

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

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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LEBAMOFF ENTERPRISES, Inc., JOSEPH DOUST,  
JACK STRIDE, JACK SCHULZ, RICHARD DONOVAN  
*Plaintiffs - Appellees*

vs.

RICK SNYDER, WILLIAM SCHUETTE, ANDREW J. DELONEY  
*Defendants - Appellants in 18-2199*  
and  
MICHIGAN BEER & WINE WHOLESALERS ASSOC.,  
*Intervening Defendant - Appellant in 18-2200*

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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

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**CONSOLIDATED BRIEF OF PLAINTIFFS-APPELLEES  
IN RESPONSE TO ALL APPELLANTS**

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## **Corporate disclosure statement**

Lebamoff Enterprises, Inc., has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

## Table of contents

Table of authorities . . . . .	v
Statement in support of oral argument . . . . .	1
Jurisdictional Statement . . . . .	1
Statement of Issues Presented . . . . .	2
Statement of the Case . . . . .	3
Standard of Review . . . . .	11
Summary of Argument . . . . .	12

### ARGUMENT

I. Michigan’s law prohibiting out-of-state retailers from shipping . . . wine to consumers while allowing in-state retailers to do so, violates the nondiscrimination principle of the Commerce Clause	15
A. Michigan’s ban on interstate wine shipping by retailers . . . . . should receive strict scrutiny because it is discriminatory and protectionist	18
B. Michigan has not proved that its discriminatory shipping . . . . . ban advances a legitimate local purpose that cannot be adequately served by nondiscriminatory alternatives	25
C. At least thirteen states allow direct shipping by out-of-. . . . . state wine retailers	39
D. The Twenty-first Amendment is not a defense . . . . .	40
E. Whether the wine passes through a wholesaler located in . . . . . Michigan is constitutionally irrelevant	42

II. Michigan’s ban on nonresidents shipping wine to consumers . . . . .	47
violates the Privileges and Immunities Clause	
A. Michigan prohibits nonresidents from shipping wine to . . . . .	48
consumers but gives its own citizens the privilege to do so	
B. Shipments of wine from an out-of-state seller poses no . . . . .	52
unique threat to public safety that justifies banning them.	
C. The Twenty-first Amendment does not exempt state liquor . . .	54
laws from the Privileges and Immunities Clause	
III. The District Court chose the correct remedy . . . . .	56
Conclusion . . . . .	60
Certificate of compliance . . . . .	61
Certificate of service . . . . .	62
<b>ADDENDUM</b>	
A. Designation of District Court Documents . . . . .	63
B. Statute at issue . . . . .	65

## Table of authorities

### Cases

<i>44 Liquormart v. R.I.</i> , 517 U.S. 484 (1996) . . . . .	56
<i>Alerding v. Ohio High Sch. Athl. Ass’n</i> , 779 F.2d 315 . . . . . (6th Cir. 1985)	50
<i>American Beverage Ass’n v. Snyder</i> , 735 F.3d 362 . . . . . (6th Cir. 2013).	11, 16, 42
<i>Ayotte v. Planned Parenthood of No. New Eng.</i> , . . . . . 546 U.S. 320 (2006).	57
<i>Bacchus Imports Ltd v. Dias</i> , 468 U.S. 263 (1984) . . . . .	16, 41, 55
<i>Brooks v. Vassar</i> , 462 F.3d 341 (4th Cir. 2006) . . . . .	24
<i>Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.</i> , . . . . . 476 U.S. 573 (1986)	16, 17, 22, 43, 44
<i>Byrd v. Tenn. Wine &amp; Spirits Retailers Ass’n</i> , 883 F.3d 608 . . . . . (6th Cir. 2018), <i>aff’d</i> 139 S.Ct. 2449 (2019).	37, 42
<i>Califano v. Westcott</i> , 443 U.S. 76 (1979) . . . . .	57
<i>Chemical Waste Mgt., Inc. v. Hunt</i> , 504 US 334 (1992) . . . . .	25, 27, 29, 35
<i>Cherry Hill Vineyards v. Lilly</i> , . . . . . 553 F.3d 423 (6th Cir. 2008)	26, 40, 42, 58, 59
<i>Cooper v. Texas ABC</i> , 820 F.3d 730 (5th Cir. 2016) . . . . .	37
<i>Craig v. Boren</i> , 429 U.S. 190 (1976) . . . . .	56
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993) . . . . .	31

<i>Dean Milk Co. v. City of Madison</i> , 340 U.S. 349 (1951).. . . . .	28, 36
<i>Dept. of Revenue of Ky. v. Davis</i> , 553 U.S. 328 (2008). . . . .	15
<i>Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.</i> , 405 U.S. 707 (1972) . . . . .	36
<i>Exxon Corp. v. Maryland</i> , 437 U.S. 117 (1978).. . . . .	22
<i>Gen. Motors v. Tracy</i> , 519 U.S. 278, 298-99 (1997).. . . . .	22
<i>Granholm v Heald</i> , 544 U.S. 460 (2005).. . . . .	<i>passim</i>
<i>Great Atlantic &amp; Pac. Tea Co., Inc. v. Cottrell</i> , . . . . . 424 U.S. 366 (1976)	36
<i>H.P. Hood &amp; Sons, Inc. v. Du Mond</i> , 336 U.S. 525 (1949).. . . . .	15
<i>Halliburton Oil Well Cementing Co. v. Reily</i> , . . . . . 373 U.S. 64 (1963)	37
<i>Healy v. Beer Inst.</i> , 491 U.S. 324 (1989) . . . . .	17, 38, 41, 43, 55
<i>Heckler v. Mathews</i> , 465 U.S. 728 (1984). . . . .	58
<i>Herman Miller, Inc. v. Palazzetti Imports &amp; Exports, Inc.</i> , . . . . . 270 F.3d 298 (6th Cir. 2001).	12, 56
<i>Hicklin v. Orbeck</i> , 437 U.S. 518 (1978).. . . . .	50, 55
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979).. . . . .	25
<i>Huish Detergents, Inc. v. Warren Co., Ky.</i> , 214 F.3d 707 . . . . . (6th Cir.2000).	15
<i>Hunt v. Washington State Apple Adv. Comm'n</i> , . . . . . 432 U.S. 333 (1977)	25

<i>Jelousek v. Bredesen</i> , 545 F.3d 431 (6th Cir. 2008).....	42
<i>Leavitt v. Jane L.</i> , 518 U.S. 137 (1996)..	59
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986).....	25, 26
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , . . . . . 475 U.S. 574 (1986).	11
<i>McBurney v. Young</i> , 569 U.S. 221 (2013) . . . . .	48, 50
<i>Med. Mut. of Ohio v. K. Amalia Enterp., Inc.</i> , . . . . . 548 F.3d 383 (6th Cir. 2008).	11, 48
<i>Mich. Bell Tel. Co. v. Engler</i> , 257 F.3d 587 (6th Cir. 2001)..	59
<i>Nat’l Meat Ass’n v. Deukmejian</i> , 743 F.3d 656 (9th Cir. 1984) . . . . .	23
<i>New Energy Co. of Ind. v. Limbach</i> , 486 U.S. 269 (1988). . . . .	25
<i>Nguyen v. I.N.S.</i> , 533 U.S. 53 (2001) . . . . .	58
<i>North Dakota v. U.S.</i> , 495 U.S.423 (1990). . . . .	38
<i>O’Reilly v. Bd. of App. of Montgomery Co., Md.</i> ,..... 942 F.2d 281 (4th Cir. 1991)	52
<i>Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality</i> ,. . . . . 511 U.S. 93 (1994)	15, 25, 35
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970), . . . . .	16, 37, 43
<i>Siesta Village Market, Inc. v. Granholm</i> , . . . . . 596 F. Supp. 2d 1035 (E.D. Mich. 2008)	4, 19, 21
<i>So. Wines &amp; Spirits of Am., Inc. v. Div. of Alcohol &amp;</i> . . . . . <i>Tobacco Control</i> , 731 F.3d 799 (8th Cir. 2013)	46

<i>Sup. Ct. of N.H. v. Piper</i> , 470 U.S. 274 (1985).....	49, 50, 52, 55
<i>Taft Broadcasting Co. v. U.S.</i> , 929 F.2d 240 ..... (6th Cir. 1991).	11
<i>Tenn. Wine &amp; Spirits Retailers Assoc. v. Thomas</i> , ..... 139 S.Ct. 2449 (2019),	<i>passim</i>
<i>Toomer v. Witsell</i> , 334 U.S. 385 (1948) .....	50, 52
<i>Wal-Mart Stores, Inc. v. Texas ABC</i> , 935 F.3d 362 (5th Cir. 2019).	22, 41
<i>Ward v. Maryland</i> , 79 U.S. 418, 12 Wall. 418 (1870).....	37, 50
<i>Wine Country Gift Baskets.com v. Steen</i> , 612 F.3d 809 ..... (5th Cir. 2010),	23
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971) .....	56

**Statutes, Constitutional Provisions and Rules**

U.S. Const., art. IV., § 2 .....	<i>passim</i>
U.S. Const., amend. XXI, § 2 .....	<i>passim</i>
U.S. Const., art. I, § 8, cl. 3 .....	<i>passim</i>
U.S. Const. amend. XIV, § 1 .....	.48
21 C.F.R. 110.35 .....	28
27 C.F.R. 24.1 et seq. ....	28
21 U.S.C. § 423 .....	45
28 U.S.C. § 1291 .....	2
28 U.S.C. § 1331 .....	1



28 U.S.C. § 1343(a)(3) . . . . .	1
42 U.S.C. § 1983 . . . . .	1, 5
Cal. Bus. & Prof. Code § 23661.2 . . . . .	39
Conn. Gen. Stat. § 30-18a . . . . .	39
Fed. R. Civ. P. 56(a) . . . . .	11
Idaho Code § 23-1309A . . . . .	39
La. Rev. Stat. § 26:359(B) . . . . .	39
Mich. Admin. Code R. 436-1727 . . . . .	34, 45
Mich. Admin. Code R. 436.1728.. . . . .	34, 45
Mich. Comp. L. § 436.1111(8) . . . . .	18
Mich. Comp. L. § 436.1113(10) . . . . .	46
Mich. Comp. L. § 436.1201(1) . . . . .	18
Mich. Comp. L. § 436.1203 . . . . .	<i>passim</i>
Mich. Comp. L. § 436.1217 . . . . .	45
Mich. Comp. L. § 436.1537(1)(f) . . . . .	49
Mich. Comp. L. § 436.1901. . . . .	18
Mich. Comp. L. § 436.1903 . . . . .	34, 53
Mich. Comp. L. § 436.1925(2) . . . . .	60
Mich. Comp. L. § 436.2005 . . . . .	45

N.D. Cent. Code § 5-01-16(5) . . . . .	39
N.H. Rev. Stat. § 178:27 . . . . .	39
N.M. Stat. § 60-7A-3(E) . . . . .	39
Neb. Rev. Stat. § 53-123.15(5) . . . . .	39
Nev. Rev. Stat. § 369.490 . . . . .	39
Or. Rev. Stat. § 471.282(1) . . . . .	39
Va. Code Ann. § 4.1-207(6) . . . . .	39
Va. Code Ann. § 4.1-219(B) . . . . .	23
W. Va. Code Ann. § 60-8-6(b) . . . . .	39
W. Va. Code Ann. § 60-8-6a . . . . .	39
Wyo. Stat. § 12-2-204(a). . . . .	39

**Other authorities**

<a href="https://www.cpsc.gov/Recalls">https://www.cpsc.gov/Recalls</a> . . . . .	45
<a href="https://www.fda.gov/safety/recalls-market-withdrawals-safety-alerts">https://www.fda.gov/safety/recalls-market-withdrawals-safety-alerts</a> . . . . .	45

## **Statement in support of oral argument**

The Court should hear oral argument because this case involves two issues of constitutional law for which there is no dispositive Sixth Circuit precedent. This will be the first case in this Circuit to apply *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. 2449 (2019), which held that the nondiscrimination principle of the Commerce Clause applied to state laws which regulate alcoholic beverage retailers. It also will be the first case to address the extent to which the Privileges and Immunities Clause protects the opportunity of nonresidents to engage in the liquor business upon the same terms as residents.

