an orderly

market, including the prevention of quantity discounts. Exhib. B, Wendt Aff., at ¶ 24. Michigan also prohibits manufacturers and wholesalers from offering volume discounts. Mich. Comp. L. § 436.1609a(5); Mich. Admin. Code, R. 436.1625(5), 436.1726(4). Allowing wines to be obtained for lower prices than in-state retailers pay, and for potentially extremely low prices to consumers, would frustrate the rule's purpose of promoting temperance by not over-stimulating consumption. Exhib. B, Wendt Aff., at ¶ 24.

Tom Hagan, director of the MLCC Enforcement Division, explains that the MLCC devotes significant resources to monitoring licensee compliance with Michigan's liquor laws. Exhib. A, Hagan Aff., at ¶ 20. In fact, in 2016, the MLCC pursued 2,247 violation cases against licensees to administrative hearings. *Id.* at ¶ 21. A vital part of licensee monitoring consists of on-site interviews with retail-licensee employees. *Id.* at ¶ 10. MLCC investigators also visit retail licensees to conduct "decoy" operations involving minors who, under Enforcement Division supervision, attempt to purchase alcohol. *Id.* at ¶ 20.

Michigan's licensing and regulation scheme would not work without the assistance and cooperation of local law enforcement agencies, which have a "special duty" to enforce the Code and rules. *Id.* at ¶ 23, citing Mich. Comp. L. § 436.1201(4); Exhib. F, Weber Aff., at ¶ 13. Local law enforcement agencies routinely help the MLCC conduct criminal background checks and on-site

inspections; they also conduct hundreds of decoy “stings” each year in their respective jurisdictions. Exhib. A, Hagan Aff., at ¶¶ 24-26. In the last five years, local law enforcement agencies have conducted 1,661 of the 3,125 sting operations involving retail-licensee sales to minors. *Id.* at ¶ 26. And 24% of all citations for violations of the liquor code in 2016 involved local law enforcement agencies. *Id.* at ¶ 21.

However, as Ms. Donley observes, Michigan has faced significant difficulties regulating out-of-state wineries, some of which are licensed to ship directly to Michigan consumers (“direct shippers,” Mich. Comp. L. § 436.1203(4), (25)(i)), without the assistance of local law enforcement. Exhib. D, Donley Aff., at ¶ 14. Out-of-state wineries represent a small fraction of the 388,000 nationwide retailers that, if Plaintiffs prevail, could be permitted to directly deliver alcohol into Michigan. Exhib. B, Wendt Aff., at ¶ 16. Not long ago, the MLCC increased its direct-shipment enforcement efforts after receiving complaints about illegal shipments. In 2015, it received a greatly needed supplemental appropriation of \$126,800 to fund these efforts. Exhib. D, Donley Aff., at ¶ 15. The MLCC’s direct-shipper enforcement team, comprised primarily of 5 investigators and 4 supervisors (who have other responsibilities as well), has been appropriated \$300,000 by the Legislature for fiscal year 2018 to monitor the 1,203 licensed direct shippers of wine nationwide and unlicensed alcohol sellers (including over 8,000 other United States

wineries) to ensure they are not illegally shipping alcohol into Michigan. *Id.* at ¶¶ 13, 16, 20. As a result of the team's efforts, since 2015, over 220 cease-and-desist letters have been sent to unlicensed wineries shipping into Michigan, and 198 violation complaints have been issued against licensed direct-shipper wineries. *Id.* Additionally, the MLCC has issued 175 violation warning notices to direct-shipper licensees for shipping violations including labeling, packaging, invoicing, and delivery matters. *Id.* at ¶ 17.

The direct-shipper enforcement team has also conducted controlled-buy operations using minors to purchase wine from licensed direct shippers. *Id.* at ¶ 18. In 2015, the team conducted 24 controlled-buy operations, and on 8 occasions minors were able to purchase wine and have it delivered. *Id.* Four of those sales were by out-of-state direct shippers. *Id.* In 2017, the team conducted 53 controlled-buy operations involving out-of-state licensed direct shippers, and on 19 occasions minors were able to purchase wine and have it delivered. *Id.* None of the three in-state licensed direct shippers tested during 2017 sold or delivered wine to minors. *Id.*

E. Tax Collection on the Sale of Alcohol

Collecting taxes from out-of-state direct shippers has also presented challenges. The State of Michigan generates significant tax revenue from alcohol sales, including the excise taxes the Code imposes on beer, wine, and mixed-spirit

drink. Exhib. E, Hamilton Aff., ¶ 3, Mar. 28, 2018. Pamela Hamilton, Director of the MLCC's financial management division, recounts in her affidavit that the manufacturer or wholesaler selling the product to retailers pays these taxes to the Commission. Mich. Comp. L. §§ 436.1301(5)-(6), 436.1409(2). But, because a licensed direct shipper does not distribute wine through a wholesaler, it must pay the excise tax directly to the Commission quarterly. Exhib. E, Hamilton Aff., ¶¶ 3-5. Numerous out-of-state wineries either fail to pay those taxes or file the required documentation. *Id.* In the first three quarters of 2017, 15 out-of-state wineries either underpaid or completely failed to pay the excise tax. In addition, 239 excise tax reports were filed late by out-of-state wineries. *Id.* Only one Michigan winery filed a late tax report under its direct-shipper license. *Id.*

In addition to those taxes, alcohol sales are subject to Michigan sales or use tax. Michigan use tax applies to certain purchases made out-of-state. *Id.* at ¶ 9; Mich. Comp. L. § 205.93(1)(a). But most online purchasers do not report Michigan use tax. *Id.* at ¶ 10. Even Plaintiff Richard Donovan testified that he did not declare any Michigan use tax on his out-of-state internet wine purchases from 2013-2016 of over \$2,000. Exhib. G, Donovan Dep. pp. 20-21, Sept. 13, 2017, Ex. ID-A.