### **Jurisdictional Statement**

**A. District court jurisdiction.** Plaintiffs brought this action in the Eastern District of Michigan under 42 U.S.C. § 1983, alleging that provisions in the Michigan Liquor Control Code violated the Commerce Clause, U.S. CONST. art. I, § 8, and the Privileges and Immunities Clause, U.S. CONST., art. IV., § 2. They sued state officials for declaratory and injunctive relief. The District Court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), which confer original jurisdiction on federal district courts to hear suits

alleging the violation of rights and privileges under the Constitution and laws of the United States.

**B. Court of appeals jurisdiction.** The District Court entered a final order and opinion on September 28, 2018, denying the defendants' motions for summary judgment and granting plaintiffs' motion for summary judgment. The order disposed of all claims and there is no part of the litigation that remains in the district court. The defendants filed timely notices of appeal and this Court has jurisdiction under 28 U.S.C. § 1291.

### **Statement of Issues Presented**

1. Does Michigan's law prohibiting out-of-state retailers from delivering wine directly to consumers, but allowing in-state retailers to do so, violate the nondiscrimination principle of the Commerce Clause?
2. Does the Twenty-first Amendment override the nondiscrimination principle and authorize Michigan to require that a retailer must be physically located in the state in order to engage in internet sales and shipment of wine to consumers?
3. After the District Court determined that the ban on interstate shipping was unconstitutional, was it an abuse of discretion to enjoin

the enforcement of that provision, or should the court have enjoined the enforcement of a different provision that allowed in-state shipping?

4. Does Michigan's ban on wine deliveries originating out of state violate the Privileges and Immunities Clause by denying nonresidents the opportunity to sell and deliver wine to Michigan consumers upon the same terms as its own citizens?

### **Statement of the Case**

The plaintiffs are an out-of-state wine retailer and several in-state consumers. They are challenging the constitutionality of provisions in Mich. Comp. L. § 436.1203 prohibiting out-of-state retailers from delivering wine directly to Michigan consumers while allowing in-state retailers to do so. They assert that the law violates the Commerce Clause by discriminating against interstate commerce, and the Privileges and Immunities Clause by denying nonresidents the opportunity to engage in business in the state. Amended Complaint, RE 5, Page ID # 18-25.

#### **A. The statute being challenged**

The relevant parts of Mich. Comp. L. § 436.1203 provide:

(2) ... except as provided in subsections (3), (12), [and] (15)..., a retailer shall not deliver alcoholic liquor to a consumer in this state at the home or business of the consumer or at any location away from the licensed premises of the retailer....

(3) ... a retailer that holds a specially designated merchant license *located in this state* may use a common carrier to deliver wine to a consumer in this state....

(12) A retailer that holds a specially designated merchant license ... may deliver beer and wine to the home or other designated location of a consumer in this state....

(15) A retailer that holds a specially designated merchant license *located in this state* may use a third party facilitator service by means of the internet or mobile application to facilitate the sale of beer or wine to be delivered to the home or designated location of a consumer.... (emphasis supplied).<sup>1</sup>

A prior version of this law was declared unconstitutional in *Siesta Village Market, Inc. v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008) and Michigan repealed it. However, in 2017, Michigan re-instated the law, giving its own in-state retailers the right to take internet orders and ship wine to consumers while prohibiting out-of-state retailers from doing so. Plaintiffs contend the new version of the law has the same constitutional flaws as the former version. It discriminates against interstate commerce and nonresidents in violation of the dormant Commerce Clause and the Privileges and Immunities Clause. That discrimination is not constitutionally justified either by the

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<sup>1</sup> The full text of §436.1203 is set out in the addendum at pp. 65 et seq. Many of its provisions are not relevant to retail wine sales.

Twenty-first Amendment or by any concrete record evidence proving that Michigan can only advance its health and safety goals by discriminating against out-of-state retailers, and no less discriminatory alternative is available.

## **B. Proceedings below**

Plaintiffs sued Michigan state officials pursuant to 42 U.S.C. § 1983 for declaratory and injunctive relief. The Michigan Beer & Wine Wholesalers Association intervened as a co-defendant. All parties filed cross-motions for summary judgment. Plaintiffs' Motion, RE 31, Page ID # 203-04; Defendants' Motion, RE 34, Page ID # 393-395; Intervenor's Motion, RE 33, Page ID # 287-88. The District Court declared that the prohibition against direct shipping by out-of-state retailers violated the Commerce Clause because it discriminated against interstate commerce and favored in-state economic interests. Opinion, RE 43, Page ID # 851-53. It held that the Twenty-first Amendment was not a defense, *id.* at Page ID # 853-57, and the State had not proved that a discriminatory ban was the only way it could further its regulatory goals. *Id.* at Page ID # 857-63. The District Court enjoined state officials from enforcing the unconstitutional ban and

ordered that direct-shipping privileges be extended to out-of-state retailers. *Id.* at Page ID # 863-65. It has stayed that order pending the appeal. Order, RE 55, page ID # 913. The Court declined to reach the Privileges and Immunities issue. Opinion, RE 43, Page ID # 864.

### **C. Statement of facts**

1. Lebamoff Enterprises, Inc., is an Indiana corporation which operates fifteen retail liquor stores in Fort Wayne under the name Cap n' Cork. *Doust First Aff.* ¶, RE 31-3, Page ID # 236. It is approximately 50 miles from the Michigan border and 65 miles from the city of Coldwater. *Id.* at ¶ 4. Many people from southern Michigan come to Fort Wayne because it is the closest regional health center and shop at Cap n' Cork while in the city. Lebamoff carries a larger inventory than what is available in Coldwater and other towns in southern Michigan. *Doust Depo.*, RE 34-9, Page ID # 622-25. It has received requests from customers that it ship wine back to their residences in Michigan, *Doust First Aff.* at ¶¶ 2 & 5, RE 31-3, Page ID # 236-37, but cannot fulfill them because shipping into Michigan is against the law. It loses the profit it would have made on such sales. *Id.* ¶¶ 2-3. Lebamoff has its own delivery vehicles and trained employees who deliver wine through-



out Indiana, and it has used the specialty wine shipping services of FedEx and UPS, so it has the ability to safely deliver wine to adult residents of southern Michigan. *Id.* at ¶¶ 4, 6, 7. It would obtain a license, collect taxes and comply with Michigan regulations if allowed to ship to that state. *Id.* at ¶ 8.

2. Joseph Doust is one of the co-owners of Lebamoff Enterprises and a professional wine merchant. He advises customers, helps them select and obtain wines, including older vintages and other hard-to-find wines. He delivers wine to them and assists them in making arrangements for beverage service at special occasions like weddings. Doust Second Aff. ¶¶ 1-2, RE 31-5, Page ID # 250; Doust Depo., RE 34-9, Page ID # 612-13, 622-25. He has hundreds of steady customers who rely on him, some of whom have moved to Michigan where he can no longer send wine to them. He is also unable to provide service to potential new customers from Michigan because he cannot deliver or ship wine to them. He loses income when he loses sales. Doust Second Aff. ¶¶ 3 & 5, RE 31-5, Page ID # 250-51. He would obtain a Michigan license if one were available that allowed him to ship or deliver to customers in Michigan, and would collect and remit taxes. He will not ship wine into

Michigan illegally because he could be fined or have the wine confiscated. *Id.* at ¶ 4.

3. Richard Donovan, Jack Stride and Jack Schulz are Michigan wine consumers who want to be able to order wine from out-of-state retailers for a variety of reasons. Mr. Donovan lives in a small town and the nearest non-grocery wine store is about 50 miles away in Grand Rapids. He wants to have wine delivered to avoid the expense and inconvenience of traveling to larger cities. Donovan Aff. ¶¶ 1-3, RE 31-6, Page ID # 252. Mr. Stride and Mr. Schulz are young lawyers from Detroit who cannot afford the time to search local stores for the wine they want while building their legal careers. Like other millennials, they buy most of their goods over the internet and rely on delivery to their homes or offices. They want to be able to acquire wine the same convenient way. Stride Aff. ¶¶ 1, 3-4, RE 31-7, Page ID # 254; Schulz Aff. ¶¶ 1, 3, 8, RE 31-8, Page ID # 256-57. Mr. Schulz has looked especially for Greek wine, because he is engaged to a woman of Greek heritage and wants to be able to serve her family good Greek wine when they visit. Very little is available locally, but he has seen a larger selection at out-of-state and online retailers. Schulz Aff. ¶¶ 4-7, RE 31-8, Page ID # 256-57.

4. Each of the consumer plaintiffs has experienced the same harm: trying to buy a wine they wanted from an online retailer, but being unable to complete the transaction because the retailer would not ship to Michigan. They ended up buying a less desirable wine from a Michigan retailer in substitution for the wine they would otherwise have purchased from an out-of-state seller. Donovan Aff. ¶¶ 4, 6, 7, RE 31-6, Page ID # 253; Stride Aff. ¶¶ 5-7, RE 31-7, Page ID # 254-55; Schulz Aff. ¶ 10, RE 31-8, Page ID # 257.

5. Russell Bridenbaugh, a wine expert with 35 years' experience, reports that there are approximately 200,000 different wines for sale in the United States, but that brick-and-mortar retail stores carry only a small percentage of them -- from 300 labels at a small shop or grocery store to 2500-5000 wines at one of the major wine stores in a metropolitan area. Bridenbaugh Decl. ¶¶ 4-5, RE 31-9, Page ID # 258-60. Popular, highly-rated and older vintage wines are especially hard to find at local stores, *id* at ¶ 6, but often can be found at one of the big internet retailers located outside Michigan. *Id.* at ¶ 7. As an experiment, he conducted an online search for eight wines that had previously been available at a Michigan retailer but were sold out, to

simulate the experience of consumers who had enjoyed a particular wine but found it was out of stock when they went back to buy more. Mr. Bridenbaugh found that none of the eight was available from any major Michigan retailer and none could be ordered directly from the winery, but all were still available from internet retailers located in other states. *Id.* at ¶¶ 8-11.

6. Tom Wark, Executive Director of the National Association of Wine Retailers, is an expert in the wine retailing business. He reviewed documents from the Michigan Liquor Control Commission and found that Michigan's consumers have access to a only about 10% of the wines available for sale elsewhere in the country. Many of the remaining 90% are available from out-of-state retailers. Wark Statement, RE 31-9, Page ID # 264-65. The prohibition against buying wine from out-of-state retailers results in higher prices and fewer choices to consumers and protection from competition for Michigan wholesalers and retailers. *Id.*. See also FTC REPORT, RE 31-12, Page ID # 275-76. The sponsor of the law banning interstate shipping, Sen. MacGregor, admitted during the hearing on the bill that Michigan retailers were at a "competitive disadvantage with out of state retailers... So, this is a bill to help out

our local businesses to be more competitive in the marketplace.” Wark Statement, RE 31-10, Page ID # 265.

### **Standard of Review**

**A. Summary Judgment.** A grant of summary judgment is reviewed *de novo*. *Med. Mut. of Ohio v. K. Amalia Enterp., Inc.*, 548 F.3d 383, 389 (6th Cir. 2008). Summary judgment is proper if, when drawing all inferences in the light most favorable to the non-moving party, the moving party shows that there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The burden is on the non-moving party to establish with concrete evidence that there is a genuine issue for trial. *American Beverage Ass'n v. Snyder*, 735 F.3d 362, 369 (6th Cir. 2013). When cross-motions are filed, each is separately evaluated to determine whether there is a genuine dispute as to the facts material to its resolution and whether the movant is entitled to judgment as a matter of law. *Taft Broadcasting Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991).

**B. Remedy.** This Circuit reviews a district court’s choice of remedy and terms of an injunction for abuse of discretion. A district court abuses its discretion when it relies on clearly erroneous findings of fact, improperly applies the law, or makes a definite and clear error of judgment. *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 317 (6th Cir. 2001).

### **Summary of Argument**

Michigan discriminates against out-of-state wine retailers engaged in interstate commerce. It prohibits them from delivering wine to consumers, Mich. Comp. L. § 436.1203(2), while allowing in-state retailers to do so. Mich. Comp. L. § 436.1203(3). The Supreme Court has repeatedly held that state liquor laws that discriminate against interstate commerce and favor local economic interests violate the Commerce Clause unless the state can prove that the discrimination advances a legitimate state interest that could not be furthered by nondiscriminatory alternatives. The Twenty-first Amendment is not a defense and does not authorize states to enact discriminatory liquor regulations. These principles were most recently restated in *Tenn. Wine & Spirits Retailers Assoc v. Thomas*, 139 S.Ct. 2449 (2019).

The state's burden to justify discrimination against out-of-state interests is an exacting one. Speculation, inference and argument are not adequate. The state must prove with concrete evidence that its interests could not be advanced by reasonable nondiscriminatory alternatives, and Michigan has failed to do so. It allows wine to be sold on the internet and shipped to consumers if the retailer is located in Michigan and it has not proved that wine shipped by out-of-state retailers presents more of a danger to the public. Michigan also allows wine to be shipped from out-of-state wineries to consumers and it has not proved that wine shipped by out-of-state retailers presents more of a danger to the public than when it is shipped by wineries. In both situations, it is the same wine being delivered by the same FedEx driver. In both situations, Michigan advances its regulatory interests by requiring that shippers obtain licenses, consent to long-arm jurisdiction, use a two-step age-verification process, label packages, and abide by reporting and auditing rules. It has offered no explanation why those regulations are sufficient to satisfy its interests in public safety when the wine is shipped by a winery or an in-state retailer, but not when shipped by an out-of-state retailer.

Because the law discriminates against out-of-state retailers engaged in interstate commerce, and the State offered no evidence to justify the discrimination, the District Court declared the ban on interstate shipping unconstitutional. It enjoined state officials from enforcing it, thereby extending the direct-shipping privilege to Lebamoff and other out-of-state retailers. The Supreme Court and this Circuit have approved extending a benefit to those who have been wrongfully denied it as an appropriate remedy to past discrimination, so the court's choice of remedy was well within its discretion.

Michigan's ban on cross-border deliveries also violates the Privileges and Immunities Clause. It denies a merchant living in Indiana the opportunity to engage in his occupation in Michigan. Such a ban must be justified with concrete evidence that the exclusion of nonresidents is necessary to protect the public, which the State has failed to do. How the Privileges and Immunities Clause applies to regulated occupations involving the sale of liquor is a matter of first impression. The district court did not reach this issue because its decision on the Commerce Clause was adequate to resolve the case.



## ARGUMENT

### **I. Michigan’s law prohibiting out-of-state retailers from shipping wine to consumers while allowing in-state retailers to do so, violates the nondiscrimination principle of the Commerce Clause**

The Commerce Clause<sup>2</sup> gives Congress the power to regulate commerce among the several States. It has long been understood that the Clause also has a negative, or dormant, aspect that prohibits states from regulating interstate commerce or discriminating against out-of-state business interests. *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994); *Huish Detergents, Inc. v. Warren Cnty., Ky.*, 214 F.3d 707, 712 (6th Cir.2000). The dormant Commerce Clause is driven by concerns about economic protectionism, i.e., regulatory measures that favor in-state economic interests over their out-of-state competitors. *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–538 (1949). Protectionism is forbidden in all fields of commerce, including the sale of alcoholic beverages. *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. 2449, 2459, 2461 (2019).

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<sup>2</sup> “The Congress shall have the power [to] regulate commerce ...among the several states.” U.S. CONST., ART. I, § 8, cl. 3.

This Circuit has adopted a two-step analysis in Commerce Clause cases, summarized in *American Beverage Ass'n v. Snyder*, 735 F.3d at 369-70 (citing *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. 573, 578–79 (1986)). First, a court determines what level of scrutiny is required. If a state law on its face, purposefully, or in practical effect, directly regulates interstate commerce or discriminates against out-of-state interests, courts apply strict scrutiny. Such laws are extremely difficult for states to justify and are usually struck down. If a law is not discriminatory, courts use the lower-scrutiny *Pike* balancing test, under which laws burdening interstate commerce are usually upheld unless the burden is clearly excessive in relation to the local benefit. *Pike v. Bruce Church, Inc*, 397 U.S. 137 (1970).

An amicus brief filed by the Wine & Spirits Wholesalers of America contends that the Supreme Court in *Tenn. Wine & Spirits Retailers Assoc. v. Thomas* abandoned decades of applying the strict scrutiny standard in discrimination cases and replaced it with a more lenient “predominant effect” test. WSWA Amicus Brief at 7-22. The argument is without merit. First, the Court itself adheres to precedents that invoked strict scrutiny, citing *Bacchus Imports Ltd v. Dias*, 468 U.S. 263 (1984)

and *Granholm v Heald*, 544 U.S. 460 (2005), a total of 48 times. Second, the Court does not say it is changing the legal standard. It is quite capable of being explicit when it wants to disown prior precedent. See *Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989) (“to the extent that *Seagram* holds that retrospective affirmation statutes do not facially violate the Commerce Clause, it is no longer good law”). Third, the predominant effect standard is not new. The Court’s Commerce Clause cases have always held that the critical consideration in reviewing discriminatory laws is predominant or “overall effect of the statute on both local and interstate activity,” *Brown-Forman*, 476 U.S. at 578-79. See also *Healy*, 491 U.S. at 340-41 (discriminatory laws are unconstitutional unless “demonstrably justified by a valid factor unrelated to economic protectionism”). Fourth, the *Tennessee Wine* opinion in fact applied strict scrutiny. It held that “if a state law discriminates [it] can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose.” 139 S.Ct. at 2461. The Court then applied strict scrutiny, 139 S.Ct at 2474-76, and held that Tennessee’s residency requirement was unconstitutional because the state failed to prove with concrete evidence that it actually promoted public health or

that nondiscriminatory alternatives would be insufficient. 139 S.Ct. at 2474.

**A. Michigan’s ban on interstate wine shipping by retailers should receive strict scrutiny because it is discriminatory and protectionist**

Michigan’s wine shipping law discriminates against interstate commerce and gives economic protection to in-state interests. The discrimination is patent and facial. Michigan retailers may obtain Specially Designated Merchant (SDM) licenses that allow them to take internet orders, verify the age of purchasers through an online age verification service, and then deliver the wine by any of three methods - common carrier, Mich. Comp. L. §§ 436.1203(3), 436.1111(8); using their own vehicles, Mich. Comp. L. § 436.1203 (12), or using the services of a third-party facilitator. Mich. Comp. L. § 436.1203 (15). An out-of-state retailer may not do so because the law specifies that deliveries to consumers must originate from premises “located in this state,” Mich. Comp. L. § 436.1203(3), (15), and that no shipments may be made that originate from outside the state. Mich. Comp. L. § 436.1203(2).<sup>3</sup> The

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<sup>3</sup> *Accord*, Mich. Comp. L. §§ 436.1201 (1), 436.1203 (1), 436.1901, all of which prohibit sales and deliveries by retailers except as permitted by § 436.1203 (3).

State concedes this in its Answer ¶¶ 13-18, RE 11, Page ID # 114-16.

The District Court has twice ruled that Michigan's discriminatory retail wine shipping law is unconstitutional. District Judge Hood declared that the former law violated the Commerce Clause in *Siesta Village Market*, 596 F. Supp. 2d at 1040, and District Judge Tarnow declared in this case that the virtually identical current law violated the Commerce Clause. Opinion, RE 43, Page ID # 863.

The ban on direct-to-consumer shipping from out-of-state retailers effectively gives in-state retailers the exclusive right to sell wine over the internet. This obviously favors the economic interests of in-state retailers (and their wholesaler suppliers) by shielding them from interstate competition. It harms out-of-state retailers and cuts off the flow of goods moving in interstate commerce. Many consumers prefer to buy wine over the internet for the convenience or because it makes products available that are difficult to obtain locally. Statement of Facts ¶ 3, *supra* at 8. Michigan limits the internet market to the few online wine retailers which are located in Michigan. *Id.* Those retailers do not carry anywhere near a majority of wines for sale in the United States, so consumers searching for rare, out-of-stock, hard-to-find or older

wines are out of luck, even though the wine may be offered for sale at a dozen out-of-state retailers. *Id.* at ¶¶ 3-5. When wines are unavailable because interstate shipping is banned, consumers will switch their purchases to in-state retailers who benefit economically from those purchases. *Id.* at ¶¶ 3, 4, 6. The ban on direct shipping protects in-state wholesalers and retailers from competition which causes higher prices and fewer choices. *Id.* at ¶ 6. Out-of-state retailers like Lebamoff Enterprises are harmed because they lose sales. *Id.* at ¶ 1. Plaintiff Joseph Doust loses income. *Id.* at ¶ 2.

Michigan’s discrimination against out-of-state retailers is also purposeful. After the District Court struck down the previous version of this law in 2008, Michigan initially heeded the District Court’s admonition that it must treat in-state and out-of-state retailers alike. It repealed the discriminatory law and replaced it with one that prohibited all retailers from shipping by common carrier but allowed both in-state and out-of-state retailers to deliver wine in their own vehicles. *See Mich. Comp. L. § 436.1203(11) (eff. 2009-2017).*<sup>4</sup> Then in

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<sup>4</sup> It provided: “A retailer that holds a [SDM] license in this state [or] an out-of-state retailer that holds its state's substantial equivalent license... may deliver beer and wine to the home ... of a consumer in this state...”

2017, the State deliberately changed the law to make it discriminatory, by giving in-state retailers broad shipping and delivery rights, and eliminating delivery privileges from out-of-state retailers. The legislature was fully aware of the *Siesta Village* decision and fully aware the new law was discriminatory. *See* Tanford Declaration ¶ 11, RE 31-2, Page ID # 235, and Letter to Legislators, RE 31-13, Page ID # 277. It passed the bill anyway in order to protect in-state economic interests. Statement of Facts ¶ 6, *supra* at 10-11.

The State effectively concedes that the law was motivated in part by protectionism. In its principal brief, the defendants argue several times that a ban on shipping from out-of-state retailers is needed not only to protect the public, but also because out-of-state retailers might have a commercial advantage over Michigan retailers. State Brief at 29, 34, 45. *See also* Defendants' Motion for Summary Judgment, RE 34, Page ID # 448 (ban justified to prevent an Indiana retailer from selling alcohol at a potentially lower price).

A statute that facially and purposefully discriminates against interstate commerce and favors in-state economic interests violates the Commerce Clause. When challenged, it must be given strict scrutiny

and faces a virtually *per se* rule of invalidity. *Granholm v. Heald*, 544 U.S. at 472, 476; *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. at 578–79. It does not matter that the statute is regulating wine instead of widgets, because the Supreme Court has said that the “state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause,” just like other products. *Granholm v. Heald*, 544 U.S. at 487.

The state and intervening defendants argue that this law is not discriminatory because in-state and out-of-state wine retailers who sell over the internet and ship wine to consumers’ homes are not similarly situated. The argument is without merit. Both entities are retailers selling the same products to the same consumers, using the same internet, and delivering by the same common carrier. This is the very definition of “similarly situated.” Even the cases cited by the defendants agree. *See Gen. Motors v. Tracy*, 519 U.S. 278, 298-99 (1997) (companies selling the same products are similarly situated); *Exxon Corp. v. Maryland*, 437 U.S. 117, 126 (1978) (in-state and out-of-state companies in the retail market are similarly situated); *Wal-Mart Stores, Inc. v. Texas ABC*, 935 F.3d 362, 376 (5th Cir. 2019) (in-state and out-of-state



retailers are similarly situated). *Accord, National Meat Ass'n v. Deukmejian*, 743 F.2d 656, 660 (9th Cir. 1984) (in-state and out-of-state meat processors are similarly situated).