F. Availability of Wine in Michigan

Approximately 132,103 brands of beer and wine are currently registered for sale in Michigan, including (as of November 27, 2017) 44,233 brands of wine. Exhib. B, Wendt Aff at ¶ 10. Plaintiffs appear to be dissatisfied with the wine selection in Michigan, but the number of brands available does not tell the whole story. In Michigan, once a wine brand and type are registered, subsequent production years of that variety do not have to be re-registered. *Id.* So, for example, if Ruffino's Orvieto Classico was registered in 2012, every subsequent vintage of Ruffino's Orvieto Classico could be sold in Michigan without additional registration. Therefore, even though approximately 44,233 brands of wine are registered for sale in Michigan, significantly more vintages of those wines may be sold in Michigan. The cited number derives from the MLCC's record keeping system but does not fully represent what wines may legally be sold in the state. Moreover, although Plaintiffs compare this number to the number of wines approved for sale in the United States, see Pls' Mtn. for Summ. J., p. 8, they do not indicate whether each of the manufacturers of those wines has requested approval to sell in Michigan. Often a wine is not registered in Michigan because the producer has chosen not to market that wine in Michigan. See Intervenor's Exhib. B, Kaminski Aff., at ¶¶ 14-18.

Additionally, Michigan law provides several avenues that a person can use to obtain a hard to find wine. Exhib. B, Wendt Aff at ¶ 13. First, a customer can ask a

local retailer to obtain a specific wine if it is not in stock or easily available in Michigan. *Id.* Even if the wine is not currently registered, the process to register a wine in Michigan is not arduous and does not cost anything. *Id.* at ¶ 9. Registering a new wine with the MLCC usually takes one week. *Id.* Oftentimes retailers have many contacts in the industry and can find the wine and bring it into the state legally through a wholesaler. *Id.* at ¶ 13. This is especially helpful for imported wines. *Id.* Second, a customer can personally transport not more than 312 ounces of alcoholic liquor for personal use in a 24-hour period from an out-of-state retailer. *Id.* Third, a customer can personally transport more than 312 ounces of alcoholic liquor if prior MLCC approval has been obtained. *Id.* Fourth, a customer may directly import more than 312 ounces of alcoholic liquor for personal consumption if prior MLCC approval has been obtained. *Id.*

G. Unworkability of monitoring retailers nationwide

There are approximately 388,000 alcohol retailers in the United States. *Id.* at ¶ 16. As further analyzed below, MLCC officials agree that no State, including Michigan, has the staff or capability to thoroughly investigate potentially even a fraction of that number that may want to directly deliver alcoholic beverages to Michigan consumers. *Id.*; Exhib. A, Hagan Aff., at ¶ 30-33; Exhib. C, Erickson Aff. at ¶¶ 17-18; Exhib. D, Donley Aff., at ¶ 21; Exhib. F, Weber Aff. at 13.¶

STANDARD OF REVIEW

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, the court must “draw all reasonable inferences [from the facts] in favor of the nonmoving party.” *Int’l Union v. Cummins, Inc.*, 434 F.3d 478, 483 (6th Cir. 2006) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Where only issues of law remain, the court may resolve the case on summary judgment. *Cincom Sys., Inc. v. Novelis Corp.*, 581 F.3d 431, 435 (6th Cir. 2009).

ARGUMENT

Plaintiffs bear the heavy burden of overcoming the strong presumption that the statute is constitutional. *See Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 693 (1981). Moreover, “given 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.” *North Dakota v. United States*, 495 U.S. 423, 433 (1990).

I. Michigan’s law allowing only retailers within its three-tier system to directly deliver alcohol to Michigan customers does not violate the dormant Commerce Clause.

The Commerce Clause provides that Congress has the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I § 8, cl.3. Under the “dormant” Commerce Clause, states may not pass laws that discriminate against out-of-state economic interests unless those laws “advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

Plaintiffs assert that the same dormant Commerce Clause analysis that applies to soda pop applies to alcoholic beverages. Pls’ Mtn. for Summ. J., p. 13. But that is not true. Section 2 of the Twenty-first Amendment prohibits “[t]he transportation or importation” of intoxicating liquors “into any State . . . for delivery or use” in that state, in violation of that state’s laws. U.S. Const., Amend XXI, § 2. This provision “grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.” *Heald*, 544 U.S. at 488. A state’s core power under the Twenty-first Amendment is to require alcohol sales to funnel through the “unquestionably legitimate” three-tier system. *Id.* at 489.

In *Heald*, the Supreme Court explored the relationship between the dormant Commerce Clause and the Twenty-first Amendment, specifically as it pertains to the producer-tier of the three-tier system. Just recently, in *Byrd*, the Sixth Circuit addressed the interplay of those two constitutional provisions when analyzing regulations in the tier relevant here—the retailer tier. Plaintiffs emphasize that *Byrd* invalidated the Tennessee law requiring retail licensees to be Tennessee residents for a specific duration, but they ignore *Byrd*’s analysis (to the point of not even mentioning the three-tier system), which requires a different result in this case for the reasons set forth below.

A. This Circuit permits distinctions between in-state and out-of-state retailers that are inherent in the three-tier system.

The *Byrd* court concluded that a state’s alcoholic-beverages law can be immune from scrutiny under the dormant Commerce Clause because, although the dormant Commerce Clause applies to state alcohol regulations, it applies “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,” *Byrd*, 883 F.3d at 617 (quoting *Cooper v. Tex. Alcoholic Beverage Comm’n*, 820 F.3d 730, 743 (5th Cir. 2016) (*Cooper II*)). Particularly relevant here, the Sixth Circuit held that if distinctions between in-state and out-of-state retailers “are an inherent

aspect of the three-tier system,” the distinctions do not violate the dormant Commerce Clause. *Byrd*, 883 F.3d at 623, quoting *Cooper II*, 820 F.3d at 743.