The defendants' first argument is that the mere fact that Lebamoff is located out of state, regulated by that other state, and obtains its products through a different supply chain, automatically makes it differently situated. State Brief at 32-34; Wholesalers Brief at 31-32. This cannot possibly be the case, or no Commerce Clause case could ever succeed because every out-of-state business complaining about discrimination is located in and regulated by another state and has a different supply chain. Indeed, the Virginia winery whose claim of unconstitutional discrimination prevailed in *Granholm v. Heald* was located in, regulated by, and got its fruit supply from a different state. *See* VA. CODE ANN. § 4.1-219(B) (class B farm winery must use 75% fruit grown in Virginia). The two cases cited by the defendants are not germane. In *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 812 (5th Cir. 2010), the Fifth Circuit did not hold that the retailer plaintiff was not similarly situated because it was located out-of-state, but because in-state retailers could distribute only within their county and

the out-of-state retailer plaintiff was seeking state-wide distribution. The part of *Brooks v. Vassar* relied on by defendants was not actually the opinion of the court because the other two judges on the panel declined to join that section. 462 F.3d 341, 344 (4th Cir. 2006).

The defendants also argue that out-of-state retailers are dissimilar to in-state retailers because they are unlicensed and unregulated. State Brief at 31-34. This is a strawman argument. Retailers like Lebamoff are not unlicensed bootleggers, they are licensed and regulated in their home states. The only reason they do not have Michigan licenses is because Michigan refuses to issue them. It is within Michigan's power to require out-of-state retailers to obtain direct shipper licenses, consent to jurisdiction, and abide by state regulations, as it currently does for out-of-state wineries. Mich. Comp. L. § 436.1203(4-6).

In-state and out-of-state wine retailers are similarly situated. They sell the same product, compete for the same customers, and seek to serve the same market by the same means -- taking internet orders and delivering by common carrier or their own vehicles to consumers in Michigan. The ban on deliveries from out of state retailers is clearly

discriminatory, so the real question is whether Michigan can justify this ban as the only feasible way it can protect public health and safety.

**B. Michigan has not proved that its discriminatory shipping ban advances a legitimate local purpose that cannot be adequately served by nondiscriminatory alternatives**

Once a court determines that a law is discriminatory, the burden shifts to the State to prove that the difference in treatment of in-state and out-of-state entities advances a legitimate local purpose that cannot adequately be served by less discriminatory alternatives. The “standards for such justification are high.” *New Energy Co.*, 486 U.S. 269, 278 (1988). At a minimum, “discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.” *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). *See also Or. Waste Systems*, 511 U.S. at 101 (the state’s purported justification must pass the “strictest scrutiny.”). The burden of proof on this issue rests with the State, *Chemical Waste Mgt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992); *Hunt v. Washington State Apple Adv. Comm’n*, 432 U.S. 333, 342 (1977) (“the burden falls on the State”), and requires an extensive factual record clearly demonstrating the absence of workable alternatives. *Maine v. Taylor*, 477 U.S. 131, 140-43 (1986).

This strict scrutiny standard applies to cases involving alcoholic beverages. To pass constitutional muster, the state must prove with “concrete record evidence” that the prohibition “actually promotes public health or safety” and that “nondiscriminatory alternatives would be insufficient to further those interests.” *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. at 2474. Mere speculation and unsupported assertions are insufficient to meet what the Court calls this “exacting standard.” *Granholm v. Heald*, 466 U.S. at 493. Critical to this scrutiny is whether Michigan has introduced actual evidence into the record demonstrating that other nondiscriminatory alternatives would be ineffective. This inquiry formed the center of the analysis in *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. at 2474-76; *Granholm v. Heald*, 466 U.S. at 489-93; and *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423, 433-34 (6th Cir. 2008).

It is a difficult burden to meet. Only once has the Supreme Court found that a state adequately had proved that out-of-state interests had to be discriminated against because there was no alternative. In *Maine v. Taylor*, 477 U.S. at 140-43, the Court upheld Maine’s decision to ban out-of-state suppliers from delivering minnows into the state to be used

as bait. Expert witnesses testified that imported minnows were likely to introduce non-native parasites that would harm the Maine fishing business and that they could not be effectively treated to eliminate the parasite, so there was no way to prevent harm other than a total ban. Michigan has come nowhere near to meeting this standard -- the record is completely devoid of any concrete evidence that no reasonable alternatives exist that could possibly prevent harm to its regulatory interests.

Before a court can determine whether the State has proved that a law advances a legitimate local interest that cannot adequately be served by nondiscriminatory alternatives, the State must identify exactly what that interest is. Michigan says that requiring a retailer to have a physical presence in the state makes it easier to enforce its myriad of liquor laws, and that those laws in general protect public health and safety. It would be harder to regulate out-of-state shippers. State Brief at 39-42; Wholesalers Brief at 26-29. However, the Supreme Court holds that increased regulatory cost and difficulty is not a justification for discrimination, *Chemical Waste Mgt., Inc. v. Hunt*, 504 U.S. at 348, because the State has the nondiscriminatory alternative of

appropriating more money or raising license fees to give the agency the budget it needs. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-55 (1951). The Supreme Court rejected this argument in *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. at 2475, and *Granholm v. Heald*, 544 U.S. at 490, because we live in a digital age where most oversight and monitoring can be done electronically. Beyond that, the State identifies only two specific legitimate concerns: restricting youth access to alcohol (Brief at 51-53) and preventing the sale of unsafe products (Brief at 47-51).

The connection between banning interstate wine shipments and public safety is tenuous at best. Wine is among the most heavily regulated products in the country -- regulated, inspected and tested by every state and the federal government. *E.g.*, 27 C.F.R. 24.1 et seq. (more than 200 TTB wine regulations).<sup>5</sup> The defendants have offered no evidence of any known incident in which public safety was threatened by direct wine shipping. What little evidence they presented had to do with products other than wine, such as tainted spirits, alcohol-infused energy drinks, and marijuana liquor, that was not being distributed by

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<sup>5</sup> See also 21 C.F.R. 110.35, which requires the F.D.A. to inspect all food production facilities, which includes wineries.

interstate shipping but on the premises of resorts in Mexico and supermarkets in Israel. (State Br. at 48-50).

In any event, actions speak louder than words. Michigan allows direct shipments of wine from out-of-state wineries, Mich. Comp. L. § 436.1203(4-6), so it must believe that interstate wine shipping is safe to the public.<sup>6</sup> Michigan trusts that public safety will be adequately protected by federal regulators and agencies in its sister states, all of which have the same safety concerns. Michigan does not offer any evidence that Lebamoff's home state of Indiana so poorly regulates its own retailers that Michigan must ban them from shipping wine to Michigan consumers that Indiana allows them to sell to Indiana consumers. It presents no evidence why deliveries from out-of-state retailers pose some unique set of public safety risks. *See Chemical Waste Mgmt., Inc. v. Hunt*, 504 US at 348 (state must show that the out-of-state product is more dangerous than the in-state product).

Indeed, for eight years, Michigan allowed retailers licensed by a sister state to deliver wine directly to Michigan consumers, Mich. Comp. L. §

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<sup>6</sup> It also allows the direct delivery of beer from out-of-state micro-brewers who have no physical presence in the state without any apparent public safety concerns. Mich. Comp. L. § 436.1203(12).

436.1203 (2), (11) (eff. 2009-2017), and has produced no evidence of a single public health and safety problem that arose from it.

Michigan attempts to justify its in-state presence requirement by arguing that it helps prevent youth access. (Brief at 51-53). It offers evidence from various sting operations that supposedly show that minors were able to order alcohol from out-of-state retailers more often than from in-state retailers. The evidence is inadequate for six reasons. First, placing an order is not the same thing as having it successfully delivered, and there is no youth access until the alcohol is delivered. Under Michigan law, age must be verified a second time when delivered, and the State's evidence does not say whether the delivery driver viewed the recipient in person, failed to verify the recipient's age, and actually delivered the wine. Second, much of the evidence is irrelevant because it concerns illegal shipments from *unlicensed* sellers, not those with direct shipper permits. Erickson Aff. ¶ 14, RE 34-4, Page ID # 501-02; Donley Aff. ¶ 17, RE 34-5, Page ID # 519. Third, the evidence shows that similar problems arise regardless of whether the seller is located in state or out of state. Erickson Aff. ¶¶ 15-16, RE 34-4, Page ID # 503-04; Donley Aff. ¶ 18, RE 34-5, Page ID # 519-20. Fourth,



the evidence that a 2017 sting operation netted 19 violations by out-of-state sellers and none from in-state sellers is misleading because only three in-state sellers were contacted. Erickson Aff. ¶ 17, RE 34-4, Page ID # 504; Donley Aff. ¶ 18, RE 34-5, Page ID #519-20. Fifth, none of the State's math-based conclusions that there are more violations by out-of-state sellers are admissible because they are not supported by any competent expert testimony that the data and conclusions drawn from them are statistically significant and scientifically reliable. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Sixth, some of the evidence was irrelevant because it concerned enforcement investigations of on-site sales, not internet sales. State's Brief at 51-52. This hardly meets the exacting requirement that the State must produce concrete evidence clearly showing that alternatives will not work. *Granholm v. Heald*, 466 U.S. at 492-93.

Michigan also fails to establish that minors actually order wine for shipping. How would they do this? Use their parents' credit card and have it shipped to the family home? There is no evidence that shipping to minors increases youth alcohol consumption. In *Granholm*, the Supreme Court found the absence of such evidence dispositive of the

youth-access issue:

The States provide little evidence that the purchase of wine over the Internet by minors is a problem. Indeed, there is some evidence to the contrary. A recent study by the staff of the FTC found that the 26 States currently allowing direct shipments report no problems with minors' increased access to wine. FTC Report 34. This is not surprising for several reasons. First, minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor. *Id.*, at 12. Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who, in the words of the past president of the National Conference of State Liquor Administrators, "want instant gratification." *Id.*, at 33, and n 137 (explaining why minors rarely buy alcohol via the mail or the Internet). Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions. Under our precedents, which require the "clearest showing" to justify discriminatory state regulation.... Even were we to credit the States' largely unsupported claim that direct shipping of wine increases the risk of underage drinking, this would not justify regulations limiting only out-of-state direct shipments. As the wineries point out, minors are just as likely to order wine from in-state producers as from out-of-state ones.

544 U.S. at 490. The FTC report referred to by the Court is in the record. RE 31-12, Page ID # 271-76.

Michigan's protestations that a physical presence is necessary to curb youth access appears contrived. It already allows wineries located outside the state to ship wine to consumers without having a physical

presence in Michigan. Mich. Comp. L. § 436.1203(4-6). It allows retailers located in the state to take internet orders, verify age online, and deliver wine to consumers using a common carrier or third-party service without the potentially under-aged purchaser appearing on their premises. Mich. Comp. L. § 436.1203(3). In both situations, it has determined that youth access is adequately restricted if the seller uses an online age verification service at the time of purchase, and the delivery service checks age again at the time of delivery. Mich, Comp. L. § 436.1203(3 and 5). This system is not perfect, of course. Minors are going to acquire alcohol. But Michigan cannot seriously assert that what it finds adequate to minimize minors acquiring wine by direct shipment from in-state retailers and out-of-state wineries will suddenly become ineffective when shipments come from an out-of-state retailer.