At issue in *Byrd* was whether a state could impose a durational-residency requirement on the owner of a licensed retailer. *Byrd*, 883 F.3d at 612-613. Tennessee law required the person or entity applying for a retailer license to have been a Tennessee resident for at least two years. *Id.*, citing Tennessee Code Annotated, § 57-3-204(b). The Sixth Circuit recognized that *Heald* said that “[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.” *Byrd*, 883 F.3d at 821, quoting *Heald*, 544 U.S. at 489.

But the *Byrd* court also recognized that the Supreme Court left unanswered in *Heald* the question it needed to answer—whether the Twenty-first Amendment immunizes a state law regarding retailers and wholesalers in the three-tier system. The Sixth Circuit then analyzed the different approaches various circuits had taken to answer that question. It reviewed the holdings from the Second and Eighth Circuits stating that laws related to wholesalers and retailers are valid so long as the law does not create discriminatory exceptions to the three-tier system favoring local products over out-of-state products. *Byrd*, 883 F.3d at 616, citing *Arnold’s Wines v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009); *Southern Wine and Spirits of America v. Division of Alcohol and Tobacco Control*, 731 F.3d 799, 809-810 (8th

Cir. 2013) (upholding Missouri’s residency law because *Heald* requires only that a State give equal treatment to in-state and out-of-state liquor products).

The Sixth Circuit found the reasoning of the Fifth Circuit persuasive, particularly because it acknowledged that *Heald* did not overrule or alter *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275-76 (1984), and *Bacchus* requires a reviewing court to consider whether the state regulation at issue is sufficiently related to the state’s Twenty-first Amendment powers to permit it to stand. *Byrd*, 883 F.3d at 617, citing *Cooper II*, 820 F.3d at 742. *Heald*, in the Fifth Circuit’s view, “reaffirm[ed] the applicability of the Commerce Clause to state alcohol regulations, *but 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.” *Cooper II*, 820 F.3d at 743 (emphasis added). In other words, the Fifth Circuit did not accept the “product-only” reading of *Heald* endorsed by the Second and Eighth Circuits, but it still recognized that the Twenty-first Amendment alters the dormant Commerce Clause analysis that applies to non-alcohol products.

The Sixth Circuit adopted the Fifth Circuit’s reasoning in *Cooper II*. *Byrd*, 883 F.3d at 618-622. Thus, the Sixth Circuit held that the Twenty-first Amendment *immunizes* a state’s alcoholic beverage laws when those laws are closely related to the State’s core Twenty-first Amendment powers. *Id.* at 622. The court also specified how to analyze the law at issue:

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.' 883 F.3d at 621–22, quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275–76 (1984).

Applying that test to Tennessee's durational-residency requirement, the Sixth Circuit observed that "a three-tier system can still function without" durational-residency requirements. *Byrd*, 883 F.3d at 623. The residency requirements, the court said, "do not relate to the flow of alcoholic beverages within the state," but rather "regulate the flow of individuals who can and cannot engage in economic activities." *Id.* Therefore, the requirements fell outside the state's powers reserved by the Twenty-first Amendment and were not immunized from dormant Commerce Clause scrutiny. *Id.*

B. Permitting only retailers who have obtained alcohol through the three-tier system to directly deliver it to customers is an inherent aspect of the three-tier system.

The regulation at issue *here*—allowing only alcohol that has been imported and distributed through Michigan's three-tier system to be directly delivered to Michigan consumers—differs markedly from the one in *Byrd*. It does not regulate the flow of persons. It regulates the importation and flow of alcohol. Significantly, the Sixth Circuit specifically recognized that states have the core

Twenty-first Amendment power—unsurprisingly not addressed by Plaintiffs here—to “require[] wholesalers and retailers to be in the state.” *Byrd*, 883 F.3d at 623 n 8; citing *Cooper II*, 820 F.3d at 743. The difference between regulating alcohol and regulating where licensees live mandates a different result here, following *Byrd*’s analysis.

Moreover, the Sixth Circuit’s reliance on the Fifth Circuit’s reasoning in *Cooper II* carries particular importance because the Fifth Circuit relied on a prior Fifth Circuit case upholding a law very similar to the Michigan law challenged here. In *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010), the court reviewed a challenge to a Texas law that, like Michigan’s, allowed retailers within its three-tier system to deliver alcohol to customers within the state. Recognizing that the three-tier system is “unquestionably legitimate,” the Fifth Circuit said that the dormant Commerce Clause applies only to discrimination “which is not inherent in the three-tier system itself.” *Id.* at 818. Like Michigan, Texas required retailers to purchase alcohol from licensed wholesalers (or, as to spirits in Michigan, the state itself), and those wholesalers purchased from producers. See *id.* at 819. Significantly, the Fifth Circuit held that, as part of the three-tier system, a state can “authorize its in-state, permit-holding retailers to make sales *and may prohibit out-of-state retailers from doing the same.*” *Id.* at 819 (emphasis added).

Further, the court recognized that the law did not discriminate among retailers in the sense contemplated by the dormant Commerce Clause:

Wine Country is not similarly situated to Texas retailers and cannot make a logical argument of discrimination. The illogic is shown by the fact that the remedy being sought in this case—allowing out-of-state retailers to ship anywhere in Texas because local retailers can deliver within their counties—would grant out-of-state retailers dramatically greater rights than Texas ones. *Id.* at 820.

Plaintiffs likewise make the same illogical argument here. Intrastate shipments of alcohol from licensed retailers are not the equivalent of the importation of alcohol from out-of-state by unlicensed (or even licensed) retailers. This is not a case where Plaintiffs are challenging an exception to the three-tier system, cf., *Heald*; rather the Plaintiffs are seeking to exempt themselves from that system altogether. Thus, properly understood, Plaintiffs are not asking this Court to “level” the playing field. Instead, they are asking this Court to give out-of-state retailers like Lebamoff a “dramatic[]” advantage over in-state retailers by allowing them to deliver alcohol into Michigan, avoiding the wholesaler tier for non-spirits and the State itself for spirits. Because they advocate selling wines that are not currently approved for sale in Michigan, they apparently want to avoid the licensed supplier tier as well. Plaintiffs would turn the system into a one-tier system for out-of-state retailers. As noted in the lead opinion in *Brooks v. Vasser*, “an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier

system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself.” 462 F.3d 341, 352 (4th Cir. 2006); see also *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-300 (1997) (“[A]ny notion of discrimination [in a dormant Commerce Clause analysis] assumes a comparison of substantially similar entities.”).

Unlike the statute at issue in *Byrd*, the challenged law here constitutes an inherent aspect of the three-tier system. *Byrd*, 883 F.3d at 623; *Wine Country*, 612 F.3d at 818; *Cooper II*, 820 F.3d at 743. There is nothing more inherent in a three-tier system than limiting consumer sales to licensed retailers who have obtained their products through the other tiers of that system. *Byrd* recognized that in a three-tier system, “requiring wholesalers and retailers to be in the state is permissible,” even though “requiring owners to reside within the state for a certain period is not.” *Byrd*, 883 F.3d at 623 n. 8. Additionally, the challenged statute does not create an exception to the three-tier system that favors an in-state interest, as was the case in *Heald*. As discussed in *Wine Country*, direct delivery to consumers is ancillary to a retailer’s place in the three-tier system. Just like a retailer handing alcohol to a consumer across a counter, the retailer delivering to the consumer is serving as the entity who obtains approved products from Michigan-licensed wholesalers or the State itself (for spirits) to sell them to the consumer. Allowing a retailer to deliver alcohol instead of selling it in person,

even state-wide, does not change the nature or character of the retailer as part of the three-tier system. The retailer still serves as the tip of the funnel, so to speak, through which alcoholic beverages are imported into and distributed within the State. *See Wine Country*, 612 F.3d at 820-21. Contrary to Plaintiffs' argument, see Pls' Mtn. for Summ. J., p. 16, the law of this circuit does not require Michigan to permit out-of-state retailers to sell wine over the internet to Michigan consumers just because it allows in-state retailers to do so. Since the State can require all sales of alcohol to take place within the three-tier system, a law allowing only retailers within that system to deliver alcohol is so closely related to the powers reserved by the Twenty-first Amendment that it is immune from dormant Commerce Clause scrutiny. *See Byrd*, 883 F.3d at 623.

Plaintiffs fail to apply, or even acknowledge, *Byrd's* test, likely because it dooms their claim. Instead, Plaintiffs rely nearly exclusively on a 2008 decision from this district that was vacated and whose reasoning has now been superseded by *Byrd*. In *Siesta Village Market v. Granholm*, 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), the district court held that the Twenty-first Amendment did not insulate a retailer-delivery statute from dormant Commerce Clause challenge. The *Siesta Village* court held that state regulations requiring an out-of-state retailer to become part of Michigan's three-tier system, open a location in Michigan, and

obtain Michigan licensure to sell to Michigan consumers “are not authorized by the Twenty First Amendment if the regulations create an extra burden on out-of-state wine retailers because the Commerce Clause is implicated.” *Id.* at 1039. But this reasoning conflicts with *Byrd*. As noted above, the Sixth Circuit has held that the Twenty-first Amendment allows a state to require “wholesalers and retailers to be in the state” and that state alcohol laws *are* immunized by the Twenty-first Amendment when they are an inherent part of the three-tier system. *Byrd*, 883 F.3d at 623 n. 8. Further, the *Siesta Village* court did not consider that in-state retailers and out-of-state retailers are not similarly situated and did not view the Twenty-first Amendment as providing *any* protection from a dormant Commerce Clause challenge. Simply put, Plaintiffs’ primary argument in favor of summary judgment relies on a case that cannot be reconciled with the binding law of this Circuit.

Moreover, the law has developed since *Siesta Village* and there is now a consensus among the circuits that laws funneling the sale of alcohol through a State’s three-tier system are valid so long as all products are treated the same regardless of origin, with the Fifth and Sixth Circuits also requiring that the laws be an inherent part of the three-tier system. See *Byrd*; *Arnold’s Wines*, 571 F.3d 190-1 (upholding a New York law that permitted state-regulated retailers to deliver

wine directly to consumers' homes); *Wine Country*, 612 F.3d at 820; *Cooper II*, 820 F.3d at 744; and *Southern Wine*, 731 F.3d at 809-810.

Just a few months ago, the United States District Court for the Northern District of Illinois rejected Plaintiff Lebamoff's same dormant Commerce Clause claim. *Lebamoff Enterprises v Rauner*, No. 16-C-8607, 2017 WL 2486084 (N.D. Ill., June 8, 2017) (now on appeal to the Seventh Circuit Court of Appeals).

Curiously, Plaintiffs do not mention that case here. Just as in this case, Lebamoff challenged an Illinois law that allowed in-state retailers to sell and ship alcohol to Illinois customers. *Id.* at *2. The District Court recognized that all alcohol sold in Illinois by retailers directly to Illinois customers must pass through the three-tier system and that, critically, allowing an out-of-state retailer like Lebamoff to operate outside of the three-tier system would provide it with an "unfair advantage over the in-state retailers" who diligently operate within the three-tier system. *Id.*, see also *Wine Country*, 612 F.3d at 820. This perverse result, the court said, is "ironically contrary to the Commerce Clause." *Id.* Accordingly, the District Court concluded that the challenged law was a constitutional exercise of Illinois' authority under the Twenty-first Amendment. *Id.*, citing *Wine Country*, *supra*.