Even without evidence, it seems obvious that the use of alcohol by minors and the potential abuse of it by adults is the kind of public health issue that gives states the authority to regulate retail sales. In doing so, however, states may not enforce those regulations only against out-of-state retailers. In order to justify a discriminatory rule, a state must prove that nondiscriminatory alternatives would be ineffective.

Michigan has not done so, and has made no claim that it can.

Michigan already uses a nondiscriminatory alternative to regulate direct shipments from out-of-state wineries which have no physical presence in the state. It protects the public not by banning such shipments, but by requiring the out-of-state winery to consent to Michigan's long-arm jurisdiction and obtain a direct shipper license. Mich. Comp. L. § 436.1203(4). Wineries must supply samples for testing if asked. Mich. Admin. Code R. 436.1728. They must use an online age verification service at the time of sale, Mich. Comp. L. § 436.1203(4), and use a common carrier to deliver the wine which will verify age upon delivery. Mich. Comp. L. § 436.1203(5). They must make their records available for inspection and audit. Mich. Admin. Code R 436-1727, 436.1728. Michigan can revoke the license or impose a fine<sup>7</sup> if the direct shipper violates Michigan law. Mich. Comp. L. § 436.1903.

Whether a wine shipment originates from an out-of-state retailer, an out-of-state winery, or an in-state seller, it is the same product being delivered by the same FedEx and UPS drivers to the same Michigan

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<sup>7</sup> The State emphasize that it could not revoke a misbehaving retailer's license in its home state, but its conclusion that this gives the retailer no financial motive to obey Michigan law is wrong. Michigan could revoke its license to do business in Michigan and/or impose substantial fines. Mich. Comp. L. § 436.1903.

residents. Why would these regulations be adequate to protect public health and safety in two of these situations but not the third? To satisfy its burden of proving the ban is necessary, the state must show that shipments from out-of-state retailers pose some “unique threat” to the public that is not posed by other kinds of shipments. *Granholm v. Heald*, 544 U.S. at 492; *Or. Waste Systems*, 511 U.S. at 101; *Chemical Waste Mgt., Inc. v. Hunt*, 504 U.S. at 348. The record is completely devoid of any such evidence.

The defendants claim that there are 388,000 American retailers and it cannot regulate them all, but the argument is frivolous. Only about 1947 retailers actually take online orders and ship outside their home states. Wark Supp. Report, RE 35-1, Page ID # 731-32. The 388,000 includes convenience stores, grocery stores, drug stores, and a host of small businesses that do not ship wine. The cost of setting up and staffing an internet operation, establishing separate bookkeeping systems for each state shipped to, and complying with each state’s reporting requirements, is prohibitive for most wine retailers. *Id.* The State has offered no proof that it lacks the capacity to monitor and regulate shipments by fewer than 2000 out-of-state retailers when it

already successfully monitors 16,444 in-state retailers. Erickson Aff. ¶ 19, RE 34-4, Page ID # 505. In any event, the Supreme Court has held that discrimination cannot be justified just because it imposes additional regulatory burdens. States can charge licensing fees to cover its increased costs. *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 377 (1976); *Dean Milk Co. v. City of Madison*, 340 U.S. at 354-55. See also *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 715-16 (1972) (collecting cases authorizing states to collect tolls and fees from out-of-state vehicles to offset costs of highway maintenance).

The Supreme Court has consistently held that physical presence requirements violate the Commerce Clause. If Michigan could require it, so could every state, and internet retailers would have to establish bricks-and-mortar distribution operations in all fifty states. The cost would be prohibitive and shut down interstate commerce. *Granholm v. Heald*, 544 U.S. at 474-75. The Court “view[s] with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere” and has consistently ruled that “States cannot require an out-of-state firm to

become a resident in order to compete on equal terms.” *Granholm v. Heald*, 544 U.S. at 475 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. at 145; *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963); *Ward v. Maryland*, 79 U.S. 418, 12 Wall. 418 (1870)).

Despite the clear holding in *Granholm*, the State contends that its physical presence requirement for wine retailers should be upheld. It claims that this Circuit so held in a footnote in *Byrd v. Tenn. Wine & Spirits Retailers’ Assoc.*, 883 F.3d 608, 623 n.8 (6th Cir. 2018) (Brief at 36-38). The contention is frivolous. Courts do not announce holdings in footnotes, and the footnote cited merely described *dictum* in a Fifth Circuit case<sup>8</sup> without indicating any approval of it.

The Wholesalers Association goes farther and argues that the Supreme Court in *Tennessee Wine* somehow overruled *Granholm v. Heald*, and held that physical presence requirements are constitutional. Wholesalers Brief at 14-20. The Association is simply wrong. That case contains no such holding and no language retreating from *Granholm*.

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<sup>8</sup> *Cooper v. Texas ABC*, 820 F.3d 730 (5th Cir. 2016). The case was decided before the Supreme Court ruled in *Tennessee Wine* that the nondiscrimination principle as articulated in *Granholm v. Heald* applied to retailers. *Granholm* ruled that physical-premises requirements are unconstitutional. 544 U.S. at 475.

To the contrary, the Court reaffirms *Granholm* throughout the opinion, e.g., 139 S.Ct. at 2471, and suggests in *dicta* that “in-state presence” requirements “can no longer be defended.” *Id.* at 2472. The Association also claims support from *North Dakota v. U.S.*, 495 U.S.423 (1990), but that case is irrelevant. It was a Supremacy Clause case concerning liquor on military bases that did not involve either the Commerce Clause or discrimination against interstate commerce. It is not even a majority opinion, just a plurality, made up of four Justices whose view that states can require liquor dealers to be physically present was explicitly rejected by the majority in *Granholm*.<sup>9</sup>

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<sup>9</sup> The *North Dakota* opinion was written by Justice Stevens and joined by Chief Justice Rehnquist and Justice O’Connor, all of whom dissented in *Granholm*. Justice Scalia concurred in *North Dakota* only because there was no discrimination. 495 U.S. at 448. Had the law been discriminatory, he would have voted otherwise because he has stated clearly that the “discriminatory character [of a liquor law] eliminates the immunity afforded by the Twenty-first Amendment.” *Healy v. Beer Inst.*, 491 U.S. at 344 (Scalia, J., concurring).



### **C. At least thirteen states allow direct shipping by out-of-state wine retailers**

At least thirteen states<sup>10</sup> allow direct-to-consumer shipping by out-of-state wine retailers. 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 (allows consumers to import); 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). Michigan has produced no evidence that direct shipping in any of those states has caused a public safety problem. The only evidence in the record on direct shipping comes from the Federal Trade Commission’s study concluding that “states that permit interstate direct shipping generally report few or no problems with shipments to minors.” RE 31-12, Page ID # 276.

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<sup>10</sup> The National Association of Wine Retailers identifies three additional jurisdictions that allow out-of-state retailers to ship directly to consumers: Alaska, Florida, and the District of Columbia. See <https://nawr.org/issues/direct-shipping/> (last visited Oct. 16, 2019). The statutory authority in those three jurisdictions is unclear.

The Supreme Court has considered the fact that other states allowed direct shipping from out-of-state wineries without any apparent public safety problems as an indication that nondiscriminatory alternatives to a total ban were likely to be effective. *Granholm v. Heald*, 544 U.S. at 490. This Circuit has also done so and looked for evidence from the state that some unique local condition might justify a ban on direct shipping even though it does not cause problems in other states. *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 434. Michigan has produced no evidence that there is something different about public safety or youth access in Michigan that would somehow make the regulatory provisions adopted by those other states ineffective in Michigan.

#### **D. The Twenty-first Amendment is not a defense**

The State argues that Section 2 of the Twenty-first Amendment<sup>11</sup> authorizes it to discriminate against interstate commerce and favor in-state retailers over their out-of-state competitors. State Brief at 35-37. It does not develop this argument and cites no authority for the proposition that the Amendment trumps the Commerce Clause. Indeed,

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<sup>11</sup> “The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. Const., amend. XXI, § 2.

the only case it cites says exactly the opposite: “Section 2 does not grant states the power to violate the “nondiscrimination principle” of the dormant Commerce Clause.” *Wal-Mart Stores, Inc. v. Texas ABC*, 935 F.3d 362, 369 (5th Cir. 2019).

The Supreme Court has consistently held that the Twenty-first Amendment is not a defense to a charge of discrimination and does not justify protectionist liquor laws. In *Bacchus Imports Ltd. v. Dias*, the Court held that the Amendment did not empower States to favor local liquor interests by erecting barriers to competition. 468 U.S. at 276. In *Granholm*, the Court held that “state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause,” and that “*Bacchus* forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny.” 544 U.S. at 487-88. Justice Scalia said in *Healy v. Beer Inst.*, that a liquor law's discriminatory character eliminates whatever immunity might be afforded by the Amendment. 491 U.S. at 344 (concurring). Most recently, in *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, the Court again reiterated that the Amendment “is not a license to impose all manner of protectionist

restrictions on commerce in alcoholic beverages.” 139 S.Ct. at 2470-72.

Cases from this circuit concur. The Twenty-first Amendment does not trump the nondiscrimination rule, *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 431, nor give States the authority to discriminate against out-of-state goods. *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008). It is not a defense to a charge of discrimination and not a justification for depriving citizens of their right to have access to the markets of other states on equal terms. *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d at 619.

#### **E. Whether the wine passes through a wholesaler located in Michigan is constitutionally irrelevant**

The defendants argue that Michigan may constitutionally ban out-of-state retailers from shipping to consumers because they do not buy their wine from Michigan wholesalers. However, they have difficulty fitting this argument into the analytical framework for scrutinizing state liquor laws required by the Supreme Court and set out by this Circuit in *American Beverage Ass'n v. Snyder*, 735 F.3d at 369-70. The law that retailers may obtain wine only from in-state wholesalers itself violates the nondiscrimination principle. It requires “business operations to be performed in [Michigan] that could more efficiently be

performed elsewhere,” which the Supreme Court has said is a violation of the Commerce Clause. *Granholm v. Heald*, 544 U.S. at 475, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. at 145. It is difficult to see how a discriminatory rule allowing only in-state retailers to ship wine could be justified by a second discriminatory rule allowing only in-state wholesalers to supply the wine. Two wrongs do not make a right. Applying the in-state wholesaler rule to out-of-state retailers would also violate the extraterritoriality principle of the Commerce Clause because it regulates how out-of-state retailers obtain their inventory. Michigan may not project its regulatory regime into the jurisdiction of another nor regulate transactions occurring outside its borders. *Healy v. Beer Inst.*, 491 U.S. at 336-37. See also *Brown-Forman*, 476 U.S. at 579-80 (law which regulates price of liquor purchased in other states has impermissible extraterritorial effect). Three wrongs certainly do not make a right.

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the courts apply strict scrutiny requiring that the State prove the discrimination materially advances

an important state issue and that no less discriminatory alternative would be effective. This requires concrete evidence, not speculation or mere assertions of probability. *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. at 579, *Granholm v. Heald*, 544 U.S. at 487, 489. The state makes a passing attempt to argue that requiring wine to be purchased exclusively from in-state wholesalers furthers public health and safety, but the argument is totally unsupported by evidence. State Brief at 47-51.<sup>12</sup> The State suggests that serious health risks exist from counterfeit or tainted alcohol that a wholesaler can help combat by tracking distribution, but offers no evidence there has ever been an incident of counterfeit or tainted wine, let alone one where the physical location of the wholesaler played an important role. Brief at 47-49. The State says that it can efficiently pursue the recall of a dangerous product with the assistance of the wholesalers, but again, does not cite even a single incident where it has initiated a recall of a wine that posed a health risk, let alone one where the physical location of a wholesaler mattered. Brief at 50-51. It does not even address the effectiveness of nondiscriminatory alternatives, such as creating an e-

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<sup>12</sup> The wholesalers in their brief do not claim they have a significant role in protecting public safety.

mail notification list that could instantly contact all licensed retail shippers.