C. Even if not immune from dormant Commerce Clause challenge, the statute survives Commerce Clause scrutiny.

Even if this Court were to conclude that Michigan's retailer-delivery law is not an inherent aspect of the three-tier system and that it discriminates between similarly situated retailers, the statute is still valid under the dormant Commerce Clause because it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988). In this case, the legitimate local purposes behind Michigan's retailer-delivery statute include: (1) protecting the health, safety, and welfare of Michigan citizens; (2) ensuring orderly markets; (3) limiting the dangers posed by excess alcohol consumption; (4) detecting and preventing underage consumption; and (5) ensuring the collection of taxes. The required "concrete record evidence" shows that nondiscriminatory means are unworkable, *Heald*, 544 U.S. at 493, and the discrimination is justified, *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994).

1. Michigan cannot feasibly regulate a nationwide market of 388,000 retailers.

Plaintiffs suggest that Michigan could regulate out-of-state retailers simply by replicating its efforts in regulating licensed wineries directly shipping to consumers in the State. Pl's Mtn. for Sum. J., pp. 13-15. But Michigan's experience with regulating and monitoring a few thousand wineries instead

provides ample evidence that expanding those efforts to sales of all alcohol through a nationwide market of 388,000 retailers would be unworkable.

Regulating licensed wineries shipping directly from out-of-state has proven challenging, and there are significantly fewer wineries in the United States than alcohol retailers. Exhib. D, Donley Aff., ¶¶ 13, 20; Exhib. B, Wendt Aff., ¶ 15.

Despite increasing its direct-shipment enforcement efforts in 2015, the direct-shipper enforcement team was appropriated only \$300,000 by the Legislature, see Exhib. D, Donley Aff., at ¶¶ 14-16.

Although focusing primarily on wine shipments, the direct-shipper enforcement team has also investigated shipments of beer and spirits and has reviewed numerous websites that evidence large-scale sales of alcohol by licensed and unlicensed persons. *Id.* The volume of violations it would need to initiate would multiply beyond the MLCC's regulatory capacity if all retailers, even those who do not obtain alcohol from a Michigan-licensed wholesaler or the MLCC, can directly ship alcohol to Michigan consumers.

Further, based on Michigan's experience with direct-shipping wineries, the MLCC could not simply regulate whatever fraction of that pool of 388,000 obtains a Michigan retailer license. Just as is the case with wineries, some fraction of that pool will attempt to ship alcohol into Michigan without a license just because some retailer shipments into Michigan are permitted. In order to detect and deter illegal shipments

of alcohol into Michigan by unlicensed retailers, the MLCC would have to attempt to conduct alcohol purchases via telephone and internet from that entire nationwide pool. It is difficult to calculate the cost of such a regulatory scheme, since no state has experience with regulating a nationwide alcohol-retailer industry. But a dollar-for-dollar and person-for-person scale-up of Michigan's current efforts with regulating wineries would result in an annual appropriation by the Legislature to the direct-shipper enforcement team of \$13.35 million, with 401 investigators and supervisors dedicated to direct-shipment enforcement. The current budget for both the Licensing Division and the Enforcement Division is approximately \$14.1 million, and the Enforcement Division has only 46 investigators. Exhib. E, Hamilton Aff., at ¶ 13. The current budget of those two divisions together cannot be fully allocated to monitoring and regulating only direct-shipping retailers nationwide. Regulating such a national retailer market is unattainable.

In addition, all wineries, including those that directly ship to consumers in Michigan, are required to have a federal permit and to comply with federal and state laws.³ Thus, if a winery violates Michigan law, Michigan's interests can still be vindicated through the application of federal law. Exhib. F, Weber Aff., at ¶ 15. In contrast, retailers, such as Lebamoff, are not licensed by the federal government.

³ See Federal Alcohol Administration Act of 1933, 27 U.S.C. § 201 *et seq.* See also, Bureau of Alcohol, Tobacco and Firearms ("ATF"), ATF Ruling 2000-1.

Id. Thus, they are not subject to federal oversight. Rather, they are subject to state law and most out-of-state regulatory agencies will not take action to enforce another state's liquor laws. *Id.*; Exhib. C, Erickson Aff., at ¶ 18.

Simply put, Plaintiffs' suggestion that existing enforcement mechanisms could be used to oversee a nationwide industry defies reality. See Pls' Mtn. for Summ. J., pp. 14-15. Not only are the out-of-state licensed wineries and microbrewers Plaintiffs mention limited in the amount of product they can directly ship to Michigan,⁴ Michigan's experience with a much smaller pool of licensed wineries shows that adding more than 40 times that number of potential retailers would overwhelm available regulatory and financial resources, as well as the Department of Attorney General's legal resources. Exhib. A, Hagan Aff., at ¶¶ 30-38; Exhib. B, Wendt Aff., at ¶¶ 19-25; Exhib. C, Erickson Aff., at ¶ 17-18; Exhib. D, Donley Aff., at ¶ 21(a); Exhib. F, Weber Aff., at ¶ 16.

2. Allowing alcohol delivery by out-of-state retailers would substantially increase the risk of minors obtaining alcohol.

Allowing out-of-state retailers to deliver alcohol to Michigan consumers would also substantially increase the risk of minors obtaining alcohol. While

⁴ Direct shipments by wineries are limited annually to 13,500 liters of wine to customers in this State. Mich. Comp. Laws § 436.1203(4)(h). Microbrewers may also directly ship to customers under Michigan law. However, a microbrewer is limited to a total production of less than 60,000 barrels of beer per year. Mich. Comp. Laws § 436.1109(3).