The State's argument is speculative. First, according to the U.S. Consumer Products Safety Commission and the Food and Drug Administration, there have been no instances of tainted wine that had to be recalled.<sup>13</sup> Second, if there were, the recall would be handled by the federal government, the manufacturer and the seller, not a state government agency. *See* 21 U.S.C. § 423. Third, the Liquor Control Commission lacks the statutory authority to conduct such recall campaigns. *See* Mich. Comp. L. §§ 436.1217, 436.2005. Fourth, the State has other nondiscriminatory alternatives that would allow it to keep track of potentially tainted wine products being shipped into the state, such as requiring shippers to keep records and make them available to the liquor commission, Mich. Admin. Code R. 436.1727, and to submit test samples of a suspicious product. Mich. Admin. Code R. 436.1728. The State has not shown that these alternatives would be ineffective.

The whole argument seems contrived because Michigan does not in fact require that all wine intended for consumers be processed by an in-

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<sup>13</sup> *See* <https://www.cpsc.gov/Recalls> and <https://www.fda.gov/safety/recalls-market-withdrawals-safety-alerts> (last visited October 14, 2019).

state wholesaler. Michigan wineries and out-of-state wineries may sell and ship directly to consumers or retailers without the wine passing through a wholesaler. Mich. Comp. L. §§ 436.1113(10), 436.1203(4-6). The State presents no evidence and makes no argument that a bottle of wine would be safe when sold directly to a consumer by a winery, but pose a public safety threat when the same bottle is sold by a retailer. It also makes no argument that the licensing and other regulations it uses to assure the safety of wine shipped from wineries would be ineffective when the wine is shipped from a retailer.

There was a plausible argument before *Tenn. Wine & Spirits Retailers Assoc. v. Thomas* that a state could constitutionally require all wine to pass through an in-state wholesaler. At least one circuit reached that result. The Eighth Circuit held that there was a significant regulatory distinction between producers and wholesalers, so states could require wholesalers to be physically present even though *Granholm* held they could not require wine producers to be physically present. *So. Wines & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 809-10 (8th Cir. 2013). However, that argument has been foreclosed by *Tennessee Wine*, in which the Supreme Court



rejected the idea that a different constitutional rule applied to producers than to retailers and wholesalers, 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.<sup>14</sup>

## **II. Michigan’s ban on nonresidents shipping wine to consumers violates the Privileges and Immunities Clause**

The District Court did not consider Joseph Doust’s Privileges and Immunities Clause claim because it determined that the Commerce Clause provided adequate grounds for complete relief. Opinion, RE 43, Page ID # 864. Perhaps for that reason, none of the appellants included a discussion of this issue in their principal briefs. Nevertheless, this Court may consider it as an alternative ground for affirming the District Court because it was fully briefed in the lower court, Plaintiffs’ Brief, RE 31, Page ID # 225-29; Defendants’ Brief, RE 34, Page ID # 445-49; Intervenor’s Brief, RE 33, Page ID # 330-33, and this court

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<sup>14</sup> Amicus Center for Alcohol Policy tries to revive this producer/retailer distinction by making a historical argument to justify physical presence requirements for retailers. Brief at 4-25. The argument is without merit. The Supreme Court has twice conducted its own extensive historical analysis of the Twenty-first Amendment and concluded to the contrary, that there is no sound basis for physical presence requirements. *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct at 2462-74; *Granholm v. Heald*, 544 U.S. at 476-89.

“may affirm the judgment on grounds other than those employed by the lower court, as long as the party opposing summary judgment is not denied the opportunity to respond.” *Med. Mut. of Ohio*, 548 F.3d at 389.

**A. Michigan prohibits nonresidents from shipping wine to consumers but gives its own citizens the privilege to do so**

The Privileges and Immunities Clause provides that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const., art. IV., § 2, cl. 1.<sup>15</sup> It places nonresidents upon the same footing as residents insofar as the advantages resulting from state citizenship are concerned. *McBurney v. Young*, 569 U.S. 221, 226-27 (2013). The Clause is violated when, as in the present case, a state law treats residents and nonresidents differently and “advantage[s] in-state workers and commercial interests at the expense of their out-of-state competitors.” *McBurney v. Young*, 569 U.S. at 228.

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<sup>15</sup> The 14th Amendment contains a confusingly labeled Privileges or Immunities Clause: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, § 1.

Plaintiffs' evidence shows that Michigan's laws regulating retail wine deliveries discriminate against nonresidents and advantage in-state merchants. Much of this is obvious from the face of the law itself. State residents may obtain Specially Designated Merchant licenses giving them the privilege to sell wine at retail and deliver it to consumers. Mich. Comp. L. § 436.1537(1)(f). They may deliver using common carriers, Mich. Comp. L. § 436.1203(3), their own vehicles, Mich. Comp. L. § 436.1203(12), or third-party facilitators. Mich. Comp. L. § 436.1203(13)-(15). Nonresidents may not sell, ship or deliver wine from a point outside the state directly to a Michigan consumer. Mich. Comp. L. §§ 436.1203(2); State's Answer ¶¶ 15-16, RE 11, Page ID # 115. Although the Code is vague about whether nonresidents could obtain SDM retail licenses at all, obtaining the license would do them no good because it authorizes only those SDM retail licensees which are "located in this state" to ship by common carrier or use a third-party facilitator. Mich. Comp. L. §§ 436.1203(3), (15). Requiring a person to establish premises in or re-locate to the licensing state presumptively violates the Privileges and Immunities Clause. *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 279-83 (1985).

This does not mean that a state must always extend all local privileges to nonresidents. The Supreme Court has long held that the Clause only protects those privileges that are “fundamental.” *McBurney v. Young*, 569 U.S. at 226. In the district court, the defendants argued that selling wine was not a fundamental privilege, but no authority supports that view.<sup>16</sup> The Supreme Court has repeatedly found that the opportunity to pursue one’s livelihood qualifies as fundamental no matter what the occupation. A state must allow nonresidents to engage in their occupations in the state on terms of substantial equality with its own citizens. *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 280. Engaging in an occupation is fundamental because jobs of all kinds are vital to the national economy, whether a person is practicing law, *id.* at 280-81, working on the Alaska pipeline, *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978), fishing for shrimp, *Toomer v. Witsell*, 334 U.S. 385, 398-99 (1948), or selling goods by mail-order. *Ward v. Maryland*, 79 U.S. at 424-25. *See also Alerding v. Ohio High Sch. Athl. Ass’n*, 779 F.2d 315, 317 (6th Cir. 1985) (fundamental privileges include the opportunity to

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<sup>16</sup> The State cited authority from several cases holding that selling alcohol is not a natural right, Brief, RE 34, Page ID # 40-41, but the Privileges and Immunities Clause concerns privileges, not rights.

pursue a livelihood). Indeed, counsel has been unable to find a single federal case in which any bona fide occupation was not found to be fundamental.

Joseph Doust is a professional wine merchant who earns his living in the wine business. He lives in Indiana fifty miles from the Michigan border and has potential customers in Michigan. He believes he can successfully compete for Michigan customers despite his location because of his large inventory, the individual attention he gives his customers and his access to many hard-to-find wines. Statement of Facts, ¶ 2, *supra* at 7-8. If he were permitted to do so, he could deliver wine in his own vehicles or take advantage of the fact that Michigan has opened the market to allow internet wine sales. Mr. Doust wants the opportunity to compete for business in Michigan on the same basis as residents. He will get a license if one is required, pay taxes, file reports and comply with other Michigan regulations. *Id.* The only thing preventing him is Michigan's law limiting shipping privileges to merchants whose business premises will be located in the state.

The fact that the wine business is heavily regulated, requires a license, and is connected to important state interests, does not exempt it

from the purview of the Privileges and Immunities Clause. The practice of law is similarly heavily regulated, requires licenses and is connected to important state interests, but the Clause applies to it. States must make law licenses available to nonresidents and may not constitutionally require them to relocate their law firm offices to the state. *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 279-83. *See also O'Reilly v. Bd. of App. of Montgomery Co., Md.*, 942 F.2d 281, 284-85 (4th Cir. 1991) (taxi licenses must available to nonresidents).

**B. Shipments of wine from an out-of-state seller poses no unique threat to public safety that justifies prohibiting them**

The Privileges and Immunities Clause is not absolute. Like the Commerce Clause, it does not necessarily preclude discrimination against nonresidents. A discriminatory law may be justified if the state proves that it is closely related to a substantial state interest and that nonresidency constitutes a unique source of the evil at which the statute is aimed which threat is not posed by state residents. *Toomer v. Witsell*, 334 U.S. at 398. As part of this inquiry, courts consider the availability of less restrictive means. *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 284.

The State cannot possibly meet this burden, because it already employs less restrictive alternatives to regulate nonresidents who participate in other parts of the wine business. They are set out in the Commerce Clause section of the brief at pages 29-34. Most obviously, Michigan allows nonresidents who operate wineries to ship it directly to consumers if they obtain a direct shipper permit. Mich. Comp. L. § 436.1203(4). It could make that permit available to nonresidents who operate wine retail stores and require them to adhere to the same requirements for age verification. Mich. Comp. L. § 436.1203(4-6). Alternatively, Michigan could issue SDM retail licenses to nonresidents with premises located outside the state and allow them to take online orders and ship by common carrier as in-state SDM retail licensees do. Mich. Comp. L. § 436.1203(3). The State can enforce compliance by requiring the nonresident to consent to Michigan's jurisdiction, as it does for other direct shippers, Mich. Comp. L. § 436.1203(4)(k), and then revoke the license or impose hefty fines if any nonresident breaks the rules, which is the same enforcement tool it uses for residents. Mich. Comp. L. § 436.1903.

The State has offered no proof that a bottle of wine shipped from a nonresident retailer would be more of a threat to the State's regulatory interests than the same bottle shipped from a resident retailer or from a nonresident winery owner, and therefore must be banned instead of regulated. Surely some combination of the regulations imposed on nonresident winery owners and resident retailers could be imposed on Mr. Doust and allow him to engage in the wine retail business in Michigan under the supervision of the Liquor Control Commission.

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

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

The first are the Commerce Clause/Twenty-first Amendment cases discussed above at pages 40-42, which hold that the Amendment does



not give states the authority to pass nonuniform laws that discriminate against out-of-state wine shippers. *Granholm v. Heald*, 544 U.S. at 484-87; *Bacchus Imports, Ltd, v. Dias*, 468 U.S. at 276; *Healy v. Beer Institute*, 491 U.S. at 341-42, 344. The Supreme Court has noted in the past that the Privileges and Immunities Clause and Commerce Clause arose from the same principle that the Constitution created a single national economic union, *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 279-80, and there is a mutually reinforcing relationship between them. *Hicklin v. Orbeck*, 437 U.S. at 531. Therefore, since the Amendment does not override the nondiscrimination principle of the Commerce Clause, it also does not override the nondiscrimination principle in the Privileges and Immunities Clause.

The second line of cases are those balancing the states' Twenty-first Amendment authority against constitutional provisions other than the Commerce Clause. The Supreme Court has held repeatedly that because state authority in the Amendment is limited to the transportation and importation of intoxicating liquor, it "places no limit whatsoever" on any constitutional provisions other than the Commerce Clause. It has consistently held that the Amendment does not permit

states to enact laws that would violate other constitutional provisions. *See 44 Liquormart v. R.I.*, 517 U.S. 484, 515-16 (1996) (banning liquor advertising violates First Amendment); *Craig v. Boren*, 429 U.S. 190, 206 (1976) (higher drinking age for men violates Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (posting habitual drunkard notices violates Due Process). These cases also suggest that the Twenty-first Amendment cannot be a defense to a violation of the Privileges and Immunities Clause.

### **III. The District Court chose the correct remedy**

Choice of remedy is a matter of discretion for the district court. A district court abuses its discretion when it relies on clearly erroneous findings of fact, improperly applies the law, or makes a definite and clear error of judgment. *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d at 317. The choice of remedy in this case was the best option and should be affirmed.

After determining that the Michigan law on retail wine shipping was unconstitutionally discriminatory, the District Court's task was to eliminate that discrimination so that out-of-state wine retailers are treated the same as Michigan retailers. In theory, there are two ways to

achieve equality -- extend rights to everyone or deny rights to everyone.

Thus, the District Court could level the economic playing field by striking down the provision banning interstate shipments, or by striking down the provisions permitting shipments from in-state.

The Court's decision to strike the provision that discriminated against and interfered with interstate commerce was the right one. It was neither a clear error of judgment nor an improper application of the law. The whole purpose of the Commerce Clause was to expand interstate trade, not restrict it, and that is what the Court did. Its decision was entirely consistent with the principle that when a court declares that a provision in state law is unconstitutional, the proper remedy is to sever the problematic portion while leaving the rest of the law intact. *Ayotte v. Planned Parenthood of No. New Eng.*, 546 U.S. 320, 328-30 (2006).

The Supreme Court also has said that when a state has been unconstitutionally giving benefits to some and denying them to others, the presumptively correct remedy is extension rather than nullification. *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979). One reason for this presumption is that the group from which the benefits would be taken

are not parties to the litigation and have not had the opportunity to be heard before being deprived of a benefit on which they rely. *Heckler v. Mathews*, 465 U.S. 728, 733, 738-40 (1984); *Nguyen v. I.N.S.*, 533 U.S. 53, 95-96 (2001) (Scalia, J., concurring).

This Circuit discussed the presumption of extension in *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 435. After finding that out-of-state wineries had been unconstitutionally denied the privilege to ship wine to consumers, the panel endorsed the remedy that would extend shipping privileges to out-of-state wineries rather than taking them away from in-state wineries who had not been given the opportunity to participate. The District Court in the present case therefore was reasonably following the guidance of the Supreme Court and this Circuit when it enjoined the state from enforcing the unconstitutional portion of the law that prohibited interstate wine shipments, and required the Defendants to find a way to allow out-of-state retailers to compete for wine sales.

The defendants concede all this, but argue nevertheless that the District Court abused its discretion. They say the judge should have nullified the provision giving in-state retailers the right to ship, thereby

reducing commerce, rather than striking the provision prohibiting out-of-state retailers from doing so and increasing commerce. They cite language from *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 435, and other cases saying that when choosing a remedy, a judge should be careful not to override the intent of the legislature. But, as this Court pointed out in *Cherry Hill*, none of those cases say that the District Court is *required* to adopt the nullification remedy, and doing so would have overridden a different legislative intent -- to allow in-state retailers to ship. Whichever remedy it chose would have nullified one part of the legislative will and affirmed the other. The defendants cite no case in which a judge's decision to extend benefits was reversed. Indeed, the Supreme Court has cautioned that federal courts should not normally nullify a valid portion of a state law because a different portion is invalid. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996).

The defendants incorrectly cast this issue as one of severability rather than choice of remedy. Severability refers to whether a smaller portion of a statute may be excised from the remainder of the statute and leave the will of the legislature intact. If not, the entire statute must be struck. *Leavitt v. Jane L.*, 518 U.S. at 139; *Mich. Bell Tel. Co. v.*

*Engler*, 257 F.3d 587, 591-92 (6th Cir. 2001). It has nothing to do with choosing which of two provisions to strike. Severability is not an issue in this case because Michigan included a severance clause in its Liquor Control Code which says: “If any provision in this act is found to be unconstitutional ... the offending provision shall be severed.” Mich. Comp. L. § 436.1925(2). That is exactly what the District Court did: found the ban on interstate shipping unconstitutional and severed it from the rest of the statute. It is impossible to say the Court abused its discretion.

## CONCLUSION

This Court should affirm the District Court, hold that Michigan’s ban on interstate shipping by out-of-state wine retailers is unconstitutional, and confirm that it was within the District Court’s discretion to enjoin enforcement of the offending provision.

Respectfully submitted:

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(I) because it contains no more than 13,000 words in sections identified by Fed. R. App. P. 32(f). It contains 12,287 words, as calculated by the word count program in WordPerfect X7. It complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it was prepared in 14-point Century Schoolbook.

s/ James A. Tanford  
James A. Tanford

## **CERTIFICATE OF SERVICE**

I certify that on November 18, 2019, the foregoing brief was served on all parties through the court's CM/ECF system.

s/ James A. Tanford  
James A. Tanford



## ADDENDUM

### A. Designation of District Court Documents

Pursuant to Sixth Cir. R. 30(g), the plaintiffs-appellees designate the following district court documents as relevant to this appeal:

RE 1	Complaint	Page ID # 1-8
RE 5	Amended complaint	Page ID # 13-23
RE 11	Defendants' answer	Page ID # 109-23
RE 14	Intervening defendant's answer	Page ID # 128-41
RE 31	Plaintiffs' motion for summary judgment	Page ID # 203-32
RE 31-2	Tanford Declaration	Page ID # 234-35
RE 31-3	Doust First Affidavit	Page ID # 236-37
RE 31-5	Doust Second Affidavit	Page ID # 250-51
RE 31-6	Donovan Affidavit	Page ID # 252-53
RE 31-7	Stride Affidavit	Page ID # 254-55
RE 31-8	Schulz Affidavit	Page ID # 256-57
RE 31-9	Bridenbaugh Declaration	Page ID # 258-61
RE 31-10	Wark Statement	Page ID # 262-66
RE 31-12	FTC Report	Page ID # 271-76
RE 31-13	Letter to legislators	Page ID # 277

RE 33	Intervening defendant's motion for summary judgment	Page ID # 287-336
RE 34	Defendants' motion for summary judgment	Page ID # 393-452
RE 34-4	Erickson Affidavit	Page ID # 491-511
RE 34-5	Donley Affidavit	Page ID # 512-524
RE 34-9	Doust Deposition	Page ID # 593-642
RE 35-1	Wark Supplemental Report	Page ID # 731-35
RE 43	Opinion and order	Page ID # 845-66
RE 44	Judgment	Page ID # 867-68
RE 48	Defendants' notice of appeal	Page ID # 897-99
RE 50	Intervening def.'s notice of appeal	Page ID # 901
RE 55	Order staying injunction	Page ID # 913.

## B. Statute at issue

Mich. Comp. L. § 436.1203.

(1) Except as provided in this section and section 301,1 a person shall not sell, deliver, or import alcoholic liquor, including alcoholic liquor for personal use, in this state unless the sale, delivery, or importation is made by the commission, the commission's authorized agent or distributor, an authorized distribution agent approved by order of the commission, a person licensed by the commission, or by prior written order of the commission.

(2) Notwithstanding R 436.1011(7)(b) and R 436.1527 of the Michigan Administrative Code and except as provided in subsections (3), (12), (13), (14), (15), and (16), a retailer shall not deliver alcoholic liquor to a consumer in this state at the home or business of the consumer or at any location away from the licensed premises of the retailer. The purpose of this subsection is to exercise this state's authority under section 2 of amendment XXI of the constitution of the United States, to maintain the inherent police powers to regulate the transportation and delivery of alcoholic liquor, and to promote a transparent system for the transportation and delivery of alcoholic liquor. The regulation described in this subsection is considered necessary for both of the following reasons:

- (a) To promote the public health, safety, and welfare.
- (b) To maintain strong, stable, and effective regulation by having beer and wine sold by retailers to consumers in this state by passing through the 3-tier distribution system established under this act.

(3) For purposes of subsection (1), a retailer that holds a specially designated merchant license located in this state may use a common carrier to deliver wine to a consumer in this state. A retailer that uses a common carrier to deliver wine to a consumer under this subsection shall comply with all of the following:

- (a) Pay any applicable taxes to the commission and pay any applicable taxes to the department of treasury as directed by the department of treasury. On the request of the department of treasury, a retailer shall furnish an affidavit to verify payment.

(b) Comply with all laws of this state, including, but not limited to, the prohibition on sales to minors.

(c) Verify the age of the individual placing the order by obtaining from him or her a copy of a photo identification issued by this state, another state, or the federal government or by using an identification verification service. The person receiving and accepting the order on behalf of the retailer shall record the name, address, date of birth, and telephone number of the individual placing the order on the order form or other verifiable record of a type and generated in a manner approved by the commission and provide a duplicate to the commission.

(d) On request of the commission, make available to the commission any document used to verify the age of the individual ordering or receiving the wine from the retailer.

(e) Stamp, print, or label on the outside of the shipping container that the package “Contains Alcohol. Must be delivered to a person 21 years of age or older”. The recipient at the time of the delivery shall provide identification verifying his or her age and sign for the delivery.

(f) Place a label on the top panel of the shipping container containing the name and address of the individual placing the order and the name of the designated recipient if different from the name of the individual placing the order.

(4) For purposes of subsection (1), a direct shipper may sell, deliver, or import wine to consumers in this state by means of any mail order, internet, telephone, computer, device, or other electronic means, or sell directly to a consumer on the winery premises. A direct shipper that sells, delivers, or imports wine to a consumer under this subsection shall comply with all of the following:

(a) Hold a direct shipper license.

(b) Pay any applicable taxes to the commission and pay any applicable taxes to the department of treasury as directed by the department of treasury. On the request of the department of treasury, a direct shipper shall furnish an affidavit to verify payment.

(c) Comply with all laws of this state, including, but not limited to, the prohibition on sales to minors.

(d) Verify the age of the individual placing the order by obtaining from him or her a copy of a photo identification issued by this state, another state, or the federal government or by using an identification verification service. The person receiving and accepting the order on behalf of the direct shipper shall record the name, address, date of birth, and telephone number of the individual placing the order on the order form or other verifiable record of a type and generated in a manner approved by the commission and provide a duplicate to the commission.

(e) On request of the commission, make available to the commission any document used to verify the age of the individual ordering or receiving the wine from the direct shipper.

(f) Stamp, print, or label on the outside of the shipping container that the package "Contains Alcohol. Must be delivered to a person 21 years of age or older." The recipient at the time of the delivery shall provide photo identification verifying his or her age and sign for the delivery.

(g) Place a label on the top panel of the shipping container containing the name and address of the individual placing the order and the name of the designated recipient if different from the name of the individual placing the order. The direct shipper must have received a registration number of approval from the commission for any wine imported into this state. However, the registration number of approval from the commission is not required to be on the invoice or on the label of the wine that the direct shipper sells, delivers, or imports to a consumer in this state.

(h) Direct ship not more than 1,500 9-liter cases, or 13,500 liters in total, of wine in a calendar year to consumers in this state. If a direct shipper, whether located in this state or outside this state, owns, in whole or in part, or commonly manages 1 or more direct shippers, it shall not in combination ship to consumers in this state more than 13,500 liters of wine in the aggregate.

(I) Pay wine taxes quarterly and report to the commission quarterly the total amount of wine, by type, brand, and price, shipped to consumers in this state during the preceding calendar quarter, and the order numbers.

(j) Authorize and allow the commission and the department of treasury to conduct an audit of the direct shipper's records.

(k) Consent and submit to the jurisdiction of the commission, the department of treasury, and the courts of this state concerning enforcement of this section and any related laws, rules, and regulations.

(5) For a delivery of wine through the use of a common carrier under subsection (3), a person taking the order on behalf of the retailer shall comply with subsection (3)(b) to (f). For a sale, delivery, or importation of wine occurring by any means described in subsection (4), a person taking the order on behalf of the direct shipper shall comply with subsection (4)(c) to (g).

(6) A person that delivers the wine for a direct shipper under this section shall verify that the individual accepting delivery is 21 years of age or older and is the individual who placed the order or the designated recipient, is an individual 21 years of age or older currently occupying or present at the address, or is an individual otherwise authorized through a rule promulgated under this act by the commission to receive alcoholic liquor under this section. If the delivery person, after a diligent inquiry, determines that the purchaser or designated recipient is not 21 years of age or older, the delivery person shall return the wine to the direct shipper. A delivery person who returns wine to the direct shipper because the purchaser or designated recipient is not 21 years of age or older is not liable for any damages suffered by the purchaser or direct shipper.