Plaintiffs mention only wine, the law they challenge permits deliveries of beer and spirits as well, and if they are successful, deliveries of all kinds of alcohol would be permitted from out of state, without it moving through the three-tier system. Michigan's experience with licensed direct-shipping wineries shows that out-of-state entities are more likely to sell wine to minors than in-state counterparts. Exhib. C, Erickson Aff., at ¶¶ 13-16; Exhib. D, Donley Aff., at ¶ 18; Exhib. B, Wendt Aff., at ¶ 8. In 2017, over one-third of the licensed out-of-state direct shippers tested sold and shipped wine to minors, while none of the licensed Michigan direct shippers tested during these controlled-buy operations sold or delivered wine to minors. Exhib. D, Donley Aff., at ¶ 18. At the same time, out of 16,444 licensed in-state retailers, there were only 1,504 citations for selling alcohol to minors. Exhib. B, Wendt Aff., at ¶ 8; Exhib. D, Donley Aff., at ¶ 18. In other words, in 2017 minors were able to successfully purchase wine at a much higher rate from an out-of-state licensed winery than they were able to purchase any alcohol from a licensed Michigan retailer.

This is consistent with a 2015 study by The Hill Group, involving a series of 26 controlled buys involving interstate shipments. Exhib. C, Erickson Aff., at ¶ 14. The study found an extremely low level of compliance. *Id.* For example, only 1 of 15 unlicensed sellers refused to ship wine to a Michigan consumer; none of the deliveries had the appropriate labeling on the delivered package; and individuals

under the age of 21 were able to order, purchase, and receive shipments of alcohol. *Id.* Another study conducted by Rebecca Williams and Kurt Ribisl of the University of North Carolina concluded that “[a]ge verification procedures used by Internet alcohol vendors do not adequately prevent online sales to minors.” *Id.* at ¶ 15.

Erickson opines that out-of-state wineries sell wine to minors at a higher rate than in-state retailers because in-state entities have more incentive to keep alcohol out of the hands of minors. *Id.* at ¶ 7. Consistent regulation of retail licensees by MLCC staff and local law enforcement agencies results in greater compliance with drinking-age laws, and the ultimate threat of putting a Michigan licensed retailer out of business by license revocation is a powerful deterrent and strong motivation for complying with Michigan law. Exhib. A, Hagan Aff., at ¶ 37. Similarly, the possibility of visits by MLCC investigators or local law enforcement officers at a retail licensee’s premises deters sales to minors. *Id.* A significant number of the controlled-buy operations conducted against retailers in Michigan are done by or with the cooperation of local law enforcement. In the past 5 years, over half of the cases in which retailers have been cited for selling to a minor in a controlled-buy operation have been investigated by local law enforcement agencies. Exhib. D, Donley Aff., at ¶ 12.

None of these tools are available to mitigate sales to minors by out-of-state retailers. The MLCC could not visit out-of-state retail premises located hundreds or even thousands of miles from Michigan, Exhib. A, Hagan Aff., at ¶ 38, and Michigan cannot rely on out-of-state law enforcement officials to conduct inspections or controlled-buy operations, Exhib. C, Erickson Aff., at ¶ 18. Moreover, most out-of-state regulatory agencies will not take action to enforce another state's liquor laws. *Id.* For instance, if Lebamoff were to deliver alcohol to a minor in Michigan, it is very unlikely that Indiana would take any action against Lebamoff's license to sell alcohol in Indiana. *Id.* Out-of-state retailers like Lebamoff just do not have the same incentive to prevent sales to minors in another state as they do in their home state, as Doust conceded by admitting that Lebamoff would not require the same stringent training it uses in Indiana to avoid sales of alcohol to minors out-of-state. Exhib. H, Doust Dep. at pp. 10-13, 41. Moreover, out-of-state entities such as Lebamoff would be allowed to deliver alcohol without complying with Michigan's stringent server-training laws. See Mich. Comp. L. § 436.1906; Mich. Admin. Code, R. 436.1060.

3. Collecting Michigan taxes from out-of-state retailers would be unworkable.

Michigan's experience with out-of-state wineries also demonstrates that it is substantially more difficult to collect taxes from entities outside the three-tier

system. Numerous out-of-state wineries either fail to pay excise taxes or to file the required documentation. Exhib. E, Hamilton Aff., at ¶ 3-4. For the first three quarters of 2017, 15 out-of-state wineries either underpaid or completely failed to pay the excise tax, and 239 excise tax reports were filed late by out-of-state direct-shipper wineries. *Id.* Only one Michigan winery filed a late tax report under its direct-shipper license. *Id.*

As noted above, the potential pool of out-of-state retailers shipping into Michigan dwarfs the 1,107 wineries permissibly sending limited quantities of wine directly to customers. It would be unworkable for the MLCC to attempt to collect taxes from even a fraction of the 388,000 nationwide retailers. Thus, if Michigan permits out-of-state retailers to sell alcohol directly to Michigan consumers, Michigan will lose a significant portion of the multi-million-dollar source of tax revenue that it would receive on alcohol that moves through the three-tier system.

The problem is even more stark if Michigan is required to allow out-of-state retailers to deliver spirits. As the seller of spirits in Michigan, the MLCC generally obtains a 65% profit on the retail price of spirits. *Id.* at ¶ 4, 6, citing Mich. Comp. L. § 436.1233. Those profits would be lost if out-of-state retailers are allowed to deliver distilled spirits to consumers that have not been purchased from the State. In addition, the MLCC collects taxes when it sells distilled spirits, Mich. Comp. L. §§ 436.2201, 2203, 2207(2)-(3), and this source of revenue would also be lost.

There is also clear record evidence that Michigan has had significant difficulty in collecting use tax from out-of-state alcohol purchases. Most out-of-state licensed wineries do not collect use tax for Michigan, and online purchases of this nature are often not reported as the law requires. *Id.* at ¶ 10. Indeed, Plaintiff Donovan confessed that he did not pay any use tax on out-of-state internet wine purchases from 2013-2016 of at least \$2,174.11.⁵ Exhib. G, Donovan Dep. Ex. ID-A. The itemized receipts indicate that Mr. Donovan did not pay sales tax on these purchases and, therefore, he was obligated to pay the 6% Michigan Use Tax on those purchases, or \$130.44. But Donovan admitted that he did not declare any of these purchases on his Michigan income tax for any of those years. *Id.* at p. 21. Even if he represented just a fraction of purchasers, the loss of revenue to the State would still be substantial. Thus, tax collection from this massive pool of out-of-state retailers would be unworkable.

4. Permitting out-of-state retailer delivery would defeat the MLCC's product-safety function.

Forcing Michigan to allow out-of-state retailers to deliver alcohol directly to Michigan customers is also unworkable because the MLCC would lose the ability both to control what alcohol enters the state and effectively assist in the recall of

⁵ Mr. Donovan also disclosed the purchase of a case of Lynx Wines from Southern Starz Wines in Huntington Beach, CA. But no purchase price for those wines was included. Exhib. G, Donovan Dep, Ex. ID-A.

dangerous or defective products. Even with the limited exceptions to the three-tier system, the MLCC has knowledge and control over the vast majority of alcoholic products imported into Michigan. Exhib. D, Donley Aff., at ¶ 21(d). But that knowledge and control would be undermined by allowing out-of-state retailers to avoid the three-tier system. In a report on “fake alcohol,” Robert Tobiassen noted, “Serious public health risks, including incidents of death, from consumption of fake alcohol have been reported in the news media from many countries” Exhib. C, Erickson Aff., at ¶ 20, citing Tobiassen, *The “Fake Alcohol” Situation in the United States: The Impact of Culture, Market Economics, and the Current Regulatory System*.⁶ Michigan combats these dangers through a vigorous regulatory scheme that requires registration of all beer and wine sold in the State. In addition, under Michigan law all spirits are sold first to the State and are distributed to retailers through ADAs on the State’s behalf. Thus, Michigan has full control over the spirits sold within its borders. But Michigan cannot prevent the importation of an alcoholic beverage of which it is not aware.

Allowing out-of-state retailers to deliver directly to customers undermines that product-safety function. Exhib. C, Erickson Aff., at ¶ 20. An out-of-state retailer may carry alcoholic beverages that are not ordinarily sold in Michigan,

⁶ Available at http://www.centerforalcoholpolicy.org/wp-content/uploads/2015/04/The_Fake_Alcohol_Situation_in_the_United-States_compressed.pdf (accessed December 5, 2017).

and, therefore, would not be traceable by the MLCC. Exhib. B, Wendt Aff., at ¶ 20; Exhib. D, Donley Aff., at ¶ 21(d). If any alcoholic beverage was recalled for safety reasons, the MLCC would not be able to help protect Michigan consumers from that tainted alcohol. Exhib. C, Erickson Aff., at ¶ 20. Recently, Mexico experienced a rash of tainted alcohol products sold in tourist areas that killed at least one U.S. citizen and injured others. *Id.*, citing Raquel Rutledge, *As Dozens More Report Blackouts at Mexico Resorts, Country Says it will Act on Tainted Alcohol*, Milwaukee Journal Sentinel, July 28, 2017.⁷ Authorities seized a large amount of alcohol product from popular resort areas and the U.S. State Department issued a warning to citizens. *Id.* Thousands of alcohol products are offered for sale over the internet, and there is little ability to determine the authenticity or safety of the product. *Id.* It would be unworkable for Michigan to have a robust consumer-protection program if forced to allow alcohol to be imported by out-of-state retailers without it going through the three-tier system.

⁷ Available at <https://www.jsonline.com/story/news/investigations/2017/07/28/amid-more-blackout-reports-mexico-says-take-action-tainted-alcohol-resorts/519101001/> (accessed December 11, 2017).

II. Selling Wine is not an activity sufficiently basic to the livelihood of the nation to fall within the purview of the Privileges and Immunities Clause.

The Privileges and Immunities Clause states that “Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art. IV, § 2. The United States Supreme Court has established a two-prong test for determining whether a classification based on state citizenship or residency is Constitutional. First, only activities “‘sufficiently basic to the livelihood of the Nation’ . . . fall within the purview of the Privileges and Immunities Clause.” *State of Virginia v. Friedman*, 487 U.S. 59, 64 (1988) (quotations omitted). “Second, if the challenged restriction deprives nonresidents of a protected privilege . . . the restriction [must be] closely related to the advancement of a substantial state interest” to be valid. *Id.* at 65.

Plaintiff Lebamoff’s claim fails because it is a corporation, 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*, 38 U.S. 519, 519 (1839) (a corporation cannot claim “the rights which belong to its members as citizens of a state.”).

Plaintiff Doust’s claim fails for two reasons. First, Doust’s claim fails as a matter of law because selling alcohol is not an activity “sufficiently basic to the livelihood of the Nation.” *Friedman*, 487 U.S. at 64. The Michigan Supreme Court

has long held that “no one has an inherent right to a [liquor] license.” *Case v. Michigan Liquor Control Comm’n*, 314 Mich. 632, 643 (1946). Likewise, the U.S. Supreme Court has held for over a century 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.” *Crowley v. Christensen*, 137 U.S. 86, 91 (1890). As the Sixth Circuit explained in the context of the Privileges and Immunities Clause of the Fourteenth Amendment, “a license to sell intoxicating liquor is not a natural or fundamental right” *Glicker v. Michigan Liquor Control Comm’n*, 160 F.2d 96, 98 (6th Cir. 1947). Because selling alcohol is not a fundamental right, the Privileges and Immunities clause of Art. IV, § 2 does not apply.