(7) All spirits for sale, use, storage, or distribution in this state shall originally be purchased by and imported into the state by the commission, or by prior written authority of the commission.

(8) This section does not apply to alcoholic liquor brought into this state for personal or household use in an amount permitted by federal law by an individual 21 years of age or older at the time of reentry into this state from without the territorial limits of the United States if the individual has been outside the territorial limits of the United States for more than 48 hours and has not brought alcoholic liquor into the United States during the preceding 30 days.

(9) An individual 21 years of age or older may do either of the following in relation to alcoholic liquor that contains less than 21% alcohol by volume:

(a) Personally transport from another state, once in a 24-hour period, not more than 312 ounces of alcoholic liquor for that individual's personal use, notwithstanding subsection (1).

(b) Ship or import from another state alcoholic liquor for that individual's personal use if that personal importation is done in compliance with subsection (1).

(10) A direct shipper shall not sell, deliver, or import wine to a consumer unless it applies for and is granted a direct shipper license from the commission. This subsection does not prohibit wine tasting or the selling at retail by a wine maker of wines he or she produced and bottled or wine manufactured for that wine maker by another wine maker, if done in compliance with this act. Only the following persons qualify for the issuance of a direct shipper license:

(a) A wine maker.

(b) A wine producer and bottler located inside this country but outside of this state holding both a federal basic permit issued by the Alcohol and Tobacco Tax and Trade Bureau of the United States Department of Treasury and a license to manufacture wine in its state of domicile.

(11) An applicant for a direct shipper license shall submit an application to the commission in a written or electronic format provided by the commission and accompanied by an application and initial license fee of \$100.00. The application must be accompanied by a copy or other evidence of the existing federal basic permit or license, or both, held by the applicant. The direct shipper may renew its license annually by submission of a license renewal fee of \$100.00 and a completed renewal application. The commission shall use the fees collected under this section to conduct investigations and audits of direct shippers. The failure to renew, or the revocation or suspension of, the applicant's existing Michigan license, federal basic permit, or license to manufacture wine in its state of domicile is grounds for revocation or denial of the direct shipper license. If a direct shipper is found guilty of violating this act or a rule promulgated by the commission, the

commission shall notify both the alcoholic liquor control agency in the direct shipper's state of domicile and the Alcohol and Tobacco Tax and Trade Bureau of the United States Department of Treasury of the violation.

(12) A retailer that holds a specially designated merchant license, a brewpub, a micro brewer, or an out-of-state entity that is the substantial equivalent of a brewpub or micro brewer may deliver beer and wine to the home or other designated location of a consumer in this state if all of the following conditions are met:

- (a) The beer or wine, or both, is delivered by the retailer's, brewpub's, or micro brewer's employee.
- (b) The retailer, brewpub, or micro brewer or its employee who delivers the beer or wine, or both, verifies that the individual accepting delivery is at least 21 years of age.
- (c) If the retailer, brewpub, or micro brewer or its employee intends to provide service to consumers, the retailer, brewpub, or micro brewer or its employee providing the service has received alcohol server training through a server training program approved by the commission.

(13) A retailer that holds a specially designated merchant license may use a third party that provides delivery service to municipalities in this state that are surrounded by water and inaccessible by motor vehicle to deliver beer and wine to the home or other designated location of that consumer if the delivery service is approved by the commission and agrees to verify that the individual accepting delivery of the beer and wine is at least 21 years of age.

(14) A retailer that holds a specially designated distributor license may deliver spirits to the home or other designated location of a consumer in this state if all of the following conditions are met:

- (a) The spirits are delivered by the retailer's employee.
- (b) The retailer or its employee who delivers the spirits verifies that the individual accepting delivery is at least 21 years of age.
- (c) If the retailer or its employee intends to provide service to consumers, the retailer or its employee providing the service has received alcohol server training through a server training program



approved by the commission.

(15) A retailer that holds a specially designated merchant license located in this state may use a third party facilitator service by means of the internet or mobile application to facilitate the sale of beer or wine to be delivered to the home or designated location of a consumer as provided in subsection (12) or this subsection, and a third party facilitator service may deliver beer or wine to a consumer on behalf of a retailer that holds a specially designated merchant license located in this state, if all of the following conditions are met:

(a) If the third party facilitator service delivers beer or wine under this subsection, the third party facilitator service verifies that the individual accepting the delivery of the beer or wine is at least 21 years of age.

(b) A manufacturer, warehouse, wholesaler, outstate seller of beer, outstate seller of wine, supplier of spirits, or outstate seller of mixed spirit drinks does not have a direct or indirect interest in the third party facilitator service.

(c) A manufacturer, warehouse, wholesaler, outstate seller of beer, outstate seller of wine, supplier of spirits, or outstate seller of mixed spirit drinks does not aid or assist a third party facilitator service by gift, loan of money or property of any description, or other valuable thing as defined in section 609,2 and a third party facilitator service does not accept the same.

(d) The retailer or consumer pays the fees associated with deliveries provided for under this subsection.

(e) The third party facilitator service offers services for all brands available at the retail location.

(16) A retailer that holds a specially designated distributor license located in this state may use a third party facilitator service by means of the internet or mobile application to facilitate the sale of spirits to be delivered to the home or designated location of a consumer as provided in subsection (14) or this subsection, and a third party facilitator service may deliver spirits to a consumer on behalf of a retailer that holds a specially designated distributor license located in this state, if all of the following conditions are met:

(a) If the third party facilitator service delivers spirits under this

subsection, the third party facilitator service verifies that the individual accepting the delivery of the spirits is at least 21 years of age.

(b) A manufacturer, warehouse, wholesaler, outstate seller of beer, outstate seller of wine, supplier of spirits, or outstate seller of mixed spirit drinks does not have a direct or indirect interest in the third party facilitator service.

(c) A manufacturer, warehouse, wholesaler, outstate seller of beer, outstate seller of wine, supplier of spirits, or outstate seller of mixed spirit drinks does not aid or assist a third party facilitator service by gift, loan of money or property of any description, or other valuable thing as defined in section 609, and a third party facilitator service does not accept the same.

(d) The retailer or consumer pays the fees associated with deliveries provided for under this subsection.

(e) The third party facilitator service offers services for all brands available at the retail location.

(17) A third party facilitator service shall not deliver beer, wine, or spirits to a consumer under subsection (15) or (16), as applicable, and shall not facilitate the sale of beer, wine, or spirits under subsection (15) or (16), as applicable, unless it applies for and is granted a third party facilitator service license by the commission. The commission may charge a reasonable application fee, initial license fee, and annual license renewal fee. The commission shall establish a fee under this subsection by written order.

(18) If a third party facilitator service used by a retailer that holds a specially designated merchant or specially designated distributor license under subsection (15) or (16), as applicable, violates this section, the commission shall not treat the third party facilitator service's violation as a violation by the retailer.

(19) For purposes of subsection (1), a qualified micro brewer or an out-of-state entity that is the substantial equivalent of a qualified micro brewer may sell and deliver beer to a retailer in this state if all of the following conditions are met:

(a) The retailer is not located in a sales territory for which the

qualified micro brewer has granted exclusive sales rights to a wholesaler under sections 401 and 4033 for the sale of any brand or brands of beer produced by that micro brewer.

(b) The beer is sold and delivered by an employee of the qualified micro brewer, not an agent, and is transported and delivered using a vehicle owned by the qualified micro brewer.

(c) The qualified micro brewer is in compliance with applicable state and federal law and applicable regulatory provisions of this act and rules adopted by the commission under this act including, but not limited to, those requirements related to each of the following:

(I) Employees that sell and deliver beer to retailers.

(ii) Vehicles used to deliver beer to retailers.

(iii) Price schedules and temporary price reductions.

(20) A common carrier that carries or transports alcoholic liquor into this state to a person in this state shall submit quarterly reports to the commission. A report required under this subsection must include all of the following about each delivery to a consumer in this state during the preceding calendar quarter:

(a) The name and business address of the person that ships alcoholic liquor.

(b) The name and address of the recipient of alcoholic liquor.

(c) The weight of alcoholic liquor delivered to a consignee.

(d) The date of the delivery.

(21) A common carrier described in subsection (20) shall maintain the books, records, and documents supporting a report submitted under subsection (20) for 3 years unless the commission notifies the common carrier in writing that the books, records, and supporting documents may be destroyed. Within 30 days after the commission's request, the common carrier shall make the books, records, and documents available for inspection during normal business hours. Within 30 days after a local law enforcement agency's or local governmental unit's request, the common carrier shall also make the books, records, and documents available for inspection to a local law enforcement agency or local governmental unit where the carrier resides or does business.

(22) A third party facilitator service that delivers beer, wine, or

spirits to a consumer under subsection (15) or (16), as applicable, shall submit quarterly reports to the commission. A report required under this subsection must include all of the following about each delivery to a consumer in this state during the preceding calendar quarter:

- (a) The name and business address of the person that ships beer, wine, or spirits.
- (b) The name and address of the recipient of beer, wine, or spirits.
- (c) The weight of beer, wine, or spirits delivered to a consignee.
- (d) The date of the delivery.

(23) A third party facilitator service shall maintain the books, records, and documents supporting a report submitted under subsection (22) for 3 years unless the commission notifies the third party facilitator service in writing that the books, records, and supporting documents may be destroyed. Within 30 days after the commission's request, the third party facilitator service shall make the books, records, and documents available for inspection during normal business hours. Within 30 days after a local law enforcement agency's or local governmental unit's request, the third party facilitator service shall also make the books, records, and documents available for inspection to a local law enforcement agency or local governmental unit where the third party facilitator service resides or does business.

(24) A report submitted under subsection (20) or (22) is subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(25) As used in this section:

- (a) "Common carrier" means a company that transports goods, on reasonable request, on regular routes and at set rates.
- (b) "Computer" means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network.
- (c) "Computer network" means the interconnection of hardware or

wireless communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.

(d) “Computer program” means a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network.

(e) “Computer system” means a set of related, connected or unconnected, computer equipment, devices, software, or hardware.

(f) “Consumer” means an individual who purchases beer, wine, or spirits for personal consumption and not for resale.

(g) “Device” includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic, or other impulses.

(h) “Diligent inquiry” means a diligent good faith effort to determine the age of an individual, that includes at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other bona fide picture identification that establishes the identity and age of the individual.

(I) “Direct shipper” means a person who sells, delivers, or imports wine, to consumers in this state, that he or she produces and bottles or wine that is manufactured by a wine maker for another wine maker and that is transacted or caused to be transacted through the use of any mail order, internet, telephone, computer, device, or other electronic means, or sells directly to consumers on the winery premises.

(j) “Identification verification service” means an internet-based service approved by the commission specializing in age and identity verification.

(k) “Mobile application” means a specialized software program downloaded onto a wireless communication device.

(l) “Qualified micro brewer” means a micro brewer that produces in total less than 1,000 barrels of beer per year. In determining the 1,000-barrel threshold, all brands and labels of a micro brewer, whether brewed in this state or outside this state, must be combined.

(m) “Third party facilitator service” means a person licensed by the commission to do any of the following:

(I) Facilitate the sale of beer or wine to a consumer as provided in subsection (15) on behalf of a retailer that holds a specially designated merchant license located in this state.

(ii) Facilitate the sale of spirits to a consumer as provided in subsection (16) on behalf of a retailer that holds a specially designated distributor license located in this state.

(iii) Deliver beer or wine to a consumer as provided in subsection (15) on behalf of a retailer that holds a specially designated merchant license located in this state.

(iv) Deliver spirits to a consumer as provided in subsection (16) on behalf of a retailer that holds a specially designated distributor license located in this state.