But even if it did, Doust is not being denied any privilege that a citizen of Michigan enjoys. The Privileges and Immunities Clause provides that individual persons are to be afforded the same privileges and rights as the individuals who are citizens, or residents, of the state in question. *Friedman*, 487 U.S. at 63-64. As the Court put it in *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), “[i]t was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.” Doust’s claim fails because it is based on an incorrect factual premise. Michigan’s retail liquor licensing laws, contrary to Doust’s assertions, do not draw any distinctions on the basis of the licensee’s state of

residence. See, e.g., Pls' Mtn. for Summ. J., p. 19-20. Both Michigan residents and nonresidents may apply for and be granted a retail liquor license, as long as the place from which they sell liquor—the licensed premises—is located in Michigan. Doust contends that the Liquor Control Code is “vague” on this issue, but that is not so. It simply does not contain a prohibition on nonresidents obtaining retail licenses, and Doust notably does not cite any provisions purportedly creating a restriction. Indeed, the MLCC has issued more than 1,800 retail licenses for premises in Michigan to hundreds of entities that are incorporated or headquartered in other states (i.e., they are not Michigan residents) and that are able to operate licensed retail establishments in Michigan. Exhib. B, Wendt Aff., at ¶ 9. These licensees have the same rights, privileges, and obligations as all other retail licensees. And, contrary to plaintiffs' assertions, neither *Heald* nor *Sup. Ct. of New Hampshire v. Piper*, 470 U.S. 274 (1985), hold that requiring the premises of a licensed liquor retailer to be in-state violates the Privileges and Immunities Clause.

Thus, contrary to Doust's argument, he is not prohibited from competing for business in Michigan upon the same terms as its residents. Pls' Mtn. for Summ. J., p. 20. In fact, the relief he seeks would give him substantial *advantages* not available to Michigan residents. For instance, no Michigan resident can be licensed to sell alcohol at retail from outside of Michigan, because Michigan cannot license retail premises outside of its jurisdiction. Doust is asking this Court

to allow him to do business in a manner expressly prohibited to Michigan residents. Likewise, no Michigan retailer can import alcohol into the State without going through the wholesaler tier of the three-tier system. Mich. Comp. L. § 436.1203(1). But that is exactly what Doust wants this Court to allow—selling alcohol directly to Michigan customers without going through a licensed wholesaler.

Moreover, under Michigan law, manufacturers and wholesalers are prohibited from offering volume discounts to retailers. Mich. Comp. L. § 436.1609a(5); Mich. Admin. Code, R. 436.1625(5), 436.1726(4). But Doust admits that Indiana law allows such volume discounts. Exhib. H, Doust Dep. at 18. Not only are volume discounts contrary to Michigan's public policy, see Exhib. B, Wendt Aff., at ¶ 24, but they would give an Indiana retailer operating in Michigan an advantage unavailable to Michigan residents by permitting the Indiana retailer to sell alcohol at a potentially lower price. In other words, what Doust is really asking for is this Court to issue an order giving him a substantial advantage over Michigan retailers.

In addition, Doust's assertion that he is being denied the opportunity to consult with customers on the purchase of wine based on state citizenship is simply not true. Nothing in Michigan law forbids Doust from consulting with Michigan citizens on what wine to purchase, nor does it forbid Doust selling wine to a

Michigan customer. In fact, Michigan law clearly allows a Michigan citizen to purchase wine from Doust and then personally transport that wine back to Michigan for personal use. Exhib. B, Wendt Aff., at ¶ 13. Moreover, nothing in Michigan law forbids Doust from working with a Michigan retailer in order to provide Michigan customers with the wine he recommends, as long as the retailer complies with Michigan law to obtain the wine.

Doust's claim that the "ban on wine sales and deliveries by out-of-state merchants denies [him] the privilege to engage in his occupation in the state upon the same terms as Michigan citizens," is wholly without merit. Accordingly, Doust is not being deprived the Privileges and Immunities of State citizenship, and this claim should be dismissed.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, this Court should enter an order granting Summary Judgment to Defendants, denying Plaintiffs' motion for summary judgment, dismissing Plaintiffs' complaint with prejudice, and granting any other relief that it may deem proper. Alternatively, if this Court does find that Michigan law violates the dormant Commerce Clause, then the proper remedy is that set forth by the Michigan Legislature: "If any provision of this act is found to be unconstitutional . . . the offending provision shall be severed and shall not affect the remaining portions of the act." Mich. Comp. L. § 436.1925(2). Despite this plain language, Plaintiffs ask this Court instead to re-write Michigan law to allow out-of-state retailers to immediately begin to ship alcohol into the State, without having to obtain that alcohol through Michigan's three-tier system. This Court should decline Plaintiffs' invitation to take up the Legislative Power of the State of Michigan.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ Mark G. Sands
Assistant Attorney General
Attorneys for Defendants
Alcohol & Gambling Enf. Div.
5th Floor, Williams Building
525 W. Ottawa Street
Lansing, MI 48933

(517) 241-0210
sandsm@michigan.gov
P67801

Dated: April 2, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 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.

/s/ Mark G. Sands

Assistant Attorney General
Attorneys for Defendants
Alcohol & Gambling Enf. Div.
5th Floor, Williams Building
525 W. Ottawa Street
Lansing, MI 48933
(517) 241-0210
sandsm@michigan.gov
P67801